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## WHAT CONSTITUTION ARE WE TALKING ABOUT?

By GEN. HUGH S. JOHNSON\*

There is great news in the morning papers. Roy Howard wrote the President that there "is need to undo the damage done by misinterpreters of the New Deal." He said that many good men beg for a breathing spell for business in a recess from further experimentation. He asked for repetition and reiteration of what the New Deal is and a smoking out of the belief that an orderly modernization of government is not revolution in disguise.

That was a great letter. It expressed the anxious, prayerful wish of all the good and thoughtful men of my acquaintance regardless of party. And it received a great reply.

The President said he realized that a hectic Congress had left some confusion. He briefly outlined the drastic legislative program which he had promised in 1932 and which the nation, as you all remember, then demanded. He said he thought it better to get the operation over soon and then he said: "*This program has now reached substantial completion. The breathing space of which you speak is here—very decidedly so.*"

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\* Address by Gen. Hugh S. Johnson, former head of the NRA, delivered before the Indiana State Bar Association, September 6, 1935.

What does that mean? I take it to mean no more experiments! It is time to consolidate gains. Lest there should be any possible questions of the assurance given, the last paragraph of the President's letter repeats the last paragraph of Mr. Howard's letter. It specifically endorses our American system and says:

"Smoke out the sinister forces seeking to delude the public into believing that an orderly modernization of a system we want to preserve is revolution in disguise."

If these words are accepted in the sincerity of their utterance, I believe that only one thing can stop a tremendous business recovery—starting now.

Of course we can't have it if the forces of which both letters speak succeed in fooling our people into believing that there is in the present situation any danger to the system of government ordained by the Constitution of the United States.

The greatest danger to our country and the one thing that can prevent recovery is unemployment. It is a stubborn curse and it is not getting better.

The *New York Times* business index today stands at 90% of normal. But there are as many people without jobs as when that index stood at 70% of normal. There is no sign of normal reemployment in this country.

Now that just won't work. You can't have recovery with 10,000,000 jobless breadwinners for something over 40,000,000 destitute people. That is 30% of our population. It isn't in the cards.

I want to go a step further and say, after three years intense concentration on this particular problem, that you won't get those people to work without some kind of a Federal law under which hours of work are regulated. We must have a shorter work week and it can't be done without a Federal Statute.

The answer instantly given is—"you can't have such a statute under the Constitution!"

That brings us to a dead end and that is what I want to talk about.

In all this clamor about the Constitution, let's give a thought to *what* Constitution we are talking about. Is it the document that was written in Philadelphia in the simplest language that ever flowed from the pen of man for such a purpose?

Is it somebody's medley, made up of a selected and conflicting judicial language?

In either case it would do no harm to go back to the language and the history of the original document, to find out what, during all their lives, was in the minds of the men who made it. What was said about it by men on the Court who were closer to its meaning than we can possibly be today.

Those may have been horse-and-buggy days, but it has always been a matter of wonder to me that the statesmen of those poor weak little thirteen colonies—a narrow fringe of civilization on the edge of a howling wilderness of continental extent—had always in their minds the making of a nation extending from sea to sea—a single country spread across a continent. They talked about and saw only one economic unit unhampered by state lines obstructing its free commerce and trade. They invented a national system, of which they dreamed in terms of continental arteries of transportation on land and water, extending from the Great Lakes to the Gulf of Mexico, and from the Atlantic to the Pacific.

A curious by-path of history is the dream indulged by many of our forefathers to extend our borders south to Panama. That vision sticks its head up many times in early annals.

It was back of the so-called conspiracy of Aaron Burr. Old Andy Jackson certainly knew about it. It was strong in Confederate and British state-craft and had something to do with the French occupation of Mexico.

Today we no longer think nationally to that extent. If anybody suggests the broadening of our continental boundaries to make us more nearly self-contained, he is looked upon as a nut. The only significance I see in this is that the men who presided over our destinies in our first fifty years had a mental approach from a purely national angle and I think we must remember this when we are now asked to

believe that, by the Constitution they meant to impair the power of the Federal government to deal with national problems nationally. It is inconsistent with all that they said or wrote or did.

I want to know where in the Constitution of the United States it says that the Congress may not pass a statute making it unlawful to work men in our national industries more than 40 hours a week, or there to coin the youth and laughter and labor of little children into greasy nickels, or to operate a sweat-shop.

I would like to know where it says that, when an overwhelming majority of employers in a national industry, agree that this or that practice in trade is destructive and unfair, the Congress can't make a law ratifying that agreement and putting a penalty on the 10% chiseling fringe that seeks to profit by practices which the majority of their fellows say are predatory and unfair.

You and I know that there are no such words in that great charter. There are some such words in varying language of the Supreme Court of the United States but there are other words there, too, of a precisely opposite meaning.

Of course, the words of the Constitution are "the Congress shall have power to regulate commerce *among* the several states."

In a very early case a simple rule was laid down that "whatever subjects of this power are in their nature national \* \* \* require exclusive legislation by Congress."

I think an application of that rule would resolve all doubts about the validity of such a law as NRA.

After all, isn't it just a question of fact, whether our great industries have become so nationalized as to create a national problem and to require regulation by national law?

To ask that question is to answer it. By far the bulk of all our industry is national, not intrastate. Location of parts of these great sprawling systems in particular states is simply an accident. There is not an important corporation that does not depend on our national market of 125 million people.

Look at a magazine like the *Saturday Evening Post*. It owes its spectacular success to its character as a national advertising medium. It is a great shop window for all the people. Mass production—mass distribution—almost all of the astonishing industrial advances of the past quarter century, are all dependent upon the fact that here in a nation of continental extent—from ocean to ocean, and from almost Arctic to almost tropical conditions—there are no outright tariffs, boundaries, or other barriers to the free flow of trade.

That is well—all to the good. Freedom always is. But here, if we are to follow such cases as the Sick Chicken Opinion which wrecked NRA, we go further. We go to the length of saying that much of this vast national development is subject to no law of God or man. That may sound like a startling statement but it is literally and demonstrably true.

It would be utterly ridiculous to say that, as a matter of practice, any *state* can effectively regulate any one of our great national corporations. It can't do it physically because only a small part of each is within any state. From a legal standpoint, if any mere state attempted national regulation in any appreciable degree impairing the utter freedom of such a corporation in its interstate business, the Court would be prompt in striking down that legislation.

But the effect of the dicta in the Schechter case is that our national industries of construction, manufacture, mining and agriculture may not be regulated by the *nation* either.

What a paradox is here if the states cannot regulate these industrial giants for practical reasons, and that the nation cannot regulate them for constitutional or legalistic reasons!

If that is true, it means that, between the practical inability of the states and the legalistic inability of the nation, there is a vast zone of economic anarchy in which these great national artificial persons can rape and ravish as they will—and rape and ravish they do daily as the great revelations of the NRA hearings amply showed.

Of course, that strange doctrine grew immediately out of certain judicial interpretations of the Constitution. When, with the anti-trust acts, the Federal government first under-

took to take notice of the growing powers of these vast national organisms, the Supreme Court uttered certain language and, from these few sentences, the whole theory arose that manufacture by national corporations could not be regulated by the nation. In the Knight case, the Court said:

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

Now the word “Commerce” actually means any kind of dealing between man and man. Legalistically we have much restricted it and especially in later years. But it had no such restricted meaning when the Constitution was written. “Commerce,” said John Marshall, “is intercourse.”

To say that manufacture is not “commerce” may be correct enough but almost every *part* of manufacture is commerce—and beyond any reasonable question, the relations between workers and their employers is commerce between man and man of the simplest sort. *Certainly* their negotiations and contracts of employment are commerce.

But, says the Knight case, which drew nearly all the teeth out of the anti-trust laws, manufacture affects commerce only *indirectly*. From this one word “indirectly” and this dicta that manufacture is not commerce, the whole doctrine is bred.

The classic definitions of these matters is, of course, in *Gibbons v. Ogden*. So far as I know, nobody has ever contested or even qualified them. They said that commerce among the states means commerce intermingled with the state—not just the trading that reaches physically across the state lines.

It has been frequently emphasized that they also said that it did not mean commerce between man and man strictly internal to a state—and so they did—but what is never emphasized, that they emphatically qualified that statement by adding the words, “which does *not* affect other states.”

The great Chief Justice did not say, "does not *directly* affect interstate commerce." He said that the Federal power *must* reach into the states *to govern that commerce between man and man which concerns more states than one or affects other states.*

Now that seems to me to be also a simple rule that *should* settle the whole matter of such statutes as NRA. Is there, in employment in manufacture, a commerce between man and man within the several states but which *does* affect other states, and which *does* violently and sometimes destructively concern more states than one? If it does, is it not in its nature national? If it is national, is any court going to commit itself to the position of saying that the regulation of that national concern of first magnitude is beyond the power of either the state or nation—a No-Man's Land reached by no system of laws?

That again is, of course, a pure question of simple fact. Is there any necessity of a national rule? If there is, does anybody seriously doubt its validity?

The great goldfish bowl of NRA brought into the public gaze the curse of interstate chiseling on the wages of labor. It revealed that a prime cause of the depression had been the maldistribution of consuming power among workers, with an effect that the tremendous industrial activity necessary to support what we call prosperity, cannot be maintained unless a sufficient reward for production is distributed among workers to enable them to consume the products of their own hands.

It showed very clearly the power of one small chiseling group in any state to degrade the wages and extend the hours of all workers anywhere in the nation and in any particular industry.

The labor cost of any product is a principal element of the price of that product. When any locality or any small group in any industry decides to gain in the competitive struggle by reducing labor wages, it can so reduce its costs in that way as to leave to the competitors in that industry—no matter

how high minded—no choice but to follow the same practice, or else to go out of business.

Now, this is a matter of primary national concern. It is the single basic reason for the continuance of child labor. It is the direct reason for the almost complete destruction of profitable operation in the bituminous coal industry. It is the only reason for the continuation of sweat-shop practices in the garment industry.

Nobody knows the extent to which unemployment was increased in this country immediately after the destruction of NRA, but it was very clear from thousands of reports in the City of New York, and from conversation with some of the greatest employers—that wages were reduced not less than 20% and hours increased by the same percentage. I know of one great commercial enterprise in which 17,000 people lost their jobs within a few days by reason of the destruction of NRA.

As I had occasion to state in a speech about that time, some national associations deliberately refrained from action until Congress adjourned because they were fearful of the public reaction, but they have taken that action with a vengeance since.

There is a school of thought in this country which apparently ardently believes, and belligerently maintains, that the way to prosperity is to reduce wages on the theory that this will make goods cheap and so increase consumption. Goods may be cheap, but if the mass of the people have few jobs and low wages, how can this country either produce or consume?

Here are no less than 10 million people with no employment at all. They, with their dependents are at least one-third of the population of the United States. Much of agriculture is still prostrate. Many of the rest of us are on a part-time low income basis. How in such a situation can you expect to keep the wheels of industry turning?

It can't be done. Private employment is the only possible solution of our labor problems. We all think recovery is coming. It is almost here. The *New York Times* index is

90% of normal. But employment is not returning. I happen to know about New York City. One-fifth of its population is dependent on relief. Public works are not doing the job, and will never do it. In my opinion the unemployment problem is worse than it ever has been and it can only be solved by some revival of at least the basic principles of NRA.

Is this a problem in its nature national and requiring national attention or isn't it? It certainly is a problem of commerce. To say otherwise is to stick our heads in the sand.

It is a *national* problem, if for no other reason than that no separate state can even approach it. But at the risk of repetition let me try to make that a little clearer. At the same time let me address a few remarks to the "indirect" effect of low wages in one locality or one state on the commerce of all localities, or all states.

The Japanese can and do buy American cotton, ship it twice across the Pacific Ocean, and because in their manufacture they pay labor only a few cents a day, they can invade our American markets, with their finished products, hopping over a high tariff wall, and drive our textile industry into bankruptcy, destroy the wealth and occupation of our capital, labor and all the millions dependent on that industry.

Maybe that is an indirect effect of manufacture at low wages in Japan on all wages in America, but it is commerce between man and man in the State of Japan tragically effecting and concerning more states than one. The effect may be *indirect*, but it is devastating. If we admit that the Constitution intended to set up some protection from destructive evil, it is pretty hard to see why it would make any silly distinction between the direct and the indirect approach of it. Common sense would say that it would regard the evil and not the direction of its path.

In the particular case of Japan, our national system has some degree of protection. It can raise the tariff wall, or impose a definite embargo. But what shall we say of the situation in New York City where, due to enlightened state laws, and other economic decencies, sweat-shops cannot legally be operated, or children enslaved.

Yet, any chiseling little buzzard, if he wants to move across a state line, as thousands have, can confront any New York manufacturer with the choice of running a sweat-shop and enslaving labor, or of going out of business. The effect of outside sweat-shops on business in New York may be indirect but I want to tell you that it is practically destroying light manufacture in the City of New York.

Under this curious doctrine, what protection *has* New York? It cannot lay any restrictions on the transportation over its border line of the products of a Connecticut sweat-shop. That is very clear in multitudinous decisions of the Court. And now if the implications of the Schecter case are to stand, the nation has no power and New York City has no protection anywhere.

Is that a matter that concerns more states than one? Can it be possible that there is no power, either in the state or nation, to address this situation? If that is the case, then we stand alone among all the nations of the world in having nowhere in our entire legal system the power to control and regulate economic brigandage.

If I am right and it is all just a question of fact, as to whether the commerce between man and man in industrial employment concerns more states than one, I could give you examples of whole national industries that have been ruined by the process of local chiseling. I could show you case after case of the prostration of an industry in one state by the wage chiseling of that industry in another. The factual case for national regulation under John Marshall's definitions is perfect and overwhelming.

The whole proposition just doesn't make sense. Let's go back again to Constitutional history and ask: If there is any such fundamental law, where did it come from?

If there was any one single thing clear in the calling of the Constitutional Convention, it was that the purpose of it was to break up a rapidly forming tendency of our commerce to go into honeycomb compartments and to make that commerce national.

As John Marshall said of the result: "In *commerce* we are one people."

The Articles of Confederation had proved a complete failure. The states were getting ready to impose against each other every conceivable kind of economic mayhem. Pennsylvania was considering a protective tariff law against all other states. Some of the states were about to impose port duties and embargoes.

The Northern states were engaged in the carrying trade. The tie between the Southern states and the British market for cotton, tea, indigo, rice and tobacco was very close. The use of British bottoms to transport these vast raw resources, threatened to frustrate the very purpose of the Revolution, create strong economic bonds between Britain and the cotton states, and ruin the North.

George Washington expressed the necessity in very emphatic language:

"If the states individually attempt to regulate commerce, an abortion or a many-headed monster would be the issue. If we consider ourselves to be a united people, why not adopt the manners which are characteristic of it?"

The Convention met with this as its primary purpose. To my mind, one of the most astonishing conclusions is that there grew out of that great Convention any theory that the Federal government had no power under that Constitution to regulate the hours and conditions of labor in manufacture for the national market. Gentlemen who insist on this seem to forget the principal great compromise that made the Constitution possible.

We never have seemed to like to talk about it because it involved the question of slavery. If any member of that Convention had entertained the thought that it was withholding from Congress the power to regulate the conditions of labor nationally, why should there have been a specific exception to the power of Congress to interfere with the institution of slavery? To me, that *single* question seems devastating to the contention that the authors of the Constitution ever

dreamed that they were limiting the power of Congress over this particular labor condition.

The compromise was just this: the South feared that the power to regulate commerce might be used to abolish slavery. It was unwilling to form a union on that basis. A trade was finally worked out. The South gave to Congress the power to regulate commerce in return for a specific condition that it should not be used to interfere with slavery in the South.

Said Charles Pinckney in the Convention: "The power to regulate commerce is a pure concession on the part of the Southern States. They do not need the protection of the Northern States."

The other Pinckney said: "It is to the true interest of the Southern States to have no regulation of commerce, but considering the loss in the commerce of the Eastern States by the Revolution and the liberal treatment of South Carolina \* \* \* no fetters should be imposed on the power of making commercial regulation."

Richard Henry Lee maintained the position throughout the Convention that the commerce of the five southern agricultural states would be harmed by the regulation of commerce to favor manufacture in the eight Northern States but at length conceded that the fostering of manufacture by the regulatory power of Congress over commerce *was necessary to create a nation*. It was necessary then to create one, and it is necessary now to save one.

In the face of all this evidence, against which there is not a whisper to the contrary, that the commerce clause was intended to give to Congress the power to address *all* national economic problems nationally, it is very hard to accept any such conclusion as even the Administration seemed to accept after the Schechter case.

NRA could have been saved by a simple joint resolution ratifying the codes by Congress and providing a period of, say, nine months during which they should be revised by a mechanism created in accordance with the formula laid down by the Court. From the moment of utterance of the opinion in the Schechter case, for about ten days, the future of the

principle that the nation had the power to protect itself in this regard hung in the balance.

There had been a vast sweep of changed sentiment throughout both industry and labor in favor of the codes. It was for the President to decide whether he should ask Congress to salvage the ruins of his greatest experiment, or whether he should elect to let the ruins stand and leave the responsibility with the Court for the frustration of high hope in both industry and labor. He chose the latter course. I thought it was wrong, but his responsibilities are so much heavier than those of any other man in this country that we cannot but bow to his decision.

I do not, however, agree that the conclusion from the Schechter case is to amend the Constitution, to limit the powers of the Court, or to throw a connoption fit over the outcome.

Granted that the Court is legislating—granted that it is *more* than legislating—that it is continuously amending the Constitution. Granted if you will that in its constitutional efforts, it is directly repealing the very Constitution the old Tories are now engaged in howling about.

Yet if there were no such resiliency in our system to keep the Constitution abreast of the times, then the grip of a document prepared nearly 150 years ago, within 90 days, by some Colonial gentlemen in a hurry, who nearly all had some direct, personal and pecuniary interest in the result, would really become the chill grasp of mortmain—the dread clutch of the dead hand.

I know of no better way to keep it vitalized than our own system, including the Court.

I don't see how anybody can blame the Court for the outcome of the Schechter case. That case should have been presented as Judge Brandeis used to present his cases when he was arguing before the Court—on a purely factual basis without the citation of a single precedent, disclosing beyond question the overwhelming showing of the NRA experience that national regulation of the problems of a nationalized industry are a modern social economic necessity.

Upon a proper showing, it is inconceivable that the Court would deny to this nation a power shown requisite in every other nation under the sun—to regulate its national commerce nationally. That showing could be made in such a way as to make it clear that the true touch stone is not whether a thing *directly* or *indirectly* affects commerce among the states. It is whether that thing substantially or insignificantly affects that commerce.

That factual showing should present beyond question the fact that degraded labor conditions within any state not only can but almost invariably do seriously, and sometimes disruptively affect other states and concern more states than one.

I can't believe that a doctrine which leaves that situation without a remedy will stand. I see no reason for a Constitutional amendment, the only purpose of which could be to make the Constitution say what its framers intended it to say in the beginning.

There is no occasion for any change in the powers or personnel of the Supreme Court of the United States. It is only necessary to take there a proper case, properly presented, to get that Court to underwrite and authorize the most obviously necessary doctrine of our present political economy—a forthright acknowledgment of John Marshall's simple truth, "*In commerce we are one people.*"