

Sec. 8—Powers of Congress

Cl. 3—Power to Regulate Commerce

lier noted, however, that the purported distinction is one that the Court both previously to and subsequent to these opinions has rejected.

Tariff laws have customarily contained prohibitory provisions, and such provisions have been sustained by the Court under Congress' revenue powers and under its power to regulate foreign commerce. For the Court in *Board of Trustees v. United States*,⁹⁵⁵ in 1933, Chief Justice Hughes said: "The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted. No one can be said to have a vested right to carry on foreign commerce with the United States. . . . It is true that the taxing power is a distinct power; that it is distinct from the power to regulate commerce. . . . It is also true that the taxing power embraces the power to lay duties. Art. I, § 8, par. 1. But because the taxing power is a distinct power and embraces the power to lay duties, it does not follow that duties may not be imposed in the exercise of the power to regulate commerce. The contrary is well established. *Gibbons v. Ogden*, *supra*, p. 202. 'Under the power to regulate foreign commerce Congress imposed duties on importations, gives drawbacks, passes embargo and non-intercourse laws, and makes all other regulations necessary to navigation, to the safety of passengers, and the protection of property.' *Groves v. Slaughter*, 15 Pet. 449, 505. The laying of duties is 'a common means of executing the power.' 2 Story on the Constitution, 1088."⁹⁵⁶

Congressional Prohibitions on Interstate Commerce

Background.—The question whether Congress' power to regulate commerce "among the several States" embraced the power to prohibit it furnished the topic of one of the most protracted debates in the entire history of the Constitution's interpretation. The issue was put forward by Henry Clay as early as 1841 when, in an argument before the Court, he raised the specter of an act of Congress forbidding the interstate slave trade.⁹⁵⁷ Development of relevant case law is set forth in the majority and dissenting opinions in *Hammer v. Dagenhart*,⁹⁵⁸ where, in a five-to-four decision, the Court held that only products such as diseased cattle or lottery tickets—which were considered inherently harmful—could be prohibited from interstate commerce. Goods made from child labor, on the other hand, could not be banned based solely on their means of production, since Congress' power was to regulate commerce, not to pro-

⁹⁵⁵ 289 U.S. 48 (1933).

⁹⁵⁶ 289 U.S. at 57, 58.

⁹⁵⁷ *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 488–89 (1841).

⁹⁵⁸ 247 U.S. 251 (1918).