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Thomas A. Gilliam

THE SCOPE OF THE PHRASE "INTERSTATE COMMERCE"—SHALL IT BE REDEFINED?

By THOMAS A. GILLIAM, *of the Colorado Bar*

"It is to Marshall that we turn for the description of the power confided to Congress and its scope."—Chief Justice Hughes.[1]

Occasionally, judges are badgered by Philadelphia lawyers into a rather extraordinary position. In 1946, *Prudential Insurance Company v. Benjamin*[2] was decided by the Supreme Court, a case which calls for some redefinition of Article I, Section 8, Clause 3 of the United States Constitution:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The *Prudential* case upheld the validity of the McCarran Act[3] enacted in view of *United States v. Southeastern Underwriters Association*,[4] in which the Court had declared that insurance is an interstate business. Since before the latter decision, insurance was generally thought not subject to the commerce clause, notably an implication derived from *Paul v. Virginia*[5] the states had evolved regulation of this phase of commerce, which Congress, by the McCarran legislation, sought to implement and develop. The effect of the Act was to declare, "that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose a barrier" to such regulation or taxation.

In sustaining the validity of the Federal legislation, Mr. Justice Rutledge also answered the attacks made by the insurance company on a state tax law, which for purposes of discussion he assumed to be discriminatory:[6]

> Here both Congress and South Carolina have acted,

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[1] The Supreme Court of the United States, 143 (1928).

[2] 328 U. S. 408, 66 S. Ct. 1142, 90 L. Ed. 1342, 164 A. L. R. 476.

[3] 59 STAT. 33, 15 U. S. C. A. 1011-1015 (1945).

[4] 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944); rehearing denied in 323 U. S. 811, 65 S. Ct. 26, 89 L. Ed. 646 (1944).

[5] 75 U. S. 168, 8 Wall. 168, 19 L. Ed. 357 (1869); Hooper v. California, 155 U. S. 648, 15 S. Ct. 207, 39 L. Ed. 297 (1895). For a similar situation in baseball, *cf.* Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U. S. 200, 42 S. Ct. 465, 66 L. Ed. 898 (1922), and Gardella v. Chandler, 172 F. 2d 402 (2nd Cir., 1949).

[6] Prudential Insurance Co. v. Benjamin, 328 U. S. 408, note 2 *supra*, 429. While Amendment XIV, Sec. 1, provides that no person shall be denied by a state the equal protection of its laws, this to Rutledge was a dangerous blurring of ideas. See Robertson v. People of the State of California, 328 U. S. 440, 66 S. Ct. 1160, 90 L. Ed. 1366 (1946); *Cf.* Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469 (1934); Crandall v. Nevada, 73 U. S. 35, 6 Wall. 35, 18 L. Ed. 744 (1868); Edwards v. California, 314 U. S. 160, 62 S. Ct. 164, 86 L. Ed. 119 (1941) Douglas, concurring opinion.

> and in complete coordination, to sustain the tax. It is therefore reinforced by the exercise of all the power of government residing in our scheme.[7]

And with reference to constitutional attacks made by Prudential [8] on the Congressional legislation itself, his answer was even more out of the ordinary to the effect that these arguments are:

> On the theory that no more has occurred than that Congress has "adopted" the tax as its own, a conception which obviously ignores the state's exertion of its own power and, furthermore, seeks to restrict the cooridnated exercise of federal and state authority by a limitation applicable only to the federal taxing power *when it is exerted without reference to any state action.*[9] (Italics supplied.)

And while state action was not elevated to the same plane as the congressional, the effect is virtually the same.[10] This superstate idea appears elsewhere in the opinion with reference to federal-state action. A *gestalt* results, the whole is greater than its parts. To justify this conclusion Justice Rutledge reflected that beginning with *Gibbons v. Ogden,*[11] in the silence of Congress, *i.e.,* when that body has not acted under the great powers given it by the commerce clause, the Court has often taken the initiative. The author of *Gibbons v. Ogden,* Justice Rutledge, explained in a footnote quote was obliged to do so by necessity, saying, "Judges legislate interstitially and the interstices were great in Marshall's time." [12]

Although there have been times when Congress had not agreed with the efforts of the Court as a substitute legislature, and had later disavowed the legislation; nevertheless he went on:

> The fact remains that, in these instances, the sustaining of Congress' overriding action has involved something beyond correction of erroneous factual judgment in deference to Congress' presumably better-informed view of the facts and also beyond giving due deference to its conception of the scope of its powers, when it repudiates,

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[7] *Id.* at 435-436.

[8] Of this it was said at p. 412, "The versatility with which the argument inverts state and national power, each in alternation to ward off the others incidence, is not simply a product of protective self-interest. It is the recurring manifestation of the continuing necessity in our federal system for accommodating the two great basic powers it comprehends."

[9] *Id.* at 438.

[10] Note 6 *supra.*

[11] 22 U. S. 1, 9 Wheat. 1, 6 L. Ed. 23 (1824).

[12] Prudential Ins. Co. v. Benjamin, 328 U. S. 408, 413, note 2 *supra,* citing Ribble, *State and National Power Over Commerce* 47. Ribble's paper grew out of Dean Stone's assignment, note 68 *post.*

just as when its silence is thought to support, the inference that it has forbidden state action.[13]

This "something beyond" involved is never quite explained,[14] but an act of Congress had never before been elevated above the Constitution. Marshall saw to that.[15] Perhaps the Court was saying that the origin of its own power to act in the silence of Congress is obscure, and if Congress speaks what authority have we to say, nay? Chief Justice Hughes once said, "the Constitution is what the judges say it is,"[16] but isn't it another matter, altogether, to say that the Constitution is what the Congress says it is when it sanctions state action? Justice Rutledge, nevertheless, felt that such sanction was supported by "the whole trend of decision." [17] Equally obscure, however, as the source of the Court's power in the silence of Congress, is in coexistence with the former, the origin of the power of Congress to enable the states to do that which they otherwise could not.[18] Perhaps what Rutledge meant was that, when the states and federal government form a partnership in regulation, something in the nature of a treaty results. If this be the case the necessity of redefinition is manifest, or at least a historical reexamination of the trend of decision is indicated, and since as all these matters troubled Marshall in the great case of *Gibbons v. Ogedn,* it might be advisable to turn first, as all decisions do, to that decision.

THE SCOPE OF THE POWER

Marshall has been much maligned.[19] He has left the impression of being the true apostle of federalism, the autocrat of the bench, the uncompromising figure of judicial supermacy. Never a popular figure, he filled the bill. And yet in *Gibbons v. Ogden,* his only popular decision,[20] and in *Willson v. Blackbird Creek Marsh Co.*[21] he possibly indicated, at the beginning, the whole scope of the commercial power, and upon review, as reexamination of legends often do, the impression left by Marshall is somewhat different from that assumed.

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[13] *Id.* at 425-426.

[14] An explanation possibly lies in Article 1, Sec. 10, Cl. 2 of the CONSTITUTION: No State shall, without the consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws.

[15] Marbury v. Madison, 5 U. S. 137, 1 Cranch. 137, 2 L. Ed. 60 (1803).

[16] Cited by Abel, *Commerce Regulation Before Gibbons v. Ogden; Interstate Transoprtation Facilities,* 25 N. CAR. L. R. 12 (1947).

[17] Prudential Ins. Co. v. Benjamin, 328 U. S. 408, 433, note 12 *supra.*

[18] Murphy, *Insurance Under the Commerce Clause.* 33 IA. L. R. 91, 100 (1947).

[19] See Abel, *Commerce Regulation Before Gibbons v. Ogden, Trade and Traffic,* 14 BROOKLYN L. R. 38, 215 (1941); Green, *Some Heretical Remarks on the Federal Power Over Commerce.* 31 MINN. L. R. 121, 148 (1947).

[20] Mendelson, *New Light on Fletcher v. Peck and Gibbons v. Ogden,* 58 YALE L. J. 567 (1949).

[21] 27 U. S. 245, 2 Pet. 245, 7 L. Ed. 412 (1829).

Gibbons v. Ogden did not involve an instance of a state acting where Congress had not; on the contrary, a monopoly created by state law, on steamship traffic on the Hudson was dissolved by that decision as being in conflict with federal licensing legislation. As Marshall pointed out, "The sole question is, can a state regluate commerce with foreign nations and among the states, while congress is regulating it?" [22] The answer to this question, counsel for the monopoly urged, was that the states have concurrent power in regulating commerce:

> It is remarkable that even the definite article "the" is omitted. . . . And this omission was not accidental, but studiously made. By referring to the journals of the Federal convention, it will be found, that the sixth article of Mr. Charles Pinkney's draft has the words "shall have the power," etc. In the draft reported by the committee of five (art. 7) the definite article is still preserved. In the draft as reported by Mr. Brearly the word "the" is left out, clearly by design. Notwithstanding that, Mr. Patrick Henry and Mr. George Mason, and indeed, the opposers of the constitution generally, thought . . . that when power was given, it was "exclusively given." . . . This construction, which was the general foundation of the opposition to the constitution, was strenuously disavowed and reasoned against in the Federalist, and actually produced the tenth article of the amendment.[23]

It was Justice Johnson in a separate opinion, and not Marshall, who said that the power was exclusive in Congress, and answered the above argument with a lawyer's answer:

> It is not material, in my view of the subject to inquire whether the article a or the should be prefixed to the word "power." Either, or neither, will produce the same result; if either, it is clear, that the article "the" would be the proper one, since the next preceding grant of power is certainly exclusive, to wit, "to borrow money on the credit of the United States." [24]

That such power was concurrent, Marshall, however, also refused to accept, for this would be to imply that the states and the Union were equal sovereignties, and that the sovereign which exercised the power first would prevail. Marshall was aware, of course, of the many instances even in his own time where the states and the federal government had cooperated and some instances at least

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[22] Gibbons v. Ogden, 22 U. S. 1, 200, note 11 *supra*. And at 211, "In pursuing this inquiry at the bar, it has been said, that the Constitution does not confer the right of intercourse between state and state .. . This is true. The Constitution found it an existing right, and gave to Congress the power to regulate it. In the exercise of this power, Congress has passed 'an act . . . '"

[23] *Id.* at 85.

[24] *Id.* at 226-227.

where the government had adopted state law.[25] Examples, which he cited, were Acts of Congress of 1796 and 1799 preventing the importation of slaves into states prohibiting slavery,[26] and the Act of August 7, 1789, adopting state law on the conduct of pilots.[27] Of these he spoke:

> Congress, in that spirit of harmony and conciliation which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the states bear to each other, has directed its officers to aid in the execution of these laws; and has, in some measure, adapted its own legislation to this object, by making provisions in aid of those of the states.[28]

And again:

> Although Congress cannot enable a state to legislate, Congress may adopt the provisions of a state on any subject.[29]

But then he added:

> The nullity of any act inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures, as do not transcend their powers . . .[30]

It is apparent that the great judge did not subscribe to any theory that congressional legislation adopting state legislation tended to put both beyond the Constitution. What then was this power of Congress over commerce? As to this he said:

> We are now arrived at the inquiry, what is this power?
>
> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.[31]

And while in other parts of the opinion he described commerce as "intercourse" [32] and the power of Congress over it as "plenary," [33] and thus "described the federal commerce power with a

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[25] *Id.* at 205-209.
[26] I U. S. STAT. 474, 619.
[27] R. S. 4235, 46 U. S. C. A. 211 *et seq.*
[28] Gibbons v. Ogden, 22 U. S. 1, 205, note 11 *supra.*
[29] *Id.* at 207.
[30] *Id.* at 211.
[31] *Id.* at 196.
[32] *Id.* at 189.
[33] *Id.* at 197.

breath never yet exceeded," [34] merely because he declined to define the power as "concurrent" does not mean he defined it as "exclusive," [35] except to the extent that when exercised exclusively by Congress, it became, under the supremacy clause, the supreme law of the land, subject, of course, to the Constitution. And while the commerce clause is in the Constitution itself, it is an express power which has no life sleeping.[36] The power of Congress is to legislate into being such as it wills from the grant of power given it by the people:

> The Congress shall have Power: . . . To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.[37]

This was decided by Marshall in *Willson v. Blackbird Creek Marsh Company,*[38] and in this case, as contrasted with *Gibbons v. Ogden,* the silence of Congress was involved. A dam, prusuant to state law, had been placed over a navigable stream, and he was of the opinion:

> The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states; *a power which has not been so exercised as to affect the question.*
>
> We do not think that the act . . . can, under all the circumstances of the case, be considered as repugnant to the *power to regulate commerce in its dormant state,* or as being in conflict with any law passed on the subeject.[39] (Italics supplied.)

Now why did Marshall say the latter after deciding the former? They are inconsistent views. The statement even acquires a certain oracle-like quality. Was it that he foresaw the enormous power the Supreme Court could wield under such a doctrine as the silence of Congress, or was he merely saying that it was only a paper power until exercised? The latter is suggested in view of what was said by him of Congress in other cases, with reference to the habeas corpus power of the courts:

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[34] Wickard v. Filburn, 317 U. S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942); and Levy, OUR CONSTITUTION TOOL OR TESTAMENT? 48, "a far more extensive national control of business than we have yet been allowed by 'the Court to witness'" (1941).

[35] *Cf.* Rutledge in Freeman v. Hewit, 329 U. S. 249, 262 (1946); rehearing denied 329 U. S. 249, 67 S. Ct. 497, 91 L. Ed. 705 (1947).

[36] *Cf.* Frankfurter, *id.* at 254.

[37] Article I, Sec. 8, Cl. 18, U. S. CONSTITUTION. The Commerce power is among the foregoing Powers.

[38] 27 U. S. 245, note 21 *supra.*

[39] *Id.* at 252.

> . . . they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted.[40]

CONGRESSIONAL SILENCE

The Chief Justice decided another case, *Brown v. Maryland,*[41] purportedly bearing on the commerce clause, and participated, according to Justice Story in another, *City of New York v. Miln,*[42] neither of which would add to the discussion here. It is of interest to note, however, that Roger Taney, who as an advocate had unsuccessfully argued before Marshall on behalf of the taxing power of a state in *Brown v. Maryland,* himself, as Chief Justice, rendered the next important decision with reference to the commerce clause in *The License Cases.*[43] In these cases, he analyzed *Gibbons v. Ogden* in the light of *Willson v. Blackbird Creek Marsh Company* and said, "The passages I have quoted show that the validity of the State law was maintained because it was not in conflict with a law of Congress, although it was confessedly within the limits of the power granted." [44] Marshall, therefore, according to Taney, never maintained that the federal commercial power was exclusively vested in Congress in the absence of congressional legislation.

The view persisted, none the less, that he did, possibly perhaps of his rather deprecatory remarks in *Gibbons v. Ogden* [45] as to the police power of the state, and in *Cooley v. Board of Wardens,*[46] what was apparently believed to be a Solomon decision between Marshall and Taney [47] was handed down in the form of the following dictum:

> It is the opinion of the majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the states of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, . . . not to regulate this subject, but to leave its regulation to

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[40] *Ex Parte* Bollman and *Ex Parte* Swarthout, 8 U. S. 75, 4 Cranch. 75, 2 L. Ed. 554 (1807).

[41] 25 U. S. 419, 12 Wheat. 419, 6 L. Ed. 678 (1827). Marshall's observations here on the commerce clause come under the heading of dicta; the case was decided on the supremacy of the tax power of Congress, McCulloch v. Maryland, 17 U. S. 316, 4 Wheat. 316, 4 L. Ed. 519 (1819).

[42] 36 U. S. 102, 11 Pet. 102, 9 L. Ed. 648 (1837).

[43] 46 U. S. 504, 12 L. Ed. 256, 5 How. 504 (1847).

[44] *Id.* at 584.

[45] 22 U. S. 1, 203, note 11 *supra.*

[46] 53 U. S. 299, 12 How. 299, 13 L. Ed. 996 (1851).

[47] Haman, Comment on Dean Milk Company v. City of Madison, 340 U. S. 349, 71 S. Ct. 295, 95 L. Ed. 329 (1950). 8 WASH. & LEE L. R. 202 (1951).

> the several states. To these precise question, . . . this opinion must be understood to be confined. It does not extend to the question what other subjects, under the commercial power, are within the exclusive control of Congress . . .[48]

By *Munn v. Illinois*,[49] in an opinion delivered by Chief Justice Waite, this dictum had grown:

> . . . certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them. . . . We do not say that a case may not arise in which it will be found that a State, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress . . .

Then in *Mobile County v. Kimball*,[50] in an opinion rendered by Justice Field, it was said that the federal commerce power was exclusive so as far as a *uniform* rule is required but that Congress by silence in the regulation of harbors, virtually declared that such may be controlled by state authority. While this decision does not conflict in practice with *Willson v. Blackbird Marsh Company*, it conflicts in theory—e.g., Marshall upheld state law because Congress had not legislated; Field upheld state law because the Supreme Court felt that, considering other instances where state regulation had been adopted by Congress, the latter would have acted as the Court did. Thus the foundation laid by dicta was solidifying into a structure for judicial legislation. It was but a short step for Field to concur as he did with Justice Matthews, who spoke for the Court in *Bowman v. Chicago and Northwestern Railway Company*,[51] a case declaring that state legislation, forbidding common carriers from importing intoxicating liquor into the state without a certificate therefor, was invalid, because the *consent* of Congress express or implied was missing; in other words, the Court felt that had Congress spoken, it would have required a national uniform rule. Justice Harlan, with whom Chief Justice Waite and Justice Gray concurred, dissented, and Justice Lamar did not participate in the *Bowman* decision, which introduced yet another word into the commerce clause, the word, "consent," was not there.[52] The dissenters spoke in vain of the departure of the Court from the Constitution and precedent:

> . . . if therefore, state police power, as the health, morals and safety of the people may be involved in its

[48] Cooley v. Board of Wardens, 53 U. S. 299, 320, note 46 *supra*.

[49] 94 U. S. 113, 24 L. Ed. 77 (1877). Waite renounced this dicta in Bowman v. Chicago and Northwestern Railway Company, note 53 *post*.

[50] 102 U. S. 691, 26 L. Ed. 238 (1880). The idea of uniformity is probably derived from Art. I, Section 8, Cl. 4, of the CONSTITUTION, relating to naturalization and bankruptcy, and which is the next succeeding clause to the commerce clause.

[51] 125 U. S. 465, 8 S. Ct. 869, 31 L. Ed. 700 (1888).

[52] The word is probably derived from Article I, Sec. 10, Cls. 2, 3 of the CONSTITUTION.

> proper exercise, can be overborne by national regulations of commerce, the former decisions of this court would seem to show that such laws of the States are valid, even when they affect commercial intercourse among the States, until displaced by Federal legislation, or until they come in direct conflict with some Act of Congress. Such was the doctrine announced in Willson v. Blackbird Creek Marsh Co.[53]

In *Leisy v. Hardin* a similar question as to the power of a state to prohibit the liquor traffic was before the Court, as was presented in the previous case, but the majority decision unfortunately was the same.[54] Fuller, its author, had joined the Court as Chief Justice; and perhaps the though of judicial legislation was too tempting a morsel to the new Chief. And it is noteworthy that the assumption of the majority in both cases, that had Congress acted it would have enacted a uniform rule, was mistaken because Congress thereafter enacted the Wilson Act,[55] adopting the diverse treatment of states, congressional legislation which Chief Justice Fuller was obliged to uphold.[56] With this setback, the Court, however, took the next obvious step—If there were an exclusive jurisdiction in the Congress under the commerce power, there was also an exclusive residue in the states, and an act of Congress, which invaded the latter, could be limited to that extent. And thus a sugar company in control of the large majority of the manufactories of refined sugar in the United States was exempted from the provisions of the Sherman Anti-Trust Act, since the company's activity was a monopoly on "a necessary of life," *United States v. E. C. Knight Co.*[57] A far cry from *Gibbons v. Ogden!* The result was that when Congress was silent, state legislation could be invalidated as encroaching upon the former's desires even though unexpressed; when Congress spoke, its own legislation could be curtailed as encroaching on the jurisdiction of the states.

And, not only in economic legislation but also in social legislation did the judges apply their new-found power. In *Plessy v. Ferguson,*[58] a state law was upheld that required railway companies carrying passengers in coaches in the state to provide sepa-

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[53] Bowman v. Chicago Northwestern Railway Company, 125 U. S. 465, 520-521, note 51 *supra.*

[54] 135 U. S. 100, 34 L. Ed. 128 (1890). Despite congressional legislation, oleomargarine was, however, afforded different treatment, Plumley v. Mass., 55 U. S. 461, 15 S. Ct. 154, 39 L. Ed. 223 (1894).

[55] 26 STAT. 313, 27 U. S. C. A. 121 (1890).

[56] *In re* Rahrer, 140 U. S. 545, 11 S. Ct. 865, 35 L. Ed. 572 (1891).

[57] 156 U. S. 1, 15 S. Ct. 249, 39 L. Ed. 325 (1895), involving the Sherman Act, 26 STAT. 209, 15 U. S. C. A. 1, et seq. *Cf.* Lorain Journal Co. v. United States, 342 U. S. 143, 72 S. Ct. 181, 96 L. Ed. 162 (1951). Houston v. E. & W. T. R. Co. v. United States, (Shreveport Rate Cases) 234 U. S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914).

[58] 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896).

rate but equal accommodations for the white and colored races, whereas a previous statute of the same state requiring carriers to give equal rights and privileges without distinction as to race or color was held, so far as it applied to interstate commerce, void, *Hall v. De Cuir*.[59] In *Hammer v. Dagenhart* [60] a congressional prohibition of transportation in interstate commerce of the work of children was held unconstitutional, while another such provision against the transportation of "white slaves" did not so offend.[61]

CONGRESSIONAL CONSENT

"Congress has undoubted power to redefine the distribution of power over interstate commerce"—Chief Justice Stone in *Southern Pacific Company v. State of Arizona*.[62]

Then in 1917 *Clark Distilling Co. v. Western Md. Ry. Co. and State of West Virginia* [63] sustained a state law, prohibiting importation in interstate commerce of liquor for personal use. If control of interstate commerce were exclusively vested in Congress what was the justification? It was no answer to say that Congress had passed the Webb-Kenyon law [64] divesting the article of its interstate character, for then the power of Congress would be no longer exclusive. It was no answer to say that Congress was aiding the state in the exercise of its police power, for that had been held exclusively to be in the province of the states. The answer is found possibly in *Gibbons v. Ogden*: the power exercised by Congress is a plenary power, which knows no limits other than those prescribed by the Constitution.[65]

The surprise, however, that this decision caused [66] and the surmise as to the source of the theory underlying it [67] may be considered as reflections of the incompatibility of the doctrines of the doctrines of congressional silence and congressional consent. The former is based on a theory of exclusiveness of powers; the latter has its base in the comity of powers. The former presumes that the need assumed by the Supreme Court for a uniform na-

[59] 95 U. S. 485, 24 L. Ed. 547 (1878). This result was obtained by the Court in Plessy v. Ferguson, note 58 *supra*, at 546, limiting the rule of Hall v. De Cuir to interstate as opposed to intrastate commerce, a dichotomy significant perhaps in 1895. *Cf.* Rasmussen v. Idaho, 181 U. S. 198, 21 S. Ct. 594, 45 L .Ed. 820 (1901); Campagnie Francaise v. State Board of Health, 186 U. S. 380, 22 S. Ct. 811, 46 L. Ed. 1209 (1902); Manigault v. Springs, 199 U. S. 473, 26 S. Ct. 127. 50 L. Ed. 274 (1905); Reid v. Colorado, 187 U. S. 137, 23 S. Ct. 92, 47 L. Ed. 108 (1902).

[60] 247 U. S. 251, 38 S. Ct. 529, 62 L. Ed. 1101 (1918); Bailey v. Drexel Furniture Co., 259 U. S. 20, 42 S. Ct. 449, 66 L. Ed. 817 (1922). *Cf.* Corwin, *The Commercial Clause Versus States Rights* (1936).

[61] Hoke v. United States, 227 U. S. 308, 33 S. Ct. 281, 57 L. Ed. 523 (1913).

[62] 325 U. S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945).

[63] 242 U. S. 311, 37 S. Ct. 180, 61 L. Ed. 326 (1917).

[64] 37 STAT. 699, 27 U. S. C. A. 122 (1913).

[65] Gibbons v. Ogden, 22 U. S. 1, note 31 *supra*.

[66] See Dowling and Hubbard, *Divesting An Article of Its Interstate Character*, 5 MINN. L. R. 100, 253 (1920-21).

[67] Murphy, op cit. *supra* note 18.

tional rule would preclude state action, whether Congress had acted or not; the latter permits Congress to decide to what extent uniformity and diversity should govern. The former makes judges, legislators; the latter makes legislators, judges, for, as has been seen, in many of the instances where such legislation has been enacted, such enactment has been to reverse the Supreme Court.

And because of this, Harlan Stone, while the great proponent of the power of Congress to redefine the distribution of control over interstate commerce, was puzzled as to its source, since he avowedly and frankly was, as a jurist, a great legislator. As a law school dean, he had assigned his staff after the enactment of the Webb-Kenyon Act, the task "of finding out all you can about just how it is that Congress can enable the states to do something which the Court already had held the states could not do—for some day that may be an important doctrine." [68] However, as an associate justice in a dissenting opinion in *Di Santo v. Commonwealth of Pennsylvania*,[69] his objection was not to the propriety of striking down state legislation where Congress had not acted, but in doing so in a situation that he felt called for local treatment rather than a uniform rule:

> The recognition of the power of the states to regulate commerce within certain limits is a recognition that there are matters of local concern which may properly be subject to state regulation . . .

And he added:

> In this case the traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, . . . we are doing little more than using labels to describe a result . . .[70]

All tihs was said by Stone in 1927 when the Court had then become entrenched as the arbiter of when the states had invaded the exclusive jurisdiction of Congress or, conversely, of when Congress had infringed upon matters exclusively the concern of the states. How far had the Court wandered from the guiding hand of Marshall! There followed in the thirties, however, a return to Marshall, for Congress undertook, in aiding the states during the depression years, a federal regulatory program which involved an interpretation of the commerce clause far different from that which would have been conceived possible under *U. S. v. E. C. Knight Co.* and *Hammer v. Dagenhart*. The Court's reaction was immediate, however, and in a series of cases, of which *Carter v.*

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[68] Dowling, *Interstate Commerce and State Power—Revised Version*, 47 COL. L. R. 547, 552, footnote 19 (1947).

[69] 273 U. S. 34, 47 S. Ct. 267, 71 L. Ed. 524 (1927).

[70] *Ibid.*

Carter Coal Company[71] and *United States v. Butler*[72] are 1936 examples, cases which probably precipitated the threat by the President to pack the Court,[73] declared much of the legislative program to be invalid as beyond the reach of congressional commercial power. And then Chief Justice Hughes and Associate Justice Roberts suddenly changed their minds, and, by joining the minority of the Court, Brandeis, Cardozo, and Stone, ruled to the effect that the commerce clause was broad in scope as Marshall had envisioned![74] Why?

> . . . few attributed the difference in results between the decisions of 1936 and those in 1937 to anything inherent in the cases themselves . . . the concensus among lawyers speculating on the Court's sudden reversal was that the Chief Justice and Mr. Justice Roberts believed that the continued nullification of the legislative program . . . would lead to acceptance of the President's Court plan . . .[75]

Whether Hughes bowed to expediency or not, the end result was that very little was left to the states. They were thought incapable of handling the depression, and congressional aid was a complete take-over in detailed regulation often in very local matters. This was the extent of congressional cooperation with the states in the thirties. In the forties, however, the states' fortunes were stabilized by war, Stone had succeeded Hughes as Chief Justice, and under his leadership the states came in as partners again in the complex economy. Stone's dissent in the *Di Santo* case became the majority's view in *California v. Thompson*[76] so as to overrule the former. There he seemed to say that exclusive power did not reside in Congress, and in the absence of its pertinent regulation, the states could regulate. Marshall, in *Willson v. Blackbird Creek Marsh Co.*, was cited by Stone as authority for

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[71] 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936), and see Cardozo's dissent at p. 324, 327, commenting on the word "direct"—" . . . a great principle of Constitutional law is not susceptible of comprehensive statement in an adjective."

[72] 297 U. S. 1, 56 S. Ct. 312, 80 L. Ed. 477 (1936).

[73] Stern, *The Commerce Clause and The National Economy*, 1933-1946; 59 HARV. L. R. 645, 681 (1946).

[74] N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, and 81 L. Ed. 893 (1937); Associated Press v. N. L. R. B., 301 U. S. 103, 57 S. Ct. 650, 81 L. Ed. 953 (1937); and Washington, Virginia & Maryland Coach Co. v. N. L. R. B., 301 U. S. 142, 57 S. Ct. 648, 81 L. Ed. 965 (1937), sustaining the Wagner Act, 49 STAT. 449, 29 U. S. C. A. 151, *et seq.* (1935). Interstate commerce probably now includes rainmaking. Notes, 1 STANFORD L. R. 43, 508 (1948-1949); migratory birds, *id.* at 514; and possibly a federal commercial code, Johnson, Comment, 45 MICH. L. R. 1021 (1947).

[75] Stern, *op. cit. supra* note 73. As early as 1913, Hughes apparently felt that the commercial power of Congress was all that Marshall said it was; see The Minnesota Rate Cases, 230 U. S. 352, 399, 33 S. Ct. 729, 57 L. Ed. 1511, involving the INTERSTATE COMMERCE ACT, 24 STAT. 363, 49 U. S. C. A. 11 *et seq.* (1887) and see note 1 *supra*.

[76] 313 U. S. 109, 61 S. Ct. 931, 85 L. Ed. 1219 (1941).

such regulation "unless there is conflict with some Act of Congress;" [77] but then unfortunately, probably unable to resist the role of the Court as a super-legislature, Stone added that this was provided that there is no infringement on the national interest in preserving uniformity in matters of national concern. If any doubt were cast by this momentary insight, his famous decision in the *Southern Pacific* case, an excerpt from which forms a foreword to this part, again emphasized the super-legislative function of the Court:

> For a hundred years it has been the accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court and not the state legislature is under the commerce clause the final arbiter of the competing demands of state and national interests.[78]

The Chief Justice thus chose not to perceive that the doctrine of congressional silence is at odds with that of congressional consent, express or implied. For the former is founded in the commerce clause itself, and the Supreme Court functioning under such doctrine knows no limitation, since that body has the final say. But what if Congress speaks and takes the place of the Court, is joint federal state action, permitting the states to do that which it could not formerly do; does this combine also transcend the Constitution? Apparently Justice Rutledge, who inherited Stone's philosophic robes as foremost advocate of both doctrines, thought so in 1946 in *Prudential Insurance Company v. Butler*,[79] and this probably accounts for the implications of that decision.

For while the Court had returned to Marshall in his concept of the plenary power of Congress [80] and to his acknowledgment that the federal government might consent to the states' use of the police power so as to affect interstate commerce.[81] Marshall it might well be believed, had no notion, strong an advocate of the power of the Court as he was, that it could act for Congress, when that body was silent.[82] Thus, while the Court returned to Marshall to this extent, the return was only partial. The difficulty is that to retain its powers under the theory of congressional silence is to magnify the position of Congress, as the Court abdicates and the former succeeds in power. The danger of this can most clearly be suggested by *Morgan v. Virginia*,[83] also decided in 1946, wherein the policy of the Supreme Court had changed since the days of

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[77] *Id.* at 114.
[78] 325 U. S. 761, 769, note 62 *supra.*
[79] 328 U. S. 408, note 2 *supra.*
[80] Gibbons v. Ogden, 22 U. S. 1, note 33 *supra.*
[81] *Id.* notes 28 and 29.
[82] Willson v. Blackbird Creek Marsh Co., 27 U. S. 245, note 39 *supra.*
[83] 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317 (1946).

Hall v. De Cuir and *Plessy v. Ferguson*, and wherein a state segregation statute was declared invalid since it was a matter, in the silence of Congress, where uniformity was, by the Court, felt desirable. But what then if Congress should adopt state law?[84] Can Congress enable a state to do that which constitutionally it could not do? Or was there ever a question of this? Is not the answer demanded in the negative provided, of course, that it is finally realized that the states' inability substantially to affect interstate commerce, in the absence of congressional legislation, is a court-made rather than a constitutional prohibition?

CONCLUSION

The present position of the Court imposes an intolerable burden on Congress, which since the war particularly has solicited state help on national problems, help which, under *United States v. Darby*[85] and *Phillips Petroleum Co. v. State of Wisconsin*,[86] necessitates express congressional adoption of state law where Congress does not intend to occupy the field. Even more intolerable, however, is the implication of the *Prudential* case: that when such consent is given, both federal and state law are, in some degree, beyond the Constitution. Marshall cannot be blamed for this result, for while he spoke of the "plenary" power of Congress, he never said that the power was almighty. What he did say was that, while Congress might permit a state's participation in national problems, such permission, in every particular, is consent, also subject to the Constitution.[87]

The idea, that in the silence of Congress the Court might act, is false, born in dicta and flashing into decision in an obscure case.[88] The Supreme Court, although returning to Marshall in 1937, nevertheless retained the doctine. To return home part of the way, however, is perhaps still to remain lost.

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[84] Justice Rutledge in the Prudential case, indicated that his remarks were confined to the tax and commercial fields. 328 U. S. 408, 439, note 2 *supra*.

[85] 312 U. S. 100, 85 L. Ed. 609 (1941), validating the FAIR LABOR STANDARDS ACT, 52 STAT. 1060, 29 U. S. C. A. 201 *et seq.* (1938), overruling Hammer v. Dagenhart, note 60 *supra*, and virtually annihilating the Tenth Amendment. Compare, however, Lloyd A. Fry Roofing Company v. Wood, 344 U. S. 157, 73 S. Ct. 204, 97 L. Ed. 168 (1952), a shift from the tendency to hold state statutes invalid where Congress had enacted comprehensive legislation, NATIONAL MOTOR CARRIER ACT, 49 STAT. 543 (1935), as amended, 54 STAT. 919 (1940), 49 U. S. C. A. 301 *et seq.*

[86] 347 U. S. 672, 74 S. Ct. 794, 99 L. Ed. .... (1954), where the Court, reviewing the legislative history of the NATURAL GAS ACT, 52 STAT. 821, 15 U. S. C. A. 717 *et seq.* (1938), overruled the Federal Power Commission, which had declined jurisdiction over "gatherers and producers." *Cf.* Panhandle Eastern Pipe Line Co. v. Public Service Commission, 322 U. S. 507, 68 S. Ct. 190, 92 L. Ed. 128 (1947), where Justice Rutledge, in view of the same legislative history, treated the Natural Gas Act in much the same manner as the McCarran Act, note 3 *supra*. But see Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157, 74 S. Ct. 396, 99 L. Ed. .... (1954).

[87] Gibbons v. Ogden, 22 U. S. 1, note 30 *supra*.

[88] Bowman v. Chicago and Northwestern Railway Co., 125 U. S. 465, note 51 *supra*.