In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE LOTTERY CASES.

JOHN FRANCIS ET AL., PETITIONERS,
v.
THE UNITED STATES. } No. 293.

CHARLES F. CHAMPION, APPELLANT,
v.
JOHN C. AMES, UNITED STATES MARSHAL. } No. 9.

REVISED BRIEF FOR THE UNITED STATES ON THIRD ORAL ARGUMENT.

For the convenience of the court, I have revised and consolidated the three briefs heretofore filed by me in the above-entitled cases, and I respectfully ask that the present brief be accepted as a substituted brief. It contains the substance of the preceding briefs, omitting such portions as, upon further reflection, seem unimportant, and adding some additional suggestions for the consideration of the court.

I.

STATEMENT OF CASES.

The above-entitled cases raise, in different forms, a question of importance affecting the exact nature of interstate commerce and the extent of the Federal power with respect to it. Both cases arise under criminal proceedings instituted by the United States under the act of March 2, 1895 (28 Stat. L., 963), the material portion of which act is as follows:

Act of March 2, 1895.

CHAP. 191.—AN ACT For the suppression of lottery traffic through national and interstate commerce and the postal service subject to the jurisdiction and laws of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who shall cause to be brought within the United States from abroad, *for the purpose of disposing of the same*, or deposited in or carried by the mails of the United States, or *carried* from one State to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one State to another in the same, shall be punishable in the first offense by imprisonment for not more than two years or by a fine of not

more than one thousand dollars, or both, and in the second and after offenses by such imprisonment only.

In both cases the charge is one of conspiracy to "*carry*" lottery tickets from one State to another.

Statement of Champion case.

In the Champion case, the complainant avers, in substance, that the said Charles F. Champion (the appellant), W. F. Champion, and Charles B. Park did then and there unlawfully, knowingly, and feloniously conspire together to commit an offense against the United States, to wit, *for the purpose of disposing of the same, to cause to be carried from one State to another in the United States, to wit, from Dallas, in the State of Texas, to Fresno, in the State of California,* certain papers, certificates, and instruments purporting to be and representing tickets, as they then and there well knew, chances, shares, and interests in and dependent upon the event of a lottery thereafter to take place, offering prizes dependent upon lot and chance, etc.

An averment of an overt act charges that the defendants "did then and there, to wit, on or about the day last aforesaid, in the year 1899, in the county of Dallas aforesaid, in the Dallas division of the northern district of Texas aforesaid, unlawfully, knowingly, and feloniously, *for the purpose of being carried from one State to another in the United States, to wit, from Dallas, in the State of Texas, to Fresno, in the State of California, for the purpose of disposing of the same, deposit and cause to be deposited and shipped and carried with and by the Wells-Fargo Express Company, a corporation engaged in*

carrying freight and packages from station to station along and over lines of railway and from Dallas, Texas, to Fresno, California, for hire, one certain box or package containing, among other things, two whole tickets or papers or certificates of said purported Pan-American Lottery Company."

Among the testimony offered before the United States commissioner was the box of lottery matter, which it was charged in the original indictment had been transported contrary to law. It consisted of tickets, advertisements, circular letters, official drawings, and other matter showing the nature of the lottery and the manner in which it was conducted. The ticket, which will be found on page 71 of the record, and which may be taken as a sample, provides as follows:

PAN-AMERICAN LOTTERY COMPANY.

CAPITAL PRIZE $32,000.

This WHOLE Ticket entitles the holder thereof to the WHOLE of such prize as may be drawn by its number in the within-named drawing, if presented before the expiration of three months from the date of said drawing.

The record thus presents a single question, and that is the constitutionality of section 1 of the act of March 2, 1895. It is not questioned that sufficient testimony was offered to justify the commissioner in committing the defendant to await an order of removal, if the act of Congress referred to be a constitutional exercise of power. Nor is it questioned that the acts complained of are within the meaning of the

said act of Congress. (See appellant's brief, filed by Rosenthal & David, page 3.)

Statement of Francis case.

In the Francis case the defendants, the present petitioners, were convicted in the district court of the United States for the southern district of Ohio, upon an indictment which charged, in substance, that they, the said defendants, "did then and there unlawfully, knowingly, and feloniously conspire together and with one another to commit an offense against the United States, to wit, *to cause to be carried from one State to another in the United States, to wit, from the city of Newport, in the State of Kentucky, to the city of Cincinnati, in the State of Ohio, papers, certificates, and instruments purporting to be and to represent, as they then and there well knew, ticket chances, shares, and interests in and dependent upon the event of a lottery,*" etc.

A trial was had, and evidence was offered to prove that the defendants were engaged in a form of lottery known as "Policy."

The lottery set forth in the Francis case differed in method from that set forth in the Champion case in one respect, that whereas in the Champion case, as in an ordinary lottery, the purchaser of a ticket secured such number as the company gave him prior to the drawings, in the Francis case the purchaser selected his own combination of numbers, of which he made duplicate slips, forwarding one to the company on the payment of his fee and retaining the other as evidence of his chance. If, in the drawings, his number were selected, the duplicate slip of paper which he retained was his ticket, and as such entitled to the prize.

The principal office of the lottery was located in a building in Cincinnati, Ohio, at which the drawings took place. The management maintained in various other States, among them Newport, Ky., offices or agencies at which tickets or chances in the drawing could be purchased. The extent of the enterprise can be measured by the fact that the drawings were transmitted by wire to over sixty agencies, located in New Haven, Conn.; Chicago, Ill.; Indianapolis, Ind.; Boston, Mass.; Detroit, Mich.; Buffalo, N. Y.; New York City, Cleveland, Ohio; Columbus, Ohio; Dayton, Ohio; Hamilton, Ohio; Springfield, Ohio; Fort Wayne, Ind.; Toledo, Ohio; Philadelphia, Pa.; Allegheny, Pa.; Providence, R. I.; Hartford, Conn.; Rosslyn, Va., and other places. To avoid arrest by Federal or State authorities, the business was conducted with all possible secrecy. The tickets were conveyed from the agencies in the various States to Cincinnati, and after the drawings were made, the results were telegraphed by a cipher code from Cincinnati to the agencies, at which point the prizes, if any, were distributed to the holder of the original slips in each State. The testimony abundantly established the defendants' connection with the enterprise. Reilley was in charge of the office, Hoff had charge of the agency in Newport, Ky., and Edgar was employed to carry the slips from Newport, Ky., to Cincinnati, and the prizes, if any, from Cincinnati to Newport. Evidence was offered to prove that an agency of this lottery company was maintained by one of the defendants, Hoff, in a barber

shop at Newport, Ky., and that Harrison, one of the witnesses for the Government, called there and made up his slip, which represented his interest or chance in the lottery, and delivered a duplicate copy thereof to Hoff and paid him the necessary amount; that shortly thereafter Edgar, one of the defendants, who was employed as carrier for the lottery company, came to Hoff's shop, took the ticket, and then started across the bridge which separates Newport, Ky., from Cincinnati, Ohio, and at the end of the bridge was arrested by the officers of the Cincinnati police force and searched, and upon his person was found the ticket which represented Harrison's interest in the lottery. The slip of paper, while informal in character, "represented the interest of the purchaser of a chance, and although containing figures only, it had a definite meaning and was understood by all the parties concerned." (Opinion of circuit court of appeals.) The law always has regard to the substance rather than to the form, and this is especially true in the enforcement of its criminal statutes, for otherwise they could be easily evaded. It is clear that the slips of paper, although containing nothing more than figures, did entitle the holder thereof to an interest in the lottery, the value of which was dependent upon the actual drawing, and that such ticket, like a bond or an ordinary lottery ticket, was transferable on delivery.

The defendants were convicted, and thereupon sued out a writ of error to the circuit court of appeals for the sixth circuit, alleging that the act of March 2, 1895,

was unconstitutional. The case was argued before Lurton, Day, and Severens, circuit judges, who, in an opinion by the last-named judge, affirmed the constitutionality of the act. (See Transcript of Record, page 359.)

The Francis and the Champion cases do not differ in principle, and both involve the constitutionality of the act of March 2, 1895.

II.

ANTI-LOTTERY LEGISLATION.

The attempt of Congress to legislate lotteries out of existence had its commencement in the act of July 27, 1868 (15 Stat., 196), which provided, section 13, "that it shall not be lawful to deposit in a post-office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever." Supplemental acts were passed on June 8, 1872 (17 Stats. at L., 302), and July 12, 1876 (19 Stat., 9), and September 19, 1890 (26 Stat., 465), all of which were designed to make the exclusion of lottery matter from the mails more effective.

Large quantities of this matter continued to be imported as merchandise from lottery companies in other countries, and accordingly Congress, by the act of August 27, 1894, the Wilson tariff act (28 Stat., 509), provided by section 10 "that all persons are prohibited from importing into the United States from any foreign country * * * any lottery ticket or any advertisement of any lottery. No such articles,

whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles shall be proceeded against, seized, and forfeited by due course of law." The lottery companies, notably those having their home office in other countries, continued clandestinely to smuggle their lottery matter into the United States, and, as the mails were closed to them, they continued to ship as merchandise their matter through the various States by means of express companies and other common carriers of freight. This continued defiance of the law led Congress to close the channels of interstate trade to this traffic by passing the act of March 2, 1895 (28 Stat., 963).

The material section of the act has already been quoted. (*Infra*, p. 2.)

III.

JUDICIAL CONSTRUCTION OF ANTI-LOTTERY LEGISLATION.

Before passing to a discussion of the constitutionality of the act of 1895, it may be desirable to briefly review the decisions of this court and the circuit court of appeals as to the previous legislation.

The acts of Congress excluding lottery matter from the mails have been under discussion in *Ex parte Jackson*, 96 U. S., 727; *In re Rapier*, 143 U. S., 110, and *Horner* v. *United States*, No. 1, 143 U. S., 207.

In none of these cases did the question of the right to exclude lottery matter from interstate traffic under the interstate-commerce clause of the Constitution arise.

All of them were cases where the United States mails, a purely governmental agency, were used as a means of conveyance, and the constitutionality of the acts was sustained on the ground that the right to establish post-offices and post-roads included the right on the part of Congress to designate what should and what should not be carried by this governmental agency. It is true that Mr. Justice Field, in *Ex parte* Jackson, did question the power of Congress to prevent the transportation, as merchandise, of matter excluded from the mails. But, apart from the fact that this expression of a doubt was purely *obiter*, and in no respect necessary to the facts of the case, it must be further remarked that it was predicated upon a case where the *conveyance of the unlawful matter was purely within the borders of a State. No reference was made in the arguments and none in the opinions of the court, either in Ex parte Jackson or the subsequent cases, to the interstate-commerce clause of the Constitution, and these cases, therefore, can not be regarded as authority in the present case, except to the extent that they affirm the right of Congress to exclude matter which, in its discretion, is injurious to the public morals, and such exclusion does not abridge the freedom of the press.*

In *France* v. *United States* (164 U. S., 676), the precise question arose, but the court decided the case upon another point, and the constitutionality of the act of March 2, 1895, was left undecided. The only cases, therefore, which directly pass upon the question are the cases at bar, in both of which the decisions of

the respective courts sustained the constitutionality of the act of Congress.

IV.

SYNOPSIS OF ARGUMENT.

I shall discuss two questions in this brief which seem to comprehend all others:

First. WHAT IS THE NATURE OF INTERSTATE COMMERCE, AND DOES IT INCLUDE THE CARRIAGE FROM STATE TO STATE OF LOTTERY TICKETS?

Second. DOES THE POWER TO REGULATE INCLUDE THE POWER TO PROHIBIT?

As to the first question, I submit three propositions:

(1) The transit of individuals from State to State is interstate commerce.

(2) The carriage of things for hire from State to State by any means of transportation is commerce.

(3) Lottery tickets are articles of commerce.

V.

HISTORY OF COMMERCE CLAUSE.

Before discussing these three propositions, it is well to remember the history of the commerce clause of the Constitution.

Prior to the formation of the Federation, the thirteen British colonies, while united in a sense by their common allegiance to the British Crown, were as between themselves independent political entities, and as against

each other sovereign and independent. (Note 2, Madison's Papers, Gilpin, 686.) Excepting the supervisory power of the Crown over trade regulations, there was no general authority over either foreign or intercolonial commerce. The result was a mass of conflicting and hostile legislation.

So jealous were the States of their commercial power, that even the Articles of Confederation, framed for the purpose of prosecuting a common war, contained no general authority over commerce, except that "no imposition, duties or restriction shall be laid by any State on the property of the United States or either of them," and "no State shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States in Congress assembled." While Congress was authorized to "enter into treaties and alliances," it was provided that "no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subject to, or from *prohibiting* the exportation or importation of any species of goods or commodities whatsoever." A prohibition, therefore, was regarded as a regulation of trade.

It was soon perceived that the Confederation could not negotiate advantageous commercial treaties if the commercial advantages which they conferred upon foreign nations could be destroyed at will by the reserved commercial power of the component States, and that, therefore, the power to regulate trade in the manner that independent nations at that day regu-

lated their commerce, *i. e.*, by restrictions and prohibitions, must of necessity be given to the Federal Government. This thought was pressed home when, in 1783, England commenced to regulate its commerce with the federation by excluding under *prohibitions* the importation into the British West Indies of much important merchandise from America. For the very purpose of counteracting this blow to our commerce by retaliatory measures, Congress recommended, on April 30, 1784, to the States to vest in the confederation for the term of fifteen years authority to *prohibit* the vessels of any power, not having treaties of commerce with the United States, from importing or exporting any commodities into or from any of the States; also with the power of *prohibiting* for a like term any foreign country, unless authorized by treaty, from importing into the United States any merchandise not the product or manufacture of such country. In the meantime the States were preying upon the trade of each other by prohibitory tariffs and restrictive statutes until commercial chaos resulted and civil war was threatened. Out of this condition, and because of it, came the constitutional convention of 1787.[a]

[a] The situation is thus described by Madison in his Introduction to the Journal of the Federal Convention:

"The want of authority in Congress to regulate commerce had produced in foreign nations, particularly Great Britain, a monopolizing policy, injurious to the trade of the United States and destructive to their navigation, the imbecility and anticipated dissolution of the Confederacy extinguishing all apprehensions of a countervailing policy on the part of the United States. The same want of a general power over commerce led to an exercise of the power separately by the States, which not only proved abortive, but engendered rival, conflicting, and angry regulations.

Hamilton early in the session of the Constitutional Convention submitted a plan of the proposed constitution, which gave to Congress absolute power over commerce under the sweeping power "to pass all laws whatsoever." Paterson presented the "New Jersey plan," which gave to Congress authority "to pass acts for the regulation of *trade and commerce* as well with foreign nations as with each other." Governor Randolph proposed to confer upon Congress power "to regulate commerce with all nations and among the several States;" and the plan suggested by Charles Pinckney upon the subject of commerce was precisely in the same language as that of Randolph. (2 Madison Papers, 863.)

The distinction between "trade" and "commerce," as suggested by Paterson, will be noted as indicating that in the minds of the framers "commerce" was a term of much broader signification than "trade," as

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Besides the vain attempts to supply their respective treasuries by imposts, which turned their commerce into the neighboring ports, and to coerce a relaxation of the British monopoly of the West Indian navigation, which was attempted by Virginia, the States having ports for foreign commerce, taxed and irritated by adjoining States trading through them, as New York, Pennsylvania, Virginia, and South Carolina. Some of the States, as Connecticut, taxed imports from others, as from Massachusetts, which complained in a letter to the executive of Virginia, and doubtless to those of other States. In sundry instances, as of New York, New Jersey, Pennsylvania, and Maryland, the navigation laws treated the citizens of other States as aliens. In certain cases the authority of the Confederacy was disregarded, as in violation, not only of the Treaty of Peace, but of treaties with France and Holland; which were complained of to Congress. In other cases the Federal authority was violated by treaties and war with Indians, as by Georgia; by troops raised and kept up without the consent of Congress, as by Massachusetts; by compacts without the consent of Congress, as between Pennsylvania and New Jersey, and between Virginia and Maryland. From the Legislative Journals of Virginia it appears that a vote refusing to apply for a sanction of Congress was followed by a vote against the communication of the compact to Congress."

Marshall subsequently decided in *Gibbons* v. *Ogden.* (See post, page 19.)

Profoundly as the framers differed in other respects, it is therefore clear that all plans agreed in this, that the absolute power which each constituent State had theretofore had over its external relations, of whatsoever nature, and which was denominated by the comprehensive word "commerce," should pass to the Federal Government. No residuum was left in the States. The purpose clearly was to empower Congress "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legistation." (2 Madison Papers, 859.)

To remedy these evils the constitutional convention of 1787 was called, and so clearly were all delegates agreed as to the wisdom of taking from the thirteen States all control over their external relations, whether intercolonial or foreign, that the clause of the Constitution which was designed to effectuate this (art. 7, sec. 1) was passed without a dissenting voice and with comparatively little debate. While they did not in this section define commerce, yet they threw a searchlight on their meeting in a subsequent section, whose history clearly reveals their purposes.

On the 6th of August, 1787, a draft of a constitution was reported to the convention by Mr. Rutledge from the committee of detail. In Article VII, section 4, of that draft, it was provided that "no tax or duty shall be laid by the legislature on articles exported

from any State; nor on the *migration or importation* of such persons as the several States shall think proper to admit; nor shall such migration or importation be prohibited." This clause limits the tax power as to such migration or importation of persons, and then denies power to prohibit such migration or importation. The tax or duty laid was aimed at the slave trade, which was permitted to continue until 1808, but the latter words have no reference to the tax power at all. To what, then, could these words refer, except as a limitation on the commerce power, under which alone Congress could have had a pretense for the prohibition of the migration or importation of persons. The clause was referred with others to a committee. On the 24th of August, 1787, the clause was reported thus: "The migration or importation of such persons as the several States, now existing, shall think proper to admit shall not be prohibited by the legislature prior to the year 1800; but a tax or duty may be imposed on such *migration* or importation at a rate not exceeding the average of the duties laid on imports." Gouverneur Morris remarked on this as a power to tax freemen migrated or imported. George Mason replied: "The provision as it stands was necessary for the case of convicts, in order to prevent the introduction of them." The latter clause was then amended, *nem. con.*, so as to read: "But a tax or duty may be imposed on such *importation*, not exceeding $10 for each person." A tax or duty was imposed on the person imported as a slave, but the migration of free persons might be prohibited after 1800.

These proceedings show that the power to tax slaves and not freemen was granted, and the power to prohibit the migration of free persons as well as slave importation was granted by clear implication, the implication of power to prohibit the migration of free persons being under the power to regulate commerce, and to prohibit commerce in slaves after the date stated. This makes the commercial power reach to the prohibition of the migration of persons and the importation of things. These views are confirmed by many cases; so that it seems to be the clear meaning of the Constitution that the words "to regulate commerce" include the regulation of migration of persons irrespective of their relations to things in commerce. (Tucker on the Constitution, p. 525.)

The power, therefore, that was taken from the States and vested in the United States was the power of each constituent State over its external relations, and in its transfer to the Federal Government it was in no respect diminished, except by certain express limitations in the Federal compact, such as the prohibition of any preference of the port of one State over the port of another State (art. 1, sec. 9, par. 6) and the prohibition of duties upon exports (art. 1, sec. 9, par. 5) and of clearance duties (art. 1, sec. 9, par. 6).

With these minor limitations the delegated power was as exhaustive and plenary as that which it was intended to supersede. The question, therefore, as to what commerce is under the Federal Constitution necessarily depends upon what commerce was regarded to be by the colonies prior to

the formation of the Constitution. Commerce meant the intercourse or intercommunication of a colony with the other colonies and the rest of the world either by the importation or exportation of goods or by the ingress or egress of individuals, and was not confined to mere traffic in purchasable commodities.

With this historical résumé of the commerce clause of the Constitution, I pass to my first proposition, which is:

VI.

1. The transit of individuals from State to State is interstate commerce.

This view of the nature of commerce was accepted by this court in the leading case of *Gibbons* v. *Ogden* (9 Wheat., 1), and, far from being weakened, has been supported and confirmed by subsequent adjudications until it should be regarded as beyond controversy.

Gibbons v. Ogden, 9 Wheaton, 1.

The facts of this familiar case need not be mentioned except to note that the matter in dispute was the *exclusive right* of navigation of a tidal river, and it was contended by the appellant that such exclusive privilege was void and that it was an infringement of the exclusive power of Congress to regulate interstate commerce. This leading case, therefore, turned upon an abstract right which affected the *transit of individuals* quite as much as the transportation of merchandise. The question at once arose whether commerce was only traffic or all intercourse, whether for purposes of sale or not. Mr. Oakley urged that commerce is only "transportation and sale of commodities," while Mr. Emmett gave the definition as "the

exchange of one thing for another, the interchange of commodities, trade, or traffic." Mr. Wirt claimed in reply that it "*always implies intercommunication and intercourse.*" This last definition was adopted by the court in the oft-quoted definition of the Chief Justice, as follows:

> The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. *The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.* The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

Of Marshall's wonderful judicial qualities nothing is more striking than his accurate use of language, and to understand this illuminating decision the court must

consider in its full significance the meaning of th word "intercourse" as contrasted with '"traffic." All traffic is undoubtedly intercourse, but all intercourse is plainly not traffic. Its full meaning is seen in its derivative, for *inter-cursus* means a running between or intercommunication, which concept has no necessary relation to the purchase and sale of commodities. It is thus defined by the Century Dictionary:

> 1. Communication between persons or places; frequent or habitual meeting or contact of one person with another, or of a number of persons with others, in conversation, trade, travel, etc.; physical interchange; reciprocal dealing, as the *intercourse* between town and country.
>
> At the last shall ye come to people, cities, and towns wherein is continual *intercourse* and occupying of merchandise and chaffare.
>
> *Sir T. More*, Utopia (tr. by Robinson), i.
>
> Euen then when in Assyria it selfe it corrupted by *entercourse* of strangers.
>
> *Purchas*, Pilgrimage, p. 47.
>
> By which (bridge) the spirits perverse
> With easy *intercourse* pass to and fro.
>
> *Milton*, P. L., ii., 1031.
>
> 2. Mental or spiritual interchange; reciprocal exchange of ideas or feelings; intercommunion.
>
> Food of the mind (talk) or this sweet *intercourse*
> Of looks and smiles.
>
> *Milton*, P. L., ix, 238.
>
> Thou wast made for social *intercourse* and gentle greetings.
>
> *Sterne*, Sentimental Journey, p. 54.
>
> The neighboring Indians in a short time became accustomed to the uncouth sound of the Dutch language, and an *intercourse* gradually took place between them and the new comers.
>
> *Irving*, Knickerbocker, p. 101.
>
> His *intercourse* with heaven and earth becomes part of his daily food.
>
> *Emerson*, Nature.

If Marshall had occasion, in using this term, to consult his dictionary he would doubtless have verified his use of the language by Dr. Johnson's dictionary, where we find intercourse defined as:

> 2. Communication. "The choice of the place requireth many circumstances, as situation near the sea, for a commodiousness of an *intercourse* with England." *Bacon.*

In this larger sense, commerce means the communication of a nation with the outer world, through the transitus of individuals or the carriage of goods, and upon such contact commerce in its narrower sense of traffic must ultimately depend.

Marshall clearly saw that intercommunication between different nations, whether it took the form of the transportation of merchandise or the transit of individuals, or the transmission of intelligence, was the appointed path to commercial independence and greatness. At that time ships were its chief instrumentality. The first railroad was not constructed until some years after *Gibbons* v. *Ogden* had been decided, but the ships, whether bringing passengers to our shores or cargoes of merchandise, were the shuttles which, passing through the warp and woof of nations, weaved the sublime pattern of civilization. This is doubly true of this age of steam and electricity, when the States of the Union are indissolubly bound together by shining paths of steel, aggregating two hundred thousand miles in length. These lines of communication are the arteries through which the life blood of the nation courses, and the telegraph wires are the sensitive nerves of our complex social system. Commerce is

the lifeblood of intercommunication, and comprehends every object to which the steamship, the railroad, the telegraph, or other form of conveyance can be applied, and the transportation of merchandise, which is intended for sale, is but one of many incidents to this comprehensive view of commerce, as Marshall's clear insight saw it.

Even more pointed is the following language of Mr. Justice Johnson's concurring opinion in *Gibbons* v. *Ogden:*

> When speaking of the power of Congress over navigation, I do not regard it as a power incidental to that of regulating commerce; I consider it as the thing itself; inseparable from it as vital motion is from vital existence.
>
> Commerce in its simplest signification means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations become the objects of commercial regulation. Shipbuilding, the carrying trade, and propagation of seamen are such vital agents of commercial prosperity that the nation which could not legislate over these subjects would not possess power to regulate commerce.

This leading case, therefore, clearly established that commerce was more than traffic; that it was intercourse, and comprised intercommunication between the peoples of one country and another, whether by shipment of commodities, the transmission of intelli-

gence, or by personal ingress and egress, and the sovereign power which each State formerly possessed over such external communication was the power which it delegated, subject to the limitations above averted to, to the Federal Government.

The precise question as to whether the transit of persons, whether traveling for commercial purposes or not, was commerce, arose and was earnestly discussed in the *Passenger cases* (7 Howard, 282), argued by Webster and Choate, in which the health commissioners of the port of New York placed a tax upon each cabin and steerage passenger arriving at that port from foreign countries. The whole subject of the commercial power of the Union was, as the court well knows, exhaustively reviewed by all of the justices in separate opinions, and the conclusion reached that the *mere entry of passengers into a port is commerce, although such passenger may come and go without any special reference to the purchase or sale of commodities.* As to what commerce is, Mr. Justice McLean says: Passenger cases, 7 How., 282.

> Commerce is defined to be "an exchange of commodities." But this definition does not convey the full meaning of the term. It includes "navigation and intercourse." That the transportation of passengers is a part of commerce is not now an open question.

He directly negatives the suggestion that passengers, not being imports, their transportation therefore can not be commerce.

Mr. Justice Wayne, after criticising the dictum in *City of New York* v. *Miln* (11 Pet., 102) that persons

"are not the subject of commerce," reaffirms the definition of commerce contained in *Gibbons* v. *Ogden.*

Mr. Justice Grier, in his opinion, argued that if the States had the power to exclude aliens one of the chief objects for which the Union was formed had totally failed, and he adds:

> Commerce, as defined by this court, means something more than traffic—it is intercourse; and the power committed to Congress to regulate commerce is exercised by prescribing rules for carrying on that intercourse.

He clearly holds that the mere ingress and egress of foreigners into this country is commerce. He says (p. 151):

> The power, then, to tax, and the power to regulate commerce, give to Congress the right to tax persons who may come into the United States, as a regulation of commerce and navigation. I have already mentioned, among the restraints which nations may impose upon the liberty or freedom of commerce, those which may be put upon foreigners coming into or residing within their territories. This right exists to its fullest extent, as a portion of the commercial rights of nations, when not limited by treaties.

Mr. Justice Catron, in his concurring opinion, says:

> The Constitution is a practical instrument, made by practical men, and suited to the territory and circumstances on which it was intended to operate. To comprehend its whole scope the mind must take in the entire country and its local governments. * * * New

States were in contemplation far off from ports on the ocean, *through which ports aliens must come to our vacant territories and new States*, and through these ports foreign commerce must of necessity be carried on by our inland population. We had several thousand miles of seacoast; we adjoined the British possessions on the east and north for several thousand miles, and were divided from them by lines on land to a great extent; and on the west and south we were bounded for three thousand miles and more by the possessions of Spain. With neither of these Governments was our intercourse by any means harmonious at that time. *Provision had to be made for foreign commerce coming from Europe and other quarters by navigation in pursuit of profitable merchandise and trade, and also to regulate personal intercourse among aliens coming to our shores by navigation in pursuit of trade and merchandise, as well as for the comfort and protection of visitors and travelers coming in by the ocean.*

Then, again, on our inland borders, along our extensive lines of separation from foreign nations, trade was to be regulated; *but more especially was personal intercourse to be governed by standing and general rules, binding the people of each nation on either side of the line.*

Mr. Justice McKinley in his opinion says:

The power to prohibit the admission of "all such persons" includes, necessarily, the power to admit them on such conditions as Congress may think proper to impose; and therefore as a condition Congress has unlimited power of tax-

ing them. If this reasoning be correct, the whole power over the subject belongs exclusively to Congress, and connects itself indissolubly with the power to regulate commerce with foreign nations.

County of Mobile v. Kimball, 102 U. S., 691.

In *County of Mobile* v. *Kimball* (102 U. S., 691), this court again affirmed the suggestion that not only was transportation of passengers commerce without respect to the purpose of the traffic, *but that the mere transit of persons and property was commerce.* In that case Mr. Justice Field, in one of his illuminating opinions, said:

> Perhaps some of the divergence of views upon this question among former judges may have arisen from not always bearing in mind the distinction between commerce as strictly defined, and its local aids or instruments, or measures taken for its improvement. Commerce with foreign countries and among the States, strictly considered, consists in *intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.*

Gloucester Ferry Case, 114 U. S., 196.

In *Gloucester Ferry Company* v. *Pennsylvania* (114 U. S., 196, 203), Mr. Justice Field said:

> Commerce among the States consists of intercourse and traffic between their citizens, and *includes the transportation of persons and property*, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities.

In *Pickard* v. *Pullman Southern Car Company* (117 U. S., 34), Mr. Justice Blatchford, speaking for the court, thus sums up the effect of the decisions (p. 48): Packard v. Car Company, 117 U. S.

> The decisions in the various cases in this court on the subject of a tax by a State on the bringing in of passengers from foreign countries, and which are collected and commented on by Mr. Justice Miller, in delivering the opinion of this court in the *Head Money cases* (112 U. S., 580, 591), show it to be a settled matter that to tax *the transit of passengers from foreign countries or between the States is to regulate commerce.*

If any doubt existed whether the transit of individuals was commerce, *irrespective of the means of locomotion*, it was set at rest by this court in the case of *Covington Bridge Co.* v. *Kentucky* (154 U. S., 204, 218), where it was held that the mere passage of foot passengers from one side of the Ohio River to the other side is commerce. In this opinion Mr. Justice Brown said: Covington Bridge Co. v. Kentucky, 154 U. S., 204.

> Commerce was defined in *Gibbons* v. *Ogden* (9 Wheat., 1, 189) to be 'intercourse,' *and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool.* While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river.

To sustain the appellants' contention that the conveyance of lottery tickets for hire from State to State is not interstate commerce would be to overrule the Covington Bridge case, already cited, in which the court held that "the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool." It is no answer to suggest that that involved an interstate highway in the form of a bridge, for it is obvious that the passage of citizens did not become commerce because they crossed an interstate highway, but the bridge was an instrumentality of commerce because of the transit of the people. If, therefore, the passage of a citizen over a bridge leading from Cincinnati, Ohio, to Covington, Ky., is commerce, assuredly it can not be less commerce if the passenger has a lottery ticket in his pocket, which he is carrying for hire. Nor can the power to regulate such commerce be less in one case than the other.

The Telegraph Cases.

Indeed, neither the transit of individuals nor the transportation of goods are essential to commerce. The mere transmission of intelligence is also commerce.

Pensacola Tel. Co. vs. Co., 96 U. S. 1.

The invisible messages which are transmitted along telegraph lines from citizens of one State to citizens of another are commerce. In *Pensacola Telegraph Company* v. *The Westernt Union Telegraph Company* (96 U. S., 1) an act of Congress was under question which provided for the construction of telegraph lines. It was held to be a valid regulation of commerce and

to be superior to a statute of Florida which gave to the Pensacola Telegraph Company the exclusive right of operating telegraph lines in that State. Mr. Chief Justice Waite delivered the opinion of the court, in the course of which he said:

> Since the case of *Gibbons* v. *Ogden* (9 Wheat., 1) it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the National Government.

Western Union Tel. Co. vs. Pendleton, 122 U. S. 347.

In *Western Union Telegraph Company* v. *Pendleton* (122 U. S, 347) a statute of the State of Indiana which required telegraph companies to deliver dispatches by messenger to the addressees, under certain conditions, was held to be in conflict with the interstate-commerce clause of the Constitution as an attempt to regulate the delivery of such dispatches. Mr. Justice Field alludes to the fact that the telegraph messages held to be within the commercial power of the Union are invisible and intangible. He says:

> Although *intercourse* by telegraph messages between the States is thus held to be interstate commerce, it differs in material particulars from that portion of commerce with foreign countries and between the States which consists in the carriage of persons and the transportation and exchange of commodities, upon which we have

> been so often called to pass. It differs not only in the subjects which it transmits, but in the means of transmission. *Other commerce deals only with persons, or with visible and tangible things. But the telegraph transports nothing visible and tangible; it carries only ideas, wishes, orders, and intelligence. Other commerce requires the constant attention and supervision of the carrier for the safety of the persons and property carried. The message of the telegraph passes at once beyond the control of the sender, and reaches the office to which it is sent instantaneously.*

In *Ratterman* v. *Telegraph Company* (127 U. S., 411), and *Leloup* v. *Port of Mobile* (127 U. S., 640), the same rulings were followed.

It must be remembered in this connection that there is no essential difference between foreign commerce and interstate commerce except as to the terminus *a quo* and the terminus *ad quem*. In both instances the idea of commerce is the same. Nothing is clearer than that the mere transit of persons arriving at our ports of entry is, without reference to traffic, the subject of Congressional regulation, because it is commerce. Thus, in

People v. Compagnie, 107 U. S., 59.

People v. *Compagnie Générale Transatlantique* (107 U. S., 59), a statute of New York imposing a tax on an alien passenger arriving in this country from a foreign country was held to be unconstitutional because an undue interference with commerce, and this notwithstanding the fact that the statute declared in its title that its purpose was to raise money for the execution

of the inspection laws of the State. Mr. Justice Miller denied that "the words 'imports and exports' are used in that instrument (the Constitution) as applicable to free human beings by any competent judicial authority," and held that a freeman could not be regarded as property. The court, after holding that the word "migration" in section 9, Article I, of the Constitution, referred to entrance into this country of a free black man, decided that such entry into this country was commerce without reference to any possible connection with traffic.

Head Money Cases, 112 U.S., 580.

In the *Head Money Cases* (112 U. S., 580, 591) the constitutionality of the act of August 3, 1882, to regulate immigration, was under discussion. This act imposed a duty of fifty cents on every passenger, not a citizen of this country, and this court held that it was a valid exercise of the power to regulate commerce with foreign nations.

Henderson v Mayor, 92 U.S., 259.

In *Henderson* v. *Mayor* (92 U. S., 259) a statute of New York was under consideration, which compelled the master of a ship carrying foreigners to this country to carry out certain regulations for the supposed protection of the State. Mr. Justice Miller, after reviewing the decision of *Gibbons* v. *Ogden*, says, page 270:

> Since the delivery of the opinion in that case, which has become the accepted canon of construction of this clause of the Constitution, as far as it extends, the transportation of passengers from European ports to those of the United States has attained a magnitude and importance far beyond its proportion at that time to other

branches of commerce. It has become a part of our commerce with foreign nations of vast interest to this country, as well as to the immigrants who come among us to find a welcome and a home within our borders.

Nishimura v. U. S., 142 U. S., 651.

In *Nishimura Ekiu* v. *United States* (142 U. S., 651) the constitutionality of the act of March 3, 1891, which forbids certain classes of alien immigrants to land in the United States, was under consideration. This court held that the entrance of aliens into our country was commerce, and while it did not place the power to forbid such entrance exclusively upon the commerce clause of the Constitution, the court, in the opinion, said (p. 659):

> It (the power to exclude aliens) belongs to the political department of the Government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress, upon whom the Constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States."

Again, Mr. Justice Gray says:

> The supervision of the admission of aliens into the United States may be intrusted by Congress either to the Department of State, having the general management of foreign relations, *or to the Department of the Treasury, charged with the enforcement of the laws regulating foreign commerce.*

If the transit of persons from a foreign country to our country is commerce without respect to the purpose of their entrance into this country, then the same must be true of the transit of persons from State to State, assuming that foreign commerce is the same as interstate commerce, with the exception of the *locus in quo*. That they are identical is clearly established by the decisions of this court:

In *Gibbons* v. *Ogden*, Mr. Justice Johnson said (9 Wheat., 228):

> But the language which grants the power as to one description of commerce, grants it as to all; and, in fact, if ever the exercise of a right, or acquiescence in a construction, could be inferred from contemporaneous and continued assent, it is that of the exclusive effect of this grant.

In *Brown* v. *Houston*, 114 U. S., 630, the court say: Brown v. Houston, 114 U. S., 630.

> The power to regulate commerce among the several States is granted to Congress *in terms as absolute* as is the power to regulate commerce with foreign nations.

Mr. Justice Matthews, delivering the opinion of the court in *Bowman* v. *Chicago, etc., Railway Co.* (125 U. S., 482), said: Bowman v. Chicago, 125 U. S., 482.

> The power conferred upon Congress to regulate commerce among the States is indeed contained in the same clause of the Constitution, which confers upon it power to regulate commerce with foreign nations. The grant is conceived in the same terms, and the two powers

are undoubtedly of the same class and character *and equally extensive.*

Crutcher v. Kentucky, 141 U. S., 47.

In *Crutcher* v. *Kentucky*, 141 U. S., 47, 58, Mr. Justice Bradley said:

> It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. * * *
>
> The prerogative, the responsibility, and the duty of providing for the security of the citizens and the people of the United States in relation to foreign corporate bodies or foreign individuals with whom they may have relations of foreign commerce belong to the Government of the United States and not to the governments of the several States; and confidence in that regard may be reposed in the National Legislature without any anxiety or apprehension arising from the fact that the subject-matter is not within the province or jurisdiction of the State legislatures. And the same thing is exactly true with regard to interstate commerce as it is with regard to foreign commerce. *No difference is perceivable between the two.*

Pitts. Coal Co. v. Bates, 156 U. S., 587.

Mr. Justice Field said, in *Pittsburg Coal Co.* v. *Bates*, 156 U. S., 587:

> *The power to regulate commerce among the several States was granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations.*

The identity of the Federal power with respect to these two classes of commerce, so clearly confirmed by

the above decisions, is in no respect shaken by the excerpt from the opinion of Mr. Justice McLean in *Groves* v. *Slaughter*, 15 Peters, 449, 505, which is cited by Mr. Guthrie in support of his proposition that the power over foreign commerce is more extensive than the power over interstate commerce. While Mr. Justice McLean concurred in the judgment in that case, yet, so far as the reasoning of the majority of the court was concerned, his opinion was in effect a dissenting opinion, and it is enough to say that his attempt to distinguish between the extent of the Federal power over the two classes of commerce was repudiated by this court in the subsequent decisions to which reference has already been made.

Groves v. Slaughter, 15 Peters, 449.

This case must therefore be decided on the assumption that the power is identical over the two classes of commerce, and as the power to regulate the transit of individuals in foreign commerce has been repeatedly confirmed by the court, it necessarily follows that the same right exists with reference to the transit of individuals in interstate commerce. To rule otherwise would be to overrule an established doctrine of this court as to the identity of the power above referred to.

VII.

2. The carriage of things for hire from State to State by any means of transportation is commerce.

It is not necessary for the Government in the present cases to argue that the mere passage of a citizen from one State to another *for his own purposes* is commerce.

The cases at bar involve a narrower and less doubtful question. We need only contend that *transportation of property for hire* from State to State is commerce. The method of transportation is wholly unimportant. Conveyance of property for hire by a rowboat is as much commerce as by a the largest steam ship, and a wheelbarrow may be as completely an instrument of commerce as an express train. Transportation may be by hand and still be commerce. The telegraph boys, who delivered messages by hand, were engaged in commerce (see *Western Union Telegraph Company* v. *Pendleton, supra*), and the carriage of a pound of tea from Cincinnati, Ohio, to Newport, Ky., by a grocer boy is as much commerce between those States as the passage of the longest freight train.

In the cases at bar the carriage of things from State to State for hire is involved.

In the Champion case a *box* containing lottery tickets was transported by the Adams Express Company, through the agency of a common carrier, from Texas to California; and in the Francis case an individual, who was employed to carry the tickets from Kentucky to Ohio, crossed the boundary of those two States for the purpose of conveying the thing. We have, therefore, here not merely the transit of persons from State to State, as to which Mr. Justice Brown, in *Covington Bridge Company* v. *Kentucky* (154 U. S., 204, 218), said was commerce (*infra*, page 27), but we have the transportation for hire of a thing, and I contend that without respect to the character of the thing,

which is wholly unimportant, the fact of transportation, whether by railroad or other vehicle, or by hand, for hire, is commerce. And for this simple proposition I need only quote the words of Mr. Justice Johnson, in *Gibbons* v. *Ogden* (*infra*, page 22), where he said:

> *But it is almost laboring to prove a self-evident proposition, since the sense of mankind, the practice of the world, the contemporaneous assumption and continued exercise of the power, and universal acquiescence, have so clearly established the right of Congress over navigation and the transportation of both men and their goods as not only incidental to but actually of the essence of the power to regulate commerce.*

The force of this declaration is in no way broken by the preceding sentence, in which the Justice is speaking of navigation, for while navigation by ships was the instrumentality of commerce most familiar to the framers of the Constitution, yet it is obvious that any means of transportation is equally within the purview of the Constitution. That instrument was made for all time, and has adapted itself and will adapt itself to all the means of transportation which the ingenuity of man can devise; none is too great and none is too small to be within its power. Whether the transportation of goods is by railroad, steamship, airship, wagon, wheelbarrow, or, as in the Francis case, by hand, in all cases and equally the transportation of a thing from State to State for hire is, as Mr. Justice Johnson said, the very "essence of commerce." Such being the fact, it is

difficult to understand why a statute of the United States, which prohibits the carriage of lottery matter from State to State, is not a constitutional exercise of the power, for "carriage" is synonymous with "transportation," and to attempt to discriminate between the means of such transportation would be unwarranted judicial legislation by reading a qualifying clause into the Constitution. The appellants' contention in these cases, if affirmed by this court, would necessarily lead to an obvious inconsistency. Take, for example, the Champion case. The box of matter which was shipped from Dallas, Tex., to Fresno, Cal., paid freight rates, and unquestionably the Interstate Commerce Act can apply to it as to any other thing which the railroad carried. Congress could regulate the rates for which it would be carried, could prohibit and punish discrimination by the company between different men who would ship boxes containing lottery matter; it could compel reports from the carrying company showing the rate for which the box was carried. To hold that the Government could have no constitutional power over the carriage of the matter because the box contained lottery tickets, and at the same time to hold that interstate commerce could apply to it as any other shipment, would be an inconsistency at once glaring and absurd. It is no answer to say that the power of the Government over the shipment was because the railroad was an instrumentality of commerce and recognized as such, because it only is held to be such instrumentality because the fact of

transportation is of the essence of commerce, and the means of instrumentalities of transportation are, therefore, brought within the Federal power. In other words, transportation does not come within the Federal power because it is carried on by a railroad, but the railroad comes within the Federal power because it engages in interstate transportation, and the fact of such transportation is the very "essence" of commerce.

A fair test of the soundness of the appellants' contention is to ask whether the State of California could lawfully have passed a law taxing the transportation of the box of lottery matter from Dallas, Tex., to Fresno, Cal., or could the State of Ohio have taxed the carriage of the policy ticket from Newport, Ky., to Cincinnati, Ohio. Their impotence to do so is predicated on the theory that such carriage is commerce.

If Congress can pass an act providing that the train which bore the lottery matter from Dallas, Tex., to Fresno, Cal., shall have a certain form of brake or coupler, it can not lack the power to prohibit the train from carrying any particular kind of freight.

Even assuming that a lottery ticket was not an article of commerce, yet, in determining whether transit or transportation are commerce, it is not practicable to distinguish between the subject-matter of the transportation or the purpose of the transportation. For purposes of Federal commerce, transportation in any form is treated as a unit. *The entry into our country of all passengers is commerce, whether they come here to trade*

with us or not. The transmission of all telegraph messages from State to State is commerce, whether the messages refer to commercial transactions or not. Similarly, the transportation of all freight for hire must be commerce, even if the thing conveyed for hire be not an article of commerce in itself. Such is the clear effect of the passenger and telegraph cases, to which extended reference has already been made. I submit, therefore, that as transportation is commerce—as "inseparable from it as vital motion is from vital existence" (Mr. Justice Johnson, in *Gibbons* v. *Ogden*)—this view is determinative of the questions involved.

VIII.

LOTTERY TICKETS ARE ARTICLES OF COMMERCE.

But, assuming that the character of the thing conveyed or transported is an important question, I submit that lottery tickets—title to which pass by delivery and which from time immemorial have been subject of barter and sale—are articles of commerce.

In the first place, Congress has held them to be articles of commerce, and this court has ruled that the judgment of the legislative branch of the Government is, in this respect, controlling upon the judiciary. In this respect there is a clear distinction between the effect of State statutes and acts of Congress. Unquestionably no State statute, by any declaration as to what is an article of commerce, could trench upon the supreme authority of the Federal Government with regard to commerce, and therefore State statutes which have sought to prohibit altogether certain forms of traffic

have been held not to divest the articles in question of their commercial character, or to forbid their importation into a State in the original package. But when Congress, by legislation, recognizes a traffic in a given form of property, the judiciary will not question the *fact* of such traffic or the commercial character of the article thus bought or sold, but will simply consider whether Congress has exceeded its authority with reference to the subject-matter of the legislation. This was clearly held in *Leisy* v. *Hardin* (135 U. S., 100), where the present Chief Justice said:

Leisy v. Harden, 135, U. S. 100.

> *Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we can not hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized* can be controlled by State laws amounting to regulations while they retain that character; although at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them.

And again, *in re Rahrer* (140 U. S., 545), the present Chief Justice negatives the contention that State legislatures had power to determine what was legal commerce, and says:

In re Rahrer, 140 U.S., 545.

> If this be the true construction of the constitutional provision, then the paramount power of Congress to regulate commerce is subject to a very material limitation; *for it takes from Congress and leaves with the States the power to deter-*

mine the commodities or articles of property which are the subjects of lawful commerce.

I have already referred to existing legislation which deals with lottery tickets as articles of commerce (*infra*, pp. 8, 9). It will there be seen that the traffic has been recognized as one to be regulated since 1868, when the mails were closed for its purposes; and that by the Wilson tariff act of 1894, it was recognized as an existing importation which should be prohibited, and which, if the law were violated, could be the subject of forfeiture and seizure as any other import. The existing legislation itself is a legislative declaration that an extensive traffic does exist in lottery matter, and that it is largely effected through the medium of foreign and interstate commerce. I submit therefore, under the authorities above cited, that the judicial department of the Government should not review this declaration of the legislative branch as to the commercial character of a lottery ticket.

Without regard to this legislative declaration, however, it seems clear that lottery tickets are articles of commerce in the sense that they are things which have been for many generations the subjects of barter and sale. It is true that under the stress of repressive legislation the traffic in them in this country has materially lessened, but the necessity of legislation under consideration clearly manifests that the traffic has by no means ceased, and is already of sufficient magnitude to justify the National Legislature in closing the channels of foreign and interstate commerce to this merchandise.

The fact that the United States and the various States have seen fit to make that illegal which was before legal can not in any way affect the character of lottery tickets as articles which have been for centuries the subject of purchase and sale. Whether an article is or is not an article of commerce is dependent, not upon the question of its noxiousness or usefulness, nor upon the question whether the States have prohibited it within their borders in the exercise of their police power, but upon the fact as to whether such articles have been, in the ordinary and usual channels of trade, the subjects of purchase and sale. It is not a question of opinion as to their utility or morality. It is a question of fact. Any article that men buy or sell is an article of commerce, and as such within the power of Congress when its exchange is interstate in its character. A State has the right under the reserved police power to protect its citizens against injury or fraudulent sales, even by excluding articles of commerce. High explosives or unwholesome articles of food are articles of commerce, but as their introduction into a State may endanger the lives and comfort of the citizens, the method of such introduction may be regulated by State legislation, where such legislation is plainly within the legitimate ends of the police power. But such regulation does not make the article less an article of commerce. The introduction of dynamite may be regulated to an extent which is practically exclusive, but dynamite is none the less an article of commerce. Putrid meat is an article of commerce. It is bought and sold as a fertilizer or as a material for

soap. It is not, however, fit for food, and any State legislation regulating its introduction into the State, while valid as an exercise of police power, can not make it less an article of commerce. It is true that this court has at times spoken of such articles as not articles of commerce, but it only meant by such expressions to mean that such articles, which endanger the lives and comfort of citizens, have no commercial rights superior to the police power of inspection reserved to the States. The only test as to whether a given article is an article of commerce is whether it is, or has been, customarily the subject of purchase and sale, and this must be determined by considering whether such an article is recognized as a subject of purchase and sale by the commercial world.

Schollenberger v. Pa., 171 U. S., 1.

It was said in the case of *Schollenberger* v. *Pennsylvania* (171 U. S., 1, 7, and 8):

> In the examination of this subject the first question to be considered is whether oleomargarine is an article of commerce. No affirmative evidence from witnesses called to the stand and speaking directly to that subject is found in the record. We must necessarily determine the question with reference to those facts which are so well and universally known that courts will take notice of them without particular proof being adduced in regard to them, and also by reference to those dealings of the commercial world which are of like notoriety.

It is a fact of common notoriety that from the beginning of the Republic to the present day lottery

tickets have been the subject of general purchase and sale in this and all civilized countries. If further proof is needed than our common knowledge, the statutes of the United States and the decisions of the courts afford ample corroboration of this fact.

It is also a fair inference that the legislation which prevailed both in State and nation in the last century and at the beginning of the present, and which almost uniformly authorized such lotteries for all purposes, public and private, religious, political, and philanthropic, carried with it a recognition that at that time lottery tickets were recognized as a proper and legitimate subject of purchase and sale. To the fathers who framed the Constitution the purchase of lottery tickets was a matter of everyday occurrence, and carried with it no moral reflection whatever. Such lotteries were conducted by distinguished officials, authorized by laws, and sanctified even to sacred uses, for it is a matter of common knowledge that not merely public works, such as canals, bridges, public buildings, and schoolhouses, but also churches, were built by means of lotteries. For example, the steeple of Christ Church in Philadelphia was built by a lottery in which pulpit and pew were alike engaged. Thus the first American Congress provided (see 2 Stat., 726) that the corporation of the city of Washington shall have full power to authorize the drawing of lotteries for effecting any important improvement in the city which the ordinary funds or revenue thereof will not accomplish;

provided, that the object for which the money is intended to be raised is first submitted to the President of the United States and shall be approved by him. Under this act of Congress ten successive lotteries were annually held by the Government from 1812 to 1821, and in all of them the President of the United States was a participant to the extent that the purposes for which the money was thus raised were submitted to and approved by him. It is a great mistake to suppose that a lottery ticket conveyed no right of action or property interest. Whatever is the present effect upon such commercial commodities of restrictive legislation, they formerly conveyed unquestioned property rights which could be enforced in courts of law. *Clark* v. *The Mayor of the City of Washington* (12 Wheat., 40).

In considering the nature of a lottery ticket it is well to distinguish between the abstract legal idea of such a ticket and its commercial or popular nature. For commercial purposes it must be regarded in the light in which it is bought and sold. And, so viewing it, it is more than a piece of paper; it is a *thing* which not merely evidences value, but which carries value with it when bought and sold or transported. Before the drawing takes place it has value in the hands of its possessor; he can obtain value for it, and such value increases or diminishes as the result of the drawing affects it. To transfer title to it requires no indorsement, and no written assignment is necessary and no consent is required

to such transfer on the books of the company. It is more than a contract; more than a certificate of a share of corporate stock; more than a bond. It is the *thing* itself, which, from time immemorial, has been bought and sold and has value as such. Thus, the present ticket says, "This whole ticket entitles the *holder* thereof to the whole of such prize," etc. As such, it was a thing of value, which passed property of value from man to man by mere physical delivery, and which was bought and sold by men as a thing of inherent value. In buying and selling such articles men are not guided by refined and metaphysical distinctions such as may trouble the legal mind, and the popular conception of a lottery ticket should determine in giving it its true character as an article of commerce.

To appellant's suggestion that lottery tickets are only the evidence of value, and not an intrinsically valuable commodity, we reply that the commercial power of the Union can extend to written instruments, where they affect or are instruments of the purchase and sale of property interests. Thus in the case of *Almy* v. *California* (24 Howard, 169) a duty upon a bill of lading was held to be unconstitutional; and while the Almy case was placed on the mistaken ground that goods shipped from San Francisco to New York were exports, yet in the subsequent case of *Woodruff* v. *Parham* (8 Wall., 123) the decision was placed on the true ground that the tax was void as a regulation of commerce; and the two cases, therefore, established that a tax on a written instrument, which

Almy v. California, 24 Howard, 169.

Woodruff v. Parham, 8 Wall., 123,

is of itself of no intrinsic value and which simply represents title, and which is ordinarily used in the purchase and sale and interstate transportation of commodities, is a regulation of interstate commerce, and if imposed by a State is void. See also the later case of *Fairbanks* v. *United States* (181 U. S., 283).

Fairbanks v. U. S., 181 U. S., 283.

A ticket is certainly not more intangible or less valuable than a telegraph message, which is neither visible nor tangible. It appears in the Champion case that the telegraph was largely used in giving the results of the drawings to the various agencies throughout the country. It can not be questioned, in view of the telegraph cases, that the transmission by the defendants in the Champion case of the drawings of the lottery over the telegraph wires was commerce. Is it, then, open to question that the conveyance of the ticket, which represented the interest in the lottery, and which had a property value as such, and which was vendable by mere physical delivery, is equally commerce? If a citizen of Pennsylvania sells to a citizen of New York United States bonds, and ships the bonds to him by express, and obtains in return the purchase price, is not this as much a commercial transaction as though a barrel of wheat and not a bundle of bonds were the subject of the traffic?

The Insurance Cases.

The only cases that seem to militate against this theory are the so-called Insurance cases,[a] and upon these

[a] *Paul* v. *Virginia*, 8 Wall., 168 (1868); *Ducat* v. *Chicago*, 10 Wall., 410 (1870); *Liverpool Insurance Company* v. *Massachusetts*, 10 Wall., 566 (1870); *Philadelphia Fire Association* v. *New York*, 119 U. S., 110 (1886); *Hooper* v. *California*, 155 U. S., 648 (1894); *Allgeyer* v. *Louisiana*, 165 U. S., 578 (1896); *New York Life Insurance Company* v. *Cravens*, 178 U. S., 389 (1900).

the appellants seem to place their chief reliance. I submit that there is an obvious distinction between a lottery ticket or a bond and a policy of insurance, for the reason that the former are usually the subjects of purchase and sale, whereas policies of insurance are not customarily the subject of purchase and sale. It is true that a policy of insurance can be assigned to one having an insurable interest, but according to commercial usage policies of insurance are not bought and sold in the sense that bonds or lottery tickets are.

The Insurance cases, carefully read, are not authority for the proposition that a written instrument, like a bond or lottery ticket, which passes title to property upon delivery, may not be a commercial commodity. It will be noticed that this court has never had the question squarely presented whether Congress may enact legislation regulating the interstate insurance business. In reading the court's opinion upon these Insurance cases the question actually presented to the court must be kept in mind. (*Woodruff* v. *Parham*, 8 Wall., 123, 138.) The precise point decided is that the insurance business is not so commercial in character that a State is obliged to admit such foreign insurance corporations. The foundation of all these decisions was that such corporations, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created, and that, therefore, their right to do business in another State depends upon the grace of such State, which can impose terms or restrain altogether.

A careful examination of all of these cases will further disclose the fact that each of them was predicated upon the fact that the method of transacting the business made the transactions *intra-state* and not *interstate.* The contract of insurance was completed within the borders of the State in which the insured had his domicile, the insuring company acting through a local representative, of whom Mr. Justice White said, in *Hooper* v. *California*, 155 U. S., 648, that "in the discharge of his business he is the representative of both parties to a certain extent."

Hooper v. California, 155 U. S., 648.

This will be clearly seen by reference to the leading case, upon which all the others is based, namely, *Paul* v. *Virginia*, 8 Wall., 168, where Paul, a resident of Virginia and representing in that State certain New York insurance companies, "issued a policy in Virginia in their name to a citizen of Virginia." This court, in an opinion by Mr. Justice Field, said:

Paul v. Virginia, 8 Wall., 168.

> *Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.*

It is true that certain expressions in *Hooper* v. *California*, supra, might seem to give the doctrine a broader

meaning, but the true doctrine of this case is laid down by this court in the later case of *Allgeyer* v. *Louisiana*, 165 U. S., 578, and is thus stated by Mr. Justice Peckham: Allgeyer v. Louisiana, 165 U. S., 578.

> *The court held that the whole transaction amounted to procuring insurance within the State of California by Hooper, residing there and for a resident in the State, from an insurance company not incorporated under its laws and which had not filed the bond required by the laws of the State relative to insurance;* that Hooper, the defendant, acted as the agent of his principals in New York City, who were average adjusters and brokers there, and who had a place of business in San Francisco, and that Hooper, as such broker, having applied for the insurance to his principals in New York City, received the policy from them for delivery in San Francisco, and the premium was there paid.

No case has as yet squarely presented an insurance transaction which was not thus effected through a local agency. The nearest approach to it is the Allgeyer case, where a citizen of Louisiana made such a contract in New York upon property which was in Louisiana, and it was held that the State of Louisiana could not restrict his freedom even with reference to property within its legislative power. Whether, if Allgeyer had written directly to the New York company and made his application for insurance, and the New York company had sent him to New Orleans by express a policy of insurance, without the intervention of a local agent, the transaction would become interstate com-

merce has not yet been expressly decided by this court. In such a transaction it is obvious that physical interstate transportation twice takes place. The insured would transport across the State boundary his money for a commercial purpose, and in return there would be a physical transportation of the policy. That this is a commercial transaction in the general sense of the term can hardly be questioned. That it is interstate is likewise obvious. It would seem to be intercourse for commercial purposes between citizens of different States within the meaning of Chief Justice Marshall in *Gibbons* v. *Ogden.*

It is, however, not necessary for the court to pass upon this hypothetical case, which is only given by way of illustration, for the case at bar is clearly distinguishable. An insurance policy is not a commodity. It is not a thing which is customarily bought and sold and recognized as a subject of such exchange. Indeed, public policy forbids its alienation except to the limited class, having an insurable interest. A lottery ticket, however, as has been amply shown, was, at the time of the framing of the Constitution, a subject of purchase and sale in every civilized country, and is to-day to an extent far greater that is generally believed. The physical transportation, therefore, of such lottery tickets is that of an exchangeable commodity, and as such it is a commercial article, and its transportation is commercial in character.

IX.

DOES THE POWER TO REGULATE INCLUDE THE POWER TO PROHIBIT?

As to this question I submit three propositions:

(1) That the power to prohibit as a regulation of trade is absolute, except where expressly limited by other sections of the Constitution.

(2) The power to prohibit exists for any purpose referable to the legitimate objects of government, such as the preservation of health, the protection of morals, and the safety of life.

(3) The power to regulate interstate commerce being an express power, with no express restrictions on the prohibition of interstate traffic in a given article, the purposes for which Congress may prohibit, are not reviewable by the courts.

That the power to prohibit is absolute, and the legislature is the final judge of the wisdom of its exercise, seems to be clearly established upon both principle and authority.

I have already referred (infra, pp. 11–18) to the conditions that prevailed prior to the constitutional convention and the familiarity of the colonists with prohibitive trade regulations.

Indeed, the most familiar exercise of the power to regulate commerce in the minds of the men who framed the Federal Constitution was, doubtless, the total or partial prohibition of traffic in particular

articles. This was often accomplished by duties; and those duties, so far as they were laid for prohibition, total or partial, and not for revenue, were regarded as regulations of commerce. Thus Chief Justice Marshall, in his Life of Washington, uses the following language in speaking of the American colonies before the Stamp Act of 1765 (Vol. II, pp. 76–77, 1st ed.):

> In the middle and southern provinces the authority of such of the acts of Parliament of internal revenue as were made for America, as well as those for the regulation of commerce, even by the imposition of duties, provided those duties were imposed *for the purpose of regulation*, had been at all times admitted.

And again the Chief Justice says (Vol. II, p. 81, 1st ed.), speaking of the Stamp Act:

> The colonies had long been in the habit of submitting to duties laid on their trade, and had not generally distinguished between those which were *imposed for the mere purpose of regulating commerce* and this, which, being also designed to raise a revenue, was in truth to every purpose a real tax.

In *Gibbons* v. *Ogden* (9 Wheat., 1, 202), speaking of the constitutional restriction upon the powers of the States in the matter of duties on tonnage, the Chief Justice says:

> It is true that duties may often be, and in fact often are, imposed on tonnage with a view to the regulation of commerce; but they may be also imposed with a view to revenue; and it

> was therefore a prudent caution to prohibit the States from exercising this power. The idea that the same measure might, according to circumstances, be arranged with different classes of power was no novelty to the framers of our Constitution. Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussions which preceded the war of our Revolution, and all of them were well read in those discussions. *The right to regulate commerce, even by the imposition of duties, was not controverted; but the right to impose a duty* for the purpose of revenue produced a war as important, perhaps, in its consequences to the human race as any the world has ever witnessed.

The remarks of the Chief Justice are fully borne out by history; and the classification of import duties into revenue duties and regulations of commerce lay at the basis of the American doctrine which led to the Revolutionary war. We may refer to the journals of the Continental Congress, vol. 1, pp. 28, 175, 176; vol. 2, p. 189; the examination of Dr. Benjamin Franklin at the bar of the House of Commons on February 7, 1776 (1 Bigelow's Life of Franklin, pp. 478, 479); John Dickinson's "Letters from a Farmer," published in 1768, pp. 15, 18–19, 37–42, 43 (note), 60, 61, 66; Dr. Franklin's letter to Joseph Galloway of February 25, 1775 (8 Spark's Franklin's Works, p. 146); John Adams's letter to Jay of July 19, 1785 (Works of John Adams, vol. 8, pp. 282, 283). The same view was maintained by the leading jurists and statesmen of the first two generations after the adoption of the Constitution; and with

practical unanimity they based the protective tariff duties on the commerce clause of the Constitution. (1 Story on the Constitution, sec. 963; 2 id., 1080 et seq.; James Madison's letter to Joseph C. Cabell of March 22, 1827 (Writings of James Madison, vol. 3, p. 571); his letter to Cabell of September 18, 1828 (id., p. 636); Henry Clay's reply to Barbour, March 31, 1824 (Annals of Congress, p. 1994); Gulian C. Verplanck's letter to Drayton, New York, 1831, pp. 21–23; Speech of Thomas Smith Grimké, etc., Charleston, 1829, p. 51. Mr. Grimké states that (p. 62):

> In 1790 Edmund Randolph, in his opinion to the President, states among the heads of the power to regulate commerce with foreign nations the power to *prohibit* their commodities to impose or increase the duties on them.

In a letter from James Madison to Joseph C. Cabell, September 18, 1828, above referred to, the same thought is expressed. Mr. Madison writes:

> It is a simple question under the Constitution of the United States whether "the power to regulate trade with foreign nations," as a distinct and substantive item in the enumerated powers, embraces the object of encouraging by duties, restrictions, and *prohibitions* the manufactures and products of the country. And the affirmative must be inferred from the following considerations.

He then proceeds to give eight cogent reasons, drawn from the history of the period and from the Constitution itself, why the power to regulate trade

includes the power to encourage our own manufactures by discouraging the importation of foreign manufactures, either by restrictive or absolute prohibitory legislation. Speaking of the conditions that preceded the adoption of the Federal Constitution, he says:

> During the delays and discouragements experienced in the attempts to invest Congress with the necessary powers the State of Virginia made various trials of what could be done by her individual laws. She ventured on duties and imposts as a source of revenue; resolutions were passed at one time to encourage and protect her own navigation and shipbuilding; and in consequence of complaints and petitions from Norfolk, Alexandria, and other places against the monopolizing navigation laws of Great Britain, particularly in the trade *between the United States and the British West Indies*, she deliberated, with a purpose controlled only by the inefficacy of separate measures, on the experiment of forcing a reciprocity by *prohibitory regulations* of her own. (See Journal of House of Delegates in 1785.)

In No. 11 of the Federal Papers Alexander Hamilton writes in support of the Constitution:

> If we continue united, we may, in a variety of ways, counteract a policy so unfriendly to our prosperity. By *prohibitory regulations*, extending, at the same time, throughout the States, we may oblige foreign countries to bid against each other for the privileges of our markets.

Again, he says:

> It has been said that *prohibitions* on our part would produce no change in the system of Britain, because she could prosecute her trade with us through the Dutch, who would be her immediate customers and paymasters, for such articles as were wanted for the supply of our markets.

In a letter written by Edmund Randolph, October 16, 1787, to the speaker of the Virginia house of delegates, he says:

> No sooner is the merchant prepared for foreign ports, with the treasures which this new world kindly offers to his acceptance, than it is announced to him that they are shut against American shipping, or opened under oppressive regulations. He urges Congress to a counter policy, and is answered only by a condolence on the general misfortune. He is immediately struck with the conviction *that until exclusion shall be opposed to exclusion, and restriction to restriction,* the American flag will be disgraced. For who can conceive that thirteen legislatures, viewing commerce under different regulations and fancying themselves discharged from every obligation to concede the smallest of their commercial advantages for the benefit of the whole, will be brought into a concert of action and defiance of every prejudice.

James Winthrop, in a letter dated January 14, 1878, to the Massachusetts convention, said:

> By section 8 of Article 1 Congress are to have the *unlimited right* to regulate commerce,

> external and internal, and may, therefore, create monopolies which have been universally injurious to all the subjects of countries that have adopted them, except the monopolists themselves.

Apart from the history of the period and the utterances of contemporaneous writers, the Constitution itself affords the most convincing proof that the right to regulate included the right to prohibit.

This is shown beyond question when we consider the great compromises of the Constitution. *So clearly did the framers recognize that the power to regulate commerce would include the power to prohibit, that they inserted an express exception to such power.*

Article I, section 9, provides:

> The immigration or importation of such persons as any of the States now existing shall think proper to admit shall not be *prohibited* by Congress prior to the year 1808, but a tax or duty may be imposed on such importation, not exceeding $10 for each person.

Without the concession of this exception the Constitution could not have been adopted, and it seems, therefore, clear that the framers were of the opinion that after 1808 Congress could, under the general power to regulate foreign commerce, prohibit the importation of slaves.

If the power to regulate did not include the right to prohibit, all the heated discussion in the Constitutional Convention on the prohibition of the slave trade was a case of "much ado about nothing"—a very tempest in

a teapot. Is this conceivable? Were the delegates from the North, who insisted upon the power to prohibit the importation of slaves as a regulation of commerce, and the delegates from the South, who struggled with equal tenacity to reserve the importation of slaves, equally in error as to their own meaning? And when they united upon the compromise which gave unlimited commercial power as to all objects except the slave trade, and as to that after 1808, were they both the victims of a gigantic delusion?

It can not be contended that the power to prohibit the migration of freemen and the importation of slaves are referable to any other clause in the Constitution. It is clear that the framers of the Constitution regarded it as inherent in the power to regulate trade, and the exception that such legislation should not be made prior to 1808 is the clearest possible statement that after that year the prohibitory regulation could be made under the commerce clause of the Constitution.

The argument from authority seems as conclusive as the argument from the history of the period. The extent of the power was originally laid down by Marshall, in *Gibbons* v. *Ogden*, 9 Wheat., 1, 196, as follows:

> 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.*

This doctrine has been reiterated in a very bead roll of authorities and, so far as I know, has never been disputed. In *Clark* v. *Field*, 143 U. S., 649, where the constitutionality of the McKinley bill was under discussion, Mr. Justice Harlan gave the following illustrations of the power of prohibition:

Clark v. Field, 143 U.S., 649.

> The authority given to the President by the act of June 4, 1794, to lay an embargo on all ships and vessels in the ports of the United States "whenever, in his opinion, the public safety shall so require," and under regulations, to be continued or revoked "whenever he shall think proper;" by the act of February 9, 1799, to remit and discontinue, for the time being, the restraints and prohibitions which Congress had prescribed with respect to commercial intercourse with the French Republic, "if he shall deem it expedient and consistent with the interest of the United States," and "to revoke such order, whenever, in his opinion, the interest of the United States shall require;" by the act of December 19, 1806, to suspend, for a named time, the operation of the nonimportation act of the same year, "if, in his judgment, the public interest should require it;" by the act of May 1, 1810, to revive a former act, as to Great Britain or France, if either country had not, by a named day, so revoked or modified its edicts as not "to violate the neutral commerce of the United States;" by the acts of March 3, 1815, and May 31, 1830, to declare the repeal, as to any foreign nation, of the several acts imposing duties on the tonnage of ships and vessels, and on goods, wares, and merchandise imported into the United States,

> when he should be "satisfied" that the discriminating duties of such foreign nations, "so far as they operate to the disadvantage of the United States," had been abolished; by the act of March 6, 1866, to declare the provisions of the act forbidding the importation into this country of neat cattle and the hides of neat cattle, to be inoperative, "whenever, in his judgment," their importation "may be made without danger of the introduction or spread of contagious or infectious disease among the cattle of the United States," must be regarded as unwarranted by the Constitution, if the contention of the appellants in respect to the third section of the act of October 1, 1890, be sustained.

In the exercise of its power to regulate foreign commerce Congress has never hesitated to prohibit commerce in any particular article, or even to stop foreign commerce altogether, either for a fixed period of time or indefinitely. A well-known instance of partial prohibition is that of obscene literature, which has been part of our laws ever since the tariff act of August 30, 1842 (ch. 270, sec. 28). To the latter class belong the well-known nonimportation and embargo laws of the period prior to the war of 1812. (See *Gibbons* v. *Ogden*, 9 Wheat., 1, 192-193; 2 Story on the Constitution, secs. 1264, 1289, 1290.)

Congress has the same power over interstate commerce as over commerce with the Indian tribes. The question whether, under its power to regulate commerce with the Indian tribes, it could exclude any selected article from such commerce as deleterious,

came up for decision in *United States* v. *Holliday* (3 Wall., 407, 416–418), and was decided in the affirmative in an opinion by Mr. Justice Miller. This ruling was reaffirmed in *United States* v. *43 Gallons of Whiskey* (108 U. S., 491), in an opinion by Mr. Justice Davis. Both of these cases related to the statute prohibiting the sale of spirituous liquors, whose constitutionality has since then been assumed without question. (*United States* v. *Le Bris*, 12 U. S., 278; *Sarlls* v. *United States*, 152 U. S., 570; *United States* v. *Mayrand*, 154 U. S., 552.)

If Congress can exclude obscene literature from foreign commerce, why not from interstate commerce also; and if it can exclude obscene literature, why can it not exclude lottery tickets? If it can exclude spirituous liquors from commerce with the Indian tribes, why not from interstate commerce also; and if it can exclude spirituous liquors, why can it not exclude lottery tickets?

The principle has in effect already been decided by this court. States have undertaken in the interests of the public health to exclude importations of a certain kind from other States, and their legislation has been held by this court to be unconstitutional. (*Railroad Co.* v. *Husen*, 95 U. S., 465; *Minnesota* v. *Barber*, 136 U. S., 313; *Brimmer* v. *Rebman*, 136 U. S., 78; *Voight* v. *Wright*, 141 U. S., 62.) These laws were not held to be void, because they in effect levied taxes upon imports; for it is well settled that the word "imports" in the Constitution refers only to articles brought in

from foreign countries. (*License cases*, 5 How., 504, 623; *Woodruff* v. *Parham*, 8 Wall., 123; *Brown* v. *Houston*, 114 U. S., 622, 628; *Coe* v. *Errol*, 116 U. S., 517, 526; *Pittsburg Co.* v. *Louisiana*, 156 U. S., 590, 600.)

The laws were held void because they were regulations of commerce. But the Constitution does not expressly prohibit States from regulating commerce. It merely gives the power of regulation to Congress. Whenever, therefore, this court has held a State law void as being a regulation of commerce, it has impliedly held that a law to the same effect could constitutionally be passed by Congress; that is, so far as Congress is not restrained by some express prohibition.

The power of Congress to prohibit any particular form of traffic, in its discretion, however, has been recently passed upon in the *Addyston Pipe case* (175 U. S., 211), in which Mr. Justice Peckham said:

> In *Gibbons* v. *Ogden* (*supra*), the power was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution.
>
> Under this grant of power to Congress, that body, in our judgment, may enact such legislation as shall declare void and *prohibit* the performance of any contract between individuals and corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce. (And when we speak of interstate we also include in our meaning foreign commerce.) We do not

assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned.

The power to regulate interstate commerce is, as stated by Chief Justice Marshall, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contract of the nature in question from the jurisdiction of that body. Nor is any such limitation contained in that other clause of the Constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law.

And, again, the Justice says:

The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the States. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law *prohibiting* the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate to a greater or less degree commerce among the States.

The legislative history of the United States gives many instances of prohibitory regulations of trade, none of which, to my knowledge, has ever been declared unconstitutional. Reference has already been made to the embargo acts and the prohibitions of trade with the Indians. The exclusion of aliens has already been discussed, and the identity of foreign and interstate commerce established by decisions of this court. (Infra, pp. 33–35.)

Recent familiar instances are the prohibition of the importation of adulterated or unwholesome food or drugs and other things injurious to health (acts of August 30, 1890, March 2, 1897); the importation and exportation of diseased cattle (act of August 30, 1890); the interstate commerce in diseased live stock (act of May 29, 1884); the importation of obscene matter (acts of March 2, 1857, March 3, 1873); the importation of women for immoral purposes (act of March 3, 1875); the importation of persons under contract to perform labor (acts of February 26, 1885, February 23, 1887, March 3, 1891, March 3, 1893); Chinese-exclusion act (July 5, 1884); the immigration of convicts and diseased persons (act of March 3, 1875); the Sherman anti-trust law (act of June 27, 1890); the Lacey bill, prohibiting the interstate transportation of game killed in a State where prohibitory game laws exist (act of May 25, 1900). The Sherman anti-trust law is in itself a prohibition, *pro tanto*, of commerce, but its constitutionality has been affirmed in the cases of *United States* v. *Joint Traffic Association* (171 U. S., 505) and

U. S. v. Joint Traffic Assn., 171 U. S., 505.

United States v. *Trans-Missouri Freight Association* (166 U. S., 290). U. S. v. Trans. Miss. Assn., 166 U. S., 290.

In this connection I call especial attention to *In re Rahrer*, 140 U. S., 545. In re Rahrer, 140 U. S., 545. That case evidences very strongly the power of Congress to prohibit interstate trade. The act of August 8, 1890, was passed by Congress with the full knowledge that in certain States of the Union the manufacture and sale of a recognized article of commerce was absolutely prohibited, and to supplement such prohibition Congress enacted "that all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Disregarding the mere form of words, and looking to the substance of this act, in connection with State legislation, it was a virtual prohibition of transportation to that State. It is obvious that the power to pass such a law could not depend in any wise upon the State statute, but must be inherent in Congress, and therefore an absolute prohibition of transportation would have been valid if there had been no State statute. This court held the virtual prohibition of the

transportation of liquors to certain States a valid exercise of constitutional power.

The present Chief Justice says (p. 555):

> The power of Congress to regulate commerce among the several States, when the subjects of that power are national in their nature, is also exclusive. *The Constitution does not provide that interstate commerce shall be free, but by the grant of this exclusive power to regulate it it was left free except as Congress might impose restraint.* Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States.

Again, the Chief Justice says (p. 562):

> No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule *which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.*

Recognizing that the Federal power over commerce could be supplemental to the police powers of the State in conserving the public health or morals, the Chief Justice says (p. 564):

> Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power

to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction.

In this connection it is well to remember that this act was not passed to conflict with or trespass upon the police powers of the State. Just as the Wilson Act, which was sustained in *In re Rahrer* (140 U. S., 545), was designed to make effective the police statutes of the State where prohibitory liquor laws were in force, this act of Congress was obviously intended to remove an obstruction which the channels of interstate trade presented to the various States in their attempt to suppress the lottery traffic. It is well known that all such attempts on the part of States have largely failed for the want of Congressional action with respect to interstate commerce. As long as lottery matter can be imported from other States, or from foreign countries, the local statutes of such States will be ineffective. So fully is this recognized that one Western State has recently considered the wisdom of repealing its prohibitory statutes with reference to lotteries and authorizing a lottery as a fiscal agency of the State, in imitation of France, Austria, and other European nations, and the chief argument for such legislation has been that as it has been impossible to prevent the people of the States from purchasing lottery tickets where the situs of the lottery is in a foreign country or in another State, it would be better for the State to have its own lottery, and thus guarantee the fairness of its administration. Indeed, the importance of these cases is that if

In re Rahrer, 140 U. S., 545.

this act be declared unconstitutional, and there be no power in Congress to suppress interstate commerce in lotteries, then the demoralization of these business enterprises can not be successfully combated. Is it possible that the Federal Government is so impotent that when it sees the channels of interstate commerce used as a means to strike down the police powers of the State that it can not assist the States in their laudable purpose of suppressing this demoralizing business?

X.

2. The power to prohibit exists for any purpose referable to the legitimate objects of government, such as the preservation of health, the protection of morals, and the safety of life.

It is not essential, however, for the Government to contend for an absolute power of prohibition, and it may well be that where a prohibition is not referable to some of the police powers of a sovereign State, or to the great aims for which all government is founded, and where therefore such prohibition is an undue trespass upon the liberties of the citizens, that the judicial department of the Government would have the power to declare such a law void. The bill of rights contained in the amendments to the Constitution may well prohibit many arbitrary and unwarranted prohibitions of trade between the States.

Any prohibition that would lead to a preference to any port, or that would destroy the immunities and privileges of citizenship, would present a very different question from that involved in the cases at bar. In

other words, there is as to interstate trade a Federal police power, and the ends that justify the State police power—the protection of life and property and the conservation of public morals—justify the other. This Federal police power is manifested in the legislation previously referred to (see p. 66), where the conveyance of obscene matter, the immigration of immoral aliens, the transportation of diseased cattle, etc., are instanced.

The ends for which the Federal Government was formed are further subserved when the Federal power aids the police powers of the State in the enforcement of internal regulations to the extent of preventing the channels of interstate trade from being an obstruction to the enforcement of police regulations. Thus the game laws, which forbid the transportation of game which has been killed within a State in defiance of its game laws, and the legislation reviewed *In re Rahrer*, which practically forbade the transportation of liquor to States where prohibitory laws existed, are instances where the Federal police power was invoked, not to strike down, but to aid the police powers of the State in the due enforcement of its laws.

Steam and electricity have woven the American people into a closeness of life of which the framers of the Constitution never dreamed, and the necessity for Federal police regulations as to any matter within the Federal sphere of power becomes increasingly apparent. The constitutionality of arbitrary prohibitions can be discussed when such a case arises, and as yet no such case has arisen, but a reasonable and proper

prohibition of immoral or unsafe trade through the channels of interstate commerce is a police power which belongs to the Republic as the sovereign authority over interstate trade. Such police power must exist somewhere as to interstate trade. It can not be nonexistent. Obviously it does not exist in the States; therefore it must exist in the Federal Government, and there is nothing in the legislative or judicial history of the country that in any manner gainsays this conclusion.

XI.

3. The power to regulate interstate commerce being an express power, with no express restrictions on the prohibition of interstate traffic in a given article, the purposes for which Congress may prohibit are not reviewable by the courts.

An implied power can be exercised only for the purposes for which it is required, but an express power is unlimited and may be exercised whenever Congress in its discretion shall see fit. Thus in *McCulloch* v. *Maryland* (4 Wheat., 316, 421) Chief Justice Marshall said of the power to incorporate:

McCulloch v. Maryland, 4 Wheat., 316.

> Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the Government.

It may be argued that this prohibition of lottery traffic is in aid of the police power of the States, or even an attempt by Congress to supply deficiencies in

the exercise of police power by certain States; and that Congress is not vested with such police power. Were this so, nevertheless Congress, having an express and unlimited power to regulate interstate commerce, may do so without having its reasons questioned. (See *Doyle* v. *Continental Ins. Co.*, 94 U. S., 535, 541.) It is well settled that Congress has no power to regulate an agricultural or manufacturing industry within a State (*United States* v. *E. C. Knight Co.*, 156 U. S., 1, and cases cited); yet, as above shown, it has always claimed and exercised a right to use its commercial power for the purpose of directing the course of development of these industries. Congress has no power to regulate the descent of real property in the various States; yet it has always had, and frequently exercised, the power to make treaties for the purpose of altering these laws of descent on behalf of the subjects of favored European nations. (*Hauenstein* v. *Lynham*, 100 U. S., 483, and cases cited; *Geofroy* v. *Riggs*, 133 U. S., 258, 266-267.) The exclusion of obscene articles from foreign commerce and of spirituous liquors from commerce with the Indian tribes is for purposes precisely similar to those which inspire our anti-lottery legislation.

Doyle v. Ins. Co., 94 U. S., 535.

United States v. Knight, 156 U. S., 1.

Hauenstein v. Lynham, 100 U. S., 483.

Geofroy v. Riggs, 133 U. S., 258.

XII.

THE FREEDOM OF THE PRESS NOT ABRIDGED.

Two minor questions remain to be noted. In the brief filed by ex-Senator Edmunds it was suggested that the statute now under consideration was an

abridgment of the freedom of the press. On the last oral argument counsel for appellant abandoned this contention at bar. It hardly needs extended argument. The liberty of the press is the freedom to express and circulate printed *opinions*. It can not include lottery matter, for two reasons. In the first place, such freedom does not include the right to circulate that which, in the legislative discretion of a country, is immoral or indecent. It could not be contended that obscene literature has freedom of circulation because it is printed. If so, every statute punishing the printing, sale, or circulation of indecent literature is invalid. Congress has seen fit to place lottery matter upon the same ground as indecent literature or other fraudulent or immoral devices, and the freedom of the press is obviously subject to this fundamental limitation imposed by good morals. Moreover, the freedom of the press is the freedom to express printed opinions, and, while lottery advertisements might be within this definition, yet a lottery ticket is not an expression of an opinion in any sense of the word. It is purely a commercial instrument, and its prohibition in no way infringes upon the right to express opinion and circulate the same. All this seems so obvious that no further argument need be made. See *Ex parte Jackson* (96 U. S., 727, 736), *In re Rapier* (143 U. S., 110), and *Horner* v. *United States* (143 U. S., 207), where such police power is clearly upheld. In the Rapier case Chief Justice Fuller said:

> The States, before the Union was formed, could establish post-offices and post roads, and

in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-offices and post roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.

XIII.

CONSTRUCTION OF ACT OF MARCH 2, 1895.

In the Francis case a minor question is suggested as to the true construction of the act of March 2, 1895. It is contended that the entire act only has reference to lottery matter that has been originally imported from a foreign country. As to this I might well rest the Government's case upon the clear and satisfactory reasoning of Circuit Judge Severens, who announced the judgment of the circuit court of appeals. (See page 362, Transcript of Record.)

I need add little to that which Judge Severens has said. If the language be in doubt, the legislative history of the act will, I think, convince the court that Congress intended to suppress domestic lotteries as well as foreign lotteries. The court is familiar with the fact that for some years the Federal Government has sought

to break up the lottery traffic. By Revised Statutes, 3894, 3929, and 4041, it excluded lottery matter from any branch of the mail service. This legislation having proved insufficient, the act of September 19, 1890, was passed, which, in a more sweeping and, as was thought, in a more effective way, sought to prohibit the use of the mails in connection with lottery enterprises. Recognizing that much of this lottery matter came from other countries, the act of August 28, 1894, prohibited the importation into this country of any lottery ticket or any advertisement of any lottery. All of these measures proved ineffective to wholly prohibit the lottery traffic. Excluded from the mails and from all importation, the lottery companies resorted to express companies and other carriers, and transported their tickets in that way. Foreign lotteries, to evade the nonimportation act, constituted agencies in this country, and had the necessary tickets and other matter printed in this country and transported in the manner indicated. Congress therefore deemed it necessary, if the traffic was to be suppressed, to prohibit the carriage, by any method, of lottery matter. This gave rise to the act of March 2, 1895. It is unnatural to assume that Congress intended to limit the act of March 2, 1895, to lottery matter which had been first imported. Had this been the case the act would have been largely ineffective and fallen short of its obvious purpose, for tickets and other matter would have been printed in this country, as Mr. Guthrie has already

pointed out in his brief in the Champion case. In my original brief in the Champion case, pages 7 to 11, inclusive, I have given the history of the legislation, and a reference to the debates will show that the entire lottery traffic, foreign or domestic, was evidently in the contemplation of Congress.

The title of the act clearly indicates the purpose to reach the entire traffic, domestic or foreign, and the reasonable and grammatical construction of the act would indicate the same thought. The matter whose carriage is forbidden is "a ticket, chance, share, or interest in, or dependent upon the event of a lottery." Any lottery, whether foreign or domestic, is therefore within the general language of the act. Had Congress referred only to foreign lotteries it would presumably have qualified the language in some way. Its purpose obviously was (1) to prevent the importation of lottery matter; (2) to prevent the carriage by mail of lottery matter; (3) to prevent the carriage from one State to another in the United States of lottery matter; and the situs of the lottery enterprise was wholly unimportant.

The record of the Francis case also presents many questions affecting the form of the indictment, the introduction of evidence, and the charge of the court. A careful examination of them discloses that none has any merit, and to discuss them would be to extend an already lengthy brief far beyond the patience of the court. I am content to rest the Government's case, in this respect, upon the record and the decision of the court below, which, after full consideration, found no

error in the many assignments of error which the industry of counsel has succeeded in multiplying.

Respectfully submitted.

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INDEX OF CASES CITED.