COMMENT.

The decision of the Supreme Court of the U. S. in *O'Neil* v. *State of Vermont* on April 4th may not, as has been asserted, reverse all decisions hitherto made on the subject of inter-State commerce, nor may it indicate a backward step in the march of federal control over the entire commercial system. But its dismission of the case on the technical objection that no federal question was presented does not make it less difficult to harmonize with *Leisy* v. *Hardin*, 135 U. S. 100. The facts were precisely analogous. The effect of the decision precisely contrary. The case itself presents many unusual questions. It maintains the power of one State to punish the citizen of another for a transaction legal and initiated in the State of his residence but illegal in the State where consummated by an agent; and it is further marked by a sharp difference of opinion as to when a federal question is so involved by the record as to give the court jurisdiction. There is the same difference as to the application of the 8th Amendment of the Constitution of the U. S. O'Neil, the plaintiff in error, was a licensed liquor dealer residing in Whitehall, N. Y. His patrons were residents of Rutland, Vermont. They were supposed to live under a stringent prohibitory law. An express company carrying the "original package," C. O. D., constituted the connecting link in the transaction. As long as O'Neil gathered in the golden harvest at a respectful distance from the border line all went well. But he ventured into Vermont, and was promptly seized and brought to justice — of a sort — at Rutland, Vt. A justice of the peace sentenced him to pay a fine of $9712.96, or an alternative sentence of more than seventy-nine years — exceeding in severity according to Mr. Justice Field, "anything which I have been able to find in the records of our Courts for the present century." The County Court mercifully modified this sentence to something like half a century. The Supreme court of Vermont affirmed the decision. It declared that the sending of such a package from Whitehall, N. Y., to Rutland, Vt., C. O. D., was an executory contract of sale in New York, but since the vendor did not part with the title until the purchaser paid the express charges, such a contract of sale was consummated in Vermont. The seller was

therefore constructively present and guilty under its prohibitory law. It held, also, that a "cruel and unusual punishment," within the terms of the constitution of its State and the U. S. meant only an inordinate punishment for a single infraction of the law, not an accumulated punishment for repeated infractions when the penalty for each was reasonable. The Supreme Court of the U. S. by a majority of four to three, held that it had no jurisdiction, and said: "The only question considered by the Supreme Court of Vermont in its opinion in regard to the present case was whether the liquor in question was sold by O'Neil at Rutland or at Whitehall, so as to fall within or without the statute of Vermont, and the Court arrived at its conclusion that the completed sale was in Vermont. That does not include any federal question. * * * The Supreme Court of Vermont decided the case before us upon a ground broad enough to maintain its judgment without considering any federal question. No federal question was presented for its decision as to this case. Nor was the decision of a federal question necessary to the determination of this case, nor was any actually decided, nor does it appear that the judgment as rendered could not have been given without deciding one." The justices disagreed as to whether the record showed that the plaintiff in error had specifically excepted in the court below on the ground that the transactions were protected by the inter-State commerce clause, or whether the Sup. Court of Vt. had or had not decided that question directly in its opinion. Mr. Justice Field, however, with whom Justices Harlan and Brewer seem in the main to agree, dissents on the broader ground that the jurisdiction of the court depends on the substance and not the form of the record, saying: "It is not necessary, to give this court jurisdiction to review the judgment of that court, that the record should show that the objection, that the transactions were those of interstate commerce, was specifically taken in terms in the court below; it is sufficient if the facts of the record show that the question of their being transactions of that character was involved in the case, though the court below may state in various forms that it did not deem it necessary to consider it. In *Murray* v. *Charleston*, 96 U. S. 432, 441, it was held that whenever rights, acknowledged and protected by the Constitution of the United States, are denied or invaded by State legislation, which is sustained by the judgment of a State court, this court is authorized to interfere; that the jurisdiction to re-examine such judgment cannot be defeated by showing that the record does not in direct terms refer to a constitutional provision, nor expressly state that a federal question was

presented; and that the true jurisdictional test is, whether it appears that such a question was decided adversely to the federal right.". Upon the question of "cruel and unusual punishment," the majority opinion says: "We forbear the consideration of this question because as a federal question it is not assigned as error nor even suggested in the brief of the plaintiff in error; and so far as it is a question arising under the constitution of Vermont, it is not within our province; moreover, as a federal question, it has always been ruled that the 8th Amendment to the Constitution of the United States does not apply to the States." Mr. Justice Field speaking on this point for the three dissenting justices declares that the operation of the 8th Amendment combined with the 14th is to protect every citizen of the U. S. from such punishment. His opinion on this point is so interesting that it is given at large: "I go farther than the consideration of the question of inter-State commerce involved. Having jurisdiction of the case on the ground stated, I think we may look into its whole record. * * * And if it appears from the proceedings taken and the rulings made in the court below, on questions brought to its notice, that the rights of the accused, affecting his liberty or his life, have been invaded, this court may exercise its jurisdiction for the correction of errors committed. The 14th Amendment declares that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and that no State shall deprive any person of life, liberty, or property without due process of law. I agree, as held in *In re Rahrer*, 140 U. S. 555, that those inhibitions do not invest Congress with any power to legislate upon subjects which are within the domain of State legislation. They only operate as restraints upon State action, like the prohibitions upon legislation by the States impairing the obligation of contracts, or to pass a bill of attainder or an *ex post facto* law. But in all cases touching life or liberty I deem it the duty of this court, when once it has jurisdiction of a case, to enforce these restraints for the protection of the citizen where they have been disregarded in the court below, though called to its attention. I do not pretend that this court should take up questions not arising upon the record, but I do contend that it is competent for the court when once it has acquired jurisdiction of a case to see that the life or liberty of the citizen is not wantonly sacrificed because of some imperfect statement of the party's right. * * * In opening the record in this case, we not only see that the exclusive power of Congress to regulate commerce was invaded, but we see that a cruel as well as an unusual

punishment was inflicted upon the accused, and that the objection was taken in the court below, and immunity therefrom was specially claimed. The 8th Amendment of the Constitution of the United States, relating to punishments of this kind, was formerly held to be directed only against the authorities of the United States, and as not applicable to the States. (*Barron* v. *Baltimore*, 7 Peters 243.) Such was undoubtedly the case previous to the 14th Amendment, and such must be its limitation now, unless exemption from such punishment is one of the privileges or immunities of citizens of the United States, which can be enforced under the clause declaring that 'no State shall make or enforce any law which shall abridge' those privileges or immunities. In *Slaughter-house Cases*, 16 Wall. 36, it was held that the inhibition of that amendment was against abridging the privileges or immunities of citizens of the United States as distinguished from privileges and immunities of citizens of the States. Assuming such to be the case, the question arises: 'What are the privileges and immunities of citizens of the United States which are thus protected?' These terms are not idle words to be treated as meaningless, and the inhibition of their abridgment as ineffectual for any purpose, as some would seem to think. They are of momentous import, and the inhibition is a great guaranty to the citizens of the United States of those privileges and immunities against any possible State invasion. It may be difficult to define the terms so as to cover all the privileges and immunities of citizens of the United States, but after much reflection I think the definition given at one time before this court by a distinguished advocate — Mr. John Randolph Tucker, of Virginia, — is correct, that the privileges and immunities of citizens of the United States are such as have their recognition in or guaranty from the Constitution of the United States. * * * The rights thus recognized and declared are rights of citizens of the United States under their Constitution which could not be violated by federal authority. For when the late civil war closed, and slavery was abolished by the 13th Amendment, there was a legislation in the former slave-holding States inconsistent with these rights, and a general apprehension arose in a portion of the country — whether justified or not is immaterial — that this legislation would still be enforced and the rights of the freedmen would not be respected. The 14th Amendment followed, which declares that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.' The freedmen thus became citizens of the

United States and entitled in the future to all the privileges and immunities of such citizens. But owing to previous legislation many of those privileges and immunities, if that legislation was allowed to stand, would be abridged; therefore, in the same amendment by which they were made citizens, it is ordained that 'no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States,' thus nullifying existing legislation of that character, and prohibiting its enactment in the future. While, therefore, the ten amendments, as limitations on power, and, so far as they accomplish their purpose and find their fruition in such limitations, are applicable only to the federal government and not to the States, yet, so far as they declare or recognize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution; and the 14th Amendment, as to all such rights, places a limit upon State power by ordaining that no State shall make or enforce any law which shall abridge them. If I am right in this view, then every citizen of the United States is protected from punishments which are cruel and unusual. It is an immunity which belongs to him, against both State and federal action."

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An interesting and important question in constitutional government was considered by the Court of Appeals of Kentucky in *Miller* v. *Johnson*, 18 S. W. Rep. 522. The Kentucky constitution of 1849 provided for the calling of a convention by the legislature for the purpose of making constitutional amendments, but contained no provision as to the submission of the work of the convention to the people. In 1890 the legislature called a convention, and enacted that the draft of a constitution adopted by the convention should not be operative until ratified by a majority of the voters of the State. The convention submitted a draft of a constitution to the voters, who ratified it by a large majority. Afterwards the convention made numerous changes in the instrument which the people had ratified, some of which changes it was claimed were material, and promulgated the amended instrument as the constitution of the State. The court held that this instrument was a valid constitution, on the broad ground that it had been recognized as such by the executive and legislative departments of the government. HOLT, C. J., said: "Great interests have already arisen under it; important rights exist by virtue of it; persons have been convicted of the highest crimes known to the law, according to its provisions; the political power of the

government has in many ways recognized it; and, under such circumstances it is our duty to treat and regard it as a valid constitution, and now the organic law of our commonwealth. We need not consider the validity of the amendments made after the convention reassembled. If the making of them was in excess of its power, yet, as the entire instrument has been recognized as valid in the manner suggested, it would be equally an abuse of power by the judiciary, and violative of the rights of the people,—who can and properly should remedy the matter, if not to their liking —if it were to declare the instrument or a portion invalid, and bring confusion and anarchy upon the State." BENNETT, J., dissenting, said that, "the constitution being silent upon the subject of submission, the power of the legislature, as the people's agent, is supreme upon that subject; and they had a perfect right to provide, as they did, that the convention must submit their work to the people for ratification or rejection, or they might have provided that they should have the absolute power upon that subject. * * * It follows from what I have said that all material changes made by the convention after it reassembled in September are void." The merit of this decision is certainly not free from doubt, and its importance is evident; because, if the court had decided that it was not bound by the decision of the political departments of the government, the reasons of the dissenting judge in favor of the invalidity of the new constitution, would seem to be logical and controlling.

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The Supreme Court of the United States has decided in two recent cases, *Ex parte Rapier*, 12 Sup. Ct. Rep. 374, and *Horner* v. *United States et al.*, 12 Sup. Ct. Rep. 407, that the Act of Congress, September, 1890, excluding lottery matter from the mails is constitutional. The court also held that the freedom of the press and the right of free communication were in no way abridged, within the intent and meaning of the constitutional provision.

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In the recent case of *Chandler* v. *Pomeroy et al.*, 12 Sup. Rep. 410, the Supreme Court of the United States, reversing same case, 46 Fed. Rep. 533, held that where the son and two daughters of a testator contracted to disregard the will and divide the property equally among them, the contract in the absence of fraud should be specifically performed.