

A DISSENTING OPINION

*Thomas C. Marks, Jr.**

Marks, J., dissenting:

The results reached by the majority are, beyond question, of enormous benefit to the salutary, long and ongoing effort to fully integrate our Black citizens into American society. It is painful to dissent from such decisions, but it is a pain that must be endured. The ends, noble as they are, do not, in these circumstances, justify the means. In the long run, distortions of the clear meaning of the Constitution, however laudatory the aim, are losing propositions. As eloquently explained, years ago, by Chief Justice Fuller:

It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and

* Member, Professional Board of Editors, *State Constitutional Commentary*, *Albany Law Review*; Professor of Law, Stetson University College of Law. This is a dissent that I hope I would have had the courage to write had I been one of the nine Supreme Court justices deciding *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964). I wish to express my appreciation to Shannon Mullins, Connie Evans and the rest of Faculty Support Services. Shannon typed the manuscript. I also wish to say that I am indebted to John E. Nowak and Ronald D. Rotunda for help in locating relatively obscure cases thanks to their book, *Constitutional Law* (4th ed., 1991). I am also indebted to Owen M. Fiss, The Oliver Wendell Holmes Devise, in 8 HISTORY OF THE SUPREME COURT OF THE UNITED STATES, for his very clear presentation of the struggle between the Commerce Clause and the police power as illustrated by the quote found in the text at note one of my "dissent." I am indebted to the late Justice Potter Stewart for his shoplifting comment in his dissent in *Perez v. United States*, 402 U.S. 146, 157–58 (1971) (Stewart, J., dissenting). Finally, I am indebted to Justice Antonin Scalia, whose phrase "ad hoc nullification machine" captures the flavor of what I have described as seemingly random line drawing. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 785 (1994) (Scalia, J., dissenting). Lastly, and very much least, I straddled the fence between court opinion and law review article by my use of notes rather than text for citations. Surprisingly enough, no case except the license cases, *infra* note 48, seems to have been explicitly overruled. No doubt some have been discredited.

urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.¹

In my view, this Court's approval today of Congress' use of its commerce power to strike at a social problem by relying on the real or perceived secondary effects of that social problem on commerce between the states is a "risk" that should not be "run." The "serious consequences" of such a course of action will be to bestow upon Congress a broad power of police loosely tied to the commerce power. The Constitution, rightly interpreted, does not allow this. I respectfully dissent.

There can be little doubt that Congress was given, by the Constitution, the power to regulate commerce between the states because, as Alexander Hamilton stated, "there is no object, either as it respects the interests of trade or finance, that more strongly demands a federal superintendence."² Today's majority blithely ignores that it is "trade or finance," not the health, safety, morals or welfare of the residents of the States that "strongly demands a federal superintendence." "Trade or finance," does not have the authority to use the Commerce Clause to regulate social concerns.

Hamilton also spoke of "the competitions of commerce [being] another fruitful source of contention [between the States]."³ In his brief for the Appellant, Heart of Atlanta Motel, Inc., Moreton Rolleston, Jr. provided us with evidence of this "source of contention." "In 1787, the State of New York. . . assessed heavy entrance and clearance fees on all vessels coming from or bound to New Jersey and Connecticut. New Jersey retaliated by taxing the lighthouse on Sandy Hook 30 pounds a month!"⁴

Whether Hamilton had taxes on lighthouses in mind, he described for us the nature of the "contention" as he saw it:

The states less favorably circumstanced, would be desirous of escaping from the disadvantages of local situation, and of sharing in the advantages of their more fortunate neighbors. Each state . . . would pursue a system of commercial policy

¹ United States v. E.C. Knight Co., 156 U.S. 1, 13 (1895).

² THE FEDERALIST NO. 22, at 104 (Alexander Hamilton) (Gideon ed., 2001).

³ THE FEDERALIST NO. 7, at 28 (Alexander Hamilton) (Gideon ed., 2001).

⁴ Brief for Appellant at 39, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (No. 515), reprinted in 60 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 325 (Phillip B. Korland & Gerhard Casper eds., 1975).

peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent. The habits of intercourse, on the basis of equal privileges, to which we have been accustomed from the earliest settlement of the country, would give a keener edge to those causes of discontent, than they would naturally have, independent of this circumstance. . . . The spirit of enterprise, which characterizes the commercial part of America, has left no occasion of displaying itself unimproved. It is not at all probable that this unbridled spirit would pay much respect to those regulations of trade, by which particular states might endeavor to secure exclusive benefits to their own citizens. The infractions of these regulations on one side, the efforts to prevent and repel them on the other, would naturally lead to outrages, and these to reprisals and wars.⁵

Can there then be any doubt that, in the view of Alexander Hamilton, the commerce power was given to Congress not to provide it with a vast regulatory power that would rival the inherent police power of the states, but rather to insure the commercial harmony that the states had enjoyed as colonies under the Crown?⁶ This Court has, in fact, recognized the fact that “[i]t was said by Chief Justice Marshall, that it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the several states was to insure uniformity of regulation against conflicting and discriminating state legislation.”⁷

This understanding of the genesis of Congress’ power to regulate commerce between the states has been recognized by this Court over and over again. In the *State Freight Tax Case*, Justice Strong opined that:

Beyond all question, the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one State to another was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several states. A power to prevent embarrassing restrictions

⁵ THE FEDERALIST NO. 7, at 208–09 (Alexander Hamilton) (Gideon ed., 2001).

⁶ See THE FEDERALIST NO. 7 (Alexander Hamilton) (Gideon ed., 2001).

⁷ *Kidd v. Pearson*, 128 U.S. 1, 21 (1888).

by any state was the thing desired.⁸

Lest there be any doubt about the lack of interest on the part of the framers to subordinate the states' inherent police power to the more specific and, thus limited, grants to Congress found in the Constitution, James Madison stated:

In the first place, it is to be remembered, that the general government is not to be charged with the whole power of making and administering laws: its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The [State] governments, which can extend their care to all those other objects, which can be separately provided for, will retain their due authority and activity.⁹

It is important to note that the proper control of commerce between the states "concern[s] all members of the republic" and "are not attained by the separate provisions of any." On the other hand, the other "objects" of government are left to the states to regulate or not under their inherent police power. Can social concerns be regulated by the states? Yes. Is Congress empowered to do so? No.

The decision of this Court that is the benchmark for our interpretation of the Commerce Clause is, of course, *Gibbons v. Ogden*.¹⁰ An understanding of this case must be against the background of Chief Justice Marshall's view of the need for a strong central government. This view had motivated this Court's decision in *McCulloch v. Maryland*,¹¹ which gave the Necessary and Proper Clause¹² the broadest possible interpretation. To read the penultimate sentence in the opinion (which contains probably the most important words in all of constitutional law) is to see the point: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."¹³

⁸ Reading R.R. Co. v. Pennsylvania ("State Freight Tax Case") 82 U.S. (15 Wall.) 232 (1873).

⁹ THE FEDERALIST NO. 14, at 65 (James Madison) (Gideon ed., 2001).

¹⁰ 22 U.S. (9 Wheat.) 1 (1824).

¹¹ 17 U.S. (4 Wheat.) 316 (1819).

¹² "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." U.S. CONST. art. I, § 8, cl. 18.

¹³ *McCulloch*, 17 U.S. at 421.

Let Marshall's principal biographer, Albert Beveridge, explain: And when in blue and buff, as an officer of the Continental army, he joined Washington, the boyish Virginia lieutenant was still a frontier individualist, though of the moderate type. But four years of fighting and suffering showed him that, without a strong and practical government, democracy cannot solve its giant problems and orderly liberty cannot live. The ramshackle Revolutionary establishment was, he found, no government at all. Hundreds of instances of its incredible dissensions and criminal inefficiency faced him throughout these four terrible years; and Marshall has recorded many of them.

Not only did each State do as it pleased, as we have seen, but these pompous sovereignties actually interfered in direct and fatal fashion with the Continental army itself. For example, when the soldiers of the line from one State happened to be in another State, the civil power of the latter often 'attempted to interfere and to discharge them, notwithstanding the fact that they were not even citizens of that State.' The mutiny of underfed, poorly clothed, unpaid troops, even in the State lines; the yielding of Congress to their demands, which, though just in themselves, it was perilous to grant on compulsion; the discontent of the people caused by the forcible State seizure of supplies—a seizure which a strong National Government could not have surpassed in harshness—were still other illustrations of the absolute need of an efficient central power. A few 'judicious patriots' did urge the strengthening of National authority, but, writes Marshall, they were helpless to 'correct that fatal disposition of power [by States and Congress] which had been made by enthusiasm uninstructed by experience.' Time and again Marshall describes the utter absence of civil and military correlations and the fearful results he had felt and witnessed while a Revolutionary officer.

Thus it is that, in his service as a soldier in the War for our Independence, we find the fountain-head of John Marshall's National thinking. And every succeeding circumstance of his swift-moving and dramatic life made plainer and clearer the lesson taught him on red battlefield and fetid camp. No one can really understand Marshall's part in the building of the American Nation without going back to these sources. For,

like all living things, Marshall's constructive opinions were not made; they grew. They were not the exclusive result of reasoning; they were the fruit of an intense and vivid human experience working upon a mind and character naturally cautious, constructive, and inclined to order and authority.¹⁴

The problem with Chief Justice Marshall's opinion in *Gibbons* was not that it was motivated by his desire for a strong central government. Few would disagree that such a government was and is essential. The problem lies in the definition of the commerce power that was used to achieve this result. As John Randolph pointed out in an 1824 letter to Dr. Brockenbrough:

A judicial opinion should decide nothing and embrace nothing that is not before the Court. If he [Marshall] had said that 'a vessel, having the legal evidence that she has conformed to the regulations which Congress has seen fit to prescribe, has the right to go from a port of any State to a port of any other with freight or in quest of it, with passengers or in quest of them, *non obstante* such a law as that of the State of New York, under which the appellee claims,' I should have been satisfied.¹⁵

Of course, given Marshall's understandable and ultimately correct desire for a strong central government, he never would have been satisfied with such a narrow first opinion on Congress' power under the Commerce Clause. If Randolph's views on what should have been written are too narrow, there is a very strong argument that Marshall's exposition was too broad. So broad in fact as to create a basis for a conflict with the state inherent police power that has continued to this very day. Indeed, it gives us the result we now see in the majority opinions handed down today and from which I, with heavy heart, dissent. Consider the view expressed by the *Richmond Enquirer* of March 16, 1824:

'The last paragraph of the [Gibbons] opinion states what would be the consequence of contracting 'by construction into the narrowest possible compass' 'the powers expressly granted to the Government of the Union.' It 'would explain away the Constitution of our country, and leave it (says the opinion) a magnificent structure, indeed, to look at, but totally unfit to use.' And suppose we fly to the opposite

¹⁴ ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 146-47 (1916).

¹⁵ CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 611-12 (1935).

extreme, suppose we stretch the power of government by a most liberal construction, suppose we consider ‘necessary’ to be synonymous with ‘convenient,’ what would be then the state of the case? The State Governments would moulder into ruins, upon which would rise up one powerful, gigantic and threatening edifice. To which of these extremes the stream of decisions from the Supreme Court is sweeping, we refer to the case of M’Culloch and the case of Cohens.¹⁶

Thomas Jefferson had similar concerns. In an 1825 letter to William B. Giles, after referring to “the rapid strides with which the Federal branch of our Government is advancing towards the usurpation of all the rights reserved to the States,”¹⁷ he correctly saw that: “Under the power to regulate commerce, they assume indefinitely that also over agriculture and manufactures.”¹⁸

In any event, Chief Justice Marshall, while refusing to reach the issue as to whether the power to regulate commerce between the states was exclusive¹⁹ (as Justice Johnson argued in a separate opinion²⁰), laid down rules that would later be held to support federal legislation that would bring into being the worst fears of John Randolph,²¹ the *Richmond Enquirer*²² and Thomas Jefferson.²³ Commerce, said the Chief Justice, was not just “traffic,” it was commercial “intercourse.”²⁴ Between the states meant “commerce which concerns more States than one,”²⁵ and the power to regulate was plenary, absolute, unless forbidden by the Constitution itself.²⁶ As John Randolph pointed out, such broad language went far beyond what was required by the facts of *Gibbons*.²⁷

The potential presented by John Marshall’s opinion in *Gibbons* was slow to be utilized by Congress and this Court. And the path beyond that point, as will be seen, was not even. But at least until 1936, this Court’s cases recognized, even if only in the breach rather than in the observance, that at some point the target of regulation

¹⁶ *Id.* at 618.

¹⁷ *Id.* at 620–21 (quoting the letter to Giles).

¹⁸ *Id.* at 621.

¹⁹ *Gibbons*, 22 U.S. (9 Wheat.) at 200.

²⁰ *Id.* at 222, 227 (Johnson, J., concurring).

²¹ See *supra* text accompanying note 15.

²² See *supra* text accompanying note 16.

²³ See *supra* text accompanying notes 17–18.

²⁴ *Gibbons*, 22 U.S. (9 Wheat.) at 189.

²⁵ *Id.* at 194.

²⁶ *Id.* at 196.

²⁷ See *supra* text accompanying note 15.

was no longer commerce, but the health, safety, morals and welfare of the states' residents. In other words, it was the subject of the states' inherent police power.

In one of the earliest Commerce Clause cases²⁸ subsequent to *Gibbons*, this Court held that congressional control of navigation on the Ohio River would require a bridge constructed under the authority of Virginia be either raised or torn down in order that navigation on the river not be obstructed.²⁹ At that point, Congress enacted a law authorizing the bridge,³⁰ which caused this Court to find that the effect on navigation was overcome by the act of Congress.³¹ "The regulation of commerce includes intercourse and navigation, and, of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation."³² These results could hardly be called a surprise since navigation is essential to commerce.

These twin navigation cases must be compared with the view of Congress' commerce power taken by this Court a little over a decade later in *Paul v. Virginia*,³³ even though that case was later apparently overruled *sub silentio* and upon very different facts.³⁴ Because there was no act of Congress on the subject, the issue of state regulation of insurance involved the Commerce Clause in its dormant state.³⁵ This Court, speaking through Justice Field, could not have been clearer:

Issuing a policy of insurance is not a transaction of commerce. . . . These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade or barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. . . . They are . . . local transactions, and are governed by the local law.³⁶

The battle over the location of the line between commerce power

²⁸ *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852).

²⁹ *Id.* at 625–27.

³⁰ *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 429 (1856) (citing Act of Aug. 31, 1852, ch. 112, 10 Stat. 112).

³¹ *Id.* at 436.

³² *Id.* at 431.

³³ 75 U.S. (8 Wall.) 168 (1868).

³⁴ See *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 552–53 (1944).

³⁵ The term was apparently first used by Chief Justice Marshall in *Willson v. Blackbird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829).

³⁶ *Paul*, 75 U.S. at 183.

and police power was clearly joined in *United States v. Dewitt*.³⁷ At issue there was the constitutional authority of Congress to enact, as part of the Internal Revenue Act of March 2, 1867,³⁸ a criminal prohibition on the “sale [of] naphtha and illuminating oils” that were “inflammable [sic]³⁹ at less temperature or fire-test than 110 degrees Fahrenheit.”⁴⁰ The United States seemed to recognize that the prohibition on the sale of certain heating and “illuminating oils” was the use of the commerce power to enact a police power type statute. It argued that:

So far as appears, there was no law of the state of Michigan regulating the sale of oil made from petroleum at the time when the alleged offence was committed. There is no decision of this court that Congress cannot enact a law regulating trade in a State, in the absence of any regulation by the State, when the articles of the trade thus regulated may enter into commerce with other States.⁴¹

Chief Justice Chase stated the issues before the Court this way: “Has Congress power, under the Constitution, to prohibit trade within the limits of a State?”⁴² This Court found that the constitutional grant of the commerce power to Congress was “a virtual denial of any power to interfere with the internal trade and business of the separate states; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted.”⁴³ We found that any relation to the power to tax was tenuous at best because the prohibited oils were not themselves taxed.⁴⁴ The Court then found that the far-fetched nexus between the power to tax and the regulation⁴⁵ was non-existent because Congress had repealed the tax on illuminating oils while leaving the

³⁷ 76 U.S. (9 Wall.) 41 (1870).

³⁸ *Id.* at 42.

³⁹ The correct term is now considered to be “flammable.” See usage note, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 690 (3d ed. 1992):

Historically, flammable and inflammable mean the same thing. However, the presence of the prefix in- has misled many people into assuming that inflammable means “not flammable” or “noncombustible.” In the circumstances, it is therefore advisable to use only flammable in contexts imparting warnings or on product labels, where a misinterpretation might have more serious consequences for the reader than an etymological mistake would deserve.

⁴⁰ *Dewitt*, 76 U.S. (9 Wall.) at 42.

⁴¹ *Id.* at 43.

⁴² *Id.*

⁴³ *Id.* at 44.

⁴⁴ *Id.*

⁴⁵ *Id.*

challenged prohibition intact.⁴⁶ This Court then clearly described it as “a police regulation.”⁴⁷

A dividing line between the commerce power and the police power, such as it is, may be seen by comparing the *License Cases*,⁴⁸ particularly the New Hampshire case,⁴⁹ with *Bowman v. Chicago & Northwestern Railway Company*⁵⁰ as indeed, Justice Matthews did in the latter.⁵¹ In the former, as distilled from the several opinions in the case,⁵² this Court, in the words of Chief Justice Taney, found that, “as Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory.”⁵³ In *Bowman*, however, when a state took the next logical step and tried to forbid the actual importation of liquor, this was found to be an invalid attempt by the state to regulate interstate commerce itself.⁵⁴ “It is enough to say, that the power to regulate or forbid the sale of a commodity, after it has been brought into the State, does not carry with it the right and power to prevent its introduction by transportation from another State.”⁵⁵ New Hampshire was exercising its inherent police power, while Iowa had gone beyond that power. Even then, Justice Matthews’ opinion drew three dissents.⁵⁶

From the idea that although a state, in the exercise of its inherent police power, may preclude liquor from being sold within its borders,

⁴⁶ *Id.*

⁴⁷ *Id.* at 45.

⁴⁸ The License Cases, 46 U.S. (5 How.) 504 (1847) (three cases, combined for decision, involving state statutes requiring licenses to sell intoxicating liquors).

⁴⁹ *License Cases*, 46 U.S. (5 How.) at 504, *overruled by* *Leisy v. Hardin*, 135 U.S. 100, 117–18 (1890) (noting that the New Hampshire statute, unlike those of the other states, acted directly on the articles of commerce as imported between states, instead of regulating only the sale within the state of intoxicating liquors). In *The License Cases*, the statute was upheld because Congress had not yet spoken, but *Leisy* notes that the case “must be regarded as having been distinctly overthrown” by, *inter alia*, *Bowman v. Chicago & Northwester Ry. Co.*, 125 U.S. 465 (1888). *Leisy*, 135 U.S. at 118–19. “[T]he present [case] is a case of commerce between two States, in relation to which Congress has not exercised its power.” *License Cases*, 46 U.S. (5 How.) at 578.

⁵⁰ 125 U.S. 465 (1888).

⁵¹ *See id.* at 476–81. Justice Matthews noted that some judges held that regulation of both importation and sale was exclusively within the power of Congress, if it should choose to exercise such power, and that any state law conflicting with an act of Congress was void; while others held that Congress’s commerce power did not include the power to regulate the sale of articles of commerce once in a state, but that the states had exclusive authority to regulate sales under their police powers. *Id.* at 481.

⁵² *License Cases*, 46 U.S. (5 How.) at 505.

⁵³ *Id.* at 586.

⁵⁴ *See Bowman*, 125 U.S. at 498.

⁵⁵ *Id.* at 500.

⁵⁶ *Id.* at 509 (Harlan, J., dissenting) (joined by Chief Justice Waite and Justice Gray).

it may not try to stop the liquor at or beyond its borders flows the somewhat analogous idea that while Congress cannot regulate prostitution within a state, it can legislate to stop the traffic in prostitutes that cross state lines.⁵⁷ The point to be made here is that while Congress owns the right to regulate the interstate shipment of liquor or prostitutes, both of these cases, *Bowman* and *Hoke*, clearly leave social regulation within the state to the state.

However, by its reference to *Hipolite Egg Co. v. United States*,⁵⁸ this Court, in *Hoke*, made a statement that was prophetic of things to come—and those things would do great violence to our federal arrangements. In *Hoke*⁵⁹ this Court asked a question that amounts to this: how far may Congress extend its commerce power within a state in order to insure that its interest in banning interstate shipment of an item are made complete?⁶⁰ The answer was, said this Court, already given in *Hipolite*:⁶¹

There, in emphasis of the purpose of the law, are denominated adulterated articles as ‘outlaws of commerce,’ and said that the confiscation of them enjoined by the law was appropriate to the right to bar them from interstate transportation, and completed the purpose of the law by not merely preventing their physical movement, but preventing trade in them between the states.⁶²

It is but a small leap in logic to argue that if adulterated eggs may be seized within a state in the furtherance of preventing their transportation in interstate commerce, then, in order to prevent the transportation of prostitutes in interstate commerce, that prevention would be made more effective if prostitution within a state was made a federal crime. Indeed, as will be seen, this has been in some cases the course we have taken.

Once the commerce power in health and social matters went beyond closing the channels of interstate commerce to items considered harmful to health and social welfare to the next step discussed above, then the only barrier to wholesale exercise of a police type power, not validly its own, by Congress under the guise of regulating interstate commerce was this Court’s seemingly random line drawing. This is not the way the Constitution should

⁵⁷ *Hoke v. United States*, 227 U.S. 308 (1913).

⁵⁸ 220 U.S. 45 (1911) (cited by *Hoke*, 227 U.S. at 323).

⁵⁹ *Hoke*, 227 U.S. at 308.

⁶⁰ *See id.* at 322–23.

⁶¹ *Id.*

⁶² *Id.* at 323 (quoting *Hipolite*).

be interpreted. However, a feature of this line drawing served a very useful purpose. The line drawn for many years between the commerce power and the police power at least recognized that there should be such a line.

The thoughts of Chief Justice Fuller in *United States v. E.C. Knight Co.*⁶³ have already been made a part of this opinion.⁶⁴ The operational premise of *E.C. Knight* was this:

Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary, and not the primary, sense; and, although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it.⁶⁵

From 1895 to 1936, this distinction was not infrequently followed. It may or may not be that this distinction between commerce and manufacturing was more apparent than real, but either way it helped draw the critical line between the power to regulate interstate commerce and the power of police.

In 1935, this Court decided a case⁶⁶ in a way that approached my objection to what today's majority has done in this case. In striking down the Railroad Retirement Act,⁶⁷ this Court found, notwithstanding strenuous argument to the contrary,⁶⁸ that:

a pension plan thus imposed is in no proper sense a regulation of the activity of interstate transportation. It is an attempt for social ends to impose by sheer fiat noncontractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the states, *but as a means of assuring a particular class of employees against old age dependency.* This is neither a necessary nor an appropriate rule or regulation affecting the due fulfillment of the railroads' duty to serve the public in interstate transportation.⁶⁹

⁶³ See *supra* text accompanying note 1.

⁶⁴ See *supra* text accompanying note 1.

⁶⁵ *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895).

⁶⁶ *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935).

⁶⁷ *Id.* at 374.

⁶⁸ Chief Justice Hughes and three other justices, Brandeis, Stone and Cardozo, dissented. *Id.* (Hughes, C.J., dissenting).

⁶⁹ *Id.* (emphasis added).

Thus, it was a police measure dressed up as a regulation of interstate commerce. To apply this Court's words in *Alton* to today's cases:

A [public accommodations law] thus imposed [upon business in the private sector] is in no proper sense a regulation of the activity of interstate [commerce]. It is an attempt for social ends to impose by sheer fiat a [police measure], not as a rule or regulation of commerce...but as a means... [praiseworthy as it may be,] of assuring [access of a racial minority to private sector places of public accommodation]. This is neither a necessary nor an appropriate [law toward furtherance of Congress' Commerce Power].⁷⁰

In an attempt to link the Railroad Retirement Act⁷¹ to interstate commerce, the government actually suggested such a possible but tenuous link as safety in interstate transportation being improved by the early retirement of older employees⁷² and workers not having to worry about their old age.⁷³ The commerce justification for the public accommodations act that the majority today upholds is of a similar type.

Little would be served by tracing at length the exponential expansion of the commerce power into the realm of police regulation, beginning in our decision in *Jones & Laughlin Steel Corp.*⁷⁴ and progressing through *Darby*⁷⁵ and *Wickard*⁷⁶ to today's cases. Suffice it to say that in *Jones & Laughlin Steel Corp.*, this Court, despite protests by four members,⁷⁷ substantially abandoned the commerce/manufacture dividing line.⁷⁸ In *Darby*, this Court found that Congress could close the channels of interstate commerce to manufactured goods produced by an employer who was in

⁷⁰ See *id.*

⁷¹ Act of June 27, 1934, ch. 868, 48 Stat. 1283 (current version at 45 U.S.C. §§ 201–14 (2000), with §§ 210–14 omitted pursuant to the *Alton* holding and § 209 being repealed in 1966).

⁷² *Alton R.R. Co.*, 295 U.S. at 363–67.

⁷³ *Id.* at 367–68.

⁷⁴ NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

⁷⁵ *United States v. Darby*, 312 U.S. 100 (1941).

⁷⁶ *Wickard v. Filburn*, 317 U.S. 111 (1942).

⁷⁷ Justices McReynolds, Van Devanter, Sutherland and Butler dissented. See *Jones & Laughlin Steel*, 301 U.S. at 49, 76 (McReynolds, J., dissenting).

⁷⁸ See *id.* at 34–43 (upholding Congress' Commerce Clause “authority to safeguard the right of [Jones & Laughlin's] employees to self-organization and freedom in the choice of representatives for collective bargaining” and declaring that “the fact that the employees...were engaged in production is not determinative”).

violation of the Fair Labor Standards Act,⁷⁹ even though the goods were not evil in themselves, such as lottery tickets,⁸⁰ adulterated food⁸¹ and prostitutes.⁸² John Marshall said that once something was commerce among the states, congressional power to regulate it was absolute, absent violation of some affirmative limit found in the Constitution itself.⁸³ Case closed!

But this Court, in *Darby*,⁸⁴ went further—Congress could mandate that the employer be penalized in order to keep the goods out of interstate commerce.⁸⁵ Then came the truly fateful step—the employer could be penalized simply for violating the Act, even if totally unrelated to closing the channel of interstate commerce.⁸⁶ The commerce power was transformed into a police measure governing wages, hours and working conditions of employees in local industry. At least in *Jones & Laughlin Steel*,⁸⁷ a case could be made that a work stoppage of more than a minimal duration would truly have a dramatic effect throughout numerous states. This cannot be said of *Darby*,⁸⁸ but this aspect of *Darby* was justified ex post facto by the Court in *Wickard*.⁸⁹ In *Wickard*, a farmer who grew 239 bushels of wheat above the maximum allowed by federal law, which was predicated by the Commerce Clause, was held to effect commerce in more states than one, even if he intended to use the 239 excess bushels to feed the livestock on his farm.⁹⁰ The reason? If he had not dared to violate the congressional edict, he would have had to buy the 239 bushels elsewhere.⁹¹ What, you might ask, can be the effect of 239 bushels of grain on the big picture of interstate commerce? This Court's answer was that it is

⁷⁹ *Darby*, 312 U.S. at 115.

⁸⁰ *Id.* at 113–14 (citing *The Lottery Case*, 188 U.S. 321 (1903), which upheld a Congressional ban on the interstate transport of lottery tickets as a valid exercise of Commerce Clause power).

⁸¹ *Id.* (citing *Hipolite Egg Co.*, 220 U.S. at 45, which upheld a federal statute requiring the confiscation of any adulterated food transported interstate that was still in its original packaging as within the scope of Congress' authority to regulate interstate commerce).

⁸² *Id.* (citing *Hoke*, 227 U.S. at 308, rejecting a Commerce Clause challenge to “the white slave act,” which criminalized the interstate transport of women and girls for the purpose of prostitution and “other immoral purpose[s]”).

⁸³ *Gibbons*, 22 U.S. (9 Wheat.) at 196.

⁸⁴ *See Darby*, 312 U.S. at 100.

⁸⁵ *See id.* at 117–18.

⁸⁶ *See id.* at 121–23.

⁸⁷ *See Jones & Laughlin Steel*, 301 U.S. at 1.

⁸⁸ *See Darby*, 312 U.S. at 100.

⁸⁹ *See Wickard*, 317 U.S. at 111.

⁹⁰ *Id.* at 114–15, 128.

⁹¹ *Id.*

not just Filburn, but every farmer like him.⁹²

The intrusion into state police power had thus become wide and deep. Is it any wonder, then, that when Congress desired to prevent racial segregation in private sector places of public accommodation which were beyond the reach of the Fourteenth Amendment, it chose the commerce power? After all, if Blacks have difficulty traveling from state to state because of private sector racial segregation, it must have an effect on commerce among the states. Thus, a somewhat weak secondary effect, at best, on interstate commerce becomes the basis for a police power-type regulation outlawing racial segregation in private sector places of public accommodation.

Turning to today's decisions shows the vital distinction in our modern federal system—that Congress' power to regulate interstate commerce and the states' inherent police power has been largely swept away. This is, therefore, a day this Court will come to regret, even in the face of the major assault on racial segregation that today's decisions represent. Segregation by race is deplorable in all its forms. Our constitutional structure, however, clearly assigns which government has the power to act against it. The states have the inherent police power for the very purpose of dealing with private sector practices that are inimical to the public health, safety, morals and welfare. This is the design of our federal system and it did not occur by happenstance. In *The Civil Rights Cases*,⁹³ this Court refused to allow Congress to legislate under the implementation clause of the Fourteenth Amendment⁹⁴ in regard to anything other than state action.⁹⁵ We were, as Justice Bradley's opinion states a number of times, concerned that constitutional interpretation not give Congress a general regulatory or police power. For example, we said: "That would be to establish a code of municipal law regulative of all private rights between man and man

⁹² *Id.* at 127–28.

⁹³ *The Civil Rights Cases*, 109 U.S. 3 (1883).

⁹⁴ "[T]he last section of the [Fourteenth] amendment invests Congress with power to enforce it by appropriate legislation." *Id.* at 11.

⁹⁵ The Court stated:

The wrongful act of an individual, unsupported by any [state] authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress.

Id. at 17.

in society. It would be to make congress take the place of the state legislatures and to supersede them.”⁹⁶ The design of our federal system prevailed. Today this Court pays lip service to the *Civil Rights Cases*,⁹⁷ but then dishonors their holding by allowing Congress to misuse the Commerce Clause in support of legislation regarding public accommodations.

After today, every social ill subject to correction by a state’s use of its police power can, in one way or another, be found to affect commerce in other states. This is the logical effect of *Darby*⁹⁸ and *Wickard*.⁹⁹ And, our Commerce Clause decisions over the last thirty years have clearly created a hubris in Congress that today’s decisions will serve to expand. Shoplifting is surely a crime in every state. Should a state decide to make it not a crime but a civil infraction to conserve the resources of law enforcement, could Congress then make it a federal crime under the theory of today’s decisions? There can be little doubt that the answer is yes.

The clear recognition by this Court that what is at issue in today’s cases is a moral problem that can be cured by Congress’ exercise of its commerce power is breathtaking. As my brother Justice Clark described it: “But [the fact that what was at issue was a ‘moral wrongs’] does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse.”¹⁰⁰ It is clear from the record before this Court that Congress set out to cure a police power issue by looking at a secondary Commerce Clause problem and not the other way around. This is made quite clear in the case of *Ollie’s Barbecue*.¹⁰¹ As Justice Clark put it: “The absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food, a factor on which the appellees place much reliance, is not, given the evidence as to the effect of such practices on other aspects of commerce a crucial matter.”¹⁰² Certainly, Commerce Clause concerns regarding racial segregation at *Ollie’s* were, to say the

⁹⁶ *Id.* at 13.

⁹⁷ *Heart of Atlanta Motel*, 379 U.S. at 250–52.

⁹⁸ *See supra* notes 79–88 and accompanying text.

⁹⁹ *See supra* notes 89–92 and accompanying text.

¹⁰⁰ *Heart of Atlanta Motel*, 379 U.S. at 257.

¹⁰¹ *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding that the Commerce Clause allowed congress to regulate, through the Civil Rights Act, discrimination and segregation at a restaurant because the restaurant serves interstate travelers or a substantial portion of food that travels through interstate commerce).

¹⁰² *Id.* at 304–05.

least, fragile, as Justice Clark, in effect, tacitly admits.¹⁰³

As Chief Justice Stone put it in *Darby*,¹⁰⁴ regulation by Congress under the Commerce Clause must be “appropriate...to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.”¹⁰⁵ For this proposition, Chief Justice Stone cited *McCulloch v. Maryland*.¹⁰⁶ However, he did not cite all of that crucial language from *McCulloch*. “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”¹⁰⁷

The “end,” however, was not the regulation of interstate commerce, but the regulation of a social problem, a power not given to Congress by the Constitution. That being the case, how could the act of Congress, which we today uphold, “consist with the letter,” much less “the spirit of the constitution?”

Given today’s decisions, there is little to stop Congress from arrogating unto itself a police-type power based on the Commerce Clause and the Necessary and Proper Clause beyond the will of Congress itself. The concerns expressed at the Founding have been made terribly real today. I dissent.

AFTERWARD

The Supreme Court has slowed, but certainly not stopped, the use of the Commerce Clause as a police-type power. The cases *United States v. Lopez*¹⁰⁸ and *United States v. Morrison*¹⁰⁹ demonstrate this behavior. However, the mere fact that Congress tried to regulate guns within a certain proximity to schools (*Lopez*) and violence against women (*Morrison*)—and that the Supreme Court decisions in those two cases were far from unanimous—demonstrates the

¹⁰³ *Id.*

¹⁰⁴ *Darby*, 312 U.S. at 100.

¹⁰⁵ *Id.* at 118; see also *Heart of Atlanta Motel*, 379 U.S. at 258 (quoting the language of Justice Stone from *Darby*).

¹⁰⁶ *Darby*, 312 U.S. at 118.

¹⁰⁷ *McCulloch*, 17 U.S. (4 Wheat.) at 421; see also *supra* note 11 and accompanying text (mentioning Chief Justice Marshall’s desire for a strong central government).

¹⁰⁸ *United States v. Lopez*, 514 U.S. 549 (1995) (holding Congress could not use the commerce power to regulate guns in school zones because the possession of a gun in a school zone is not an economic activity that will affect interstate commerce).

¹⁰⁹ *United States v. Morrison*, 529 U.S. 598 (2000) (holding Congress could not use its commerce power to enact a civil remedy provision because violent crime is not a sufficient economic interstate activity affecting interstate commerce).

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effects and the bitter fruit of *Darby*, *Wickard*, *Heart of Atlanta*, and *Katzenbach*.