1892

The Power of a State to Interfere with Interstate Commerce by the Exercise of its Police and Taxing Powers

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BY THE EXERCISE OF ITS POLICE AND TAXING POWERS.

-By-

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THE POWER OF A STATE TO INTERFERE WITH INTERSTATE COMMERCE
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Introduction.

In considering the question as to how far a State has the right to interfere with interstate commerce it will be necessary first to determine whether or not the power in Congress is exclusive, by glancing at the causes which led to the formation of the Articles of Confederation and by looking briefly at the results of those Articles, which really were indirectly the cause for the formation and adoption of the present Constitution; and then to consider and discuss the principal cases that have arisen under the commerce clause of the Constitution by reason of some burden or restraint upon commerce by the States.

PART I.

Brief Review of the Causes which led the States to Surrender the Power to Regulate Commerce, with a View of Showing that the Power in Congress is an Exclusive one.

The first settlers of this country were filled with the
idea of popular sovereignty, and consequently they planted themselves in little communities and had the Council House and the Town Meeting as the safeguards of self government. They conceived that local government was the only safe foundation upon which they could firmly set their institutions. And it may be added that the observations of those who have made our early institutions a special study have led to the conclusion that this idea of popular sovereignty and of local government spread from the Township to the County, and from the County to the Colony, without any disastrous or evil results. But the difficulty was in the fact that each State had a diversity of local interests, and therefore regarded each other State in a certain degree foreign soil; and when it had become necessary to form a Confederation, in order for the States to secure themselves against the encroachments of Great Britain, the jealousy that existed between the different States, and the selfishness with which each State guarded its own right to govern itself on all subjects, were found to be an insuperable barrier to the formation and adoption of any articles that would bind them together.

The Articles of Confederation were, however, agreed upon by the States as a form of new government in November, 1777,
and with such vigilance did each State watch its own rights that the very power which is an absolute necessity to a peaceful and Strong Government and Union,—to wit, the power to control commerce,—was not surrendered by the respective States, and it was not long after these Articles went into effect before the extreme selfishness of the States began to show itself in the regulation of commerce between them.

The trouble of having this power to regulate commerce in the States is well summed up by Hamilton in the Federalist (No. 22), in which he says: "The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have in different instances given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a National control, will be multiplied and extended until they become not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy."

The then imperfect Union having become nearly destroyed by the discord and dissension between the States, experience soon taught the different States that as long as this power over commerce remained in the respective States the power in
the general Government was inadequate to the formation of an indissoluble Union of indissoluble States, and so it was determined by some of them to report to Congress the necessity of calling a convention for the purpose of altering and enlarging the powers of the general Government, and the report of the States having been approved by Congress, a convention was called to meet at Philadelphia in May, 1787.

As can be anticipated from what has been said, one of the principal causes for calling this convention was the absence in the general Government of the power to regulate commerce between the States and with foreign nations, and the convention after a long and tedious session, which was characterized by very learned expositions on powers of government, at last fully met the emergency for which it was called, by framing and adopting the present Constitution, which has incorporated within it the clause "Congress shall have power to regulate commerce with the foreign nations, and among the several States and with the various Indian tribes."

From the fact that the States retained this power over commerce when the Articles of Confederation were in existence, that those Articles proved to be insufficient to a strong Union, that when the States possessed this power discord and
dissension were prevalent among them, that the absence of this power in the general Government was one of the main causes for calling the convention of 1787, and that in the convention the States surrendered this power to the general Government, I think the only logical conclusion is that this power is exclusive in the general Government and that there is no concurrent power in the States.

PART II.

Statement and Discussion of the Principal Cases (Excepting the Taxing Cases) which have arisen under the Commerce Clause.

The power vested in Congress by virtue of the commerce clause has been the source of much litigation and the question of the extent of the power, or as to how far the State can validly legislate before it encroaches upon the delegated power to the United States, has been the cause for a great variance of opinion with the judges of the highest judicial tribunal of this land.

As the main question discussed by the court in all the
cases that have arisen under this clause is whether or not the State by enacting certain laws has acted within its police power or has gone without it and usurped the powers of the general Government, the first question that confronts us in considering these cases intelligently is, what is the police power of a State? The police power has been defined to be "in a comprehensive sense, that power which embraces the whole system of internal regulation by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own so far as it is reasonably consistent with a like enjoyment by others." (Cooley's "Constitutional Limitations", p. 572.) Whenever the State acts within this power its legislation will be valid, and as a general rule the motives of the legislature in passing a certain act cannot be questioned unless the act shows on its face that it is a flagrant abuse of the power, and then the courts will take notice of the fact and declare such a statute unconstitutional.

The first great case that arose under this clause of the
Constitution was that of *Gibbon v. Ogden* (9 Wheaton, 196). The question for the court to decide in that case was whether or not a statute of a State which gave to one of its citizens the exclusive navigation of all waters within the jurisdiction of the State, with boats propelled by fire or steam, was in any way a regulation of commerce and therefore not within the police power of a State, and the court, discussing very elaborately the extent of the police power and also the question as to what was an interference or regulation of interstate commerce, decided that such power exercised by the State was a regulation of interstate commerce.

The defendant in the case contended that inasmuch as the privilege only extended within the borders of a State, that therefore the statute was merely a regulation of internal commerce and not a regulation of interstate commerce. But Chief Justice Marshall, in writing the opinion, said: "In regulating commerce with foreign nations the power of Congress does not stop at jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which pene-
trate our country in every direction pass through the interior of almost every State in this Union and furnish those means of exercising this right. If Congress has the right to regulate commerce, that power must be exercised wherever the subject exists. If it exists within the State, if a foreign voyage may commence or terminate within the State, then the power of Congress may be exercised within the State."

While what was said by the distinguished jurist just quoted had reference to commerce with foreign nations, it seems to me the principle is made still more clear when applied to commerce among the States; for no commerce at all could possibly be carried on among the States unless it was commerce with the States, as the States are simply divided by an imaginary mathematical line, and it is simply a matter with transporters from one jurisdiction to the other.

Therefore this power over commerce, which is commercial intercourse between States and nations, is the power to prescribe rules governing this interstate intercourse, and any power exercised by the State which grants to its own citizens privileges which citizens of other States, engaged in the same common commerce, are debarred from is the exercise of an unwarranted power by the State.
While it is an established fact at present that this power to control commerce which is vested in Congress is an exclusive one, yet there are cases, nevertheless, where the State may legislate on subjects which relate to and remotely affect commerce, and such legislation is valid until superseded by National legislation on the same subject. The Legislature of the State of New Jersey enacted a law which authorised a certain corporation to erect a dam across the Black Marsh Creek, which is a part of the navigable waters of the United States, situated in the State of New Jersey and which had floating upon it at the time vessels enrolled and licensed as United States coasting vessels, and the course of these vessels being obstructed by this dam, they ran into and broke down the dam and were sued for damages by the corporation that had erected the dam. The owners of the vessels set up as a defense the unconstitutionality of the statute, claiming that the law granting the privilege to any corporation to erect a dam was in violation of the commerce clause of the Constitution; but the court held that inasmuch as the value of certain property would be enhanced by the building of the dam and exclusion of the water, and as the health of the citizens of New Jersey was also probably improved, the law was valid, be-
cause measures calculated to produce these objects, provided they do not come into conflict with laws of the general Government, were undoubtedly within the power reserved to the States. (Wilson v. Black Horse Creek Co., 2 Peters, 235.)

A statute of New York making it the duty of the master of every ship arriving in the port of New York to report within twenty-four hours after its arrival, in writing on oath or affirmation, to the mayor of the city the names, ages and residences of all passengers on the ship, was held constitutional and within the police power of a State. The court, in deciding the case, wrote substantially as follows: That a State has complete and unlimited jurisdiction over all persons and things within its territorial limits where that jurisdiction is not surrendered or restrained by the United States Constitution; that by virtue of this the State has not only the right but it is its bounden duty to advance the safety and happiness and prosperity of its people, and to provide for their general welfare by any and every act of the legislature which it may deem conducive to those ends; that all the powers which relate to merely municipal legislation, or what may be more properly called internal police, are not surrendered or restrained by the Constitution of the United
States, and that consequently in relation to those subjects the authority of a State is complete, unqualified and conclusive. (New York v. Hiln, 11 Peters, 102.)

In rendering a decision in the case of New Hampshire v. Pierce (6 Howard, 515) Judge Story, in passing upon the validity of a statute which prohibited the sale of distilled spirits in any quantity without a license from the selectmen of the town in which the party selling it resided, said: "The controlling and supreme power over commerce with foreign nations and among the several States is undoubtedly conferred upon Congress, yet, in my judgment, it is within the police power of a State, nevertheless, for the safety or convenience of trade or for the convenience of its citizens, to make regulations of commerce for its own ports and harbors and for its own territory, and such regulations are valid unless they come in conflict with a law of Congress."

In the celebrated Passenger cases, reported in 1 Howard, 283, it was held that a State had no power, under the plea of protecting the health and safety of its own citizens, to enact a law which required the master of every ship arriving in port to pay a certain tax on every passenger that was landed, for by so doing the State was placing a direct burden upon a
subject which was of National importance,—to wit, the free passage of subjects of the respective States between them.

It was in the opinion written in these cases by Mr. Justice Curtis that the local and National doctrine,—to wit, that all subjects which are of a local character and only remotely respect commerce are proper subjects of legislation for the State, such legislation being valid until Congress legislates upon the same subject, but all subjects which are of a National character and require a uniform legislation can only be legislated upon by Congress,—was first clearly laid down as an established and controlling principle of the court in all cases where the subject of proper legislation of the State was in issue; although it can be seen from reading the prior decisions of the court that this principle had always been recognized by it but not plainly laid down. This doctrine since it was clearly announced by the court has always been in all cases where the regulation of interstate commerce was in issue, except in the taxing cases, the principal doctrine applied by the court in determining the question whether a State has acted within or without its police power. I think it can be stated with propriety that ever since this doctrine was first laid down by Mr. Justice Curtis it has been to the
Supreme Court of the United States what the north star has been to the explorer,-- forever a guide, whether the court was being tossed from conclusion to conclusion by the waves of eloquence which have flown from the lips of distinguished jurists arguing in the forum or whether the court in search of a new and broader principle to apply was being led on into the unknown and uncertain paths of discovery by the meditations and discussions in the secret chambers of the court.

It has been held to be perfectly valid for a State to require every ship master coming into port with a ship to receive pilots, and if they do not to subject them to a certain penalty; the grounds upon which the decision is based being that although the statute was clearly a regulation of commerce, yet as Congress had not enacted any law on the subject, and as the safety of the citizens of the State was involved, the legislation of the State would be perfectly valid until superseded by Congressional legislation.

In Gilman v. Philadelphia (3 Wallace, 713), the validity of a statute of a State was upheld which provided for the erection of a bridge over the Schuylkill River at Chestnut Street, Philadelphia. This river is a part of the navigable waters of the United States and upon it coast vessels engaged
in commerce between the States and licensed and enrolled as coa-
ting vessels. A person by the name of Gilman owning a 
wharf on the river, just above the place where the bridge was 
to be constructed, which would be greatly damaged by the con-
struction of it, contended that the statute passed by the 
State authorising the erection of the bridge was unconstitu-
tional, as it vitally interfered with commerce of the state. 
The court in deciding the case came to the conclusion that al-
though the statute might be a slight regulation of commerce, 
yet the building of a bridge was a local matter which had to 
do simply with the interest of the State itself and therefore it was in the police power of a State to enact such laws.

Whenever a State passes a law which discriminates between the rights of its own citizens and those of another State it clearly attempts to regulate commerce, and consequently a statute which prohibits any person from selling certain wares in the State which are not the growth, product or manufacture of the State, without a license, is invalid. (Wilton v. Mis-
souri, 91 U. S. 265.)

Any State invades the power of Congress when it seeks to impose upon the master of every ship that brings passengers into its ports the burden of giving a bond in a penalty of a
certain amount for every passenger landed, or allows him to commute within twenty-four hours after arrival by paying a certain sum for each passenger, as the design of such a statute passed by a State is simply to place a tax upon the passengers, and as transportation of passengers is an act of commerce, such a restriction upon it is invalid. (Henderson v. Mayor, 92 U. S. 275.)

A law of Missouri was held to be unconstitutional which provided that no Texan cattle should be brought into the State between March 1st and November 1st, and when such cattle were taken through the State during that part of the year by an transportation company, if any disease should occur along the line of such transportation, then the company should be liable for all damages. The legislature in passing this statute clearly transcended its power to legislate and invaded the domain of Congress, for by the statute no greater restriction could be placed upon commerce, as it entirely prohibited cattle of all kinds, whether diseased or not, from being transported into the State. If the legislature had enacted a law which only prohibited diseased cattle from being brought within the State during a certain period of the year or at all times of the year, it could have been sustained under the
State's right to pass laws for the protection of the health of its citizens. In deciding this case, the court said:

"While we unhesitatingly admit that a State may pass sanitary laws and laws for the protection of life, liberty, property or health within its borders, while it may prevent persons and animals suffering under contagious and infectious diseases, or convicts, etc., from entering the State, and while for the purpose of self protection it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State beyond what is absolutely necessary for self-protection. It may not, under cover of exerting its police power, substantially prohibit or burden either foreign or interstate commerce. The police power of a State cannot obstruct foreign commerce beyond the necessity of its exercise and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution." (H. K. Co. v. Husen, 95 U. S. 465.)

No State, under the power it has to protect the life, health and safety of its citizens, has the right to enact a law forbidding any common carrier from bringing any intoxicating liquors into the State without at first obtaining a cer-
tificate sealed with the seal of the county auditor of the county where the liquors are to be taken; for by so doing, the State Legislature attempts to exercise a jurisdiction over persons and property without the State. The State by virtue of such legislation seeks to prohibit the importation into its own limits of a just article of commerce, and therefore the legislation is designed as a regulation for the conduct of commerce before the real subject of commerce has been brought within its borders. Such legislation is not a local legislation, designed to aid and facilitate commerce; neither is it an inspection law, nor a law to regulate or restrict the sale of articles deemed injurious to the health and morals of the community, nor a regulation confined to purely internal commerce of a State, nor a restriction which only operates upon property after it becomes mingled with and forms part of the mass of the property within the State; but it is, on the other hand, a regulation directly affecting interstate commerce in an essential and vital point. (Bowman v. R. R. Co. 125 U. S. 465.)
PART III.

Statement and Discussion of a few of the Import-
Cases that have arisen under the Commerce Clause, by
reason of the Taxing Power of a State.

Having briefly considered a few of the important cases
which have arisen under the commerce clause of the Constitution
by reason of some restraint having been laid on commerce other
than a tax, I will now state and briefly discuss a few of the
cases that have arisen under the taxing power of a State.

One of the first cases that came before the Supreme Court
in which this power was involved was Brown v. Maryland (13
Wheaton, 419), and the court held that a statute of Maryland
which required importers of goods to take out a license and
pay a license fee therefor imposed a burden or condition upon
engaging in foreign commerce, whether the license fee was re-
garded as an imposition of a tax or a mere regulation of the
business. The court also held that a taxation of an impor-
ter, in the way of requiring a license for his engaging in the
business, was the same thing as a tax on the business itself,
and therefore it was clearly a regulation of commerce.

In the State Freight Tax cases (15 Wallace, 284), the
question presented to the court to decide was whether a statute of a State imposing a tax upon freight taken up within the State and carried out of it,—or, in different words, upon all freight other than that taken up and delivered in the State,—is repugnant to the commerce clause of the Constitution. The court decided that it made no difference that the effect of the statute was not to discriminate between the citizens of one State and those of another or that it only applied to railroads within the State, for the reason that the tax was not on the franchise or business of the corporation but on the subject of commerce itself, and therefore its effect being extra-territorial it was clearly a burden upon and a regulation of commerce. It is perfectly clear that when a State enacts such a law it exceeds its taxing power, for if a State has any right to impose any tax at all upon a subject of commerce being transported in or out of the State it has the right to impose sufficiently large a tax to destroy all commerce and thereby defeat the very purpose for which the power over commerce was given to the general Government. The subject of transportation from one State to another, being one of a National character, requires National regulation.

It is not within the power of a State to impose a tax
upon persons dealing in goods not produced in the State, while no corresponding tax is imposed upon those dealing in goods which are the product of the State, neither is it within the power of a State to impose a tax on selling goods to be shipped into the State, when no such tax is imposed upon selling the corresponding home product, for the reason that commerce must remain free and untrammeled and not be loaded down with any of the burdens of selfish State legislation. (Walling v. Illinois, 115 U. S. 445.)

A tax of a certain amount on each car, imposed by a State on all sleeping cars or coaches run over a railroad of the State and not owned by the railroad company itself, is unconstitutional as an interference with interstate commerce. (Pickard v. Pullman Car Co., 117 U. S. 38.) But the Supreme Court has held that it is perfectly legitimate for a State, inasmuch as it has the right to tax personal property within its jurisdiction even though such property is employed in interstate commerce, to impose a tax on such proportion of the whole capital stock of a foreign sleeping car company as the number of miles over which its cars are operated within the State bears to the whole number of miles over which its cars are operated, though such cars run into, through and out of
the State; and the grounds upon which such a statute is held constitutional are that the legislative powers of every State extend to all property within its borders, whether engaged in interstate commerce or not, and that inasmuch as such property can be affected by the laws of any other State only so far as the comity of that State allows, it is perfectly legitimate for a State to repeal, modify or limit such laws of comity, and when it does so act it simply exercises an ordinary and proper function of legislation. (Pullman Palace Car Co. v. Per. 11 Sup. Ct. 876.)

While it has recently been held that a statute of a State requiring the agent of a foreign express company doing business in the State to pay a license fee of five dollars and deposit with the auditor a statement of the company's assets and liabilities, showing that it has an actual capital of a certain amount, is invalid as being a burden upon commerce, upon the grounds that the prerogative and responsibility for providing for the security of the citizens and people of the United States, in relation to foreign corporate bodies or individuals with whom they may have relations of interstate commerce, belong to the Government of the United States and not to the governments of the several States (Crutcher v. Kentucky, 11 Sup. 21
Ct. 851), it has more recently been held by the same court,-- and it seems to me in direct opposition to the principle laid down in the last case,-- that a State has the power to require every corporation operating a railroad in its borders to pay an "annual excise tax for the privilege of exercising its franchises", the amount of the tax to be determined according to a sliding scale proportioned to the average gross earnings per mile within the State for the year preceding the levy of the tax. The main ground upon which this case was decided was that any State has a perfect right to demand of any corporation a certain excise tax for the privilege of exercising its franchises within the State. (State of Maine v. Grand Trunk R. R. Co. of Canada, 12 Sup. Ct. Rep. 121.) This decision of the court, like many others decided of late under the taxing power of a State, is irreconcilable with other decisions of the court, and therefore I have not attempted to reconcile it by stretching my imagination to see or read certain things out of this opinion which the court never intended to be so read.
PART IV.

Statement of General Principles established by the United State Supreme Court and used by them in determining whether or not a State has exceeded its Powers.

As a conclusion, it may be stated that owing to the uncertainty of the border line between the police and taxing powers of a State and the powers of Congress as regards the subject of commerce, and also owing to the recent revolutionary and uncertain decisions of the court upon these subjects, no definite and specific rules can be laid down as to when a State can validly legislate upon them and as to when it cannot, but there are a few general principles which the court always applies whenever it can, and they may be summed up as follows:

1. The power to regulate commerce among the States having been given to Congress by the United States Constitution, that power is exclusive whenever the subjects of it are National in their character and admit of only one uniform system or plan of regulation.

2. Whenever a subject is merely of local concern a State
may rightfully legislate upon it although such legislation
may remotely affect commerce, and the legislation of the State
will be valid until superseded by Congressional legislation.

3. Whenever Congress fails to legislate upon subjects
of a National character its failure to so legislate indicates
its will that the subject shall be free from any regulations
by the respective States.

4. No State has a right to lay a tax on interstate com-
merce in any form, whether by way of duties laid on the trans-
portation of the subjects of that commerce or on the receipts
derived from the transportation or on the occupation or busi-
ness of carrying it on.

5. All States have the right to tax all personal prop-
erty within their jurisdiction, whether that property is en-
gaged in interstate commerce or whether it has its situs in
the State, provided the tax is legally proportioned.

6. Any State has the power to require a certain excise
tax of any corporation for the privilege of exercising its
franchises in its borders.

[Signature]
TABLE OF CASES CITED.

Bowman v. R. R. Co.
Brown v. Maryland.
Crutcher v. Kentucky.
Gibbon v. Ogden.
Henderson v. Mayor.
New Hampshire v. Pierce.
New York v. Miln.
Passenger Cases. (1 Howard, 283.)
Pickard v. Pullman Car Co.
Pullman Palace Car Co. v. Penn.
R. R. Co. v. Husen.
State Freight Tax Cases. (15 Wallace, 284.)
State of Maine v. Grand Trunk R. R. Co. of Canada.
Wilson v. Black Marsh Creek Co.
Wilton v. Missouri.