1893

The Power of a State to Interfere with Inter-State Commerce

George J. O'Connor
Cornell Law School

T H E S I S

The Power of a State to Interfere with Inter-State Commerce.

-by-

George J. O'Connor,

Cornell University School of Law,

1893.

PREFACE.

In the category of perplexing legal problems arising out of the complexity of our dual system of government, there are, perhaps, none more difficult of solution then those involving the interpretation and construction of that clause of the Constitution which grants to Congress the power to regulate commerce.

Upon an examination of the immense mass of cases dealing with this subject, it at once becomes apparent that there has not been, nor is there at the present day, a uniformity of opinion among the judges of the Supreme Court as to the precise limit of this power. Every important case has been a battle ground and almost every decision has met with a strong and vigorous dissent.

In writing this treatise I have attempted to set forth briefly the law as I have found it, without attempting to advance any independent theory by which all the de-

cisions can be reconciled. I have cited a number of cases but no more than I have thought necessary to illustrate fully the workings of the principles and propositions stated.

It has been happily said that the Constitution of the United States is an instrument of enumeration rather than one of definition, therefore to discover the approximate limits of a grant such as the one empowering Congress to regulate commerce, the decisions of the Supreme Court of the United States must necessarily be the sources of investigation. Consequently a treatise on this subject can, at best, be little more than a digest and discussion of the cases.

My object in writing this was not an ambitious desire to be ranked among the writers, on this subject, who with their graceful pens, have written, on the pages of time, an immortal name for themselves; but rather a desire to furnish a reference to the leading principles and propositions which may be deduced from the chaos of decisions and irreconcilable dicta involving the construction of Article I. Sec. 8, of the Constitution. If the reader finds that this work accomplishes that object, I gratefully receive any criticism which may be passed upon it.

Among the powers conferred upon the central government by the several states, and enumerated in the Constitution of the United States, one of the most important, one of the most necessary and vital to the prosperity and life of the Union, is the power to regulate foreign and interstate commerce and is found in Article I. Sec. 8, couched in the following language "The Congress shall have power. . . . to regulate commerce with foreign nations among the several states and with Indian tribes."

In order to obtain a proper understanding of the nature and scope of the clause, it will be necessary to glance at the history of the several states immediately prior to the adoption of the Constitution, that we may see the object sought to be accomplished and the difficulty sought to

be overcome by conferring this important power upon Congress. Under the old Confederation, the Congress had no power to regulate commerce or to impose or levy duties or customs on foreign or imported goods. It is true that Congress had the power to make treaties and the compact between the states declared that no stste should lay any imposts or duties which might interfere with any stipulation in treaties entered into by the Congress. But this power to make treaties was rendered useless by the fact that the Federal government had no means to enforce their observance and as might be expected their stipulations were recklessly disregarded by the states. Each state, consequently, could and did establish a separate tariff and pursued its own commercial policy. This want of uniformity could be productive of nothing but commercial dimunition. States which from their geographical position enjoyed great natural commercial facilities took undue advantage of them and the other states resorted to retaliation. The state of commerce before the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests and the disunited efforts of the legislatures of the several states

to counteract their restrictions, were rendered powerless by a want of combination. One of the most important industries of an ambitious, strong, energetic people who in interest, language and religion were really one was rapidly declining. The strong sympathies which bound the states together during a common war disappeared when peace was declared and petty jealousies cropped out in the form of laws containing embarassing restrictions, and destroyed that friendly entercourse between the states so necessary for a perfect union.(1)

That some reform was necessary was becoming painfully apparent to the states. As earily as 1778, the subject was brought to the attention of Congress by a memorial from the state of New Jersey, and in 1781 a resolution was presented to that body by Dr. Witherspoon, affirming that it was indespensably necessary that the United States, in Congress assembled, should be vested with a right of supertending the commercial regulations of every state. The resolution of Virginia appointing commissioners to meet commissioners from other states expresses the purpose to be to look into the necessity of an uniform system of commercial regulation; and Mr. Madisons resolution for the same purpose is introduced by a preamble

from which the following is a quotation, "Whereas the relative situation of the United States has been found,on trial, to require uniformity in their commercial regulations, as the only effectual policy for obtaining, in the ports of a foreign nations, a stipulation of privileges reciprocal to those enjoyed by the subjects of such nations, in the ports of the United States; for preventing animosities which can not fail to arise among the several states from the interference of partial and separate regulations. . . . . Therefore be it resolved etc.,etc."

In conformity with the resolution adopted by Congress in Feb. 1787, delegates from all the states with the exception of Rhode Island, met in Philadelphia on the first Monday in May, 1787, and the result of the Convention was the present Constitution of the United States, containing the commercial clause, as above set out, with the exception of the words "and with the Indian tribes" which was added later; and to th this general grant were added the following special prohibitions. "No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of Congress or revenue to the ports of one state

over those of another; no shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another." "No state shall without the consent of Congress lay any imposts or duties on imports or exports, except what may be absolutely necessary for the execution of its inspection laws. No state shall without the consent of Congress law any duty on tonnage."

The framers of the Constitution started out not merely to make an instrument of government, but to construct a nation. And in the Constitution they incorporated among the enumerated grants to the central government the power to enforce and carry out the provisions of those grants. It is not necessary for me to state the result of their efforts, and the wonderful and unprecedented national growth which followed the adoption of the Constitution is, to a large degree, owing to the clause which conferred on Congress the power to regulate Congress with foreign nations and among the several states. Immediately upon the adoption of the Constitution, by the people, those legislative embodiments of state jealousies, the inequitous and impolitic laws droped lifeless from the statute books of the different states, and the restrictive inter-state commerce gave away to an unfettered freedom of

intercourse.

I have thus briefly sketched the outline of the ~~sta~~ state of the commercial industry immediately prior to the adoption of the Constitution, that we may the more clearly see the purposes and aims of the states in conferring upon Congress this important power and having these purposes and aims in mind we may the more fully understand the nature and scope of the clause granting it and may be in a better position to examine a few of the leading cases involving its construction and interpretation. The first question which confronts us is whether this power to regulate commerce is exclusive in Congress.

The famous case of Gibbon vs. Ogden, reported in 9 Wheaton, 1, was the first case in which the language of this grant received a judicial construction. In this case a law of the state of New York granting certain persons the exclusive privilege to navigate all navigable waters of the state, in vessels propelled by steam was declared invalid in so far as it applied to a steam vessel enrolled as a coaster under the laws of the United States. All that was actual-

ly decided by this case was that laws passed by Congress, in exercise of its commercial power, were paramount to conflicting state legislation. In discussiong the manner in which the clause conferring the grant of powers of Congress should be construed the courts speaking through Chief Justice Marshall use the following language:- "We know of no rule for construing the extent of such powers, other than as given by the language of the instrument which confers them, taken in connexion with the purposes for which they were conferred," and then proceeded to examine the meaning of the word commerce. Commerce, he says, is intercourse; that it describes the commercial intercouse between nations and parts of a nation; that the word as used in the Constitution comprehends navigation; that the commerce which Congress has - power is a unit comprehending every species of commercial intercourse and that the power to regulate commerce is the power to prescribe the rule by which commerce is to be governed. Johnson J. supplements this in a separate opinion by stating that the subject, the vehical, the agent and the various operations become the subject of commercial regulation; that ship building, the carrying trade, the propaga-

tion of seamen are such vital agents of commercial prosperity, that a nation that could not legislate over such subjects would not possess the powers to regulate commerce. Proceeding the Chief Justice said that the word 'among' meant intermingling with, that is it did not stop at state lines, but that it did not comprehend completely internal commerce of a single state. He then proceeded and decided the case upon the facts resting his decision upon the fact that the law in question passed by the legislature of the State of New York, was in direct conflict with the laws passed by Congress in the exercise of the power to regulate commerce, This case has always been considered the fountain head of the law on this subject and as one of the chief bulwarks of the Constitution. Chief Justice Marshall in rendering the opinion did not confine himself to stating principles applicable to the case but enunciated broad principles which underlie and support the whole Constitution, and his language in this case is considered as almost a part of the Constitution itself.

The next case involving the interpretation of the clause was Brown vs. The State of Md., reported in 12 Wheaton 419, where the construction of the clause as laid down in

Gibbon vs. Ogden, was reiterated and a statute of Maryland requiring an importer of foreign dry-goods and other articles to take out a license from the state before he could be permitted to sell the bales or packages so imported, was held void because in conflict with the 8th and 10th clauses of Article I. of the Constitution. The courts said:- "There is no difference between a power to prohibit the sale of an article and the power to prohibit its introduction into the country. The statute in question was an act supplementary to an act of Congress regulating the retailing of imported dry-goods, and therefore does not decide that the mere grants of Congress of the power to regulate inter-state commerce without legislation in pursuance thereof prevented the states from exercising such a power. But the grant contained in the Constitution together with the legislation of Congress in pursuance thereof, precluded the states from interferring with the subject matter of the Congressional legislation and from passing any supplementary or additional measures even though there was no direct conflict between such measures and the measures enacted by Congress. Although it was decided in neither of these cases that the

power was exclusive in Congress and that even although Congress had not exercised the power the states had no right to act. Yet the remarks of Chief Justice Marshall in Gibbon vs. Ogden, in answering the arguement that as the states have power to pass laws regulating its internal affairs such as health laws etc., which affect Congress they therefore have concurrent power with Congress to regulate Commerce, seems necessarily to lead to the conclusion that the power in Congress is exclusive; and that if the states pass valid laws interfering with Congress they do so in the exercise of another and distinct power which were reserved by the states and never ceded to Congress and one under which Congress has no right to act.

The statutes declare constitutional in Wilson vs. Black Creek Marsh Co.; New York vs Miln, were statutes passed in the exercise of this power reserved by the states and, therefore, these cases which we will notice in another connection, did not decide that the power to regulate commerce was either exclusive or concurrent.

The opinions in the License Cases and Passenger Cases which came next in order of time, present in the strongest

gest light the diversity of judicial opinion, at that time (1847-49), upon the question as to whether the states had a right to legislate in reference to commerce when Congress failed to do so. This question was at the basis of the great, burning, political question of state and national rights and the judges seized upon these cases as an opportunity of setting forth their partisan, individual, opinions. The License Cases involve the validity of state liquor license laws which it was claimed were unconstitutional, in so far as they operated to impose a burden upon the sale of liquors brought into the state from without. All the judges, in their opinions, sustained the validity of the laws but their decisions were based upon various reasonings, three of the judges based their decision upon the fact that the law in question were not a regulation of Congress. Chief Justice Tanney took the position that the laws were rgulations of inter-state commerce but that the power to regulate commerce was concurrent and therefore that the laws were valid. In the Passenger Cases the Constitutionality of state laws imposing a tax upon every non-resident landing within the state, from every vessel arriving from a port of any foreign

state or country was in question and decided by a divided court, five judges against four to be invalid, because in conflict with laws of Congress. In this case as in the License Case each of the judges rendered exhaustive opinions presenting their respective views upon the question of the concurrency or exclusiveness of the power to regulate commerce But neither this case,or as we have seen, any prior case, called for a decision of this question.

However, in 1851, the question came up directly before the Supreme Court of the United States in the case of Cooley vs. Board of Port Wardens, The law there in question was a statute of Penn. which established and provided for the regulation of pilots for the port of Philadelphia and prescribed certain duties in respect to such pilots to the master of vessels arriving at that port. Curtis J. in rendering the opinion of the court, uses the following language, which settled the controversy between the concurrent and exclusive theories, and lays down for the first time as law the rule which has since been recognized and universally followed, and is at the present day looked upon as a sound principle of constitutional law. "Either absolutely [illegible] af-

firm or deny that the nature of this power requires exclusive legislation by Congress is to lose sight of the nature of the subjects of this power and to assert concerning all of them, what is realy applicable, but to a part. Whatever subjects of this power are, in their nature national, or admit of only one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." And then proceeded to state and decide the case upon the ground, that such subjects of commerce as admitted of local regulation might be controlled by state legislation.

That this is the only true solution and interpretation of the commercial clause of the constitution, and that any other construction would practically defeat the ends for which it was given, is obvious,; that the rule stated in Cooley vs. The Board of Wardens is a chrystalization of the theory held by Chief Justice Marshall appears from his language in Gibbon vs. Ogden; and that the judges who so vigorously conteded in the License Cases and Passenger Cases that the state had the power to legislate upon subjects in their nature national, read the clause through partisan

spectacles, is easily discerned upon a reading of the opinions there rendered.

From these cases involving the interpretation and construction of Article I. sec. 8 of the Constitution we may draw the following conclusions:-

1st., That navigation is commerce within the meaning of the commercial clause of the Constitution.

2nd., That articles brought from one state into another remain articles of commerce while in the original package and a law imposing a license tax upon the privilege of selling the same is a regulation of commerce.

3rd., When the subject upon which Congress can act, by virtue of its commercial power, is national in its character and admits of, and requires, uniformity of regulation effecting alike all the states, Congress alone can act upon it and provide the needed regulations; and the absence of any law of Congress upon the subject is equivalent to its declaration that commerce in that matter should be free.

4th., When the subject is local in its nature or sphere of operation, such as pilot laws which can be properly regulated only by special provisions adopted to their location,

the state can act until Congress interferes and supercedes the state authority.

Thus the law stands to-day and how well those faithful guardians of the Constitution , the judges of the Supreme Court, have looked into the purposes and aims of the states in conferring upon Congress the power to regulate commerce with foreign nations and among the states; and how well they have, in their holding, conformed with the intention of the framers of the Constitution, in interpretating and construing the clause granting it may be seen by comparing the 3rd and 4th conclusions above stated with the words of Hamilton in No. 32 of the Federalist. "This exclusive delegation, or rather the alienation of state sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where, if granted, in one instance, an authority to the Union and in another prohibited the states from exercising the like authority; and when it granted an authority to the Union to which a similar authority in the state would be absolutely and totally contradictory and repugnant."

Having thus ascertained the construction put upon

this clause by the courts and the principles which determine the respective powers of Congress and of the states it will be seen that the test to be applied to determine the validity of state legislation, on this subject, in every case are the following:--

1st., Does Congress have exclusive power over the subject matter?

2nd., If Congress has the exclusive power over the subject matter, is the law in question a regulation of Commerce--that is, does it proscribe the rules by which commerce is to be carried on?

3rd., If Congress does not have exclusive jurisdiction over the subject matter does the law conflict with any act of Congress?

And it shall now be my purpose to examine some of the leading cases in which these tests have been applied and from them determine, if possible, the limits of constitutional state legislation which effects foreign and inter-state commerce. As will appear, the line between the subjects of legislation national in their character and those local in their nature; and between laws which constitute a regulation

of commerce and those which do not, is very indistinct. The courts have traced the line from point to point, as each case arose, have been very careful to go no further than the facts of the case compelled them to go and have laid down no principle or rule which will serve us as a touch stone, by which, we can, in every case, tell on which side of the line a certain law lays.)

The Tenth Amendment of the Constitution is as follows:-- "The powers not delegated to the United States by the Constitution, nor prohibited to it by the states, are reserved to the states respectively or to the people." The extent of those powers retained by the state, is well defined by Madison in the 45th No. of the Federalist, in the folowing language:- "The powers reserved to the several states will extend to all objects, which in the ordinary couse of affairs concern the lives, liberties and property of the people; and the internal order, improvement and property of the state." And laws passed by the states in the exercise of these powers may be valid even although they to some extent affect commerce. In the case of Sherlock vs. Alling, 93 U.S., 103, the court says:-- "Legislation, in a great variety of ways,

may effect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution."

Among the powers reserved to the states is that power so necessary for the protection and comfort of the citizens of every civilized state, the police power. And it here becomes necessary to observe w at is the meaning of the phrase 'police power,' It is difficult,if not impossible, to defines the limits of this power with any reasonable degree of certainty . The courts have been inclined to discribe rather than define it. To minds like that of Chief Justice Tanney, the term police power is tantamount to the term sovereign power. Here, however, for convenience, we will treat the police power as distinct from the taxing power of the state, as here used it may be said, in a general way, to include the means to legislate for the furtherance of domestic order, morals, health, comfort and safety of the people; for the exclusion of paupers, idiots and lunatics and for the general welfare of the state.

In the Slaughter House Cases, 16 Wall., 36, it was held that the power extends to the suppression of nuisances,

when they prove injurious to the public health and in deciding the case, Miller J. says:-- "The power is and must be from its very nature, incapable of any exact definition or limitation . Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life and the beneficial use of property." And in Thorpe vs. Rutland & Burlington R.R.Co., 27 Vt., 149, Chief Justice Redfield uses the following, often quoted, language in speaking of the police power of the state. "It extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state." And in R.R.Co. vs. Hazen, 95 U.S., 142, the court says:- "It may also be admitted that the police power of the state justifies the adoption of precautionary means against social evils.

In Wilson vs. The Black Creek Marsh Co., 2 Peters, 245, a statute of Deleware, permitting a company to dam a small, navigable, tidal creek for the purpose of reclaiming marsh lands and improving the drainage of the surrounding territory, was held valid, and not in conflict with any con-

stitutional provisions. The opinion in this case, was written by Chief Justice Marshall, and has been thought, by some judges, to be in conflict with the principles laid down by him in Gibbon vs. Ogden; but that he considered the law of the state a valid exercise of the police power is seen from the following language in his opinion therein rendered:--"The value of the property on its banks must be enhanced by excluding the water from the marsh and the health of the inhabitants probably improved" and in strict conformity with his statement in Gibbon vs. Ogden in speaking of the powers of the state:- "They form a portion of that immense mass of legislation not surrendered to the general government, all which can be most advantageously administered by the states themselves. Inspection laws, quarantine laws, health laws of every discription. . . . . are component parts."

In city of New York vs. Miln, 11 Peters, 102, a statute of New York which required of a master of every vessel arriving from a foreign port, in that of New York City, to report the name of all his passengers, with particulars as to their age, occupation, last place of settlement, and place of their birth, was in question. Although this statute operated, at least,

indirectly upon the commercial intercouse of the citizens of the United States and of foreign nations, it was held to be a law passed in the exercise of the police power of the state and valid. In Cooley vs. Board of Port Wardens, above referred to, the court held that pilot laws were local in their nature and that therefore until Congress had acted the state had power to pass them. In Gilman vs. Philadelphia, 3 Wall., 713, a law authorizing the bridging of the navigable streams and in County of Mobile vs. Kimball, 102 U.S., 69, laws providing for harbor improvements were held valid on the same principle.

In the case of Pond vs. Turch, 95 U.S., 459, it was held that in the absence of legislation of Congress bearing on the subject, a statute of Wis. which authorized the erection of a dam across a navigable stream which emptied into the Mississippi river, and which was wholly within the limits of the state was not unconstitutional; and in Escambia Co. vs. Chicago, 107 U.S,, 678, the court held that the Chicago river although lying within the limits of the state of Ill., is a part of the navigable waters of the United States over which Congress, in the exercise of its power under the commercial clause of the Constitution, may exercise control to

extent necessary to protect its free navigation; but until that body acts the state has plenary power over bridges crossing it.

In Packet Co. vs. Cattelsburg, 105 U.S., 559, a state law authorizing a town, situated upon navigable waters to erect wharves, , collect reasonable wharfage and forbid vessels, under penalty, to land within the corporate limits at any point other than the public wharf or landing was declared valid. In speaking of the state law the court say:- "It belongs manifestly to that class of legislation ~~which like politics and some other~~ which like pilotage and some others can be most wisely exercised by local authorities, and in regard to which no general rules, applicable alike to all ports and landing places, can be properly made," ——

Morgan Steamship Co. vs. Board of Health, 118 U.S., 455, involved the validity and constitutionality of a state statute, requiring that each vessel passing a certain quarantine station shall pay a fee fixed by the statute, for examination as to their sanitary condition. Miller J. in rendering the opinion of the court said:-- "Quarantine laws belong to that class of state legislation, which, whether passed

with intent to regulate commerce or not, must admitted to have that effect and which are valid until displaced or controvened by some legislation of Congress."

The above are a few, of the many, cases in which it has been held that the state had power to enact, in the exercise of the police power, wharfage laws etc., which were virtually regulations of commerce and are all explained by the rule laid down in Cooley vs. Board of Wardens, that where the subject of the state law is local in its nature and is not in conflict with any legislation of Congress, it is not in controvention of the 8th Section of Artcle I. of the Constitution. On the other hand in Welton vs. Mo., 91 U.S., 275, a statute of Mo. requiring the payment of a license tax from persons selling goods not the growth or manufacture of the state, and not from persons so selling goods which were the growth of manufacture of the state, was held unconstitutional and void by reason of the discrimination between citizens of their own state and those of another. And in machine Co. vs. Gage, 100 U.S., a statute imposing a like tax but without discrimination as to the place of growth or manufacture, was adjudged to be constitutional.

In Railroad Co. vs. Husen, 95 U.S., 465, A statute of Missouri forbidding the introduction of any Texas, Mexican or Indian cattle into the state during certain months of the year, was held to an unconstitutional interference with inter-state commerce, upon the groud that the statute made no distinction in the transportation forbiden between cattle which might be diseased and those which were not. The court in this case said that the state may not under the cover of exerting its police power, substantially, prohibit all burden inter-state commerce; and that the reason of the statute was far beyond its professed object and far into the realm of the exclusive jurisdiction of Congress.

In Bowman vs. The Railroad Co., 125 U.S., 465, a statute of Iowa, which forbade common carriers to bring intoxicating liquors into the state from any other state without first obtaining the certificate from a county officer of Iowa, to the effect that the consignee was authorized by the laws of Iowa to sell such liquors, was held to be an unconstitutional regulation of commerce. In Railroad Co. vs. Ill., 118 U.S., 557, the court decided that a state had no power to regulate the rate of freight of any part of continuous transportation upon railroads partly within the state and partly

without the state. In Henderson vs. The Mayor, 92 U.S., 259, a statute, imposing a burdensome condition, on ship masters as prerequisite of the landing of passengers, was held to be a regulation of commerce and void. And a statute, levying a tax upon non-resident drummers offering for sale or selling goods, wares or merchandise by sample manufactured or belonging to citizens ofother states, was held to be a regulation of commerce and void in the case of Robbins vs. The Shelby Taxing District, 120 U.S., 489. It was held in Brown vs. Maryland, as we have already seen, that a state cannot constitutionally require the importer of foreign articles to take out a license from the state before he shall be permitted to sell the bales or packages so imported.

The following have also been held to be regulations of commerce and void: A law requiring an inspection on the hoof of all animals brought within the state to be used as food (Minn. vs. Barber, 136 U.S., 313.); a statute of a state forbidding the sale of liquor in the original package by a person who brought it within the state from another state, on the ground that liquor was an article of commerce (Leisy vs. Harding, 135 U.S., 100).

From the above cases, it will be observed, that when the subject of legislation is local in its nature a state may, in the exercise of its police power, enact laws even though they amount to a regulation of commerce. But that that portion of either inter-state or foreign commerce which consists of either transic or traffic, including transportation in all forms, by land or by water, and the purchase, sale or exchange of goods is national in its character, susceptible of a uniform plan of regulation, and is therefore under the exclusive control of Congress. And the law of a state enacted in the exercise of its police power, if it is not discrimination in its effect, and was not enacted for the purpose of burdening or restricting inter-state commerce, may, indirectly, effect this commerce and yet be valid; but if it was enacted, ostensibly, in the exercise of the police power, but the court can see that the police power is used as a veil or guise to hide some selfish motive, of the state, for which it was passed, or if it amount to a regulation of Congress, it will be declared void.

There yet remains for us to discuss the taxing power

of the state and to notice how far this power is limited by the commercial clause of the Constitution.

Inherent in every independent state, as an inseparable incident of sovereignty, is the power to levy taxes. This power which is a sacred one and one of vital importance, is justified by the principles of necessity and self preservation. A tax is a demand of sovereignty----the amount which the government requires of a member of community to contribute toward the support and maintainance of the institutions, which insure to him the protection of life, liberty and property; the protection of his civil rights and the redress of his wrongs.

Under our form of government, the power to levy taxes is a concurrent and a co-equal one in the United States and in the individual states. It was absolute in the several states, before the adoption of the Constitution of the United States, and in that instrument there is no expression, in any granting clause, which marks that power exclusive in the Union; nor is there any independent clause, or sentence, which prohibits the states from exercising it. Therefore, the power to levy taxes may be said to be an absolute power, in

the states, acknowledging no other limits than those expressly prescribed in the Constitution. --(MaColloh vs. Maryland, 4 Wheaton, 415.)

It is, at the present day, a well settled doctrine that a state may levy taxes on all the property, real or personal, having a situs within its boundaries; and in the application of this rule, property employed in carrying on commerce between the states or with foreign nations is not excepted. (Glouchester Ferry Co. vs. Penn., 114 U.S., 196, at page 206.) The question now arises how far can the state go in taxing the instruments of inter-state commerce, without coming in conflict with the commercial powers of the Constitution? It is evident that a state cannot, under the guise of its taxing power, regulate commerce among the states or with foreign nations. But, it will readily be observed that, from the very nature of things, the line of demarcation between a valid exercise of the taxing powers of a state and the invalid attempt to regulate commerce bemust be very dim and indistinct; and is to be ascertained in every close case with difficulty.

To aid us in fixing the approximate location of the

boundaries of this power of a state it will be well to examine a few decisions , without attempting an exhaustive citation of all the authorities, involving the validity of state taxation laws, and from them to determine, if possible, the principles which guide the courts in determining the validity or invalidity of state legislation.

The case of Brown vs. Maryland, which we have noticed in another connection, is one of the leading cases on this subject. The state of Maryland had passed an act imposing a license fee upon importers of certain kinds of merchandise. The court held that this law imposed a burden upon engaging in the business of inter-state or foreign commerce; that a tax upon the importer, because of his business, is a tax upon the business itself and therfore an encroachment upon the power of Congress and void. The case of Cook vs. Penn., 97 U.S., 556, involved the validity of a state law, exacting a certain percentage of the proceeds of foreign goods sold at auction for the privilege of selling them in that manner. The tax was held to be a duty on imports and the law imposing it unconstitutional.

In Crandall vs. The State of Nevada, 6 Wall., 35,

A law which imposed a capitation tax, of one dollar, upon carriers, for every person leaving the state, by any vehicle engaged or employed in the business of transporting passengers for hire, was held to be in effect a tax upon the passengers, for the privilege of being carried out of the state, and for that reason a regulation of commerce and void. In The State Freight Tax Case, 15 Wall., 232, the constitutionality of a statute of a state imposing a tax upon freights taken up within the state and carried out of it or taken up without the state and brought within it was involved, The court decided that this statute imposed a burden on inter-state commerce and was therefore void. And in Fargo vs. Mich., 121 U.S., 230, a statute of Mich. levying a tax upon the gross receipts of railroads employed in the carriage of freights and passengers, into, out of, or through the state, was held to be a tax upon commerce among the states, void and unconstitutional. It will be seen from the last two cases that a state can enforce no regulation which make foreign or inter-state commerce subject to the payment of tribute to them. Another important case, which we have noticed briefly in another connection, is the case of Robbins vs. The Shelby Taxing

District, 120 U.S., 489. A statute of Tenn., enacted that all drummers and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares or merchandise, therein by sample shall be required to pay to the county treasurer a certain amount, each week, as a privilege tax. Robbins, a drummer for a Cincinnati firm was prosecuted for a violation of this law. The courts said that although this statute purported to tax the business of selling goods, by sample, and applied to persons who resided, within the state, as well as to those who might come from other states to engage in that business, and was therefore not discriminating in its effect, yet the business of selling goods, by sample, which were in another state, at the time, and were to be delivered within the district, constituted an inter-state commercial business; and that so far as this tax was to be imposed upon Robbins for doing that business, it was a tax upon inter-state commerce and therefore void.

A leading case, following Fargo vs. Mich., and laying down the important doctrine that a state law imposing a tax upon the gross receipts, of a corporation, derived from

the transportation of persons and property between different states and from foreign countries, imposes a regulation of inter-state and foreign commerce and is void and unconstitutional, is Philadelphia Steamship Co. vs. Penn., 122 U.S., 326.

It is a well settled doctrine of constitutional law that the powers conferred upon Congress in the Constitution are not of determined extent, but expand with the advance of invention and civilization; that the power in Congress to regulate commerce extends not only to the means and instrumentalities of commerce, known and in use at the time of the adoption of the Constitution, but to all such means and instrumentalities since discovered or invented. An excellent illustration of this is the line of cases in which state statutes imposing restrictions upon, or regulating the use of, the telegraph were declared void. The case of Telegraph Co. vs. Texas, 105 U.S., 46, following Pensacolla Telegraph Co. vs. The Western Union Telegraph Co., 96 U.S., 1, held that a statute of Texas, imposing a tax upon any message transmitted by a Telegraph Co, so far as it operated upon messages sent out of the state, was a regulation of foreign and inter-state

commerce and beyond the power of the state to enact. In rendering the opinion, the court uses the following language "A Telegraph Co. occupies the same relation to commerce as a carrier of goods, both companies are instruments of commerce and their business is commerce itself."

On the other hand, as I have before remarked, it is a well settled principle, that a state can, in the exercise of its taxing powers, constitutionally levy taxes upon all property within the state, even though such property be engaged in carrying on foreign or inter-state commerce. In Pullman Palace Car Co. vs. Penn., 141 U.S., 18, the constitutionallity of a statute of Penn., was in question. The statute imposed a tax on the capital stock of all corporations engaged in the transportation of freight or passengers within the state, under which a corporation of another state engaged in running railroad cars, into, through and out of the state and having at all times a large number of such cars within the state, was taxed, by taking as a basis of assessment such proportation of its capital stock as the number of miles, of railroad over which its cars are run within the state, bears to the whole number of miles, both within the state and

without, over which its cars are run. The corporation contended that the tax was a regulation of inter-state commerce; but the court held that for the purpose of taxation, personal property may be separated from its owner and that the statute in question was in effect a tax upon property having its situs within the state and therefore valid. In Western Union Telegraph Co. vs. Mass., 125 U.S., 550, a statute of Mass., imposing an excise tax upon the capital of a foreign corporation engaged in inter-state commerce, the value of which was to be ascertained by comparing the length of its lines in that state, with the length of its entire lines, was held to be a tax upon property within the state and that the manner of ascertaining the amount of the tax did not invalidate the statute imposing it. Again in Mass. vs. The Western Union Telegraph Co., 141 U.S., 40, a foreign corporation questioned the validity of a state law which imposed upon every telegraph company owning a line within the state a tax upon its corporate franchise, at a valuation thereof equal to the aggregate number of shares in its capital stock, deducting such portion of that valuation as is proportional to the length of its lines without the state. The court held that the tax was

in effect, a tax upon the corporation on account of property owned and used by it within the state and therefore valid. In Glouchester Ferry Co. vs. Penn., 114 U.S., 196, it was held that the state could not tax the capital stock of a ferry company of another state whose only business within the former state is discharging and receiving persons and property passing between the states. In rendering the opinion in this case the court uses the following language:- "While it is conceeded that the property in a state belonging to a foreign corporation, engaged in foreign or inter-state commerce, may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation, because it is used to carry on that commerce, or upon the transportation of persons or property or for the navigation of the public waters over which the transportation is made, is invalid and void as an interference with, and an obstruction of, the power of Congress in the regulation of such commerce."

In Norfolk & Western R.R.Co. vs. Penn., 136 U.S., 114, A statute of the state of Penn. imposing a tax upon a

foreign corporation engaged in inter-state commerce, for the privilege of keeping an office in the state for the use of its officers, stockholders, agents and employees, was held to be unconstitutional and void. And in McCall vs. Cal., 136 U.S., 104, the state of California had levyed a tax upon a foreign railroad corporation for the privilege of keeping an agency within the state for the purpose of inducing passengers going from San Francisco to New York city, to take its line at Chicago. The court held that the agency in question was a means of inter-state commerce and that the tax imposed upon the agent for doing business in San Francisco was a tax upon such means and therefore void. Both of these cases were decided upon the theory that the subject matter of the tax was one of the means and instrumentalities of carrying on inter-state; and the tax, in both cases, was in terms upon the privilege of exercising those means and therefore void. While the language in the former of these cases, taken alone, might lead one to think that the point decided was that a ~~sta~~ state cannot levy a tax upon a foreign corporation engaged in inter-state commerce, for the privilege of exercising a corporate franchise within the state, yet this case refers

back and rests its decision upon the case of McCall vs. Cal., decided at the same term, and upon a close reading will be seen, I think, to have been decided upon the facts above indicated i.e., that the office in question was a necessary instrument of inter-state commerce and therefore could no more be made the subject matter of a privilege tax than could the cars, depots, road-beds and other necessary means of carrying on inter-state or foreign commerce.

These cases naturally lead up to a discussion of the interesting and importnat question whether a state can levy a tax upon a foreign corporation, engaged in the business of inter-state or foreign commerce, for the purpose of exercising its corporate franchise within the boundaries of a state. This question of late years, has been the subject of much discussion and thinkers have advanced many different theories to support both the affirmative and negative sides of the quaere. The importance of this question will be seen at a glance. It is obvious that if a state has this power it may exercise it to the extent of practical exclusion or may selfishly impose onerous conditions and burdens; and on the other hand if it is conceded that a state has not this

power, then we must concede that the Constitution in this particular case makes the laws of one state binding upon another, even although those laws may be entirely opposed to the policy of the latter state. It is well settled that a state may exclude entirely from its borders; and having the power of exclusion may restrict, burden or impose any condition it may see fit upon a foreign corporation which is not engaged in inter-state commerce, if admitted within its territorial limits. On principle the arguements for the affirmative of this proposition, which have been advanced, in brief are:-- That a foreign corporation is a creature of the laws, of the state that created it, and independent of those laws can have no existence, that the laws of one state are not binding upon another and therefore if a state affords recognition to a foreign corporation it does so merely by reason of inter-state comity; that incorporation is not a necessary element of an inter-state commerce business and ~~if~~ that if a state considers corporations contrary to her policy, it may, in the exercise of the police power declare those artificial, invisible, intengible persons to be productive of fraud, repeal its own statutes creating them and exclude for-

eign corporations from entering, or having the power to exclude may regulate their action and impose a tax upon the privilege it grants, if it allows them to do business within her boundaries. Again the franchise or privilege of doing business within the state on a limited liability basis, of having a corporate name and exercising other corporate privileges, is property. Property having its situs within the state---for it cannot be exercised without her borders---and property having value. Value, which may be assessed and, therefore, under all the decisions may be taxed as property having a situs within the state.

On the other hand, it is argued that a corporation is a necessary element, instrument and means of carrying on foreign or inter-state commerce; that a tax upon this means is a tax upon the business of inter-state commerce; that it is prescribing the rule by which commerce may be carried on and therefore unconstitutional. Numerous dicta favoring both of these positions are to be found in the cases but are so conflicting as to make them unreliable. The question, however, came up squarely, for decision in the case of Maine vs. The Grand Trunk R.R.Co., 142 U.S., 217,. The state of

Maine had passed a law imposing a tax upon every corporation, operating a railroad within the state for the privilege of exercising its franchise therein, to be determined by the amount of its gross transportation receipts and further providing that when applied to a railroad lying partly within and partly without the state, or to one operated as a part of a line or system extending beyond the state, the tax shall be equal to the proportion of the percentage of the gross receipts within the state. The Grand Trunk R.R.Co., a foreign corporation, contended that the statute imposed a regulation upon inter-state commerce and was for that reason void but the court held that the tax was one which the state had power to levy and was valid. Field J. in rendering the prevailing opinion said "The validity of a tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for their franchise." The judges who dissented rested their opinion upon the ground that the tax was in reality a tax upon the gross receipts and as such void under all the decisions. Their language does not deny the power of a state, to tax the franchise of acting as a corporation within the state and, I

think, may be taken to be decisive of the question. How the courts will treat this case, however, remains to be seen; but in the opinion of the writer they will treat it as decisive of the proposition that a state can impose a tax upon the privilege it grants to a foreign corporation of acting within the state, as such,

I have now briefly examined the leading cases which determine the line of demarcation between the power of Congress and the power of the state; and from them, I think, we may draw the following conclusions and well settled principles of law.

CONCLUSIONS.

I. Articles brought into a state, from a foreign nation or from another state, remain, while in the original package, articles of commerce.

II. Persons as well as goods, merchandise etc., may be the subjects of inter-state commerce.

III. The state can constitutionally impose a tax upon all property, personal or real having its situs within the

boundaries of the state; and this, notwithstanding the fact that such property may be engaged in the business of carrying on inter-state commerce.

IV. A state has not the power to levy a tax upon the gross receipts derived from the transportation, of passengers or freight, between one state and other states or foreign nations.

V. A state has not the power to levy a tax upon the business or privilege of carrying on inter-state or foreign commerce.

VI. A tax upon the instruments or means of carrying on inter-state commerce is unconstitutional and void, if such tax is levied upon those instruments or means because they are engaged in such commerce.

VII. A telegraph company occupies an analogous position to a transportation company, and if its lines extend beyond the boundaries of the state its business is that of inter-state commerce.

VIII. The articles forming the subjects of inter-state commerce cannot be taxed by a state as such, even although the statute imposing such tax does not discriminate between

articles manufactured within the state and those manufactured without.

IX. A state may levy a tax or impose a license fee upon a foreign corporation for the privilege or franchise of acting as a corporation within the state.

X. The validity of a tax does not depend upon the mode in which its amount is to be ascertained but upon the subject matter of the tax.