Gibbons v. Ogden Then and Now

Hugh Evander Willis

Indiana University

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Constitutional Law Commons, and the Legal History Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Available at: https://uknowledge.uky.edu/klj/vol28/iss3/2
GIBBONS V. OGDEN THEN AND NOW

By HUGH EVANDER WILLIS*

1. STATEMENT OF THE CASE

Gibbons v. Ogden is one of the great landmarks in United States Constitutional history. In this case Chief Justice Marshall wrote one of his five greatest opinions, and in his appearance before the Supreme Court in this case, Webster made his greatest argument. Gibbons v. Ogden and M'Culloch v. Maryland wrote into our Constitution the doctrine of a dual form of government, and the decision in Gibbons v. Ogden made the Constitution legally accomplish what was the moving cause of the adoption of the Constitution in the Constitutional Convention—"to keep the commercial intercourse among the states free from all invidious and impartial restraints."

Chancellor Livingston of New York for a number of years had been trying to solve the problem of steam navigation and had been conducting experiments on the Hudson River. In 1798, he procured from the New York Legislature an act giving him for twenty years the exclusive right to navigate by steamboats the streams and waters of the state, provided he should build a boat within a year which would make four miles an hour against the current of the Hudson. Another American, Robert Fulton, had been trying experiments of the same sort on the River Seine and in 1803 gave a public exhibition for Napoleon before scientists of France. The scientists of France were not impressed, but Livingston, who was present, was impressed. They soon met and formed a partnership. Livingston failed to meet the conditions of the Steamboat Act given him, but his agent, Nicholas J. Roosevelt, succeeded in having it renewed. Livingston resigned his position as American minister to France and returned home. Within a year he was

* Prof. of Law, Law School, Indiana University, Bloomington, Indiana, B.A. 1897, M.A. 1899, LL.B. 1901, LL.M. 1902, Univ. of Minn.; LL.D. 1925, Yankton Coll.; Univ. of Minn. Law School, 1902-13 (Asst. Prof. of Law 1906, Prof. of Law, 1910); Dean and Prof. of Law, Southwestern University Law School, 1913-15; Prof. of Law, University of North Dakota 1917-22; Dean 1920-22; Prof. of Law, Indiana University, since 1922. Author of numerous books and magazine articles.

9 Wheat. 1 (U. S. 1824).
joined by Fulton. Livingston failed to meet the conditions of the second act of the New York Legislature and a third was passed. The conditions of this act were met on August 17, 1807, by a successful steamboat voyage up the Hudson from New York to Albany. In April, 1808, a final act was voted by the New York Legislature giving Livingston and Fulton five years' prolongation of their monopoly for a full period of not exceeding thirty years, and forbidding the navigation of New York waters by steam craft without a license from Livingston and Fulton. Soon three boats were operating between New York and Albany, and Livingston and Fulton obtained from the legislature of Orleans territory the same exclusive privilege for steam navigation upon Louisiana waters, including the mouth of the Mississippi, that New York had granted upon the waters of that state. The people in other states resented the privileges thus given Livingston and Fulton and the legislatures of other states began to retaliate. The New Jersey legislature authorized the owner of any boat seized under the New York law to seize any steam propelled craft belonging to a citizen of New York to be forfeited for the New Jersey boat seized. Connecticut forbade any vessel licensed by Livingston and Fulton from entering Connecticut waters. Even other citizens of New York defied the Livingston and Fulton monopoly. One James Van Ingan and his associates thus challenged their exclusive contract. Livingston and Fulton sued them for an injunction against their operating their boats. Chancellor Lansing denied the injunction on the ground that the monopoly was a denial of the natural rights of all citizens to the free navigation of the waters of the state. This opinion was reversed by the Court of Errors and in his opinion Chief Justice Kent discussed the question of state power as against the power of the national government to grant such a monopoly, and he upheld the state power on the theory that the power given to congress was not exclusive and that the states had a concurrent power until their action came into collision with the federal power, and even then that the national power was only incidental.

Then the case of Gibbons v. Ogden came into the picture. Ogden had purchased from Livingston and Fulton the privilege of running ferry boats from New York to points in New Jersey and he combined with Gibbons, who operated a boat at New
Jersey landings, but who had not secured permission to navigate the New York waters. The steam boat monopoly asked for an injunction against them. Kent refused to enjoin Ogden because he operated his boat under the license of the monopoly but did enjoin Gibbons from operating boats in the waters of New York or the Hudson. Gibbons was angered by this decree and began to run boats between New York and New Jersey in competition with Ogden, his former associate. Ogden applied to Chancellor Kent for an injunction. Gibbons set up as a defense a license from the national government to run his boats in the coasting trade. Kent held that the act of Congress licensing a vessel for the coasting trade conferred no right incompatible with the exclusive right of Livingston and Fulton. The Court of Errors followed Chancellor Kent's opinion and the case was then appealed to the United States Supreme Court.²

Gibbons was represented by Webster and Wirt, and Ogden was represented by Emmett and Oakley. Pinckney would have appeared for Ogden but he was fatally ill and died during this term of court.

The importance of this case cannot be over emphasized. In spite of the adoption of the Constitution various states, because of the invention of the steamboat, were doing the very things for the suppression of which the Constitution had been adopted. If some way could not have been discovered to stop these conflicts, the Constitution might as well have never been adopted. Marshall discovered the way, and in his opinion in Gibbons v. Ogden made the power to regulate commerce given to Congress by the original Constitution adequate for the purpose and set forth the principles of our dual form of government so as to settle and make understandable for all time the relation between the states on the one hand and the federal government on the other, perhaps, if it had been realized, even to the settlement of the slavery question.

The questions involved in the case were: What is commerce? When is commerce interstate? What is the power of the federal government over interstate and intrastate com-

merce? Marshall answered each of these questions and thereby laid the foundation for our constitutional law upon these subjects; and the fundamental principles laid down by him still remain the fundamental principles upon the subject although some of his positions have been modified by later decisions, some of the points decided by him have had later clarification, and for short periods his principles have been wholly repudiated.

He defined commerce as commercial intercourse including both traffic and transportation. With him it was obvious that commerce included traffic (buying and selling), and the only difficulty was whether it included transportation. He held that it did and that transportation included navigation. He based his argument upon the common understanding of the people and the primary object of the adoption of the Constitution.

As to when commerce is interstate, Marshall did not give the final word, but he did establish the general doctrine. Interstate commerce, according to him, is that commerce which concerns more states than one. It includes all of the external concerns of the nation and those internal concerns which effect the states generally. This power of Congress must be exercised within the territorial jurisdiction of the several states. It cannot stop at the state boundaries. But just when interstate commerce begins in one state and ends in another state and whether it includes production and a flow of goods, the decision in *Gibbons v. Ogden* did not clear up.

On the nature and scope of the power Marshall also was somewhat uncertain. As to whether the power of the federal government over interstate commerce is exclusive or concurrent, Webster had argued that the power was an exclusive power, and there is some language in the decision of *Gibbons v. Ogden* which suggests that this was the opinion of Chief Justice Marshall. He, for example, compared the police power with the power of taxation, and pointed out that the states and the federal government each exercises a separate power of taxation, but that when the states proceed to regulate interstate or foreign commerce, they are exercising the very power granted to Congress; and he also pointed out how there are restrictions on the taxing power, but none on the commerce power. Yet, he finally took the position that the New York laws were void.
because they came into collision with an act of Congress to which they must yield under the doctrine of supersedure and that it was "immaterial whether the New York laws were passed under the concurrent power to regulate commerce with foreign nations and among the several states or in virtue of a power to regulate their domestic trade and police."

As to whether the federal government under the commerce clause may have power to regulate intrastate commerce, the decision in *Gibbons v. Ogden* was silent. It left unsettled the question of the scope of the power of the Federal government to prevent obstructions to interstate commerce and to foster interstate commerce. It recognized in the states a general police power which might conflict with the power of the federal government to regulate interstate commerce. But it took the position that the power to regulate is the power to govern and is a complete power which may be exercised to its utmost extent and which acknowledges no limitations, thereby impliedly, if not expressly, holding that the power over interstate commerce is no less than that over foreign commerce; that the power to regulate includes the power to prohibit; that the power may be used for the general welfare as well as for the benefit of commerce; and that the power is not limited by the powers over intrastate commerce retained by the states, but instead the powers of the states over intrastate commerce are limited by the power of Congress over interstate commerce, under the doctrine of federal supremacy, whenever there is a conflict between the two powers; and that no subject is withdrawn from the delegated powers of the United States by the fact that the same subject matter lies within the reserved powers of the states, or by the fact that the exercise of its power by the federal government may interfere with the powers of the states.

2. **Subsequent History of the Case**

   a. **Commerce**

    Chief Justice Marshall defined commerce as commercial intercourse in all of its branches including both traffic and transportation (and navigation). The decision that commerce includes transportation has never since been doubted. It is true that for a time the Supreme Court held that only goods
and not persons could be the subject of commerce, but this position was soon abandoned and the court held that commerce included the transportation of persons as well as goods. With this exception the Supreme Court has not hesitated to hold that wherever there was transportation there was commerce. Thus it held commerce the transportation of information, the transportation of electrical current, the transportation of gas, the transportation of prize fight films, and the transportation of many other things though no profit motive is involved.

However, upon the subject of whether commerce includes traffic, that is, buying and selling, the later decisions of the United States Supreme Court have not been so consistent. There was after awhile a tendency to limit commerce to transportation. The court had no difficulty in holding that there was commerce where people passed back and forth over a bridge, and even where sheep were being driven from one state to another, but where there was a sale either of tangibles or of intangibles without the contemplation of any transportation, the court apparently began to hold that there was no commerce. Certainly it held that neither the making of insurance nor advertising was commerce, and even went so far as to hold that the federal government could not prohibit the transportation in interstate commerce of goods manufactured by child labor, or apply the Sherman Anti-Trust Act to manufacture because it was undertaking to regulate something which was not commerce. These decisions represented

* Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1 (1877).
* Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 204 (1894).
* Kelley v. Rhoads, 188 U. S. 1 (1903).
the viewpoint of such justices as Field, White, Day, Sutherland, Butler, McReynolds, and Van Devanter. More recently the Supreme Court has gone back to the definition of Marshall and has made commerce include traffic as well as transportation. It even has modified the advertising case. It has not, as yet, expressly overruled the insurance case and the child labor case, but it must be assumed that these cases have been overruled sub silentio by the recent cases just cited and other cases in accord with them. These recent cases represent the viewpoint of such justices as Holmes, Brandeis, Stone, and Cardozo. These latest holdings represent a return to the viewpoint of Chief Justice Marshall and not only vindicate the position of the great Chief Justice, but represent the triumph of sane thinking and probably have reestablished Marshall's definition so it will never again be questioned.

b. When Commerce becomes Interstate

Chief Justice Marshall explained the meaning of interstate commerce, pointed out where it began and ended, and drew the line between intrastate and interstate commerce in broad general outlines, but he did not fill in many specific details. Later cases have undertaken to fill in these details. Some of these later cases have carried out the spirit of Marshall's generalizations and some of them undoubtedly have run counter to such spirit.

First, of the cases which determined when interstate commerce begins. The case of United States v. E. C. Knight Co., held in an opinion by Chief Justice Fuller that interstate commerce did not extend to the regulation of manufacture by the United States. Following this case there came in 1905 the case of Swift & Co. v. United States which in an opinion by Justice Holmes announced the doctrine of a flow or current of commerce so that interstate commerce would extend back for regulation by the United States to what otherwise would have been called in-

21 156 U. S. 1 (1895).
22 196 U. S. 375 (1905).
trastate commerce. This case was followed by *Stafford v. Wallace* in 1922 and *Board of Trade v. Olsen* in 1923, the opinions in which were written by Chief Justice Taft (McReynolds and Sutherland dissenting). In 1918 came the first child labor decision of *Hammer v. Dagenhart* in which the Supreme Court in an opinion by Justice Day to which Holmes, Brandeis, McKenna, and Clarke dissented took as narrow a position as it had taken in *United States v. E. C. Knight Co.*, but shortly after this case there followed a number of decisions taking a liberal view as to the beginning of interstate commerce. *Dahnke-Walker v. Bonedurant* in 1921 held that there was interstate commerce so as to prevent state regulation when a person from one state bought some goods in another state although he later decided never to ship them to the first state. *Lemke v. Farmers' Grain Co.*, decided in 1922, held that interstate commerce had begun after grain had been deposited in grain elevators in North Dakota even though there was yet no sale of it to other states, because statistics showed that year after year a greater part of such grain was shipped to other states, and the Court denied the power of the state to regulate it by a grain grading act. In *Real Silk Hosiery Mills v. City of Portland*, decided in 1925, the Supreme Court held in an opinion by Justice McReynolds that interstate commerce began with the soliciting of orders by drummers. Yet, in passing upon some of the pieces of so-called New Deal Federal Legislation the Supreme Court in *Railroad Retirement Board v. Alton Railroad*, decided in 1935, a case involving a compulsory railroad retirement and pension act; in *Schecter v. United States*, decided in 1935, a case involving the National Recovery Act; in *Carter v. Carter Coal Co.*, decided in 1936, a case involving the Guffey-Snyder Bituminous Coal Act; and in *United States v. Butler*, decided in 1936, a case involving the Agricultural Adjustment Act, in opinions by Justices Sutherland and Roberts.

---

258 U. S. 495 (1922).
262 U. S. 1 (1923).
247 U. S. 251 (1918).
258 U. S. 50 (1922).
268 U. S. 325 (1925).
298 U. S. 238 (1936).
297 U. S. 1 (1936).
and Chief Justice Hughes, took a conservative view as to the beginning of interstate commerce, and denied power to the federal government. However, after the shift in position of Justice Roberts from the conservative to the liberal side of the Supreme Court, the Court took a liberal view as to the beginning of interstate commerce in the cases of National Labor Relations Board v. Jones & Laughlin Steel Co.,23 involving the National Labor Relations Act, and Mulford v. Smith,24 involving the new Agricultural Adjustment Act, in opinions by Chief Justice Hughes and Justice Roberts.

It should be observed that most of the decisions prior to 1937 taking a liberal view as to the beginning of interstate commerce involved state regulations and most of the cases taking a conservative view as to the beginning of interstate commerce involved federal regulations. This at least arouses the suspicion that the dominant majority in the Supreme Court in these various earlier decisions was more concerned with the protection of business against any social control whatever than with making a correct decision as to where the line should be drawn between intra and interstate commerce. The most recent decisions seem to apply to federal legislation the principles developed with reference to state regulations and to go back to the general attitude of Chief Justice Marshall upon the subject.

Second, of the cases which involve the ending of interstate commerce. Chief Justice Marshall himself in the decision of Brown v. Maryland25 tended to make more specific the general rule which he had announced in Gibbons v. Ogden. In Brown v. Maryland he held that foreign commerce was not over so long as goods imported were in the original package and there was no sale thereof. The Supreme Court in 1900 extended the original package doctrine to interstate commerce.26 The Supreme Court has held that where goods are sold to be assembled as distinguished from installed, interstate commerce is not over until the goods have been so assembled,27 and that where gas and electricity are transmitted from one state to another, interstate

23 300 U. S. 1 (1937).
25 12 Wheat. 419 (U. S. 1827).
26 Austin v. Tennesse, 179 U. S. 343 (1900).
commerce is not over until the pressure or voltage is stepped down in the station in the community served.\textsuperscript{38} So where goods are ordered by a buyer through a dealer in his state from a manufacturer in another state, interstate commerce is not over upon delivery of the goods to the dealer, and the dealer is an agent engaged in interstate commerce;\textsuperscript{39} but interstate commerce is over and a dealer is engaged in intrastate commerce where he sells goods from another state after an order therefor by himself and the breaking of the original package,\textsuperscript{40} and a peddler peddling goods which he himself brings in from another state is not engaged in interstate commerce though there is no breaking of the original package.\textsuperscript{11}

c. The Powers of the National and State Governments over Interstate Commerce

The power to regulate interstate commerce is a specific police power delegated to the federal government, but both the federal government and the states have police powers thereof, and not only that but both may have tax powers and powers of eminent domain with reference thereto also. \textit{Gibbons v. Ogden} is silent as to tax and eminent domain questions.

Both the federal government and the states have a general power of taxation. Hence it must be assumed that the federal government has the power to tax interstate commerce. Perhaps if the federal government did not have this general taxing power the grant of the power to regulate might be held to include the power to tax. The Supreme Court has held that Congress may levy duties on foreign imports in the exercise of its powers to regulate foreign commerce,\textsuperscript{42} and it naturally follows that it might do the same in the exercise of its power over interstate commerce. The federal government's power to take property by eminent domain is an implied power which may be used in the aid of other powers and it would therefore seem to follow that

\textsuperscript{39} Kehr v. Stewart, 197 U. S. 60 (1905).
\textsuperscript{40} Banker Bros. Co. v. Commonwealth of Pennsylvania, 222 U. S. 210 (1911).
\textsuperscript{41} Wagner, etc. v. City of Covington, 251 U. S. 95 (1919).
\textsuperscript{42} Board of Trustees of University of Illinois v. United States, 289 U. S. 48 (1933).
the federal government may exercise the power of eminent domain in aid of interstate commerce.\textsuperscript{43}

The states probably cannot exercise the power of eminent domain for the benefit of interstate commerce unless possibly as an incident to their concurrent power. The states’ power to tax interstate commerce is another matter. Of course there is no direct prohibition of state taxation of interstate commerce but after a period of doubt\textsuperscript{44} the Supreme Court finally held in 1888 in the case of \textit{Leloup v. Mobile}\textsuperscript{45} that there was such a conflict between the states’ power of taxation of interstate commerce and the federal government’s police power over it that the latter would supplant the former, and held that a state could not directly tax interstate commerce. Consequently, the Supreme Court has held that a state may not tax persons while carried in interstate commerce,\textsuperscript{46} nor goods while in transit in interstate commerce,\textsuperscript{47} nor the privilege of doing interstate commerce.\textsuperscript{48} Yet it has more and more been holding that the states may exercise their general power of taxation if it only incidently effects interstate commerce, and that they may do this either by property taxes or by excise taxes. Thus a state may tax goods being carried in interstate commerce before transportation has begun,\textsuperscript{49} or while they are at rest in transit,\textsuperscript{50} and after they have come to rest inside the state, although because of the original package doctrine interstate commerce is not as yet over.\textsuperscript{51} A state may also levy non-discriminatory property taxes on the property of anyone engaged in interstate commerce if the property is within its jurisdiction whether land\textsuperscript{52} or tangible chattels\textsuperscript{53} or intangible chattels.\textsuperscript{54} A state may not only levy license taxes for the privilege of doing intrastate business but a franchise tax for the privilege of a corporate charter to do interstate business,\textsuperscript{55} a use tax for

\textsuperscript{43}United States v. Lynah, 183 U. S. 445 (1903).
\textsuperscript{44}Osborne v. Mobile, 16 Wall. 479 (U. S. 1873).
\textsuperscript{45}127 U. S. 640 (1887).
\textsuperscript{46}Henderson v. Mayor, 92 U. S. 259 (1875).
\textsuperscript{47}Kelley v. Rhoads, 183 U. S. 1 (1903).
\textsuperscript{49}Coe v. Errol, 116 U. S. 517 (1886).
\textsuperscript{50}Minnesota v. Blasius, 290 U. S. 1 (1933).
\textsuperscript{51}Brown v. Houston, 114 U. S. 622 (1885).
\textsuperscript{52}Glouster Ferry Co. v. Pennsylvania, 114 U. S. 196 (1885).
\textsuperscript{53}Glouster Ferry Co. v. Pennsylvania, 114 U. S. 196 (1885).
\textsuperscript{54}Virginia v. Imperial Coal Sales Co., 293 U. S. 15 (1934).
\textsuperscript{55}Railroad Co. v. Maryland, 21 Wall. 466 (U. S. 1874).
the use of articles bought from another state,\textsuperscript{56} a highway tax for the use of the state's highways by interstate carriers\textsuperscript{57} and net income taxes on income derived from interstate commerce by a domestic corporation.\textsuperscript{58} However, the Supreme Court has held that a gross income tax has too direct an effect on interstate commerce.\textsuperscript{59}

(1) State Police Power

So far as police powers are concerned, it might be assumed that the grant of a specific police power to regulate interstate commerce would give the federal government an exclusive police power and take from the states any power which they might otherwise have had. This apparently was the viewpoint of Chief Justice Marshall in regard to the matter in his opinion in the case of \textit{Gibbons v. Ogden}. Perhaps he was influenced to take this position by the logic of Daniel Webster. At all events, when there came before him five years later the case of \textit{Wilson v. The Black Bird Creek Marsh Co.},\textsuperscript{60} he definitely took the position that the grant to the federal government of the power to regulate interstate commerce did not take a concurrent power thereover from the states, and apparently he did not even apply the doctrine of Federal supersedeure because there was a Federal coasting license involved in the case of \textit{Wilson v. The Black Bird Creek Marsh Co.}, the same as in the case of \textit{Gibbons v. Ogden}. It has been suggested that the distinction between the two cases is the distinction between small streams and large streams, but a better explanation would probably be that Daniel Webster was not an attorney in this case. The case of \textit{Wilson v. The Black Bird Marsh Co.} was followed by the License Cases.\textsuperscript{61}

In 1851 a great change was made in the law of concurrent powers which had been established by Chief Justice Marshall, and his exclusive power theory was adopted. In this year in the case of \textit{Cooley v. Board of Port Wardens}\textsuperscript{62} the Supreme

\begin{itemize}
\item United States Glue Co. v. Oak Creek, 247 U. S. 321 (1918).
\item 5 Pet. 245 (U. S. 1829).
\item 5 How. 504 (U. S. 1847).
\item 12 How. 299 (U. S. 1851).
\end{itemize}
Court definitely held that while there might still be a few matters like pilotage over which the police powers of the states and federal government might be concurrent yet where a matter was national in scope and needed one uniform method of regulation the federal government's police power was an exclusive power. This continued to be the position of the Supreme Court until 1894. In this period came the decision that the regulation of the rates of interstate railways was national in scope and that therefore the states had no power thereover even in the case of silence on the part of Congress with reference to the matter. In this period also the Supreme Court held in its celebrated liquor decisions that the states could not even exercise their general police power indirectly to regulate interstate commerce. This period marked the passing of the states' power over interstate commerce. It came as the result of the nationalization of United States' business and a change in the viewpoint of the Supreme Court as to the balance between state and federal power. As a consequence of the decision in Wabash v. Illinois, Congress was forced to pass the act creating the Interstate Commerce Commission.

In 1894 in the case of Plumley v. Massachusetts the Supreme Court finally and definitely made another change in the constitutional powers of the state and of the federal government over interstate commerce. This decision did not change the concurrent power of the states and the nation in the small territory where this obtained nor the exclusive police power of the federal government where the matter was national in scope and needed one uniform method of regulation, but it held that where this exclusive police power of the federal government came into conflict with the general police power of the states for the protection of the general social interests of the state, the states might exercise their general police power even though they thereby indirectly and incidently regulated interstate commerce, provided Congress had not as yet passed any legislation which would supersede such state legislation. This position also was in accord with Marshall's logic in Gibbons v. Ogden. It will be observed that this decision was directly contra to the

---

63 Wabash, etc., Ry. v. Illinois, 118 U. S. 557 (1886).
64 Leisy v. Hardin, 135 U. S. 100 (1890); Bowman v. Chicago N. W. R. R., 125 U. S. 465 (1888).
65 155 U. S. 461 (1894).
liquor decisions rendered between 1851 and 1894, but obtained the same result as the decision in the License Cases in the period prior to 1851, although upon a new and entirely different ground. The rule of Plumley v. Massachusetts has continued to be the rule up to the present time. It should also be noted that in the latter part of the period between 1851 and 1894 the Supreme Court held that Congress in the Wilson Act could give the dry states power to control the liquor traffic after transit was over although interstate commerce was not over, and it has been contended that this meant that the federal government might delegate some of its own exclusive power to the states or change its exclusive power to a concurrent power. But the real explanation is that the Supreme Court was allowing the states to exercise their general police power though they thereby indirectly regulated interstate commerce after an act of Congress permitting it. And this in a way anticipated the decision in the case of Plumley v. Massachusetts which held that the states might exercise such a power without an act of Congress. Now undoubtedly the Supreme Court would hold that it would be unconstititutional for Congress to change the nature of our dual form of government.

What can the states do in the exercise of their general police power, though they indirectly and incidently regulate interstate commerce, provided they do not try to override Federal legislation? Here also Marshall saw the answer but later decisions established the law. For one thing the states may exclude articles, or persons if necessary to protect the health of the people in their own state, and they may do this even though Congress also prohibits the shipment of the proscribed articles. Although, of course, if Congress permits such shipment, a state cannot forbid it. They may require of motor carriers liability insurance as to third persons though not as to cargo, indemnity bonds for injuries other than to passengers, the building by

---

67 In re Rahrer, 140 U. S. 545 (1891).
68 Plumley v. Massachusetts, 155 U. S. 461 (1894).
70 Crossman v. Lurman, 192 U. S. 139 (1904).
73 Sprout v. South Bend, 277 U. S. 163 (1928).
railroads of underground or overhead passes for the safety of the public, and may regulate the manner trains may approach dangerous street crossings for the safety of the general public. States also may inspect either goods shipped in interstate commerce or property to be used by a carrier in interstate commerce, but there can be no inspection of persons. The power of a state to forbid the shipment out of the state of goods of the state is perhaps not as great as its power to exclude goods. A state may forbid such shipment of game and fish and running water on the theory that the state is the owner thereof as a representative of all its people in common, and in the exercise of its general police power a state may conserve its natural resources to prevent waste before they become articles of commerce. But after game, fish, or running water have been appropriated by a particular individual so as to become articles of commerce and in the case of percolating water, gas, oil, and all other objects of individual ownership, the state cannot forbid the shipment because they are articles of interstate commerce and this would be too direct a regulation thereof. However, in the case of Clason v. Indiana, the Supreme Court allowed the state of Indiana to forbid the shipment out of the state in interstate commerce of dead animals, although it permitted such shipment in intrastate commerce, because the purpose of the law was the protection of health through disposal plants. Of course, one state cannot exercise its police power for the benefit of another state. At first it would seem as though this law in forbidding the shipment of dead animals in interstate commerce out of the state was exercising a police power for other states, but the Supreme Court thought the main purpose of the law was to protect the health of the people of the state of Indiana.

---

77 Postal Teleg.-Cable Co. v. New Hope, 192 U. S. 55 (1904).
81 Bandini Petroleum Co. v. Superior Court, 284 U. S. 8 (1931).
82 Pennsylvania v. West Virginia, 262 U. S. 553 (1923); Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1 (1928).
83 59 Sup. Ct. 609 (1939).
A state may not, unless it makes the use of its highways or other property the basis thereof, impose any condition upon a person engaged in interstate commerce for the privilege of doing interstate commerce, and it cannot impose upon a foreign corporation not engaged in interstate commerce for the privilege of doing intrastate commerce any condition which would violate any interest of the United States or of another state under our dual form of government. Instead of having a power to impose a condition, the United States Constitution imposes upon a state the duty to take jurisdiction of a suit instituted by a person engaged in interstate commerce; and the Constitution permits a state court to take jurisdiction of a suit by a non-resident against a corporation engaged in interstate commerce where a cause of action arises inside the state, whether the foreign corporation is operating in the state or not, and of a suit by a resident of the state against a foreign corporation engaged in interstate commerce, whether the cause of action arises outside the state or inside the state, if the corporation is operating in the state. But a state court may not take jurisdiction over a suit by a non-resident against a foreign corporation engaged in interstate commerce on a cause of action outside the state, nor of a suit by a resident against a foreign corporation engaged in interstate commerce on a cause of action arising outside the state, if the corporation is not operating in the state.

Yet it should be remembered that whatever powers the states may have are subject to the doctrine of federal supremacy developed by Chief Justice Marshall in the cases of McCulloch v. Maryland and Veazie Bank v. Fenno. In the application of

---

69 Denver, etc. v. Terte, 234 U. S. 234 (1919).
71 Missouri v. Taylor, 266 U. S. 200 (1924).
72 Davis v. Farmers' Co-op. Equity Co., 262 U. S. 312 (1923).
73 Denver, etc. v. Terte, 234 U. S. 234 (1919).
74 4 Wheat. 316 (U. S. 1819).
75 8 Wall. 533 (U. S. 1869).
this doctrine to interstate commerce the Supreme Court has held that where the states and the federal government have a concurrent power or where the federal government’s power is exclusive but the states have a general police power, the federal government’s power will supersede that of a state whenever there is a conflict, and that there is such a conflict where there is a disagreement between the state rule and the federal rule, or where the rules are the same, or where the state’s rule is less or more than the federal.96

The most important change in the power of the states over interstate commerce under our dual form of government since the time of Chief Justice Marshall has been wrought not by judicial decisions but by the Twenty-First Amendment to the Constitution. Section 2 of this malodorous amendment provides: "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." This amendment did not give Congress the power to prohibit such transportation or importation; Congress already had this power.97 It gave the states, so far as concerned intoxicating liquors, through the weasel words "in violation of the laws thereof" a power over interstate commerce which they never had had before under the Constitution. After the adoption of this amendment the Supreme Court held, as it was bound to hold, in opinions written by Justice Brandeis that the Twenty-First Amendment was not limited by the commerce clause, the equality clause, or the due process clause of the Constitution.98 The result was that the Twenty-First Amendment pro tanto nullified not only the commerce clause but the other clauses in the United States Constitution. A more pernicious piece of legislation in the form of a constitutional amendment could not be imagined. Because of this amendment the states have begun to erect ports-of-entry and to levy all sorts of taxation and tariff barriers against interstate commerce in intoxicating liquors. This has made the situation between

96 Erie R. Co. v. People of New York, 233 U. S. 671 (1914).
97 Clark Distilling Co. v. Western Maryland R. Co., 242 U. S. 311 (1917).
the various states so far as concerns intoxicating liquors as bad as the general commerce situation was at the time of the meeting of the Constitutional Convention.

(2) Federal Government’s Police Power over Interstate Commerce

As we have already seen, Chief Justice Marshall held that the federal government’s power to regulate interstate commerce was a complete power which acknowledged no limitation, which was as great over interstate commerce as it was over foreign commerce, which included the power to prohibit, which might be used for the general welfare as well as for commerce, which limited the powers of the states over intrastate commerce, but was in no way limited by the reserve powers of the states, and which apparently would also include the power to prevent obstructions to interstate commerce and to foster interstate commerce. How have these various phases of federal power fared throughout the years since John Marshall’s time?

Of course the federal government’s power varied from a concurrent power prior to 1851 to an exclusive power without state general police power from 1851 to 1894 and to an exclusive power subject to the states’ general police power since 1894. But while these changes in the law changed the police powers of the states, they did not change the police power of the federal government; because, if the federal government decided to exercise its power, it made no difference whether its power was exclusive or concurrent, for it could do under a concurrent power what it could do under an exclusive power; and, because of the doctrine of supersedure, its power would override not only the concurrent power of the states, but any general police power which the states might otherwise exercise.

The federal police power over interstate commerce has manifested itself (1) in the regulation of persons and instrumentalities engaged in interstate commerce,9 (2) in the regulation of goods carried in interstate commerce,10 (3) in the regulation of persons or things obstructing interstate commerce,11 and (4) in the fostering and encouraging of interstate commerce.

---

9 Minnesota Rate Cases, 230 U. S. 352 (1913).
10 Ex parte Jackson, 96 U. S. 727 (1877).
11 In re Debs, 158 U. S. 564 (1895); Northern Securities Co. v. United States, 193 U. S. 197 (1904).
Federal regulation has extended both to land transportation and to water transportation. In 1887 Congress passed the Interstate Commerce Act establishing an Interstate Commerce Commission and giving it jurisdiction over the railroads of the country and over the railroads and water carriers in case of through carriage. Since that time the Commission has been given jurisdiction over pipe line companies, express companies, sleeping car companies, and companies transporting intelligence by wire and wireless; and in recent times the Shipping Board has been given power over water carriers on the high seas and Great Lakes comparable with the power of the Interstate Commerce Commission over the railroads. The theory of these acts is to apply to some of our great monopolies through administrative action the law of public utilities. Congress has also passed the Sherman Anti-Trust Act, the Clayton Act, and established the Federal Trade Commission, for the purpose of enforcing competition, not only as to those companies not regulated by the Interstate Commerce Commission, but even by those under the regulation of such Commission.

Chief Justice Marshall was of the opinion that the federal power over interstate commerce was as great as its power over foreign commerce. Dicta in many Supreme Court cases for fifty years continued to announce this same position. Madison had given a slightly different opinion five years after the decision in *Gibbons v. Ogden*, and Madison's distinction was adopted by a dictum in Justice McLean's opinion in the slavery case of *Groves v. Slaughter*. Justice White took up the torch of this illumination in his opinions in the case of *Buttfield v. Stranahan* and the case of *Abby Dodge v. United States*. This position of Chief Justice White was subscribed to by the court in *Hammer v. Dagenhart* and was repeated by Chief Justice Hughes in his opinion in *University of Illinois v. United States*, so that now it may be assumed that the power of Congress over foreign commerce is greater than its power over

---

104 15 Pet. 449 (U. S. 1841).
105 122 U. S. 470 (1904).
106 223 U. S. 166 (1912).
107 247 U. S. 251 (1918).
interstate commerce and that to this extent the pronouncements of Chief Justice Marshall have been overruled.

While Marshall was not explicit upon the question of whether Congress’ power to regulate interstate commerce included the power to prohibit the shipment of goods in interstate commerce, his general language is broad enough to include this power. Webster and Madison also took this position. The idea that the power to regulate did not include the power to prohibit was first invented in connection with the power of Congress over foreign commerce. Jefferson’s embargo was the occasion for this discussion. In the case of *Groves v. Slaughter*, this argument was transferred from the field of foreign commerce to the field of interstate commerce, because of the fear of the defenders of slavery that Congress might put a ban upon interstate slave trade. Yet ignoring this argument, the Supreme Court held in the beginning of the twentieth century in one case after another that Congress has the power to prohibit the shipment of goods in interstate commerce. Yet in spite of these cases the Supreme Court announced in the case of *Hammer v. Dagenhart* that the power to regulate did not include the power to prohibit the shipment in interstate commerce of goods manufactured by child labor. However, since the first child labor decision, the Supreme Court has again held that Congress may prohibit the shipment of prison made goods in interstate commerce. Hence it must now be assumed that the position of the Supreme Court in the first child labor case has been abandoned, that the earlier position has now been reestablished, and that the federal government’s power to regulate includes the power to prohibit.

It has been contended in recent times that even though Congress has the power to prohibit the shipment of goods in interstate commerce, it may do so only for the protection of commerce and not for the protection of the general welfare.

---

10. *15 Pet. 449 (U. S. 1841).*
11. *Lottery Cases, 188 U. S. 321 (1903) (lottery tickets); Hipolite Egg Co. v. United States, 220 U. S. 45 (1911) (impure food); Hoke v. United States, 227 U. S. 308 (1913) (white slaves); Clark Distilling Co. v. Western Maryland R. Co., 242 U. S. 311 (1917) (intoxicating liquor); United States v. Popper, 98 Fed. 423 (1899) (obscene literature); Rupert v. United States, 181 Fed. 87 (1910) (game unlawfully killed); Weber v. Freed, 233 U. S. 325 (1915) (prize fight films).*
The lottery case would seem to be one where Congress was promoting the general welfare, but if this case did not so hold certainly the white slave case so held. Yet this was the position taken in the first child labor case of *Hammer v. Dagenhart* and it was recognized again by Chief Justice Taft speaking for the court in the second child labor case of *Bailey v. Drexel Furniture Co.* Evidently the Supreme Court at this time thought Congress would have power to keep child labor from harming commerce among the states but not to prevent commerce among the states from harming child labor. This issue divided the court five to four in the railroad retirement and pension case. The recent case of *Nebbia v. New York* has apparently again re-instated the proposition that Congress' power to regulate interstate commerce includes the power to promote the general welfare as well as to benefit such commerce, and that the only limitation on its power is that found in the due process clause.

In *Gibbons v. Ogden* Chief Justice Marshall indicated that the power of the federal government is not limited by any of the reserve powers of the states, and in *M'Culloch v. Maryland* he established the doctrine of federal supremacy in case of a conflict between federal and state powers. He held that the federal government could tax state instrumentalities, but that a state could not tax federal instrumentalities. Later justices of the Supreme Court followed this doctrine of Marshall's in holding that the federal government might take the property of a state by eminent domain though a state could not take the property of the federal government, in steadfastly holding, as we have noted, that the federal police power of interstate commerce would supplant the states' general taxing power over interstate commerce, and likewise in holding that the federal government could sue a state though a state could not sue the federal government. Yet in spite of all this, from time to

---

259 U. S. 20 (1922).
4 Wheat. 316 (U. S. 1819).
M'Culloch v. Maryland, 4 Wheat. 316 (U. S. 1819); Veazle Bank v. Fenno, 8 Wall. 533 (U. S. 1869).
Kohl v. United States, 91 U. S. 367 (1875).
United States v. Texas, 143 U. S. 621 (1892); Kansas v. United States, 204 U. S. 331 (1907).
time throughout our constitutional history, Marshall’s position has been attacked. His doctrine of tax supremacy was later modified to give what may be called tax immunity equality. The second child labor case of Bailey v. Drexel Furniture Co. held that the federal government could not exercise a police power it did not have in the guise of taxation, and the case of United States v. Butler held that the federal government could not use its general taxing power to cut down the states’ general police power, and for this reason declared unconstitutional the first Federal Agriculture Adjustment Act. Yet still more recently, the Court has held the second Agricultural Adjustment Act constitutional on the ground that it was an exercise of the federal government’s specific police power over interstate commerce and that this would override the states’ general police power. However, the same position taken by the Supreme Court in the above tax case was introduced off and on in certain police power cases. In other words, the court came to take the position that while Congress’ police power to regulate commerce among the states is supreme over the states’ power, it must not be construed to include the power to conflict with state power, and among the subjects segregated to the reserve power of the states and which therefore lie outside the range of the power of Congress was the power of production. This was the position taken by the Sugar Trust case, and the first child labor case stood squarely for the same position. The cases which recognized a current or flow of interstate commerce of course indirectly overruled this position. The flow doctrine seems to have been abandoned in the New Deal decisions of Schecter Poultry Corp. v. United States and Carter v. Carter Coal Co., but this last position

Collector v. Day, 11 Wall. 113 (U. S. 1870).
259 U. S. 20 (1922).
297 U. S. 1 (1936).
298 U. S. 238 (1936).
of the court has again been reversed and the current of commerce doctrine restored by the case of *National Labor Relations Board v. Jones & Laughlin Co.*

Hence it may now be taken for granted that the Supreme Court has established that the Tenth Amendment is not a limitation on either the express or the implied powers of the federal government; that it reserves only the non-delegated powers; and that it does segregate any state powers so that the delegated powers of the federal government may not operate on them under the doctrine of supremacy of the federal power; and therefore that any police power cases holding to the contrary have been overruled, and that any tax cases holding to the contrary should be overruled.

The strongest illustration of the doctrine of federal supremacy is found in the holding of the United States Supreme Court that under its power to regulate interstate commerce the federal government may also regulate intrastate commerce, either when intrastate commerce and interstate commerce are so interblended that one system of regulation is required for both or to prevent obstruction and interference with interstate commerce.

As a result of this short survey of important United States Supreme Court decisions since the decision of *Gibbons v. Ogden*, it must be concluded that the decision in the case of *Gibbons v. Ogden* is still very much alive, and that the work of Chief Justice Marshall in his opinion in this celebrated decision still endures. The definition of commerce is now the definition which Marshall gave in *Gibbons v. Ogden*. The determination of the question of when commerce becomes interstate has been worked out in detail along the general lines laid down by him. The powers of the federal government and their supremacy over the powers of the governments of the states are today only an unfolding and natural evolution from the principles set forth by the great Chief Justice.

In conclusion, attention should be called to two recent

---

29 Houston, etc. v. United States (Shreveport Case), 234 U. S. 342 (1914).
addresses by prominent members of the legal profession. One of these addresses was delivered by the Honorable Frank J. Hogan as a presidential address to the American Bar Association.\textsuperscript{132} The other was an address delivered by Honorable Robert H. Jackson, then Solicitor-General of the United States, before the section of Public Utility Law of the American Bar Association.\textsuperscript{133}

Mr. Hogan was filled with alarm because of commerce decisions and other decisions of the United States Supreme Court rendered since Justice Robert's change of view in the spring of 1937. He told of how again and again the Court turned aside from what had long been looked on as "established principles of constitutional law" "settled by repeated decisions of this Court." The trouble with Mr. Hogan was that he apparently was familiar only with the decisions of Justices Butler, McReynolds, Sutherland, and Van Devanter, who dominated the Supreme Court from about 1922 to 1936, and a few decisions of such justices as Field, Fuller, and Peckham in the period dominated by them from 1890 to 1910. The decisions of the Supreme Court since 1937 certainly did reverse a lot of decisions rendered by the men of whom mention has been made, and if the decisions of these men were correct, perhaps there was a cause for Mr. Hogan's alarm. But if Mr. Hogan had read all of the decisions of the Supreme Court instead of those to which he referred, he might have found more cause for alarm in the decisions which were overruled than in the decisions which did the overruling. The recent decisions in which the opinions were written by Justices Stone, Cardozo, Frankfurter, Reed, and Hughes may not be in accord with prior decisions which were written by Justices Butler, McReynolds, Sutherland, and Van Devanter, but they are in accord with those of Holmes, Brandeis, and Hughes in the period dominated by them from 1910 to 1933, with the decisions made by Justices Taney, Miller, and Waite in the period running from the time of the Civil War up to 1890, and even with the majority opinions of Chief Justice Marshall. The only opinions of Chief Justice Marshall rendering any comfort for the Butler, McReynolds, Van Devanter, and Sutherland

\textsuperscript{132} 25 A. B. A. J. 629 (1939).
\textsuperscript{133} 25 A. B. A. J. 745 (1939).
opinions involved are found in Marshall's dissenting opinion in the case of Ogden v. Sanders\textsuperscript{134} and in some dicta in the Dartmouth College Case.\textsuperscript{135} Long since many unsatisfactory decisions of Justices Field, Fuller, and Peckham\textsuperscript{136} have been overruled or abrogated by amendments to the United States Constitution and later decisions of the Court without destroying our form of government in the United States. Why should Mr. Hogan be alarmed with similar overrulings of the decisions of Justices Butler, McReynolds, Sutherland, and Van Devanter? These recent decisions have been no more startling than the former. These recent decisions are in accord with the principles announced in other periods by the greatest justices we have had upon the Supreme Court. They probably have placed all constitutional law upon a more rational basis and have made it accord more with the needs of the people of the United States. Yes, these recent decisions have changed our Constitution, but it was that part of our Constitution made by Justices Butler, McReynolds, Field, Fuller, and Peckham, not the Constitution made by such justices as Holmes, Brandeis, Stone, Cardozo, Taney, Waite, and Marshall. It would seem therefore that Mr. Hogan ought to have been able to have better controlled his alarm.

Mr. Jackson in his address took a position practically as indefensible as the position of Mr. Hogan, only it was exactly the opposite of Mr. Hogan's. Mr. Jackson was not filled with any alarm but was taking pride in the work of the Supreme Court during the last three years; but he claimed that the Supreme Court in these recent decisions had simply removed the successive layers of oil which had been spread over the original Constitution by prior justices and had revealed the original Constitution as an old master, a genuine article, welcomely restored. In other words, that the recent decisions of the Supreme Court had only taken us back to the original Constitution. This is as great an error as that of Mr. Hogan. The Constitution to which these recent decisions have taken us back was not a Constitution made in the Constitutional

\textsuperscript{134} 12 Wheat. 213 (U. S. 827).
\textsuperscript{135} 4 Wheat. 518 (U. S. 1819).
\textsuperscript{136} For example, Leisy v. Hardin, 135 U. S. 100 (1890); Bowman v. Chicago Northwestern R. Co., 125 U. S. 465 (1888); Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429 (1895); and Lochner v. New York, 198 U. S. 45 (1904).
Convention, but a Constitution made by the justices of the Supreme Court, mostly by Justice Marshall and his associates prior to the Civil War, but partly by the justices immediately after the Civil War and the justices between 1910 and 1922.

However, the fact that both Mr. Hogan and Mr. Jackson were wrong in their rationalization of the work of the Supreme Court does not detract from the value of its work. The plain fact of the matter is that justices with different viewpoints have sat upon the Supreme Court throughout our history. Sometimes the viewpoint of one group of justices, sometimes the viewpoint of another group of justices has prevailed. On the whole in the past decisions on our dual form of government which have given the greatest promise of enduring are those which have been rendered by Chief Justice Marshall and such justices as Holmes, Hughes, Brandeis, Stone, and Cardozo. If this continues to be true in the future, it is a safe prophecy that the recent decisions of the Supreme Court rather than the decisions of that period immediately preceding it will be those which will endure.