Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 106.

CHARLES F. CHAMPION,
Appellant,
vs.
JOHN C. AMES, United States Marshal.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF ON BEHALF OF APPELLANT.

The question presented by this appeal is as to the constitutional power of Congress to prohibit and punish as for a crime any one who shall cause to be "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 . . . transferred from one state to another in the same," as provided in the act of March 2, 1895, c. 191, § 1; 28 Stat. 963. Section 1 of the act reads as follows:

> "*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 the case at bar, the overt act charged in each count of the indictment is the delivery in the state of Texas of a box containing lottery tickets, papers or certificates to the Wells-Fargo Express, a corporation engaged in carrying freight and packages, for the purpose of having the box carried to Fresno, in the state of California, or to Ogden, in the state of Utah (record, pp. 15, 23). The offence charged is that the attempt to have lottery tickets, papers or certificates carried or transferred from one state to another is a crime constituted such by virtue of the above statute.

The statute in question purports to regulate three distinct and separate branches of the subject of lotteries, viz.: (1) bringing lottery tickets, etc., within the United States from abroad; (2) depositing any such matter in the mails of the United States, and (3) carrying or transferring such matter from one state to another in the United States by means or medium other than the mails.

The first branch involves the regulation of our relations with foreign countries, the second involves the regulation of the United States mails, and the third is an attempt to regulate intercourse among the people of

the respective states in a matter which, it is submitted, does not constitute commerce within any proper meaning of that term.

I.

As to the first branch of this statute, it may well be conceded that Congress, under the plenary power to regulate our relations with foreign countries, may exclude persons, commodities or printed matter of any nature whatsoever, whether or not relating to or connected with commerce. In this case, it is not necessary in the slightest degree to challenge the power of Congress—the legislative power of a sovereign nation—to exclude foreign persons or commodities or printed matter in its judgment and discretion. When we say that Congress may exclude or deport foreigners or their products or publications from the United States, we are but recognizing the ancient doctrine of international law that an alien or an alien's property comes into the territory of a sovereign nation only by its sufferance, and may be excluded at its will. And whether the exclusion be for the purpose of self-defense, or for the general welfare of the people, or as an incident to the regulation of imports, the right to exclude or deport is as much a part of the sovereign's prerogative as is the right to make treaties giving to foreigners the privilege of abiding or of bringing or selling their goods or publications within the sovereign's domain. That this attribute of sovereignty has been surrendered by and does not belong to the states cannot for a moment be doubted, for the states are forbidden to enter into any form of treaty[1]; nor can it be questioned that the whole power to regulate every form of relations with foreign countries must of necessity reside in the

[1] Section 10 of Article I of the Constitution of the United States.

sovereign newly created by the Constitution of the United States.[1]

As Mr. Justice Gray said in *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659;

> "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Vattel, lib. 2, §§ 94, 100; 1 Phillimore (3d ed.), c. 10, § 220. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war."

And in the subsequent case of *Fong Yue Ting* v. *United States*, 149 U. S. 698, 707, Mr. Justice Gray again said:

> "The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."

Many of the considerations which are of a national character and which come up between the United States as a sovereignty and foreign nations wholly disappear when we contemplate interstate relations. We must recognize that the nature and source of the power to regulate domestic commerce is far different from the nature and source of the power to regulate international commerce. In the case of interstate commerce, there is no implied power in Congress. In the case of foreign commerce, there is no limitation upon the power of Congress and no implied or reserved power in the states. When regulating inter-

[1] *Head Money Cases*, 112 U. S. 580, 591.

state commerce, the only power Congress exercises is that expressly delegated by the states, and it is limited and hedged in by the local police and municipal powers reserved to the states. When regulating commerce or intercourse with foreign nations, the extent of the power delegated to the federal government is as unlimited as that of any other sovereignty. It rests not merely on the commerce clause, but on the power to lay duties and imposts, to make treaties, to provide for the common defense, to wage war, etc. But when considering a statute regulating interstate commerce, we must realize that the exercise of power in the given case must not trench upon "the powers not delegated to the United States by the Constitution," but by that instrument expressly "reserved to the states respectively or to the people"[1]— considerations and limitations which may have little or no weight in regulating foreign affairs.[2]

Under the regulation of what is generally termed foreign commerce or intercourse, Congress has ample power not only to prevent the introduction of foreign lottery matter, but in order to render such inhibition effective, it may prohibit the possession of such matter or its transfer from one state to another just as fully as it may prohibit the possession or transfer of smuggled imports or contraband goods. In the case at bar, however, the offense of bringing lottery matter from abroad is not charged in the indictment, and is not presented for adjudication.

The earliest acts of Congress in regard to the introduction of goods into this country were acts imposing duties on imports—which were laid upon all goods quite irrespective of their commercial qualities—and acts inci-

[1] Tenth Article of Amendment to the Constitution of the United States.

[2] Indeed, Madison placed the power to regulate intercourse with foreign nations in a class distinct and separate from the power to regulate interstate commerce. The Federalist; Hamilton's Works, Lodge's ed., vol. 9, pp. 250, 258, 262.

dentally affecting the goods while primarily regulating the carrying trade. Carrying goods was obviously as much commerce, and as subject to commercial regulation, as the carrying of passengers. To promote the carrying trade, registration of vessels of the United States has been provided for with rules for their construction, equipment and transfer. And in regulating maritime contracts under the power over foreign commerce and admiralty jurisdiction, Congress has punished the theft of shipwrecked goods even when they have been washed ashore, has revised the liability of shipowners and incidentally determined the validity of exemptions from liability in bills of lading.[1] So, also, in order to promote the export trade in live-stock, regulations have been made to prevent the exportation of diseased cattle.[2] Provision, too, has been made for the inspection of imported meat; an act forbids the importation of poisonous food and infected animals, and provides for the total suspension of importation of animals whenever "it shall be necessary for the protection of animals in the United States against infectious or contagious diseases."[3] In so far as these regulations are more than regulations of the carrier, they are in furtherance of foreign traffic in the goods in question. A possible exception may be the act of August 30, 1890; but that was passed, not under the commerce clause, but as an auxiliary of the power to regulate import duties, and to say what goods shall or shall not be free; and the object of the act is to provide that no detriment shall come to the states by reason of the enforced admission of foreign goods within their borders.

Turning to commerce between the states, we find that Congress no longer regulates it in conjunction with its

[1] Act of February 13, 1893, c. 105; 27 Stat. 445; R. S. 4285; *Lord* v. *Steamship Co.*, 102 U. S. 541; cf. *People* v. *Raymond*, 34 Cal. 492.
[2] Act of May 29, 1884, c. 60, §§ 4, 5; 23 Stat. 31.
[3] Act of August 30, 1890, c. 839, § 9; 26 Stat. 416.

powers over foreign relations or with its power over imports. Articles brought for sale from one state to another are not imports.[1] In regulating interstate commerce pure and simple, Congress has busied itself principally with laying down the law for carriers, as in regulating rates and placing them under the direct supervision of the interstate commerce commission.[2] Such also are acts regulating bridges,[3] telegraphs[4] and the coasting trade.[5]

In connection with this point, a legislative episode of 1836 may be mentioned in which an attempt was made to prevent the circulation of anti-slavery publications from one state to another by excluding them from the United States mails. For a number of years the circulation of such documents had caused bitter feeling in the southern states; and in 1835 the governor of North Carolina, in his address to the legislature, had urged the adoption of stringent provisions against the circulation of these publications, and had advocated a union of the slave states to protect themselves against this "pest".[6] In

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[1] *Woodruff* v. *Parham*, 8 Wall. 123.

[2] *Railroad Company* v. *Fuller*, 17 Wall. 560; *Railroad Company* v. *Richmond*, 19 Wall. 584; *Phila. Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *McCall* v. *California*, 136 U. S. 104; *Norfolk, etc., Railroad Co.* v. *Penn.*, 136 U. S. 114; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Carton* v. *Illinois Central Railroad*, 59 Iowa 148.

[3] *Luxton* v. *North River Bridge Co.*, 153 U. S. 525; *State of Pennsylvania*, v. *Wheeling and Belmont Bridge Co.*, 18 How. 421; *The Clinton Bridge*, 10 Wall. 454; *South Carolina* v. *Georgia et al.*, 93 U. S. 4; *Bridge Co.* v. *U. S.*, 105 U. S. 470; *Miller* v. *Mayor of New York*, 109 U. S. 385; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Fargo* v. *Michigan*, 121 U. S. 230.

[4] *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *W. U. Telegraph Co.* v. *Pendleton*, 122 U. S. 347; *Ratterman* v. *Western Union Tel. Co.*, 127 U. S. 411; *Leloup* v. *Port of Mobile*, 127 U. S. 640.

[5] *Sinnot et al.* v. *Davenport et al.*, 22 How. 227; *Foster et al.* v. *Davenport et al.*, 22 How. 244; *The Daniel Ball*, 10 Wall. 557; *Moran* v. *New Orleans*, 112 U. S. 69.

[6] 49 Niles' Register, 228.

many of the southern states laws existed prohibiting all circulation of anti-slavery documents, whether they came from another state or not.[1] The general impression which prevailed in the South was that these regulations applied even to the United States postmasters, and rendered them liable to conviction for delivering the publications of the anti-slavery societies. Some postmasters, both in the North and South, excluded these publications from the mails that passed through their offices, and Kendall, the Postmaster General, though unable to find authority justifying him in ordering such action, intimated that in their position he should pursue a similar course.[2] In 1835, President Jackson, in his message, recommended that a bill be passed excluding these publications from the mails. This message was referred to a select committee, and on the 4th of February, 1836, a bill was reported by Mr. Calhoun making it a penal offense to transmit by the mails all anti-slavery documents which were prohibited by the states to which they were addressed. His doctrine was that Congress had no power under any clause of the Constitution to forbid directly the transmission of these publications, that Congress had no power to interfere with the internal regulations of the states, but that in furtherance of the police regulations of the several states, Congress might exclude from the mails papers which were condemned by those police regulations.[3] Buchanan placed his support of the bill on higher grounds, and thought that, under the power of Congress to regulate the mails, it might exclude from the mails whatever it saw fit, and in

[1] North Carolina, 1830, Laws, vol. 14, p. 10, and Maryland, 1831; 49 Niles' Register, 228. Cf. Rev. Sts. La. 1852.

[2] 48 Niles' Register, 447-448; 49 Niles' Register, 7-8.

[3] Cong. Globe, 24th Cong., 1st Sess., 10, 164, 165, 347.

the bill under discussion, he agreed to the adoption of state laws, not as a source of power, but as a convenient test of what publications should be held incendiary.[1] The opposition to the bill was based upon constitutional as well as political grounds. The constitutional objection made was that it abridged the freedom of speech and of the press. This was the ground taken by Davis of Massachusetts[2] and by Webster.[3] On the 8th of June the bill was rejected by a vote of 25 to 19.[4]

The significance of this episode lies in the fact that Congress was grappling with the proposition to regulate the transmission from state to state of documents which lacked entirely the quality of merchandise. It was admitted throughout the debate that if Congress could not regulate this matter indirectly through the mails it could not regulate it at all; and no suggestion was made throughout the debate that such a bill could be passed under the commerce clause.[5]

From this general review of the subject, it must be clear that the word "commerce," although construed broadly when it is used in a grant of sovereign power with respect to foreign relations, should be construed strictly when applied purely to interstate relations, and that there is no authority for saying that interstate commerce includes the mere transit from state to state of an individual or the mere carriage or transfer of an article which is not a subject or article of commerce.

It has not been necessary for this court in any case yet arising to consider and analyze in juxtaposition the power

[1] Cong. Globe, 24th Cong., 1st Sess., App. 454.
[2] " " " 348.
[3] " " " App. 453.
[4] " " " 539.
[5] We say this, fully aware of the other view taken by Mr. Justice Field in Jackson's case, 96 U. S. 727. We find no support for his view in the debate.

to regulate foreign affairs, commerce and intercourse on the one hand and the power to regulate interstate commerce on the other. The difference has been as yet only commented on, but it is obviously great and broad. The present case may be deemed to present that interesting question, and perhaps may lead to the declaration of a sound doctrine that in the one case the power of the legislative branch of the sovereign nation is practically absolute, whilst in the other case the federal legislative power is necessarily limited by the nature and essence of the reserved powers in the states, and by the extremely delicate machinery of our system of dual government.

Referring to the difference between the power to regulate foreign commerce and the power to regulate interstate or domestic commerce, Mr. Randolph, in his recent excellent work on "The Law and Policy of Annexation" uses the following language (pp. 94-98):

> "Now the power conferred in respect of foreign, Indian, and interstate or domestic commerce is in each case 'to regulate,' and from this identity in the terms of the grants it has been assumed that the three powers are co-extensive. But it will not be difficult to show that the power over domestic commerce is not identical with the power over commerce with foreign nations,[1] and with the Indians. The assertion of identity between the powers over domestic and Indian commerce may be dismissed almost summarily. The Indian tribes are, in the language of Chief Justice Marshall, 'in a state of pupilage. Their relation to the United States resembles that of a ward to its guardian. They look to our Government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.'[2] Whatever relation the people of the United States may bear to the

[1] See Madison's Works, IV, 15; *Groves* v. *Slaughter*, 15 Peters, 449, 505.

[2] *The Cherokee Nation* v. *The State of Georgia*, 5 Peters, 1, 17.

Federal Government it is not this. The dependent position of the Indians justified the Supreme Court in saying: 'As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the Government, Congress has the power to say with whom and on what terms they shall deal, and what articles shall be contraband.'[3] Whatever power Congress may have over domestic commerce, it is not this. It is a fair rule of interpretation that, when powers in respect of several subjects are assumed to be co-extensive merely because of identity in the terms of the grants, the differentiation of one subject discredits the assumption as to the rest. But we need not stop here; for, in point of fact, the assumed parallel between domestic and foreign commerce is quite as illusory as in the case of Indian trade, and for the same reason—a radical difference in the status of the parties.

"The United States deal with a foreign nation as one sovereign with another. They have no connection, and, apart from the obligation of treaties, no conventional relation with the foreign state. Their attitude toward other nations is dictated by policy, tempered in some directions by treaty and international law; and they may discriminate between them—inclining toward one and away from another—as their interests require.

"If Congress may interdict foreign commerce, it is by way of carrying out the policy of a sovereign—the United States—in opposition to, or disregard of the policy of other sovereigns to whom it owes no legal duty in the premises.

"Obviously a right to interdict, which may inhere in the power to regulate commerce with foreign or dependent nations cannot be attributed by analogy to the power to regulate our own. Because we may forbid intercourse with a foreign nation, essentially an unfriendly act despite any protestation to the contrary, and forbid private dealings with Indians in order to protect childish wards from the rapacity of traders, it does not follow that we may turn the

[3] *U. S.* v. *43 Gallons of Whiskey, etc.*, 93 U. S. 188, 195.

> weapon of embargo against our own countrymen, or treat them as children of a 'great father.'
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> "In fact, the need of commercial unity was the greatest incentive to the establishment of 'the more perfect Union' assured by the Constitution. The States did not transfer to Congress the sovereign power of restriction which each possessed. They renounced these powers, left them in the air, and authorized Congress to maintain the freedom of trade established by their renunciation. To regulate domestic commerce, then, is to facilitate an intercourse placed beyond reach of prohibition, and, while regulations may in fact involve some restraint upon the conduct of particular intercourse, they have their warrant and purpose in the facilitation of all intercourse."

II.

As to the second branch of the statute, which involves the power to exclude lottery tickets, advertisements, etc., from the United States mails, it is sufficient to say that this portion of the statute has been upheld on the ground of the exclusive and comprehensive power vested in Congress to establish post offices and post roads, which embraces the regulation of the entire postal system of the country. Under this broad and almost unlimited power, Congress can designate what shall be carried in the mails and what shall be excluded. This point was settled by the decisions of the court in *Ex parte Jackson*, 96 U. S. 727, 732, and *In re Rapier*, 143 U. S. 110, 133.

III.

As to the third branch of the statute, which involves the power of Congress to forbid the carriage or transfer of lottery tickets, advertisements, etc., from state to state, it is to be at once observed that although the point has not yet been expressly adjudicated, this court has nevertheless said that no such power exists. Thus, in *Ex*

parte Jackson, 96 U.S. 727, 735, Mr. Justice Field, delivering the unanimous opinion of the court, said:

> "But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted, consisting of letters, and of newspapers and pamphlets, when not sent as merchandise; but further than this its power of prohibition cannot extend."

And in the subsequent case of *In re Rapier*, 143 U. S. 110, 133, Mr. Chief Justice Fuller, delivering again the unanimous opinion of the court, stated that the former case had held "that the transportation in any other way of matter excluded from the mails would not be forbidden."

That question is now distinctly presented for adjudication, and the following argument is submitted in support of the contention that the court should adhere to the view expressed by Mr. Justice Field. The court below considered it a debatable and doubtful question whether the act would be held constitutional by this court (Jenkins, C. J., record, p. 103).

IV.

The portion of the act of March 2, 1895, with which we are now concerned, does not regulate any commerce in the sense in which that word is used in the Constitution of the United States. The first portion relating to foreign lotteries, forbids the introduction into the United States of any paper concerning lotteries "for the purpose of disposing of the same." Admitting, for the purpose of argument, that this provision is a regulation of traffic in such

papers, within the scope of the power of Congress to control our relations with foreign countries, we find that the remainder of the act provides simply against the passing from state to state, by the mails or by any other means, of any lottery ticket or advertisement without any reference whatever to any "purpose of disposing of the same." In so far as this provision is aimed against the transit of the paper, it deals with no commerce. Nor is it a regulation of a carrier, whose business is commerce irrespective of what it carries. A thing that is not in itself a subject or article of commerce, cannot surely become invested with a commercial character by being transferred from one state to another. The paper does not become commercial simply because in furtherance of an interstate business. It is merely in furtherance of a lottery, and a lottery is not commerce.

In so far as the law is aimed against the lottery business, either at the place where the paper started or delivery was made, or at the place where the paper will find itself, or where the contract may take effect at the end of its journey, it is an attempt to interfere with the local police regulations of either place. The lottery business, wherever found, is not interstate commerce. It is true that the lottery business, which was once extensively engaged in, has gradually fallen into disrepute, and that the states, in the exercise of their police powers, have one by one prohibited them, and in aid of this prohibition passed laws forbidding the introduction of advertisements and papers from other states. But the gradual condemnation of lotteries did not make the business interstate commerce if it was not so before, or diminish the power of the respective states to permit, regulate or prohibit them. If the change had any effect, it must have been the reverse.

A conviction for selling lottery tickets for the national lottery, authorized by the act of Congress of May 4, 1812, was sustained under the statute of Virginia in the case of *Cohens* v. *Virginia*, 6 Wheat., 264. The state statute in that case forbade the sale within the state of any ticket in a lottery not authorized by the laws of Virginia. The main argument in the case was devoted to the question whether the lottery was not a fiscal agent of the Government with which no state could interfere, and the court held that it was not. Chief Justice Marshall regarded the law as a penal regulation, having for its sole object the internal government of the state. Yet if the lottery ticket had been an article of commerce, the Virginia act would obviously have been invalid.[1]

The primary and fundamental inquiry upon the merits is, therefore, whether a lottery ticket or policy or advertisement is or is not an article of commerce or constitutes in any sense a transaction of interstate or domestic commerce within any proper meaning of the word.

As was said by Mr. Justice Miller in the *Trade-Mark Cases*, 100 U. S. 82, 96:

> "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress."

Transactions connected with lotteries do not constitute a part of the commerce between the states any more, for example, than issuing a policy of insurance, which is an analogous form of wagering contract.

In the case of *Paul* v. *Virginia*, 8 Wall. 168, 183, it was distinctly held that the sending of insurance policies,

[1] *Welton* v. *State of Missouri*, 91 U. S. 275; *Webber* v. *Virginia*, 103 U. S. 344.

say from New York to Virginia, to be there delivered to the insured on payment of premium, was not interstate commerce. The remarks and reasoning of the court, by Mr. Justice Field, apply as much to a lottery policy or ticket as to a policy of insurance, viz.:

> " Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. 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."

Again, in *Hooper* v. *California*, 155 U. S. 648, 653, 655, Mr. Justice White said:

> " Whilst it is true that in *Paul* v. *Virginia*, and in most of the cases in which it has been followed, the particular contract under consideration was for insurance against fire, the principle upon which these cases were decided involved the question of whether a contract of insurance, of any kind, constituted interstate commerce. The court in reaching its conclusion upon this question was not concerned with any matter of distinction between marine and fire insurance, but proceeded upon a broad analysis of the

nature of interstate commerce and of the relation which insurance contracts generally bear thereto. . .

"The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'"

And, in *New York Life Insurance Co.* v. *Cravens*, 178 U. S. 389, 401, Mr. Justice McKenna said:

"Is the statute an attempted regulation of commerce between the States? In other words, is mutual life insurance commerce between the States?

"That the business of fire insurance is not interstate commerce is decided in *Paul* v. *Virginia*, 8 Wall. 168; *Liverpool Ins. Co.* v. *Mass.*, 10 Wall., 566; *Phila. Fire Asso.* v. *New York*, 119 U. S. 110. That the business of marine insurance is not is decided in *Hooper* v. *California*, 155 U. S. 648. In the latter case it is said that the contention that it is 'involves an erroneous conception of what constitutes interstate commerce.'

"We omit the reasoning by which that is demonstrated, and will only repeat, 'The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the 'perils of the sea'.' And we add, or against the uncertainty of man's mortality."

A lottery contract is, in all its aspects, of the same nature as an insurance contract. They are both aleatory. An aleatory contract is one whose fulfillment depends on a future and uncertain event. Such are contracts of annuity, insurance, lottery and other forms of gambling. In the case of insurance, the company or underwriter says, "If by a future casualty your house, your barn or your ship be lost, we will pay you so much." The lot-

tery company similarly says, "If a certain number be drawn, we will pay you so much."

It cannot be denied that insurance policies are essentially wagers and constitute aleatory contracts substantially the same as the contract of lottery. Both forms of contract depend upon chance and uncertain events, and in principle cannot be distinguished in their nature.[1]

If, therefore, insurance policies, although connected with property which is the subject matter of interstate or foreign commerce, be not commerce within the true meaning of the Constitution of the United States, it must logically follow that the other forms of aleatory contracts, such as lottery tickets or policies, likewise, do not come within the scope of the commerce clause.

This court having definitely settled that a state regulation of the business of interstate or foreign insurance is not a regulation of commerce, does it not logically follow that the court could not uphold an act of Congress which attempted to regulate insurance or, for example, to forbid the carriage or transfer of insurance policies or tickets or other printed matter from state to state by agencies other than the mails? Would it not be held that any such statute was not a regulation of interstate commerce in any proper meaning of the term and that the power to regulate insurance as well as other forms of business intercourse had not been delegated to Congress? It is true that it is now desirable and expedient to have Congress regulate the

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[1] Pothier's Obligations, Evans' Transl., vol. I., pp. 9–10; Louisiana Civil Code, act 1776; Civil Code of Spain of 1889, Title XII., U. S. Govt. Transl. 1899, pp. 230-232; May on Insurance, (4th ed.), vol. 1, p. 5; Clark on Contracts, pp. 405–406; Lawson on Contracts, secs. 284–287; Hollingsworth on Contracts, pp. 229–232; Anson on Contracts, (2nd Am. ed.); pp. 232–233; Angell on Fire & Life Insurance, pp. 12, 14; Joyce on Insurance, vol. 1, secs. 2, 7; Emerigon, Meredith's Transl., p. 13; Richards on Insurance, § 20.

subject of insurance, particularly in connection with vessels engaged and commodities used in interstate commerce;[1] but that consideration cannot draw to Congress a subject not delegated to it by the Constitution.

This feature of insurance, also, presents quite a striking example of the force of the suggestion heretofore made as to the difference in the nature of the power to regulate interstate commerce and foreign commerce. No one would challenge the power of Congress, by treaty or otherwise, to enact that foreign insurance companies should not be permitted to enter the United States by their agents or to send insurance policies for delivery there. Yet, if *Paul* v. *Virginia* and *Hooper* v. *California* and *New York Life Ins. Co.* v. *Cravens* are sound law and are not to be now overruled, Congress would have no power whatever to regulate the business of interstate insurance.

So, too, can it be doubted that Congress could by treaty provide that foreign insurance companies and underwriters might enter the territory of the United States and make contracts of insurance? That would clearly be within the power of Congress to regulate foreign relations, although no power exists to give domestic insurance companies such rights among the respective states.

V.

Let us suppose, as a test, that Congress should expressly authorize the circulation of Louisiana lottery tickets among the respective states. We are not now, of course, contemplating an attempt of the federal government to raise revenue or war funds by a lottery, which would present entirely different questions. The only theory upon which the power of Congress to act at

[1] *Hooper* v. *California*, 155 U. S. 648.

all in the case of state lotteries could be sustained would be under the commerce clause. Is it conceivable that this court would hold that such an enactment by Congress was a regulation of commerce before which the police laws of the states must fall, and that Congress could thus compel the respective states to permit traffic in lottery tickets authorized by another state or states? The conclusive answer would be that that was a matter within the police power reserved to the states and that it was never intended that any such power, express or implied, should be delegated to Congress by the grant of the power to regulate commerce.

We may also suppose, for example, that the Connecticut legislature desired, in the year 1796, to authorize a lottery, as it did in 1733, in order to raise funds for a new building for Yale College, and that the New York legislature desired to aid this purpose and authorized the sale of such lottery tickets.[1] Would an act of Congress prohibiting the carriage or transfer of such lottery matter from state to state other than by the mails have been a valid exercise of the power to regulate commerce? Indeed, in 1806, the legislature of Massachusetts authorized the raising of funds by a lottery for Harvard College so as to build Holworthy Hall and repair Massachusetts Hall. Could Congress have interfered with the transfer of these tickets to other states for the purposes of sale or have compelled the states to permit their sale?

But, what is, perhaps, more interesting, let us consider the question in connection with public revenue. The Continental Congress raised money for the army by means of a lottery[2] and Congress itself, under the Constitution,

[1] Spofford, Annual Report American Historical Association, 1892, pp. 171–195; Conn. stats. 1, 1736, p. 284; 1 Kent & Redcliffe, Laws of New York, 1801.

[2] Spofford, *supra*.

has authorized lotteries.[1] Clearly, in no reasonable meaning of the commerce clause could it have been said that this legislation constituted a regulation of commerce. If the nation were to-day laboring under some great reverse and vicissitude of fortune and Congress were compelled to raise war funds by lotteries, its power to prevent the states from interfering with this perhaps vital and necessary source of revenue would not be under the commerce clause. This point was not necessarily involved in *Cohens* v. *Virginia*, 6 Wheat. 264, and the power of Congress to compel the states to permit the sale of lottery tickets issued under federal authority was not adjudicated. A state may desire to aid a public purpose by means of a lottery, as Massachusetts raised funds by a lottery, in 1780, for clothing the Massachusetts part of the Continental army.[2] Could Congress compel the other states to permit the sale of Massachusetts lottery tickets under the power to regulate commerce. Assuredly not.

Now, a state could prevent the sale of lottery tickets issued by or under the authority of other states, but could it prevent the sale of lottery tickets issued under federal authority if their sale within the respective states had been expressly authorized by Congress? It is submitted that it could not do so any more than it could prevent the sale of federal bonds or stocks, or tax them. This would not be because of the commerce clause, but under other powers of the supreme federal sovereignty. Yet it is submitted that a state could probably prohibit the sale of bonds or stocks of other states, and certainly could freely tax them.

[1] Act of May 4, 1812, c. 75 § 6, 2 Stat. 721, 726; act of May 6, 1812, c. 76, § 1, 2 Stat. 728; act of February 22, 1827, c. 14, 4 Stat., 205.

[2] Laws of 1780, c. 15; General Laws Massachusetts, 1780–1822, p. 42.

The analysis need not be pursued further. These examples must be sufficient to point the argument and to show the force of the contention that the court should not hold this lottery legislation to be within the power of Congress to regulate commerce.

VI.

In considering these ever-interesting and important questions as to the extent and limits of the power of Congress to create and punish crimes, it is always necessary to bear distinctly in mind that the framers of the Federal Constitution saw fit to withhold and deliberately "reserved to the states respectively" many objects which would have been appropriate for federal legislative action. In the light of the practical experience of our own times, we must deplore the fact that unreasonable fear and jealousy of a centralized national government prevailed when the Constitution was adopted, and thwarted the foresight of broader-minded statesmen and philosophers who would have extended and not curtailed the powers of the national government they were about to found. But the general power to punish for crimes in connection with many matters of national interest was denied. The student of the history of that critical period cannot fail to be impressed with the conviction that a grant to the federal government of police powers, such as the regulation and prevention of lotteries, could not have been secured, and that the Constitution itself would not have been ratified if any attempt had been made to give greater scope to federal legislation. All must regret the unfounded fear and the unreasoning jealousy that withheld from the national government powers which to-day could be exercised with immense benefit to the people of

the whole country. It was then, and is now, most desirable that lotteries, divorces, frauds,[1] negotiable instruments, the manufacture of explosives and inflammable oils,[2] etc., should be regulated by the central government under uniform laws. Legislation upon these subjects would tend to simplify the administration of justice, to introduce certainty into our systems of law, to accommodate interstate intercourse, and to strengthen and solidify us as one people. But the power was not conferred; and conservatism has thus far restrained us from amending the fundamental law. Until it is amended, the courts must enforce the Constitution as it is and not as we might wish it had been framed.

If it was not intended in 1789 to confer upon Congress power to regulate lotteries because lotteries were not then commerce any more than other aleatory contracts, then the power does not exist, for the Constitution "neither changes with time, nor does it in theory bend to the force of circumstances."[3] It is today what it was when Hamilton and Madison and Marshall wrote and argued in its support. The surrounding circumstances have changed, modes of life and trade have changed, the manners and morals and thoughts and notions of the functions and end of government and ideals of civic duty and patriotism, all these have changed, but the Constitution remains as it was then. New conditions of society are evolving; systems of municipal law are being changed incessantly to meet novel and complicated conditions; but the fundamental principles of the Constitution are the same as they were when adopted. When new conditions arise, the

[1] *United States* v. *Fox*, 95 U. S. 670.

[2] *United States* v. *Dewitt*, 9 Wall. 41.

[3] See *Ex parte Milligan*, 4 Wall. 2, 120; *In re Debs, Petitioner*, 158 U. S. 564, 591.

inquiry is whether they are analogous in their nature to the conditions which existed at the time of the adoption of the Constitution; and, if so, whether they come reasonably within the scope of the general powers intended to be granted to Congress by the express provisions of the Constitution. We are not at liberty to give the provisions of the Constitution new meanings as applied to conditions such as lotteries which actually existed at the time it was adopted. If we could, then "there is no power which may not, by this mode of construction, be conferred on the general government and denied to the states."[1]

The question now presented must, therefore, be decided, not according to our views of morals or of what would or should be now expedient as a function or power of the federal government, but according to the views of the framers so far as we can gather those views and their intention from the language of the Constitution itself and the circumstances and conditions existing at the time it was framed and adopted.[2] If lotteries which then existed would not have been deemed commerce at that time, the fact that lotteries have now fallen into disrepute cannot turn them into commerce or bring them within the scope of that term.

It may, indeed, be conceded that it is now desirable to have a uniform law regulating or preventing lotteries, as it would be to have a uniform law regulating insurance and divorces and commercial frauds; but, however desirable or however necessary such a federal power may seem to be, if it was not intended to be conferred upon the Congress, it cannot be read into the Constitution by legislative declaration or by judicial legislation.

[1] Chief Justice Taney in the *Passenger Cases*, 7 How. 286, 478; see also *Ex parte William Wells*, 18 How. 307, 311.

[2] *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 558; *Knowlton* v. *Moore*, 178 U. S. 41, 95.

As is well known, at the time of the adoption of the Constitution, the ideas of the people in the thirteen states with respect to lotteries were radically different from what they are in our own times. We think lotteries immoral and necessarily detrimental to the welfare of the community. Other nations, particularly the Latin peoples, think otherwise. Our fathers considered lotteries, if honestly conducted, not only not injurious but to be encouraged. Revenue for the support of the state governments, of colleges and churches and other public enterprises was at that time derived from lotteries, and Congress itself sanctioned lotteries. It cannot reasonably be conceived that it was the intention or understanding of the people of the respective states in adopting the Constitution to grant to the federal government the power to prevent the states from using lotteries as a source of state revenue, if they saw fit so to do. It cannot be doubted that if the present question had arisen in the days of Marshall, when the public opinion of the country was not as hostile to lotteries as it is today—an opinion which continued for more than half a century afterwards—and if the federal government had sought to prevent the people of any state from dealing as they saw fit in the lottery issues of other states, it would have been held that Congress had gone outside of the powers which had been conferred on it by the terms of the Constitution, and that the legislation was unconstitutional and void. If this be true, the present legislation is no more valid than it would have been if adopted a century ago. To repeat, the Constitution does not change.

An adjudication that Congress has no constitutional power to prohibit the carriage or transfer of what does not in its nature constitute commerce or relate to it, will in no way affect or limit the power of Congress to carry out effect-

ively the express grant of the function to regulate interstate commerce. If the suggestion be made that Congress would be deprived of the power to prohibit the carriage of diseased animals, of infectious commodities, and of obscene literature and pictures, the answer is that all these constitute primarily a part of legitimate commerce and that, having the power to regulate commerce in them, Congress may prohibit the carriage or transfer of such as will tend to injure the community. Congress was given the power to compel the states to admit articles of commerce, notwithstanding any laws or police regulations of the respective states to the contrary. In all reason, therefore, the power must be implied to say what classes of articles of commerce should or should not be compulsorily brought into a state, and thus to protect the people, for otherwise there could be no protection. Having power to compel, it can safeguard. It is sometimes said that diseased animals or infectious goods or obscene literature do not constitute legitimate articles of commerce, and that their transport may be prohibited on that ground, but this is an incorrect use of terms. If they do not constitute articles of commerce, where did Congress find the power to exclude or regulate them? They are inherently articles of commerce, but they are injurious and harmful articles of commerce, and, as such, Congress may say that it will protect the states against them by prohibiting interstate commerce in them. Whatever may be the definition of lexicographers of the term "regulate," the reasonable and only true interpretation of the Constitution is that when the power to regulate interstate commerce was granted to Congress, it included the power to determine what articles of commerce should or should not have the advantage of free and untrammeled transport or sale, not-

withstanding the laws of any state. It would, however, be stretching the language to an extreme which, it is submitted, the court will not sanction, if it be urged that under the power to regulate commerce, Congress could prohibit the transfer or compel the free sale of documents which have no relation to commerce and which concern transactions that in their essence do not constitute commerce in any form or sense.

CONCLUSION.

The order should, therefore, be reversed and the court below directed to discharge the appellant.

Washington, February, 1901.

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