

Sec. 8—Powers of Congress

Cl. 3—Power to Regulate Commerce

established that the power to regulate commerce, whether with foreign nations or among the several states, comprises the power to restrain or prohibit it at all times for the welfare of the public, provided only that the specific limitations imposed upon Congress' powers, as by the Due Process Clause of the Fifth Amendment, are not transgressed.⁷⁰⁷

Among the Several States.—In *Gibbons v. Ogden*, Chief Justice Marshall observed that the phrase “among the several States” was “not one which would probably have been selected to indicate the completely interior traffic of a state.” It must therefore have been selected to exclude “the exclusively internal commerce of a state.” Although, of course, the phrase “may very properly be restricted to that commerce which concerns more states than one,” it is obvious that “[c]ommerce among the states, cannot stop at the external boundary line of each state, but may be introduced into the interior.” The Chief Justice then succinctly stated the rule, which, though restricted in some periods, continues to govern the interpretation of the clause. “The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.”⁷⁰⁸

Recognition of an “exclusively internal” commerce of a state, or “intrastate commerce” in today's terms, was regarded as setting out an area of state concern that Congress was precluded from reaching.⁷⁰⁹ Although these cases seemingly visualized Congress' power arising only when there was an actual crossing of state boundaries, this view ignored Marshall's equation of intrastate commerce that affects other states or with which it is necessary to interfere in order to effectuate congressional power with those actions which are purely interstate. This equation came back into its own, both with the later finding that the “current of commerce” brings each element in the current within Congress' regulatory power⁷¹⁰ and with the emphasis on the interrelationships of industrial produc-

⁷⁰⁷ *United States v. Carolene Products Co.*, 304 U.S. 144, 147–148 (1938).

⁷⁰⁸ 22 U.S. (9 Wheat.) 1, 194, 195 (1824).

⁷⁰⁹ *New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837); *License Cases*, 46 U.S. (5 How.) 504 (1847); *Passenger Cases*, 48 U.S. (7 How.) 283 (1849); *Patterson v. Kentucky*, 97 U.S. 501 (1879); *Trade-Mark Cases*, 100 U.S. 82 (1879); *Kidd v. Pearson*, 128 U.S. 1 (1888); *Illinois Central R.R. v. McKendree*, 203 U.S. 514 (1906); *Keller v. United States*, 213 U.S. 138 (1909); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Oliver Iron Co. v. Lord*, 262 U.S. 172 (1923).

⁷¹⁰ *Swift & Co. v. United States*, 196 U.S. 375 (1905); *Stafford v. Wallace*, 258 U.S. 495 (1922); *Chicago Board of Trade v. Olsen*, 262 U.S. 1 (1923).