FEDERAL REGULATION OF BUSINESS ENTERPRISE

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It is obviously beyond the scope of this paper to present an exhaustive exposition of the subject of federal regulation of business enterprise, or even to summarize the Constitutional, statutory, and administrative provisions for such regulation. The purpose therefore will be to present a few observations which I have made during a recent study of a large number of federal regulatory measures. These observations will be presented under two following headings: (1) The Changing Concept of Federal Regulation, and (2) The Broadening Bases of Federal Regulation.

I. The Changing Concept of Federal Regulation

The word "regulate" is found in the Commerce Clause of the Constitution. This empowers Congress "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[1] This clause has not been modified by amendment; but there is reason to believe that its connotation has been changed by construction, or usage, with the passage of time. The popular concept of the term within recent years has been that of restriction; but to one who is familiar with the history of our early years it is inconceivable that the members of the Constitutional Convention, meeting in the fall of 1787, should have contemplated the imposition of restrictions upon the struggling infant industries of their time. Nor is it likely that many, if any, of their number possessed sufficient vision to anticipate the problems and difficulties which would emerge with the development of large-scale industry, and the consequent need for restrictive measures. It is therefore reasonable to assume that they intended the word *regulate* to mean only *promote*.

There is evidence to support the view that the purely promotive concept of regulation prevailed for many years. During the debates attending the passage of the Interstate Commerce Act, in 1887, such able lawyers as Senator Evarts, of New York, a former Attorney-General of the United States, contended that the regulatory provisions of the Interstate Commerce Act were un-Constitutional because they were *restrictive* rather than *promotive* of the industries affected.[2] But the restrictive provisions of the act were subsequently upheld by the Supreme Court in numerous decisions. Gradually the public adopted the restrictive concept. In 1912 the Supreme Court, in the Case of Mondou v. New York, N. H. & H. Ry. Co.,[3] construed the term to mean "to foster, protect, control, and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large."

This definition recognizes both the promotive and restrictive concepts and suggests the type of regulation which seems to be evolving, namely, that of government participation. To all intents and purposes the federal government is a participant in the operation of the railroads. So close and continuous is the supervision of the Interstate Commerce Commission over the carriers subject to its jurisdiction that they have acquired a quasi-public character, even though they remain nominally as private enterprises. As the scope of federal authority over business enterprise increases, it is not unlikely that the term federal *regulation* will come to be synonymous with federal *participation*. In this connection it might be observed that the term participation is more apt than the term regulation if there is a sharing of responsibility between the industries and the government.

II. The Broadening Bases of Federal Regulation

Strictly speaking, there are only two Constitutional bases for the federal regulation of business enterprise. These bases are found in the Commerce Clause, previously quoted, and in the final clause of Article I, Section 8, which empowers Congress to make all laws necessary for carrying out the powers expressly granted to Congress or to any other department or officer of the federal government.

[1] Article I, Section 8, Par. 3.
[2] Cullom, S. M., *Fifty Years of Public Service*, p. 230.
[3] 223 U. S. 1, 47 (1912).

It is of interest to note, in passing, that the Commerce Clause remained practically unused during the century following the adoption of the Constitution, the Interstate Commerce Act being the first significant statute based upon it. The Interstate Commerce Commission in its first annual report to Congress discussed the long delay in applying the provisions of the Commerce Clause, and gave as its explanation "the slow expansion of interstate trade."[4]

There could be little question as to the propriety of regulating interstate carriers and communication systems on the basis of the Commerce Clause. But gradually the definition of interstate commerce was expanded to include industries auxiliary to interstate carriers, and later to include firms whose products were intended to be sold outside the state in which they were produced. Statutes such as the Fair Labor Standards Act,[5] popularly known as the Wages and Hours Law, are typical of this tendency to bring within the federal jurisdiction activities which can be called interstate only under the most liberal construction.

The implied powers of Congress provide a basis for the indirect regulation of business enterprise. The economic activities of the federal government have always had their impact upon private enterprise. But recently advantage has been taken of this fact for the purpose of inducing private enterprisers to conform to certain standards of business conduct set up by Congress or some federal agency. The Walsh-Healey Act of 1936 is typical. It provides for the withholding of all contracts exceeding in amount $10,000 from contractors who fail to observe specified requirements relative to the wages, hours, and working conditions of their employees; and it provides severe penalties for violations. While such procedures were certainly not contemplated by the framers of the Constitution, they are accepted by liberals as being in keeping with the spirit of the Constitution.

National emergencies provide occasion for the extension of federal control on the basis of the implied powers, for under such circumstances governmental functions are expanded and redirected, thus increasing their potency as regulatory factors. The present state of war has necessitated the rigid regulation of many industries by the federal government, not merely by means of positive and negative incentives, but through executive orders. Such regulation is in many instances necessary for the successful prosecution of the war, and is therefore justifiable. But experience has shown that powers exercised in an emergency are with difficulty relinquished by the government when the emergency has passed.

In the exercise of some of the express or implied powers it has been discovered that regulation of business enterprise may be achieved where it might not be *purposefully undertaken.* For example, in the exercise of the taxing power it is possible to accomplish a regulatory end, even though a tax imposed for the obvious purpose of regulation would not be allowed by the Supreme Court.[6] Thus, a penalty, or regulatory tax, on oleomargarine was upheld by the Court on the ground that a Constitutional function of government (taxation) must not be defeated on the ground that its effect would be regulatory. But in a later case[7] it was held that if the statute gave evidence on its face that its purpose was to achieve an un-Constitutional regulatory effect, the statute would not be enforceable.

Again, the taxing power has been used to effect general economic changes which have a direct bearing upon business enterprise. Through a proper use of this power in the establishment of rates and incidences of taxation it is possible to induce a redistribution of wealth or income which will materially affect private enterprises. This power was greatly implemented by the Sixteenth Amendment, on the basis of which progressive income taxes are possible.

Tracing the development of federal control one cannot but be amazed at the manner in which the Constitution may be made to apply where regulation is desired. This at once constitutes a basis for optimism and a basis for fear. It is the responsibility of political scientists, sociologists, and economists to use their influence to see to it that these enlarged Constitutional powers are not abused.

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[4] I. C. C., *Annual Report*, Vol. I, (1887) p. 2.
[5] *52 U. S. Stat.* 1060ff (1938).
[6] *McCray v. United States*, 195 U. S. 27 (1904).
[7] *The Child Labor Tax Case*, 259 U. S. 20 (1922).