

CONGRESSIONAL POWER OVER TAXATION AND COMMERCE: THE SUPREME COURT'S LOST CHANCE TO DEVISE A CONSISTENT DOCTRINE

*by Nelson Lund**

I. INTRODUCTION

If one were to seek the most important provisions in the Constitution, the commerce and taxation clauses would have to be leading candidates. The Federal Convention was originally called to address the problems caused by the confederation government's lack of the powers they bestowed upon it.¹ In the time since the adoption of the new Constitution, a tremendous expansion of the federal government's power has been made possible largely by the authority to tax and to impose commercial regulations. Today, virtually the whole of the modern administrative state has been erected on the basis of the taxing and commerce powers—only the war power could be considered as important.

Dissatisfaction with the Articles of Confederation stemmed primarily from the obstacles to commerce that arose in the absence of a strong central government.² These obstacles consisted chiefly of trade barriers by foreign governments, which the American governments were almost helpless to combat, and a thicket of import duties

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1. See, e.g., J. MADISON, JOURNAL OF THE FEDERAL CONVENTION 46-48 (E. Scott ed. 1893).

2. See, e.g., The Federalist No. 22 (A. Hamilton); J. MADISON, JOURNAL OF THE FEDERAL CONVENTION 46-48 (E. Scott ed. 1893); *Passenger Cases*, 48 U.S. (7 How.) 283, 445, 12 L. Ed. 702, 770 (1849) (Catron, J., concurring); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 224, 6 L. Ed. 23, 76 (1824) (Johnson, J., concurring); 1 G. BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES 249-50, 267-70 (1882); Sholley, *The Negative Implications of the Commerce Clause*, 3 U. CHI. L. REV. 556, 559-60 (1936); Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1337 (1934).

and restrictions imposed by the American states on goods from other states passing through their borders.³

The new Constitution gave the central government the powers necessary to address these problems. The commerce clause permits Congress "[t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes."⁴ Even more fundamentally important is the taxation clause, which empowers Congress to tax individuals directly rather than having to depend on the state governments for its revenues.⁵ Without such taxation power, the federal government could operate only at the pleasure of the states, and the Confederation experience had shown how very confined it would be in such circumstances.⁶ The power of taxation was therefore crucial in making the commerce power effective, as well as in enabling the federal government to carry out its other responsibilities.

Facially, the commerce and taxation clauses are quite sweeping grants of power. The history of the Constitution makes it clear that there was significant support among its promoters for infusing the federal government with as much "energy" as possible in order to diminish the danger of petty and jealous squabbling among the states.⁷ The justification for thus diminishing the role of the states and aggrandizing the central government was the opportunity to build a great nation. Alexander Hamilton was the most forceful and articulate exponent of this view.⁸

Men whose political horizons were more limited by their state borders were, of course, not so enthralled with this vision. Even apart from the fact that Hamilton cannot be presumed to have spoken for the nation, however, the principal framers were acutely

3. See, e.g., The Federalist Nos. 7, 11, 22 (A. Hamilton); J. MADISON, JOURNAL OF THE FEDERAL CONVENTION 46-48 (E. Scott ed. 1893); D. HUTCHISON, THE FOUNDATIONS OF THE CONSTITUTION 99-104 (1975); Alvies, *The Commerce Power: from Gibbons v. Ogden to the Wagner Act Cases*, 3 OHIO ST. L.J. 307, 311 (1937); Roper, *The Constitution: Discovered or Discarded*, 16 NOTRE DAME L. REV. 97, 100-05 (1940).

One scholar has argued that the extent of the problem of state-created barriers to trade has been greatly exaggerated. See Kitch, *Regulation and the American Common Market*, in REGULATION, FEDERALISM, AND INTERSTATE COMMERCE 9, 10-19 (A. Tarlock ed. 1981). Whatever the validity of Kitch's argument, there does not seem to be any doubt that these barriers were *thought* to constitute a serious problem at the time. See sources cited *supra* note 2.

4. U.S. CONST. art. I, § 8, cl. 3.

5. *Id.* cl. 1.

6. See, e.g., The Federalist Nos. 30-36 (A. Hamilton).

7. See, e.g., The Federalist *passim*.

8. See, e.g., The Federalist Nos. 16, 17, 23, 24, 27 (A. Hamilton).

conscious of the timeless truth that *all* political power, whatever its potential for good, can be used to the detriment of those over whom it is exercised. The principal theorists among the framers—particularly James Madison—are famous for their distrust of “parchment barriers” to the abuse of power. They seem, therefore, to have put special reliance on the structure of the political system they designed. The principal mechanisms for reducing the abuse of the central government’s power are those that promote the election of competent and public-spirited men to federal office and those that hinder the concentration of power in a few of those men.⁹

The fact that the framers distrusted the *adequacy* of parchment barriers, however, should not cause us to ignore those that they did employ. First, it was only through parchment instruments that the framers could affect the future of all: the commerce and taxing powers themselves, as well as all the protections offered through the separation of powers and federalism, are immediately dependent on the written Constitution. Second, the framers put into that document a considerable number of specific limitations on the taxing and commerce powers of the federal government. Taxation is limited by the uniformity, apportionment, export taxes, and port preference clauses,¹⁰ and perhaps by a “general welfare” requirement.¹¹ The commerce power is expressly limited only by the port preference clause,¹² but a number of other clauses authorizing specific regulations of commerce seem to suggest, by negative implication, that the commerce clause itself was not meant to be a plenary grant of power.¹³ In addition, the commerce and taxing powers are affected, and perhaps to some extent bounded, by such general provisions as the “necessary and proper”¹⁴ and treaty¹⁵ clauses, the executive power Article,¹⁶ and by subsequent amendments, including the Bill of Rights (particularly the tenth amendment).¹⁷

9. See The Federalist Nos. 10, 51 (J. Madison).

10. U.S. CONST. art. I, § 8, cl. 1; § 9, cls. 4-6.

11. See *id.* preamble.

12. *Id.* art. I, § 9, cl. 6. The commerce clause is, of course, limited by its own terms to interstate, foreign and Indian commerce. See *id.* § 8, cl. 3. It has turned out, however, to be very difficult to frame legal tests that make these limitations genuinely meaningful.

13. E.g., U.S. CONST. art. I, § 8, cls. 4-8.

14. *Id.* cl. 18.

15. *Id.* art. VI, cl. 2.

16. *Id.* art. II.

17. *Id.* amend. X.

Apart from such specific constitutional provisions, one must ask whether the taxation and commerce clauses *themselves* contain any limitations on the powers they confer. If so, what is the proper scope of those powers, and how are their boundaries defined?

When addressing these questions it makes sense to discuss the two clauses together. In addition to the relations between them previously discussed, taxation and commercial regulations are often functionally equivalent means of structuring a nation's economic life. For example, imagine that the government wishes to reduce to a given level the amount of pollution generated by steel plants. This can be done either by direct regulation (limiting emissions to a certain level) or by taxing emissions at a rate calculated to induce steel companies to confine their release of pollutants within the desired limit. Sometimes the regulatory effects of a tax (or the "taxing" effects of a regulation) will be unintended, but sometimes they are deliberate. This phenomenon is important in interpreting the Constitution because of the anomaly that can arise if Congress can accomplish under the commerce power what is forbidden under the taxation power (or vice versa).

According to the conventional view, the federal government's virtually plenary power over the commercial life of the nation is a legacy of the Franklin D. Roosevelt administration, and especially of President Roosevelt's victory over an obstinate (or heroic) Supreme Court.¹⁸ The story of the Court's resistance to the New Deal is well-known and need not be repeated here. This article argues that the crucial doctrinal battles had already been largely settled during the 1920's, when the Supreme Court had a chance to put meaningful limits on the commerce and taxation clauses. The Court did not do so, although it was then, if ever, that such a project should have seemed inviting and achievable.

At the beginning of Chief Justice Taft's tenure, the Court's jurisprudence of the taxing and commerce clauses was visibly unsettled. During the Taft period, free enterprise capitalism seemed to be working very well, and the Court itself was staffed with a number of strong and politically conservative Justices. In these circumstances, one might have expected the Court to be especially attentive to both the importance and the dangers of the powers conferred by the

18. See, e.g., J. NOWAK, R. ROTUNDA, J. YOUNG, *CONSTITUTIONAL LAW* 144-48 (3d ed. 1986).

commerce and taxation clauses. This article seeks to demonstrate that while the Taft Court was manifestly *concerned* about these problems, it was unable to devise a doctrinal framework through which the problems could satisfactorily be solved. This failure, which helped lay the groundwork for the "Roosevelt Revolution" of the 1930's, was not inevitable. After critically reviewing the decisions from the Taft period, I propose a solution that could have been, and I argue should have been, adopted by the Court.

II. BACKGROUND CASES

A. "*Interstate*" Commerce

The principal issues with which this article is concerned were framed as early as 1791, during a debate within the Washington administration on the constitutionality of incorporating a national bank.¹⁹ Alexander Hamilton, Secretary of the Treasury at the time, proposed and defended such a bank. He argued that the power to incorporate it was implied by the "necessary and proper" clause since a bank would be an appropriate means of exercising the broad authority conferred by the taxation, commerce, and war powers clauses. Thomas Jefferson, who was Secretary of State, objected that such reasoning in effect conferred on Congress a general police power, a "power to do whatever would be for the good of the United States; and . . . [therefore] also a power to do whatever evil [Congress] please[d]."²⁰ This suggestion was certainly plausible, given the broad construction to which the commerce, taxation, and war powers would be amenable. With equal plausibility, Jefferson argued that this would violate the tenth amendment, which expressed the very "foundation of the Constitution"—namely, that the federal government was one of enumerated powers rather than the possessor of a plenary sovereign authority.²¹

Jefferson's objection to Hamilton's construction of the "necessary and proper" clause is undeniably powerful, but it poses a

19. The debate is summarized in GUNTHER, CONSTITUTIONAL LAW 94-99 (10th ed. 1980).

20. *Id.* at 95-96.

21. The tenth amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

difficult problem much more clearly than it suggests a satisfactory solution: if the federal government's authority is not as broad as the needs of the nation, where and on what principles can one draw the line which Congress may not cross?

Perhaps because of the difficulty of this question, Chief Justice Marshall adopted Hamilton's view when the constitutionality of the Bank finally came before the Court in 1819.²² Marshall was on strong ground in arguing for a generous doctrine of implied powers,²³ and he was careful not to conclude that this doctrine entailed an abrogation of the principle of enumerated powers. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."²⁴

The same arguments that support this reading of the necessary and proper clause also suggest that the commerce and taxation powers should be generously construed: if the end is legitimate, reasonable means to the end should be available. But because *McCulloch* passed rather lightly over these other clauses,²⁵ one must turn to a later case for further consideration of the issue.

In *Gibbons v. Ogden*,²⁶ the question of the scope of the commerce power was clearly presented. Chief Justice Marshall read the constitutional reference to commerce "among the several states"²⁷ to include all "commercial intercourse" except that "which does not extend to or affect other states."²⁸ He was careful, as he had been when construing the "necessary and proper" clause, to disavow an intent to establish a plenary power in Congress: "The completely internal commerce of a state, then, may be considered as reserved for the state itself."²⁹

Reading these words a century and half later, one can wonder what commerce might not "affect" other states and what kind of

22. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819).

23. See Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835*, 49 U. CHI. L. REV. 887, 928-30 (1982).

24. *McCulloch*, 17 U.S. (4 Wheat.) at 421, 4 L. Ed. at 605.

25. See Currie, *supra* note 23 at 932-33.

26. 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23 (1824).

27. U.S. CONST. art. I, § 8, cl. 3.

28. 22 U.S. (9 Wheat.) at 194, 6 L. Ed. at 69.

29. *Id.* at 195, 6 L. Ed. at 70.

commerce would qualify as "completely" internal. There is evidence that the framers had a narrow view of Congress's power over commerce,³⁰ but Marshall laid the basis for a different view—a view that would culminate eventually in the Court's upholding regulations over commerce that was about as "completely internal" to a state as one could hope in practice to find.³¹

That point had not yet been reached when Chief Justice Taft joined the Court in 1921. At that time, large-scale federal intervention had only rather recently begun (the Interstate Commerce Act³² and the Sherman Antitrust Act³³ were enacted just prior to the turn of the century), although the difficulties of the problem were already manifest in the fact that three separate doctrinal approaches to the commerce clause had developed.

The first approach began with *United States v. E.C. Knight Co.*,³⁴ in which the Court held that the Sherman Act applied only to commerce itself, not to such related but distinct activities as manufacturing, which affect commerce only indirectly.³⁵ The opinion made it clear that the Court was looking for a way to avoid the kind of result Jefferson had feared—that if any "effect" on interstate commerce could justify federal regulation, the federal power would know no bounds.³⁶ As Justice Harlan pointed out in dissent, however, the distinction between commerce and manufacturing, or between direct and indirect effects, is in practice unsatisfying since indirect effects can be as potent as direct effects; a monopoly on manufacturing carries with it a monopoly on commerce in the thing manufactured.³⁷

30. See Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941).

31. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964); *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942).

32. Ch. 104, 24 Stat. 379 (1887) (codified as amended at 49 U.S.C. §§ 10101-11914 (1982)).

33. Ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)).

34. 156 U.S. 1, 15 S. Ct. 249, 39 L. Ed. 325 (1895).

35. *Id.* at 16, 15 S. Ct. at 255, 39 L. Ed. at 330.

36. *Id.* at 14, 15 S. Ct. at 254, 39 L. Ed. at 330. The Court stated that if it were to adopt an overbroad definition of "commerce," "[t]he result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufacturers, but . . . every branch of human industry." *Id.* (quoting *Kidd v. Pearson*, 128 U.S. 1, 21, 9 S. Ct. 6, 10, 32 L. Ed. 346, 350 (1888)).

37. *Id.* at 18-19, 15 S. Ct. at 255-56, 39 L. Ed. at 331 (Harlan, J., dissenting). In fact,

The second strand of commerce clause doctrine came into prominence with the *Shreveport Rate Case*.³⁸ Here, Texas had adopted lower intrastate railroad rates than those fixed by the Interstate Commerce Commission (ICC) for comparable interstate shipments. This encouraged Texas producers to ship their goods to distant points within that vast state rather than to nearby markets in neighboring jurisdictions.³⁹ The Court upheld the authority of Congress to control (through the ICC) intrastate transactions as an incident of its "power to foster and protect interstate commerce": Congress may control an interstate carrier "in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate" for the effective government of that commerce.⁴⁰

The *Shreveport* Court did not discuss *E.C. Knight*, but the *Shreveport* approach is clearly much closer to that in Harlan's *E.C. Knight* dissent. *Shreveport*, however, was more successful in leaving room for congressional power to expand than in indicating any definite limit on how far that expansion could be carried.⁴¹

the defendants were charged with monopolizing not only the manufacture of sugar but also the "sales" of sugar and "trade thereof with other states." *Id.* at 2-3, 15 S. Ct. at 249-50, 39 L. Ed. at 325-26.

It should also be noted that there is some evidence suggesting that the framers would have meant by the term "commerce" something broad enough to include manufacturing. See Roper, *supra* note 3, at 107-23 (arguing that the restriction of "commerce" to "movement" dates only from about 1890).

38. *Houston E. & W. Texas Ry. v. United States*, 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914). Hints of this doctrine can be found in language occurring in cases as early as *Gibbons v. Ogden*, though Chief Justice Marshall was careful to limit any suggestions that could lead as far as *Shreveport* went. Compare *Gibbons*, 22 U.S. (9 Wheat.) at 189-90, 6 L. Ed. at 68 ("Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.") with *id.* at 195, 6 L. Ed. at 70 ("The completely internal commerce of a state, then, may be considered as reserved for the state itself").

The *Shreveport* decision, however, was not altogether unprecedented. In *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 9 L. Ed. 1004 (1838), the Court, speaking through Justice Story, held that Congress could make it a federal crime to steal shipwrecked goods even when the goods had washed up beyond the high-tide mark and were thus within the boundary of a state: "Any offence which thus interferes with, obstructs or prevents [interstate or foreign] commerce and navigation, though done on land, may be punished by congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers." *Id.* at 78, 9 L. Ed. at 1007.

39. 234 U.S. at 346-47, 34 S. Ct. at 834, 58 L. Ed. at 1346.

40. *Id.* at 351, 34 S. Ct. at 836, 58 L. Ed. at 1348.

41. The *Shreveport* Court did not indicate exactly how far the expansion of congressional

A third approach to the commerce clause can be traced to Justice Holmes' opinion in *Swift & Co. v. United States*.⁴² The "stream of commerce" or "current of commerce" doctrine employed in that case treated transactions at local stockyards as subject to the federal antitrust laws because they were part of a "flow" of commerce that was itself interstate in nature.⁴³ This approach is at odds with *E.C. Knight*, for it treats indirect effects as equivalent to direct effects. Under *Swift*, one would expect local manufacturing to be considered as the beginning of the stream of commerce just as the stockyards at which livestock pause on their way from farms and ranches to market are considered an integral part of that stream. As with the *Shreveport Rate Case*, however, and as one might anticipate from the nature of the problem, *Swift* raises more questions than it answers about the reach of the doctrine. Exactly what elements compose the "stream" of interstate commerce? And how great must an activity's effect on that stream be in order to justify federal regulation? *Swift*'s inviting metaphor tends to suggest that such questions are easier to answer than in fact they are.

B. A National Police Power?

Once one perceives the difficulties in limiting the kinds of *activities* Congress should be permitted to regulate, one naturally wonders whether there might be limits on the kinds of *purposes* Congress may legitimately pursue under color of the commerce

power could be carried. The Court seemed to believe that "the internal commerce of a State, as such," was not subject to federal regulation, because Congress could regulate only the "instrumentalities" of interstate commerce (though those "instrumentalities" could be regulated in both their intra- and inter-state operations). *Id.* at 353-60, 34 S. Ct. at 837-40, 58 L. Ed. at 1349-52. The "instrumentalities" limitation (lacking in *Coombs*), were it taken seriously, would be subject to the same sensible objection made by Justice Harlan's dissent in *E.C. Knight*: activities that are not instrumentalities of interstate commerce can affect that commerce as powerfully as activities that are. 156 U.S. at 19-24, 15 S. Ct. at 256-58, 39 L. Ed. at 331-33 (Harlan, J., dissenting).

The Taft Court seemed to recognize this in *Colorado v. United States*, 271 U.S. 153, 46 S. Ct. 452, 70 L. Ed. 878 (1926). The Court upheld an ICC order allowing a railroad to abandon an unprofitable, wholly intrastate line over the protest of the state where the line was located. *Id.* at 166-68, 46 S. Ct. at 455, 70 L. Ed. at 884-85. Justice Brandeis argued that because one company owned both lines, the unprofitable intrastate line could threaten the company's ability to provide interstate service, and that this justified the federal regulatory action. *Id.* at 170, 46 S. Ct. at 456, 70 L. Ed. at 886.

42. 196 U.S. 375, 25 S. Ct. 276, 49 L. Ed. 518 (1905).

43. *Id.* at 399, 25 S. Ct. at 280, 49 L. Ed. at 525.

power. There is evidence that the framers of the Constitution were not indifferent to those purposes. The commerce power was given to Congress, not out of a preference for federal regulation as such, nor even from a preference for regulation as such, but rather out of a desire to foster the *removal* of regulatory barriers to commerce and, therefore, to economic development generally, especially those barriers erected by the states.⁴⁴ Might there be some federal regulations so far or so obviously removed from this purpose—or even contrary to it—that they would be outside the scope of congressional authority? If a legal test based on this suggestion could be devised, it would help meet Jefferson's objection that *McCulloch* would lead to a plenary congressional power to do evil as much as to do good.⁴⁵

This question arose in *The Lottery Case*,⁴⁶ where the Court upheld a federal law prohibiting the importation, mailing, or interstate transportation of lottery tickets. Justice Harlan, speaking for a narrow majority, seemed to suggest that because the states could exercise their police power to suppress lotteries, Congress ought to be able to do the same: the federal commerce power is "plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution."⁴⁷ Elsewhere in the opinion, however, Harlan suggested that Congress here was acting only to *aid* the states, not to override them, and that if Congress attempted to "arbitrarily exclude" a "useful or valuable" article from commerce, the legislation might be unconstitutional.⁴⁸

In his lengthy but weak dissent, Chief Justice Fuller argued that lottery tickets are not "articles of commerce," but merely "means of enforcing a contract right," like insurance contracts, which had previously, though anomalously, been held not to be "transactions in commerce."⁴⁹ Fuller was right to sense that the majority's reason-

44. See *supra* notes 2-3 and accompanying text.

45. See *supra* notes 20-21 and accompanying text.

46. *Champion v. Ames*, 188 U.S. 321, 23 S. Ct. 321, 47 L. Ed. 492 (1903).

47. *Id.* at 356, 23 S. Ct. at 327, 47 L. Ed. at 501.

48. *Id.* at 362, 23 S. Ct. at 327, 47 L. Ed. at 503-04.

49. Chief Justice Fuller relied upon the insurance case, *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 19 L. Ed. 357 (1869), in his dissent. *Paul* was the beginning of a line of cases (including *Hooper v. California*, 155 U.S. 648, 15 S. Ct. 207, 39 L. Ed. 297 (1895)) relied upon by Justice Holmes in *Federal Baseball*, 259 U.S. 200, 209, 42 S. Ct. 465, 466, 66 L. Ed. 898, 900 (1922) (discussed *infra* note 93) that treated the insurance industry as not being engaged in interstate commerce for the purposes of the dormant commerce power. When the federal

ing was very troublesome and that it presented a threat to the states' traditional authority over "the conservation and promotion of the public health, good order, and prosperity."⁵⁰ He was less obviously correct in suggesting that the Constitution leaves the federal government powerless to *aid* the states in carrying out their reserved powers, for this would seem to be the least pernicious way in which the federal government could alter the allocation of responsibilities between itself and the states.⁵¹ Most important, however, Fuller's attempt to characterize lottery tickets as something other than "articles of commerce" is unconvincing—they are objects that people buy and sell, and Fuller presented no principled way to distinguish between "commercial" and "noncommercial" objects that people buy and sell.

Thus, since lottery tickets do seem to have been articles of interstate commerce, and since no compelling reason against the government's regulation was presented, the case appears to have been correctly decided. But the majority's opinion was badly at fault in failing either to explain or defend its assertion that the federal police power is "plenary" while suggesting that the federal government may act only to aid the states in *their* exercise of the police power.

The *Lottery Case* approach was soon used to uphold several federal laws banning "harmful" objects from interstate commerce.⁵² However, in *Hammer v. Dagenhart*⁵³ the Court abruptly decided that

government eventually undertook to regulate the insurance industry, the Court upheld the regulations as a valid exercise of the commerce power. *See, e.g.,* Polish Nat'l Alliance v. NLRB, 322 U.S. 643, 64 S. Ct. 1196, 88 L. Ed. 1509 (1944); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S. Ct. 1152, 88 L. Ed. 1440 (1944) (disallowing any application of the *Paul* "interstate commerce" formula to cases involving congressional power). For a review of the cases, see Stern, *The Commerce Clause and the National Economy, 1933-1946* (pt. 2), 59 HARV. L. REV. 883, 909-25 (1946).

50. 188 U.S. at 364-65, 23 S. Ct. at 330, 47 L. Ed. at 504 (1903) (Fuller, C.J., dissenting).

51. There is, of course, an irreducible danger in such aid. It is generally true that charity fosters dependence, that dependence fosters slavishness, and that slavishness often leads to slavery. This fact, however, means only that there is always a risk when the strong help the weak; it does not imply that they should never be permitted to do so.

52. *E.g.,* *Hipolite Egg Co. v. United States*, 220 U.S. 45, 31 S. Ct. 364, 55 L. Ed. 364 (1911) (impure foods); *Hoke v. United States*, 227 U.S. 308, 33 S. Ct. 281, 57 L. Ed. 523 (1913) (women for prostitution); *Caminetti v. United States*, 242 U.S. 470, 37 S. Ct. 192, 61 L. Ed. 442 (1917) (women for debauchery). *See generally* Cushman, *The National Police Power Under the Commerce Clause of the Constitution*, 3 MINN. L. REV. 381, 384-96 (1919) (reviewing cases).

53. 247 U.S. 251, 276, 38 S. Ct. 529, 533, 62 L. Ed. 1101, 1107 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100, 116-17, 61 S. Ct. 451, 458, 85 L. Ed. 609, 618 (1941).

Congress could not exclude from interstate commerce "ordinary" commodities (those that "are of themselves harmless") produced in plants employing child labor, in order to reduce the use of child labor in manufacturing. The Court interpreted the statute as a federal response to the failure of some states to ban the use of child labor in manufacturing,⁵⁴ and held it unconstitutional: "There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition. . . . [nor] to control the States in their exercise of the police power over local trade and manufacture."⁵⁵ A contrary holding, the Court suggested, would threaten the principle of enumerated powers and would have the result that "all freedom of commerce will be at an end, and the power of the State over local matters may be eliminated, and thus our system of government be practically destroyed."⁵⁶

Justice Holmes was joined by Justices McKenna, Brandeis, and Clarke in dissent. Holmes argued convincingly that both the facial meaning of the commerce clause and many prior decisions suggested that the immediate action taken by Congress was within its power, and that indirect effects on local affairs were permissible.⁵⁷ He also quite properly pointed out that inquiries into congressional motives are treacherous exercises that the Court should wish to avoid.⁵⁸ Much less convincingly, Holmes suggested that the Court should *never* examine congressional purposes, and that Congress "may carry out its views of public policy *whatever* indirect effect they may have on the activities of the States."⁵⁹ Taken together, these two conclusions would effectively mean the end of the judiciary's attempt to police the legislature's exercise of its delegated powers. If congressional purposes were never examined, Congress would be greatly aided in using pretexts for escaping whatever constitutional limitations on its powers it found inconvenient; and if the Court refused to consider

54. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States.

Id. at 271-72, 38 S. Ct. at 531, 62 L. Ed. at 1105.

55. *Id.*, at 273-74, 38 S. Ct. at 532, 62 L. Ed. at 1106.

56. *Id.*, at 276, 38 S. Ct. at 533, 62 L. Ed. at 1107.

57. *Id.* at 277, 38 S. Ct. at 533, 62 L. Ed. at 1108 (Holmes, J., dissenting).

58. *Id.* at 280, 38 S. Ct. at 534, 62 L. Ed. at 1109 (Holmes, J., dissenting).

59. *Id.* at 281, 38 S. Ct. at 534, 62 L. Ed. 1109 (Holmes, J., dissenting) (emphasis added).

the effects that federal laws may have on the states, the tenth amendment would be, not a truism,⁶⁰ but "a splendid bauble."⁶¹

The general approach of the *Hammer* majority is therefore preferable to the Holmes dissent. The majority's actual decision also seems correct. The child labor law⁶² was obviously an attempt to override the decision of some states to be more liberal than the federal government would have liked in allowing the use of child labor in industry. Unlike diseased cattle⁶³ or unsafe trains,⁶⁴ goods manufactured with the help of child labor posed no threat to interstate commerce itself. Unlike state-created monopolies, the state laws permitting liberal use of child labor were themselves not obstructions to interstate commerce; on the contrary, they were likely to promote trade and economic growth. Unless it could be shown that Congress had some plausible reason for believing that child labor somehow posed a long-term threat to the system of interstate commerce,⁶⁵ it would be correct for the Court to invalidate the regulation.

C. Taxation

The Supreme Court has always been extremely reluctant to find that the federal taxation power is governed by limits beyond those that are expressly provided in the constitutional text. This reluctance is understandable. The Constitution itself does limit the taxing power in several ways⁶⁶ while appearing to leave congressional discretion otherwise unfettered. Furthermore, the Court is ill-suited for the task of reviewing the delicate legislative compromises that underlie many taxation laws. The choice of the subjects of taxation and of the rates

60. See *United States v. Darby*, 312 U.S. 100, 124, 61 S. Ct. 451, 462, 85 L. Ed. 609, 622 (1940).

61. Cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421, 4 L. Ed. 579, 605 (noting the "vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble").

62. Child Labor Law, ch. 432, 39 Stat. 675 (1916) (codified as amended at 29 U.S.C. § 212 (1982)).

63. E.g., 7 U.S.C. § 391 (1982); 21 U.S.C. §§ 112-15, 117-20, 130 (1982).

64. E.g., 45 U.S.C. §§ 437, 438, 440, 441 (1982).

65. It might be possible for Congress to have such a reason. For example, a legislature could find that the use of child labor promotes illiteracy and that widespread illiteracy would eventually harm the commercial interests of the nation. Such reasoning mostly illustrates the difficulty of finding any activity that could not conceivably affect commerce.

66. See *supra* notes 10-17 and accompanying text.

at which they will be taxed depends on complex policy considerations, economic judgment, and—invariably—the ebb and flow of interest-group politics. To review the outcomes of such a process, using the relatively clumsy judicial tools of general principles and legal categories, would be extremely difficult at best and possibly disastrous.

The reasons advanced for the Court's reluctance to review congressional taxation decisions are not sufficient, however, to justify abandonment of such judicial review. Because of the regulatory effects of taxation, almost any regulation of commerce can be accomplished indirectly by a tax. Thus, in order for the Court to enforce any limits on the commerce power, it must ensure that Congress cannot evade those limits simply by casting forbidden regulations in the form of taxes. The Supreme Court had considered this problem prior to the Taft period, but had never resolved it in a satisfactory manner.

In *Veazie Bank v. Fenno*,⁶⁷ the Court upheld a federal tax on state bank notes. It was argued that because the tax was so heavy, it effectively prohibited the issuance of such notes. Since it could not have been designed to raise revenue, the measure was in reality a regulation banning state bank notes.⁶⁸

Justice Chase advanced two different arguments as grounds for upholding the statute. While acknowledging that there are limits on the taxing power, imposed by the principles of enumerated powers and federalism,⁶⁹ he refused to consider the purpose of the tax, asserting instead that the judiciary was helpless to prevent the legislature from exercising its acknowledged powers "oppressively."⁷⁰ Justice Chase was able to avoid having to resolve the tension between these two positions because he had a second argument: Congress had the power to prohibit state bank notes directly, as a "necessary and proper" means of regulating the currency.⁷¹ The decision rests on the questionable proposition that so long as Congress has the authority to accomplish the results effected by a statute, the Court should not require such niceties as a *deliberate* exercise of *that* authority. The Taft Court would later reject this proposition. More importantly,

67. 75 U.S. (8 Wall.) 533, 19 L. Ed. 482 (1869).

68. *Id.* at 548, 19 L. Ed. at 488.

69. *Id.* at 547, 19 L. Ed. at 487.

70. *Id.* at 548, 19 L. Ed. at 488.

71. *Id.* at 549, 19 L. Ed. at 488.

the *Veazie* opinion left open the question of the permissible scope of congressional discretion in exercising the taxing power to accomplish non-revenue purposes that are *not* clearly authorized by other constitutional provisions.

In 1904, in *McCray v. United States*,⁷² the Court was faced with another prohibitive-tax case. Congress had placed a very high excise tax on artificially colored oleomargarine, which allegedly made the commodity unable to compete with butter.⁷³ As in *Veazie*, it was argued that such a prohibitive tax could not have a revenue purpose and that it must therefore have been laid "to suppress the manufacture of the taxed article."⁷⁴ In the strongest possible language, Justice White declared that the Court had never and would not now inquire into Congress's purposes in exercising a lawful power.⁷⁵ In commenting on the judicial deference accorded Congress, Justice White stated:

It is, however, argued, if a lawful power may be exerted for an unlawful purpose, and thus, by abusing the power, it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this: that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power whenever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department. . . . The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.⁷⁶

Justice White interpreted *Veazie* to mean that a "regulatory" tax would be upheld even if a direct regulation having the same effect

72. 195 U.S. 27, 24 S. Ct. 769, 49 L. Ed. 78 (1904).

73. *Id.* at 29, 24 S. Ct. at 771, 49 L. Ed. at 79.

74. *Id.* at 51, 24 S. Ct. at 775, 49 L. Ed. 94.

75. *Id.* at 54-59, 24 S. Ct. at 775-78, 49 L. Ed. at 95-97.

76. *Id.* at 54-56, 24 S. Ct. at 776, 49 L. Ed. at 95.

was not constitutionally authorized,⁷⁷ and collected a number of other decisions indicating that congressional discretion under the taxation clause is effectively absolute.⁷⁸ This position is obviously untenable, as Justice White seemed to recognize when, at the end of the opinion, he predicted that an "extreme" abuse of the taxing power would be invalidated by the Court.⁷⁹ Unfortunately, he seemed to limit such extreme abuses to those that involve a violation of natural law, *i.e.*, "the principles of freedom and justice upon which the Constitution rests."⁸⁰

In *United States v. Doremus*,⁸¹ the Court was presented with a new variation on the regulatory use of taxation. Congress had enacted a statute imposing a \$1.00 per year tax on any person who distributed narcotic drugs. The statute also provided for very detailed regulations covering the manner in which the drugs were distributed and the records that distributors had to maintain.⁸² Far from being prohibitive, this tax was so *small* that it raised doubts about any revenue purpose, especially since it was linked with such detailed regulations. Speaking for a narrow majority, Justice Day repeated the usual platitudes about the dangers of investigating congressional motives⁸³ and invented an utterly implausible revenue purpose for the regulations: they were supposed to be useful in determining whether large quantities of drugs were falling into the hands of unregistered persons, who in turn might distribute them without paying the tax.⁸⁴ If this law could be upheld as an exercise of the taxing power, then any regulations having "any relation to the raising of revenue,"⁸⁵ no matter how remote or imaginary the connection, could be upheld.

Four dissenters in *Doremus* briefly indicated their opinion that this law invaded the reserved police powers of the states;⁸⁶ when Chief Justice Taft came into office, there was thus some reason to

77. See *id.* at 57-58, 24 S. Ct. at 777-78, 49 L. Ed. at 96.

78. *Id.* at 56-58, 24 S. Ct. at 776-77, 49 L. Ed. at 95-97.

79. *Id.* at 64, 24 S. Ct. at 779-80, 49 L. Ed. at 99.

80. *Id.* Justice White may have meant to invoke the fifth amendment due process clause, but he never mentioned it, and the language he used suggests that he was invoking *extra-constitutional* principles.

81. 249 U.S. 86, 39 S. Ct. 214, 63 L. Ed. 493 (1919).

82. *Id.* at 91-92, 39 S. Ct. at 215, 63 L. Ed. at 495-96.

83. *Id.* at 93-94, 39 S. Ct. at 216, 63 L. Ed. at 496 (citing, *inter alia*, *Veazie and McCray*).

84. *Id.* at 95, 39 S. Ct. at 216, 63 L. Ed. at 497.

85. *Id.* at 94, 39 S. Ct. at 216, 63 L. Ed. at 496-97.

86. *Id.* at 95 (White, C.J., dissenting).

expect that the issues presented by "regulatory taxes" might be reconsidered. More important, however, the jurisprudence prevailing at the time was so clearly unsatisfactory that it invited such a reconsideration. That invitation was taken up during the Taft period.

III. THE TAFT COURT

Almost without exception, the Taft Court sustained Congress's regulations over commerce. This might imply that the Court held a very broad view of congressional power, but it might merely mean that Congress and the Executive were doing little to test the limits of federal power. The cases brought to the Court in the early years of Taft's tenure suggest that the latter interpretation is at least as plausible as the former.

In *Railroad Commission v. Chicago, Burlington & Quincy Railroad*,⁸⁷ the ICC had ordered a state agency to raise the regulated rates on intrastate rail traffic to the same level that traffic would have to pay if the intrastate trip were part of a longer interstate journey.⁸⁸ Equality was thought necessary to remove the incentive for shippers and passengers to buy interstate tickets to bring them or their goods into the state and then use cheap intrastate tickets to continue their journeys. The situation was quite similar to that in the *Shreveport Rate Case*,⁸⁹ and a unanimous Court, speaking through Chief Justice Taft, upheld the regulation on the same rationale: where an evil arises from the relation between intra- and inter-state rates, Congress may regulate one as an incident of regulating the other.⁹⁰

In *Stafford v. Wallace*,⁹¹ Congress had undertaken to effectuate the purposes of the antitrust laws through direct regulation of the stockyards, the antitrust laws themselves having apparently been found inadequate to solve the problem that Congress perceived. With Taft writing again, the Court upheld the statute (over Justice McReynolds' unexplained dissent) on the authority of the *Swift* case.⁹² As in *Railroad Commission*, no new ground was broken: if the

87. 257 U.S. 563, 42 S. Ct. 232, 66 L. Ed. 371 (1922).

88. See *id.* at 578, 42 S. Ct. at 234, 66 L. Ed. at 379.

89. *Houston E. & W. Tex. Ry. v. United States*, 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914).

90. See 257 U.S. at 590, 42 S. Ct. at 238, 66 L. Ed. at 384 (quoting *Shreveport*).

91. 258 U.S. 495, 42 S. Ct. 397, 66 L. Ed. 735 (1922).

92. See *id.* at 517-20, 42 S. Ct. at 402-03, 66 L. Ed. at 742-43.

"stream of commerce" theory permitted application of the antitrust laws to the stockyards, it would be difficult to see why direct regulation for the same purposes should be prohibited.

The first important surprise of the Taft years came in two taxation opinions authored by the Chief Justice.⁹³ In *The Child Labor Tax Case*,⁹⁴ the Court invalidated a very heavy tax that provided exemptions for persons who complied with regulations quite similar to those struck down in *Hammer v. Dagenhart*. Undoubtedly offended by this manifest attempt to evade a Supreme Court decision,⁹⁵ the Court held that while Congress has considerable discretion in the imposition of taxes (especially in fixing the *rate* of taxation), it may not go so far as to impose forbidden regulations in the guise of a tax:

Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them, and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment. Such is the case in the law before us.⁹⁶

The Child Labor Tax Case is important for its recognition of the importance of attending to the purposes of constitutional grants of

93. Another case, *Federal Base Ball Club v. National League*, 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898 (1922), was undoubtedly something of a surprise, but it has not proved important. The court, speaking through Justice Holmes, held that professional baseball, although it requires inducing people to cross state lines for money, is not subject to the antitrust laws: "transport is a mere incident, not the essential thing," and "personal effort . . . is not a subject of commerce." *Id.* at 209, 42 S. Ct. at 466, 66 L. Ed. at 900. Like Fuller in his *Lottery Case* dissent, Holmes relied on an anomalous line of cases treating insurance contracts as something different from "transactions in commerce." *Federal Base Ball* itself has been treated as an anomaly and confined strictly to its facts. It has been limited to the antitrust area (though Holmes' opinion could be read as resting on constitutional grounds), and even there it has not been extended to sports other than baseball. See, e.g., *Radovich v. NFL*, 352 U.S. 445, 451, 77 S. Ct. 390, 393, 1 L. Ed. 2d 456, 451 (1957); *United States v. International Boxing Club*, 348 U.S. 236, 238, 75 S. Ct. 259, 262, 99 L. Ed. 290, 295 (1954); *United States v. Shubert*, 348 U.S. 222, 224, 75 S. Ct. 277, 280-82, 99 L. Ed. 279, 285-86 (1955) (theatrical booking agency).

94. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 42 S. Ct. 449, 66 L. Ed. 817 (1922).

95. See *id.* at 39, 42 S. Ct. at 451, 66 L. Ed. at 820 (case at bar is indistinguishable from *Hammer v. Dagenhart*); *id.* at 40, 42 S. Ct. at 451, 66 L. Ed. at 820 (quoting *McCulloch* dictum banning congressional accomplishment of illegitimate objects under pretext of executing valid powers).

96. *Id.* at 38, 42 S. Ct. at 451, 66 L. Ed. at 820.

power and therefore of the need to look sometimes at the purposes of Congress in exercising its authority under those grants. *Hammer v. Dagenhart*, however, made *The Child Labor Tax Case* an exceptionally easy one in which to perceive a forbidden congressional purpose.⁹⁷

The same day that this case was decided, the Court ruled in *Hill v. Wallace*⁹⁸ that a similar attempt to regulate the grain-futures trade (through a heavy tax accompanied by exemptions for those complying with federal regulations) was similarly unconstitutional.⁹⁹ Here, however, Congress had never purported to exercise its power over commerce. When Congress did so the next year, undertaking direct regulation over the grain-futures trade, the Court promptly upheld the law on the authority of *Swift and Stafford v. Wallace* ("stream of commerce" rationale).¹⁰⁰ Thus, *Hill v. Wallace* and *The Child Labor Tax Case* provided a doctrinal basis for enforcing limitations on Congress's exercise of the commerce power,¹⁰¹ but they did not

97. That is, the Court perceived that Congress had invaded the sphere reserved to the states as recognized by the Court four years earlier. Had *Hammer v. Dagenhart* not already been decided, the *Child Labor Tax Case* would have surely indicated that the Taft Court took the problem of limiting the taxation power more seriously than its predecessors had; given *Hammer*, however, one cannot help suspecting that the Court was more worried about its own dignity than about the Constitution.

This last suggestion gains some support from a subsequent taxation case. In *Nigro v. United States*, 276 U.S. 332, 48 S. Ct. 388, 72 L. Ed. 600 (1928), a narcotics tax similar to the one at issue in *Doremus* was upheld. Chief Justice Taft had to exercise considerable ingenuity (of a kind similar to Justice Day's in *Doremus*) to find a revenue rationale for the tax. See *id.* at 341-44, 48 S. Ct. at 390-91, 72 L. Ed. at 603-04.

In subsequent years, the Court chose not to settle the questions raised by *The Child Labor Tax Case*. The situation was summarized by one commentator as follows:

The net result is that there are now available two judicial techniques for dealing with the validity of national "police" regulations under the taxing power. The one permits the Court to uphold any carefully drawn taxing statute designed to promote the social and economic well being of the country through regulation of the subject. It may be invoked to sustain whatever degree of national police power under the taxing clause the Supreme Court deems safe and desirable. But when, in the opinion of the Court, Congress has exceeded the safe and desirable limits of its authority to legislate in this area and for these purposes, it remains within the discretion of that judicial body to invalidate the legislation by resort to the "penalty" theory.

Note, *The Broadening Scope of Federal Regulation Through Taxation*, 22 U. CIN. L. REV. 371, 379-80 (1953).

98. 259 U.S. 44, 42 S. Ct. 453, 66 L. Ed. 822 (1922).

99. *Id.* at 67, 42 S. Ct. at 457, 66 L. Ed. at 829.

100. *Board of Trade v. Olsen*, 262 U.S. 1, 34-36, 43 S. Ct. 470, 476-77, 67 L. Ed. 839, 849-50 (1923).

101. *Olsen* contains an interesting suggestion. Chief Justice Taft emphasized language in

necessarily imply a new judicial interest in specifying what those limits are.

In 1925 the Court had an opportunity to develop such an interest in *Brooks v. United States*.¹⁰² Congress enacted a law that made the transportation of stolen automobiles in interstate commerce a federal crime.¹⁰³ Rather than attempting a thorough analysis of the problems posed by well-intended uses of the commerce power for essentially noncommercial purposes,¹⁰⁴ Chief Justice Taft treated the case as an easy one and began with a surprisingly strong endorsement of the existence of a general police power in the federal government:

Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other states from the state of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce.¹⁰⁵

This statement is supported only by a citation to a dormant commerce power case that cannot fairly be read to imply the proposition for which it is cited.¹⁰⁶

Hill v. Wallace about the failure of Congress to make a finding that interstate commerce had been burdened or obstructed; he also emphasized that Congress had specifically made such a finding in the present case and that *Hill* was therefore authority for upholding the legislation. 262 U.S. at 32, 43 S. Ct. at 475-76, 67 L. Ed. at 848. This suggests that in order for Congress to exercise its power under the commerce clause, it must at least make a specific finding of some threat to commerce. Although slight, there would be some limitation on congressional discretion. Furthermore, the principle could easily be extended so as to require Congress to state with some specificity what the connection is between its legislation and the commerce power. For development of this suggestion, see Bogen, *The Hunting of the Shark: An Inquiry into the Limits of Congressional Power under the Commerce Clause*, 8 WAKE FOREST L. REV. 187, 196-200 (1972).

102. 267 U.S. 432, 45 S. Ct. 345, 69 L. Ed. 699 (1925). The *Brooks* decision does not seem to have attracted much attention at the time. See, e.g., Powell, *Commerce, Congress and the Supreme Court, 1922-1925. II*, 26 COLUM. L. REV. 521, 524-25 (1926) (treating the case as interesting primarily because it left "open for future quarrel many nice issues as to how closely the storing, bartering, etc., [of stolen automobiles] must be connected with the prior interstate transportation").

103. 267 U.S. at 435-36, 45 S. Ct. at 345-46, 69 L. Ed. at 700-01.

104. Cf. *The Child Labor Tax Case*, 259 U.S. at 37, 42 S. Ct. at 450, 66 L. Ed. at 819: "The good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards." This is the same problem that worried Jefferson in the original debate over the national bank. See *infra* note 20 and accompanying text.

105. 267 U.S. at 436-37, 45 S. Ct. 346, 69 L. Ed. 701 (citation omitted).

106. See *id.* (citing *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 215, 5 S. Ct. 826, 834, 29 L. Ed. 158, 166 (1885)).

Taft correctly indicated that the Court had several times before upheld what were essentially federal police regulations under the commerce clause: bans on diseased cattle, lottery tickets, adulterated foodstuffs, prostitutes and concubines, and intoxicating liquors (when they were illegal in the state of final destination).¹⁰⁷ But in attempting to distinguish *Hammer v. Dagenhart*,¹⁰⁸ Taft's analysis was needlessly confusing, which suggests that he was confused about the underlying problem. At one point he characterized elaborately organized auto-theft conspiracies as a "gross misuse of interstate commerce,"¹⁰⁹ which is hard to deny; but he failed to answer the obvious objection that Congress apparently also considered the marketing of goods produced by child labor to be such an abuse.¹¹⁰ Taft also mentioned the fact that the articles of commerce at issue in *Hammer v. Dagenhart* were not themselves harmful to those in other states (*i.e.*, other than that of their origin) who bought or used them.¹¹¹ This fact, much emphasized by the *Hammer* Court itself,¹¹² might have provided the starting point for an intelligible doctrine, but Taft did not even bother to explain how stolen automobiles are *themselves* harmful to those who purchase them.¹¹³ Finally, Taft suggested that the federal auto-theft law was necessary to protect the property rights of those whose vehicles were stolen.¹¹⁴ This conflicts somewhat with

107. 267 U.S. at 437, 45 S. Ct. at 346, 89 L. Ed. at 701. The cases Taft discussed were: *Reid v. Colorado*, 187 U.S. 137, 23 S. Ct. 92, 47 L. Ed. 108 (1902); *Champion v. Ames*, 188 U.S. 321, 23 S. Ct. 321, 47 L. Ed. 492 (1903); *Hipolite Egg Co. v. United States*, 220 U.S. 45, 31 S. Ct. 364, 55 L. Ed. 364 (1911); *Hoke v. United States*, 227 U.S. 308, 33 S. Ct. 281, 57 L. Ed. 523 (1913); *Caminetti v. United States*, 242 U.S. 470, 37 S. Ct. 192, 61 L. Ed. 442 (1917); *Clark Distilling Co. v. Western Md. Ry.*, 242 U.S. 311, 37 S. Ct. 180, 61 L. Ed. 326 (1917).

108. See 267 U.S. at 438, 45 S. Ct. at 346, 89 L. Ed. at 701.

109. *Id.* at 438-39, 45 S. Ct. at 346-47, 89 L. Ed. at 701-02.

110. Edward S. Corwin interpreted this case as one of the first important signals that the Court was moving towards a complete rejection of the *Hammer v. Dagenhart* approach. See Corwin, *Congress's Power to Prohibit Commerce: A Crucial Constitutional Issue*, 18 CORNELL L.Q. 477, 500 (1933).

111. 267 U.S. at 438, 45 S. Ct. at 346, 89 L. Ed. at 701.

112. See *Hammer*, 247 U.S. at 271-76, 38 S. Ct. at 531-33, 62 L. Ed. at 1105-07.

113. One supposes that he might have been thinking of the financial harm that is suffered by a bona fide purchaser if the stolen property is identified and returned to its rightful owner. But persons in states with restrictive child labor laws who must compete against producers who use child labor are also financially harmed by the presence of cheaper products in interstate commerce; the difference between these two kinds of harm is only that one affects purchasers and the other affects competitors, which is hardly an obvious basis for a constitutional distinction.

114. *Brooks*, 267 U.S. at 439, 45 S. Ct. at 346-47, 89 L. Ed. at 702.

the previous rationale, which focused on the harm to persons in the state of destination. In addition, it opens questions—which the Court did not address—about whether *all* state law rights are subject to such federal reinforcement and about the problems that could arise when the reinforcement of the laws of one state would frustrate the enforcement of the laws of another state. I will argue in the next section, however, that these questions could be answered, and that an approach along the lines of Taft's last suggestion (which has roots going back at least as far as the *Lottery Case*) would have offered the best solution to the conundrums of the commerce and taxation clauses.

IV. PROPOSAL: LEGITIMATE FEDERAL REGULATIONS UNDER THE COMMERCE AND TAXATION CLAUSES

Brooks brought to the surface unresolved problems in the Court's commerce clause jurisprudence that had previously been concealed by Chief Justice Taft's skillful and persuasive opinions. It was also the last major commerce clause decision during his tenure and thus a harbinger of the storm that was to come in the following decade.¹¹⁵ This section of the article sketches a jurisprudence of the commerce and taxation clauses that would have been superior to the one that developed during the Taft period. My proposed approach might also have forestalled the Court's later abdication of any important role in enforcing constitutional limitations on the congressional exercise of these powers.

A. Commerce

The interstate commerce provision of the commerce clause was apparently intended by the framers as an extremely limited grant of power. The principal purpose of the clause as a whole was to give the federal government power over *foreign* commerce, a power that

115. Cf. Roche, *Entrepreneurial Liberty and the Commerce Power: Expansion, Contraction, and Casuistry in the Age of Enterprise*, 30 U. CHI. L. REV. 680, 703 (1963) (at the beginning of the New Deal era, the case law had so developed that the commerce clause was "capable of almost infinite adjustment to the needs of a Court majority"). But cf. Stern, *The Commerce Clause and the National Economy 1933-1936*, 59 HARV. L. REV. 645, 652 (1946) ("If the Court adhered to the doctrines expressed in the *Stafford* and *Olsen* cases, there could be little doubt as to the power of Congress to use the Commerce Clause in regulating all the interrelated elements of the great interstate industries.").

was considered both very important and necessarily very broad.¹¹⁶ However, if this was the framers' intention, it was poorly drafted, for the text of the Constitution gives no indication that congressional power over interstate commerce is any less extensive than its almost plenary power over foreign commerce.¹¹⁷ In order to prevent the interstate commerce provision from conferring on Congress an unlimited authority to usurp the police functions of the states, some principled way must be found to overcome the natural inference from the broad language of the Constitution.

This could be done—and without any violence to the text of the Constitution—if one could find a way to limit the meaning of “interstate commerce” to some reasonably discrete sphere of social life. Courts and commentators, however, have struggled unsuccessfully to carry out this task and have quite understandably abandoned it.¹¹⁸ It is likely that the task will become even more uninviting in the future, for the progress of civilization is clearly making our national economic life ever more complex and interdependent. As this trend continues, “interstate commerce” will become even harder to disentangle from merely local affairs than it has been in the past.

A different approach—the one I propose—involves stepping back from the text of the Constitution and focusing instead on the purposes of the constitutional grants of power and the constitutional limits on those grants.

The principal purpose of giving the federal government the power to regulate interstate commerce was undoubtedly to promote free trade and especially to facilitate the removal of state-created barriers to free trade. The purpose of limiting the commerce power was principally to preserve the states as semi-sovereign components in a

116. See Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941).

117. The commerce clause provides simply that Congress is empowered “[t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes.” U.S. CONST. art. I, § 8, cl. 3.

118. ‘The commerce power’ does not name a thing; judicial efforts to settle the matter through definition of the power itself or of its subjects have proved useless—the definitions arbitrary. The reason for this is not difficult to establish. Congress was not given power to regulate commerce as an end in itself, but as a means. Few definitions of means are perfectly congruent with ends.

O’Fallon, *The Commerce Clause: A Theoretical Comment*, 61 OR. L. REV. 395, 397 (1982) (footnotes omitted). Cf. Roche, *supra* note 115, at 690-91 (drawing the distinction between inter- and intra-state commerce is “rather like designing a suit for a poltergeist”).

federal system.¹¹⁹ These two purposes conflict. Since the Constitution

119. The continuing value of the constitutional principle of federalism has come under heavy attack since the 1930's. For a recent specimen of the claim that the tenth amendment is either empty or obnoxious, see *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555-56, 105 S. Ct. 1005, 1018-20, 83 L. Ed. 2d 1016, 1034-37 (1985).

[T]he Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. . . .

[T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result. . . .

These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause.

Id.; see also O'Fallon, *supra* note 118, at 398.

There is no consensus, however, on the proposition that federalism ought to be dead as a matter of constitutional analysis. See, e.g., *Garcia*, 469 U.S. at 560, 105 S. Ct. at 1022-23, 83 L. Ed. 2d at 1039-40 (Powell, J., dissenting) ("Despite some genuflecting in [the] Court's opinion to the concept of federalism, today's decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause. . . . [I]t does not seem to have occurred to the Court that *it*—an unelected majority of five Justices—today rejects almost 200 years of the understanding of the constitutional status of federalism. In doing so, there is only a single passing reference to the Tenth Amendment."); *id.* at 580, 105 S. Ct. at 1033, 83 L. Ed. 2d at 1053 (O'Connor, J., dissenting) ("The Court today surveys the battle scene of federalism and sounds a retreat. Like Justice Powell, I would prefer to hold the field and, at the very least, render a little aid to the wounded."). Whatever the inherent value and nature of federalism, the tenth amendment has not been removed from the Constitution by the process prescribed in article V of the Constitution.

Note that this article does not advocate the discredited notion of "dual federalism." That theory can be succinctly refuted:

It is axiomatic that the National Government is supreme in its sphere. As to the powers granted to it, it must take precedence. The state powers comprise only what is left after the grant to the central government. There is thus an apparent denial of the plan of the Constitution when reserved powers serve to measure those which are granted.

Ribble, *Conflicts between Federal Regulation Through Taxation and the States*, 23 CORNELL L.Q. 131, 131 (1937). For a lengthier refutation of the theory of dual Federalism, including a review of the cases that seem to have adopted it, see E. CORWIN, *THE COMMERCE POWER VERSUS STATES RIGHTS: BACK TO THE CONSTITUTION* (1936); Corwin, *Congress's Power to Prohibit Commerce: A Crucial Constitutional Issue*, 18 CORNELL L.Q. 477, 483-88 (1933).

It remains true, however, that a construction of the Constitution that leaves no powers at all to the states is even more apparently "a denial of the plan of the Constitution." The dual federalism doctrine, flawed though it may be, grew up in an attempt to avoid an even more flawed result:

[The Constitution] surely has never contemplated states whose every act might be controlled and whose very existence as political units might be snuffed out by Congress. . . .

The Court seems to have felt in the child labor case that a line had been drawn somewhere shortly, or the dual structure of our government would have been completely changed by the gradual process of legislative and judicial erosion. Whether

must be read as an attempt to balance two competing goals, the Supreme Court should have sought to devise a legal test that would respect both purposes while providing a reasonably clear definition of legislative authority.

This could best have been accomplished by originally distinguishing between those federal statutes that promote interstate commerce and those that do not. In the first class of cases, congressional discretion ought to be greatest because Congress is directly acting to serve the central purpose of the commerce power. Thus, so long as an activity "affects" interstate commerce in the sense that it does or could obstruct that commerce (either directly or indirectly), Congress should be free to enact regulations designed to remove or prevent the obstruction. The hardest cases under this prong of the test would arise where Congress was purporting to promote commerce overall or in the long term by restricting certain kinds of commerce now. Prohibitions on the shipment of diseased cattle¹²⁰ and restrictive regulations governing the shipment of dangerous explosives¹²¹ illustrate the fact that some kinds of restrictions on commerce can indeed serve to promote commerce. Harder cases would arise where the connection is less obvious, especially perhaps in the rules governing regulated monopolies. Since complex factual considerations will often affect Congress's exercise of judgment in the area of economic regulation, it would be best to design a test that would permit Congress to engage in virtually any kind of genuine economic regulation that is reasonably well-tailored to promote commercial activity.¹²²

the Court made a happy choice of a place for drawing the line may be seriously questioned. But the writer does not question the political wisdom of or the constitutional sanction for drawing a line such as will leave, as of right, some substantial autonomy to the states.

Ribble, *The "Current of Commerce:" A Note on the Commerce Clause and the National Industrial Recovery Act*, 18 MINN. L. REV. 296, 311 (1934).

120. E.g., Animal Industry Act, 7 U.S.C. § 391, 21 U.S.C. §§ 112-15, 117-20, 130 (1982).

121. E.g., 18 U.S.C. § 836 (1982).

122. This test would fall somewhere between what is known as "rationality review" and the kind of "strict scrutiny" that is used for racial classifications under the fourteenth amendment.

Under this test, *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942) may have been correctly decided. (But not necessarily. Even under rationality review, the Court could decide that there must at least be some kind of commerce or trade to regulate—and production of wheat for on-site consumption might not qualify. In any case, a more detailed consideration of the facts in *Wickard* would be needed to decide whether the regulations were reasonably

When, Congress acts to inhibit commerce for some *other* purpose than facilitating free trade, a greater threat to the principle of federalism is presented, and the Court should be much less deferential to Congress. Two different cases, however, should be distinguished. When Congress is aiding the states in carrying out some task that they have a right and a desire to undertake, but are unable to accomplish successfully, the principle of federalism is in little danger. While the framers may not have actually foreseen a need for this kind of federal help to the states, the text of the Constitution does not specifically forbid it, and the growing complexity of modern society makes it desirable. This is one area in which it makes good sense to interpret the broad language of the Constitution in the light of changed conditions and new needs. Under this analysis, the *Brooks* case¹²³ would have been easily decided. Car theft is illegal in every state, as is receiving stolen property.

A different kind of difficulty would arise where state laws conflict. The rule should be that Congress may close interstate commerce to goods being shipped in violation of a valid state law

well tailored to promote the grain trade.) Even if one has to accept *Wickard*, however, the approach proposed in this paper is superior to the Supreme Court's. Congressional power of regulation would be given a wide scope only in an area confined to what can fairly be characterized as "economic."

Much more difficult conceptual problems would arise in attempting to develop a legal test for distinguishing between "economic" and "police" regulations. Practically any human activity can plausibly be shown to "affect" the economy in some way; even marriage and divorce—the classic example of an area of life that is usually assumed to belong exclusively within the police power of the states—might be classified as economic, on the ground that statistics show a correlation between individuals' marital status and their economic productivity. Even without so far-fetched an example, one could find numerous existing laws, *e.g.*, 29 U.S.C. § 160 (1982) (regulating "unfair labor practices"); 29 U.S.C. § 660 (1982) (OSHA) that serve both economic and noneconomic purposes.

In order to avoid the impossible task of sorting out the various purposes and effects of such "mixed" laws and of determining which purposes and effects are in some sense dominant, the test for distinguishing economic from noneconomic purposes should rest on the common sense notion of commerce as the buying and selling of goods and services. The government should have to show that a regulation that inhibits commerce in this sense is reasonably tailored to promote commerce, apart from incidental health and safety benefits or detriments. Many cases would undoubtedly arise in which this test would not be easy to apply. Perhaps the most that can be said in its favor is that it makes more sense (because it is tied more closely to the purpose of the commerce clause) than the *E.C. Knight* test, *see supra* notes 34-37 and accompanying text, and that some difficulties will inevitably arise in any attempt to put limits on the commerce power under the conditions of a modern economy.

123. *Brooks v. United States*, 267 U.S. 432, 45 S. Ct. 345, 69 L. Ed. 699 (1925).

of either the state of origin or the state of final destination.¹²⁴ Under this test, *Hammer* was probably decided correctly.¹²⁵ Congress was certainly not acting to reinforce any laws of the states where factories employing the proscribed forms of child labor were located. Nor did the statute limit itself to forbidding the use of interstate commerce to ship such goods into states that made such importation illegal. Note, however, that if the statute *had* been so limited, it would have been proper to uphold it.¹²⁶

As it happens, some of the issues raised by the test proposed in this article were discussed by the Court in cases of conflicting state liquor laws prior to the passage of the eighteenth and twenty-first amendments.

In the *License Cases*,¹²⁷ the Court held that the commerce clause left the states free to regulate the sale of imported liquor, so long as their regulations did not conflict with a law of Congress. In 1888 the Court ruled, however, that importation of liquor could not itself be prohibited by the states¹²⁸ and in *Leisy v. Hardin*¹²⁹ the decision of the *License Cases* was overruled. *Leisy*, however, was a dormant commerce doctrine case, and the Court left room for Congress to restore to the states authority to prohibit or regulate the importation of liquor.¹³⁰

124. The validity of the state laws for this purpose should be determined apart from the dormant commerce doctrine. Under that doctrine, the states are prohibited from either regulating interstate commerce directly or imposing incidental burdens on it that are excessive in relation to the state's local interests. See e.g., *Edgar v. MITE Corp.*, 457 U.S. 624, 640, 102 S. Ct. 2629, 2639, 73 L. Ed. 2d 269, 282 (1982). But Congress may override the Court's dormant commerce rulings and allow the states to engage in such regulation. See *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 66 S. Ct. 1142, 90 L. Ed. 1342 (1946). If Congress can authorize the states to violate dormant commerce doctrine strictures, it should also be allowed to help them do so.

125. 247 U.S. 251, 38 S. Ct. 529, 62 L. Ed. 1101 (1918).

126. This limitation would have removed the basis for the *Hammer* Court's objection to the Child Labor Law. Cooperative federal and state legislation directed against child-made goods was proposed by a law student during the New Deal period. See Note, *The Power of Congress to Subject Interstate Commerce to State Regulation*, 3 U. CHI. L. REV. 636 (1936). The proposal was developed in more detail in Himbert & Stone, *Congressional Assistance to the States Under the Commerce Power*, 9 U. COLO. L. REV. 101 (1937) and Ribble, *National and State Cooperation under the Commerce Clause*, 37 COLUM. L. REV. 43 (1937).

127. 46 U.S. (5 How.) 504, 522-24, 12 L. Ed. 256, 264-66 (1847).

128. *Bowman v. Chicago & N.W. Ry.*, 125 U.S. 465, 498-500, 8 S. Ct. 689, 705-06, 31 L. Ed. 700, 711-12 (1888).

129. 135 U.S. 100, 124-25, 10 S. Ct. 681, 689-90, 34 L. Ed. 128, 137-39 (1890).

130. *Id.* at 125, 10 S. Ct. at 690, 34 L. Ed. at 139.

Congress promptly took advantage of this suggestion and passed the Wilson Act,¹³¹ which authorized the states to subject imported intoxicating liquors to police power regulations just as if they had been domestically produced. This was upheld in *In re Rahrer*,¹³² though the Supreme Court later construed the Wilson Act so narrowly that it became ineffectual.¹³³ Finally, Congress passed a law (the Webb-Kenyon Act) directly prohibiting the use of interstate commerce to ship liquor in violation of the laws of the state of final destination.¹³⁴ This law was upheld in *Clark Distilling Co. v. Western Maryland Railway Co.*¹³⁵

Thus, the Court concluded with the sensible position that where a state desires to exclude certain commodities from its territory, Congress is free to support that decision through regulations of interstate commerce¹³⁶—even if other states object to the exclusion.¹³⁷

Rahrer and *Clark Distilling* are not perfect precedents for the proposal in this article. They were rendered at a time when the Court tended to favor the existence of a broad national police power stemming from the commerce clause;¹³⁸ this article would support the decisions as an *alternative* to the doctrine of a national police power. Furthermore, the cases did not distinguish clearly between federal laws that simply removed “dormant commerce doctrine” bars to state action and federal laws that affirmatively reinforced state laws. This article assumes that the former are permissible and argues

131. 27 U.S.C. § 121 (1982).

132. 140 U.S. 545, 564-65, 11 S. Ct. 865, 870, 35 L. Ed. 572, 577-78 (1891).

133. See *Rhodes v. Iowa*, 170 U.S. 412, 424-26, 18 S. Ct. 684, 668-69, 42 L. Ed. 1088, 1095-96 (1898) (state had no power under Act to regulate interstate commerce in transit).

134. 27 U.S.C. § 122 (1982).

135. 242 U.S. 311, 330, 37 S. Ct. 180, 186-87, 61 L. Ed. 326, 340 (1917).

136. In 1900 Congress passed a law dealing with the converse situation. The Lacey Act, 16 U.S.C. § 701 (1982), prohibited the use of interstate commerce to ship any bird or animal whose slaughter violated the laws of the state of *origin*. This statute was upheld on the authority of *Rahrer*. *United States v. Five Gambling Devices*, 346 U.S. 441, 446 n.7, 74 S. Ct. 190, 193 n.7, 88 L. Ed. 179, 186 n.7 (1953) (plurality opinion); *Rupert v. United States*, 181 F. 87, 90-91 (8th Cir. 1910) (cited with approval in *Kentucky Whip & Collar Co. v. Illinois Cent. R.R.*, 299 U.S. 334, 346 n.11, 57 S. Ct. 277, 280 n.11, 81 L. Ed. 270, 274 n.11 (1937)).

137. Presumably, liquor-exporting states were not thrilled with their sisters' prohibition laws.

138. *Clark Distilling*, for example, cited the *Lottery Case*, 188 U.S. 321, 363, 23 S. Ct. 321, 329-30, 47 L. Ed. 492, 504 (1903) and *Hoke v. United States*, 227 U.S. 308, 33 S. Ct. 281, 284, 57 L. Ed. 523, 527-28 (1913) (upholding Mann Act as a valid police regulation under the commerce clause) for this proposition.

on somewhat different grounds that the latter should also be allowed. Nevertheless, the liquor cases could have been used by the Taft Court to devise an approach like the one proposed in this article.

B. Taxation

The test proposed in the previous section should also have been applied to federal tax laws having significant regulatory effects. The application of the test would be complicated by the need to make a threshold inquiry into the regulatory nature of the tax. In extreme cases—where the tax is so heavy or so trivial that it could not be designed to raise revenue—the threshold inquiry would be relatively simple.¹³⁹ In many cases, however, Congress would be able to frame legitimate revenue measures in such a way that they would have significant regulatory effects. The hypothetical tax on steel plant emissions discussed in the introduction to this article offers one obvious example. The best way to handle this problem would be to treat all tax measures having significant regulatory effects as simultaneous exercises of the taxation and commerce powers.¹⁴⁰ Cases like the steel emissions hypothetical would be decided under the test for commerce power regulations laid out above.¹⁴¹ If the regulatory effects could be justified as an economic regulation, the tax should be upheld.¹⁴² Similarly, if the levy on emissions served to reinforce emissions regulations of states where the pollution originated or to enforce

139. A model for this kind of analysis is provided in *Guinn v. United States*, 238 U.S. 347, 35 S. Ct. 926, 59 L. Ed. 1340 (1915). In that case, Oklahoma had enacted a state constitutional provision requiring rigorous literacy tests for voting, but exempting from the tests lineal descendants of persons who had been eligible to vote on January 1, 1866. *Id.* at 356, 35 S. Ct. at 928, 59 L. Ed. at 1344-45. The United States argued that this was a flagrant attempt to evade the proscriptions of the fifteenth amendment, and the Court agreed. *Id.* at 360-67, 35 S. Ct. at 929-32, 59 L. Ed. at 1341-49. After pointing out that the state constitutional provision did have the effect of depriving blacks of the franchise, Chief Justice White reasoned that this would not be dispositive except that there could be no other purpose. "[W]e are unable to discover how, unless the prohibitions of the 15th Amendment were considered, the slightest reason was afforded for basing the classification upon a period of time prior to the 15th Amendment." *Id.* at 365, 35 S. Ct. at 831, 59 L. Ed. at 1348. Similarly, where a law purporting to be a taxation measure is so designed that it can raise only an insignificant revenue or none at all, a court would have to conclude that it has some other purpose.

140. This would entail no particularly troublesome limit on Congress's ability to raise revenues, since simple tariff and income taxes have always proved capable of raising more money than the government needs.

141. See *supra* notes 115-39 and accompanying text.

142. See *supra* notes 119-24 and accompanying text.

objections by other states to pollution being "exported" into their airspace, the tax should be upheld.¹⁴³

C. *The Problem of Inquiring into Congressional Purposes*

Perhaps the most obvious drawback of the constitutional test proposed in this article is that it requires inquiries into legislative purpose. Such investigations are difficult and potentially very embarrassing exercises for courts to conduct; the Supreme Court has repeatedly—and understandably—indicated a reluctance to engage in them if they can possibly be avoided.¹⁴⁴ The Court has also recognized, however, that they cannot always be avoided.¹⁴⁵ Particularly when very important constitutional limitations on legislative power are involved, the incentives for legislative evasion are so strong and the opportunities for pretextual stratagems so great that judicial scrutiny of legislative motive or purpose is an indispensable tool of the judicial function.¹⁴⁶

143. For an analysis of the complex and competing state and federal interests involved in the regulation of pollution, see Note, *The Clean Air Act Amendments of 1970: A Threat to Federalism?*, 76 COLUM. L. REV. 990 (1976).

144. See, e.g., *Palmer v. Thompson*, 403 U.S. 217, 224-25, 91 S. Ct. 1440, 1444-45, 29 L. Ed. 2d 438, 444-45 (1971); *United States v. O'Brien*, 391 U.S. 367, 383-84, 88 S. Ct. 1673, 1682-83, 20 L. Ed. 2d 672, 683-84 (1968); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130, 3 L. Ed. 162, 176 (1810).

145. See, e.g., *Washington v. Davis*, 426 U.S. 229, 239-48, 90 S. Ct. 2040, 2047-52, 48 L. Ed. 2d 597, 607-12 (1976) (race neutrality); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111, 29 L. Ed. 2d 745, 755-56 (1971) (secular purpose); cf. Note, *The Constitutionality of Federal Taxation as an Exercise of Federal Police Power*, 28 NOTRE DAME L. REV. 127, 135 (1952) ("as the Court has reiterated time and time again, congressional motive underlying legislative enactment is not a proper subject for judicial inquiry, except, of course, in those circumstances when inquiry is made.") (footnotes omitted).

146. The use of terms like "motive analysis" can lead to exaggerated fears about the procedure involved in such inquiries:

The eagerness of the Court to be guided by the face of [congressional Acts] has doubtless been based chiefly on two factors: a judicial hesitancy in substituting the will of the Court for that of Congress, and a feeling of reticence in looking into the "motives" of Congress. The former principle of judicial self-denial has been invoked too seldom in American constitutional law. But when it is invoked it should be frankly declared and not rested on a sort of juristic make believe.

The second principle, it is believed, has gained some support from confusion involved in the use of the word "motive." Of course, if Congress has the power to act in a given situation, the motives behind the exercise are immaterial on the question of power. Obviously the inquiry into "motive" can be used only when there is doubt as to the federal power. Again the motives of Congress viewed by the Court in such cases as that presented under the Grain Futures Act are not the impulses of an

Without pretending that inquiries aimed at rooting out laws motivated by illicit congressional purposes can ever be made easy or error-free, I would suggest that the analytical framework proposed in this article could work reasonably well. Under both the commerce and taxation clauses, the federal government is left with a great deal of discretion in dealing with truly national problems and concerns, reducing to a small number the cases in which Congress would find itself inclined to engage in deliberate and persistent attempts to evade the constitutional limits on its powers. Further, if circumstances arose in which the Court was seriously afraid of precipitating a constitutional crisis or of doing grave damage to the country by inhibiting congressional freedom, it would have the expedient option of resolving doubtful cases in accord with the traditional presumption in favor of the constitutionality of acts of Congress. If today's almost unlimited congressional authority seems required by the national interest, then it would be appropriate to amend the Constitution to give Congress the plenary power that the present document does not provide. That leaves cases where Congress casually or inadvertently exceeds its proper sphere of authority. In such cases, Congress would probably not have taken trouble to conceal a constitutional violation, and the text of the statute together with the legislative history should provide fairly clear evidence to justify the Court's refusal to give effect to the law. It is not easy to see why the Court should want to avoid a declaration of unconstitutionality in these circumstances. The tests proposed in this paper would have put Congress on clear notice of what is permitted and forbidden, mechanisms are provided by which the federal government can work together with the states to solve national problems, and the federal government is itself left with ample authority to carry out the tasks for which the commerce and taxation powers were designed.

aggregate of minds individually considered. The Court was not holding a statute bad because of any mental attitude of any man or of any group of men. What the Court is concerned with in this type of case is the motive or purpose of Congress in the sense of fairly contemplated results. It is the fair meaning and probable effect of the statute which is important in its validity and not the cerebrations which led to its enactment. As long as judicial review obtains, it is hard to see how a court can shut its eyes to this factor.

Ribble, *Conflicts Between Federal Regulation Through Taxation and the States*, 23 CORNELL L.Q. 131, 141 (1937).

CONCLUSION

By a process more notable for its steady consistency of direction than for its self-evident correctness or fidelity to the Constitution, Congress has sought to exert (and the Supreme Court has sought to excuse) a growing federal presence in the lives of the citizens at the expense of the states' authority. The commerce and taxation clauses of the Constitution have been called upon to justify this transfer of power, but neither the text of the Constitution nor the intentions of the framers can support the use to which these clauses have been put. The permissive Supreme Court jurisprudence is now so firmly entrenched that we have probably passed the point of no return. During the Taft period, however, that point had not yet been reached. The Taft Court had an opportunity either to arrest the process that led to this result or to make a serious attempt to explain why it should be allowed to continue. This article has shown that such an attempt was not made and has argued that it would have been possible to develop a coherent and defensible doctrine with which the drift towards federal hegemony could have been stemmed.