Michigan Law Review

Volume 8 | Issue 6

1910

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Recommended Citation
Fred'k H. Cooke, *The Right to Engage in Interstate and Foreign Commerce as an Individual or as a Corporation*, 8 MICH. L. REV. 458 (1910).
Available at: https://repository.law.umich.edu/mlr/vol8/iss6/2

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THE RIGHT TO ENGAGE IN INTERSTATE AND FOREIGN COMMERCE AS AN INDIVIDUAL OR AS A CORPORATION.

THERE are two circumstances that seem to me to tend to obscure a discussion of the right to engage in interstate or foreign commerce. One is the existence of the constitutional provision conferring on Congress power to regulate such commerce; the other, the circumstance that such commerce is commonly carried on rather by corporations than by individuals. For the present, let us ignore these two circumstances, and assume the commerce clause to be non-existent; also, that all interstate and foreign commerce is carried on by individuals exclusively, and not at all by corporations. In short, let us transport ourselves *pro tanto* into medieval conditions.

We shall find the right to engage therein to be well established. In *Hoxie* v. *N. Y., N. H. & H. R. Co.*,[1] it was said by BALDWIN, C.J., in a well considered opinion: "The right to engage in commerce between the States is not a right created by or under the Constitution of the United States. It existed long before that Constitution was adopted. It was expressly guaranteed to the free inhabitants of each State, by the Articles of Confederation, and impliedly guaranteed by Article 4, § 2, Const. U. S., as a privilege inherent in American citizenship."

This language seems fully justified by the authorities. It was said by MARSHALL, C.J., in *Gibbons* v. *Ogden*,[2] "In pursuing this inquiry at the bar, it has been said, that the constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The constitution found it an existing right, and gave to Congress the power to regulate it." Seven centuries ago the following provision appeared in Magna Charta: "All merchants shall have safe and secure conduct, to go out of, and to come into England, and to stay there, and to pass as well by land as by water, for buying and selling by the ancient and allowed customs, without any evil tolls."[3]

One of the grievances against the King of Great Britain specified

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[1] 82 Conn. 352, 364 (1909).

[2] 9 Wheat. 1, 211 (1824).

[3] For references to local charters even earlier than Magna Charta, recognizing freedom of trade, also statutes of the 14th and 15th centuries, see Stimson's Federal and State Constitutions, pp. 31, 32.

in the Declaration of Independence was "cutting off our trade with all parts of the world," and it was thus provided in the Articles of Confederation of 1777; "The people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant."

In the *Slaughter-House Cases*[4] reference was made to this provision, also to the constitutional provision that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," and it was said: "There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each." In *Ward* v. *Maryland*,[5] it was said of such constitutional provision: "The clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation."

It follows then that, at the time of the adoption of the Federal Constitution, there had been recognized from time immemorial the right to engage in commerce generally. It was certainly secured against action by Congress, by the Fifth Amendment forbidding Congress to "deprive of life, liberty, or property, without due process of law"; so against action by the States, by the like provision of the Fourteenth Amendment. Besides is the other constitutional provision just considered.

It seems, then, a fair conclusion that, as a general rule, one has the absolute right, as against any prohibitory or other restrictive legislation, whether by Congress or by the States, to engage in interstate or foreign commerce, that is, to transport persons or articles (including, to a certain extent, the right to transport or transmit the intangible, as in case of telegraphic messages) from State to State, or to or from a foreign country. It is, of course, to be understood that this statement is subject to qualification as to commerce or transportation that may be prohibited or otherwise regulated by way of exercise of what is known as the "police power."

But we come now to a consideration of the effect of the commerce clause conferring upon Congress power "to regulate commerce with

[4] 16 Wall. 36, 75 (Dec. 1872).
[5] 12 Wall. 418, 430 (Dec. 1870).

foreign nations, and among the several States." It is clear enough that, so far as concerns mere individuals, as distinguished from corporations, the right to engage in such commerce is in no sense derived from the commerce clause, which operates rather by way of restricting than of establishing the right. We are not here concerned to determine the precise scope of such power of regulation vested in Congress. It may be admitted that, as said in *Northern Securities Co.* v. *U. S.*,[6] "in some circumstances regulation may properly take the form and have the effect of prohibition." As, under certain conditions, it is within the power of a State to prohibit intrastate transportation, so Congress may, by an exercise of what, if not strictly a police power, may perhaps with propriety be regarded as analogous thereto, prohibit interstate or foreign commerce or transportation. Instances will be considered hereafter, in discussing the power of Congress with reference to corporations.

But, whatever may be the scope of the power to prohibit, it may, I think, be confidently asserted that there is no reasonable likelihood of it being established, as a general rule, that, to use the language of the *Lottery Case*,[7] "Congress may arbitrarily exclude from commerce among the States any article, commodity or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one State to another." That is to say, notwithstanding the commerce clause, it still remains true, as a general rule, that one has the absolute right to engage in interstate or foreign commerce, that is, to transport from State to State, or to or from a foreign country.

This conclusion will not, I think, be substantially disputed. I have dwelt upon these preliminary considerations with perhaps needless fulness, that we may be the better prepared to deal with the difficulties resulting from the circumstance that such commerce is commonly carried on rather by corporations than by individuals.

While, then, there exists the right to engage in such commerce as an individual, it seems obvious that there is no corresponding right to engage therein *as a corporation*, and this for the reason that there is no right *to exist* as a corporation. This is elementary. "In the United States, as in England, the consent of the sovereign power—the State or the United States, as the case may be, acting through the legislative department—is necessary to the existence of a corporation."[8] "A corporation not being, like a natural person, one

[6] 193 U. S. 197, 335 (1904).
[7] 188 U. S. 321, 362 (1903).
[8] 1 Clark & Marshall on Corporations, §37.

of the elements of society, of which government is formed, can only be considered as a creature of the law."[9]

Now both Congress and the States have power under certain conditions to create corporations. As to Congress, we need here concern ourselves only with such power as existing under the commerce clause. It seems not easy to accept on principle the conclusion that the mere power to *regulate* commerce or transportation includes the power to create a corporation for the purpose of engaging therein. Yet, as a matter of authority, it must be regarded as established that Congress has such power, which was notably exercised in authorizing the construction of the Pacific railroads.[10]

The right of such a corporation to engage in interstate or foreign commerce requires little consideration. Obviously such right is not subject to restriction under the authority of State legislation. In *McCulloch* v. *Maryland*[11] it was said by MARSHALL, C.J., with reference to a corporation created by Congress: "The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared." On the other hand, such a corporation can have no right, as against Congress, its creator, to engage in such commerce, for, as already suggested, this would imply the right *to exist* as a corporation.

It being then within the power of Congress to create a corporation to engage in interstate or foreign commerce, does such power reside elsewhere? On principle the answer seems clear. Nothing seems better established as a general rule, than that it is only Congress that can effectively legislate under the power conferred by the commerce clause, any legislation by a State on the subject being invalid, even in the absence of legislation by Congress.[12] For present purposes, it seems unnecessary to consider the alleged exception of subjects "local in their nature." As recently declared, "the governmental power over the commerce which is interstate is vested *exclusively* in the Congress by the commerce clause of the Constitution, and therefore is withdrawn from the States."[13] It follows, then, that, as the power is in Congress to create a corporation to engage

[9] McKim v. Odom, 3 Bland Ch. (Md.) 407, 418 (1829).

[10] See California v. Central Pacific R. R. Co., 127 U. S. 1 (1888).

[11] 4 Wheat. 316, 436 (1819).

[12] The illustrative decisions are numerous. See for instance Leisy v. Hardin, 135 U. S. 100 (1890).

[13] Asbell v. Kansas, 209 U. S. 251 (1908).

in interstate or foreign commerce, there is no such power in the States.

Having reached this conclusion on principle, let us consider the situation that was in 1871 presented in *Railroad Co.* v. *Harris.*[14] In 1827 the State of Maryland had created a corporation, the Baltimore & Ohio Railroad Company, for the purpose of constructing a railroad "from the city of Baltimore to some suitable point on the Ohio River." But the Ohio River forms a part of the western boundary of what was then Virginia, being many miles distant from any point in Maryland. Though it was regarded as necessary to obtain the consent of Congress to the extension of the road into the District of Columbia, it does not seem to have occurred to any one concerned, that it was necessary to obtain such consent to the extension through Virginia to the Ohio River. It was, however, obtained from the State of Virginia. In an action brought in the District of Columbia to recover damages for personal injury sustained in Virginia, the court considered it necessary to determine whether there was a new and distinct corporation deriving authority from Virginia, or whether the Virginia statutes in question were only enabling acts. In concluding the latter to be the true view, the court said: "In what it does in Virginia the same principle is involved as in the transactions of the Georgia corporation in Alabama, which came under the consideration of this court in *Bank of Augusta* v. *Earle,*[15] . . . It (a corporation) cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place." But in *Bank of Augusta* v. *Earle* the question was as to the right of a foreign corporation to purchase a bill of exchange. It is not apparent that the commerce clause has any necessary application to such a transaction. But the existence of a distinction in this respect does not seem to have occurred to either court or counsel in *Railroad Co.* v. *Harris.* Would the result have been otherwise, had it been brought to the attention of the court that for years there had been in force legislation by Congress authorizing the construction of the Pacific railroads?

Thus, then, the decision of the question of the power of a State to confer authority upon a corporation to engage in interstate or foreign commerce seems to have gone by default, it not being realized that recognition of the existence of such power was inconsistent with recognition of the exclusiveness of the power of Congress to regulate commerce.

[14] 12 Wall. 65.
[15] 13 Pet. 519, 558 (Jan. T. 1839).

This conflict of rules is sharply involved in a determination of the extent of the power of Congress to impose restrictions, whether by way of prohibition or otherwise, upon the exercise of the privilege of engaging in interstate or foreign commerce. On the one hand, the rule of the exclusiveness of the power of Congress to regulate commerce, coupled with the rule that Congress may confer authority upon a corporation to engage in such commerce, seems to suggest the conclusion that Congress may impose such restrictions even to the extent of absolutely excluding from interstate or foreign commerce any corporation created under State authority. And *a fortiori* it may, in this view, impose conditions, thus, by way of requiring payment of a license tax, upon the exercise of the privilege of engaging therein. But here we must take into account the circumstance that the Supreme Court has, unwittingly, it may be, and without a sufficient realization of the consequences, conjured into existence another rule that must be reckoned with, howsoever illegitimate and illogical it may be—the rule that recognizes the power of a State to confer authority to engage in such commerce. I am unable to see that, in this view, the right of a State-created corporation to engage in interstate or foreign commerce is substantially less than that of an individual, already considered. Thus, then, we reach the result that, as a general rule, in spite of any prohibitory or other restrictive legislation by Congress, a corporation created by a State has, like an individual, the absolute right to engage in interstate or foreign commerce.

It will, of course, be borne in mind that what has already been said as to transportation by individuals is applicable here. That is to say, Congress may, by an exercise of what, if not strictly a police power, may perhaps with propriety be regarded as analogous thereto, impose restrictions even to the extent of prohibition, upon interstate or foreign transportation by a corporation. This is so, where engaging therein would involve the commission of acts criminal in their nature or otherwise contrary to public policy. Thus in the *Lottery Case*[16] was sustained as applicable to an express company an act of Congress prohibiting as a criminal offense the carriage of lottery tickets from State to State. So in *U. S.* v. *Trans-Missouri Freight Assoc.*,[17] *U. S.* v. *Joint Traffic Assoc.*,[18] *Northern Securities Co.* v. *U. S.*[19] the anti-trust act, enacted by way of giving effect to "the rule of free competition," was sustained as applicable to transporta-

[16] 188 U. S. 321, 356 (1903).
[17] 166 U. S. 290 (1897).
[18] 171 U. S. 505 (1898).
[19] 193 U. S. 197, 335 (1904).

tion by railroad corporations created by the States. The same rule was in *U. S.* v. *American Tobacco Co.*,[20] *U. S.* v. *Standard Oil Co.*[22] given application to corporations transporting, not as carriers, but as shippers through the agency of carriers. It scarcely seems necessary to dwell on the distinction between such power of prohibition, and an absolute power of prohibition.

But I turn now to a consideration of the power of a State to impose restrictions, by way of prohibition or otherwise, upon the exercise by a corporation of the privilege of engaging in interstate or foreign commerce. So far, at least, as concerns corporations of its own creation, I submit that on principle there is scarcely any room for argument on this point; that the powers reserved to the States include the power to control such corporations, even as to interstate and foreign commerce. It has been pertinently said: "Certainly a State cannot be compelled to create corporations in aid of, or to facilitate, commerce between the states; but if it does create one capable of engaging in such commerce, and the corporation in fact so engages, is that an emancipation of the corporation from the control of the State?"[22] So in *Wabash, St. Louis & Pacific Ry Co.* v. *Illinois*,[23] in contending for the power of the State to regulate rates for transportation, it was said in the dissenting opinion of BRADLEY, J.:[24] "Not only does the right to charge fares and freights at all come to a railroad company from the grant of the State, but the amount of such charges is also regulated by the State law, either by the charter of the company, or by legislative regulations, or by the general law that the charges shall be reasonable—and that is State law, and not United States law. Where else but from the laws of the State does the railroad company get its right to charge any fares or freight at all? And since its being, its franchises, its powers, its road, its right to charge, all come from the State, and are the creation of State law, how can it be contended that the State has no power of regulation over those charges? . . . *Omne majus continet in se minus.* If the State created the company and its franchises, it surely may make regulations as to the manner of using them." I do not see how to escape from the logic of this reasoning.

But we know the established rule to be otherwise; that is to say, it is not absolutely within the power of a State to impose restrictions upon the exercise by a corporation of its own creation, of the privi-

[20] 164 Fed. 700 (C. C. N. Y. 1908).
[21] 173 Fed. 177 (C. C. Mo. 1909).
[22] State v. C. N. O. & T. P. Ry. Co., 47 Ohio St. 130 (1890).
[23] 118 U. S. 557 (1886).
[24] p. 587, concurred in by Waite, C.J. and Gray J.

lege of engaging in interstate or foreign commerce. This seems to be another illegitimate and illogical rule, one that crept in without much observation. Its precise origin is somewhat obscure, but it seems to have been based on a failure to distinguish between the right to engage in interstate and foreign commerce *as an individual,* and to so engage *as a corporation.* This distinction has already been sufficiently discussed.

The rule is illustrated by *Wabash, St. Louis & Pacific Ry. Co.* v. *Illinois,* supra, where it was as to a domestic railroad corporation that there was held invalid the regulation under State authority of rates for transportation. So by *Philadelphia & Southern Steamship Co.* v. *Pennsylvania,*[25] a case of taxation of gross receipts of a domestic corporation.

The same reasoning seems to me applicable to foreign corporations. Generally speaking, a State has unquestionable power to impose restrictions, even to the extent of prohibition, upon the transaction of business therein by a foreign corporation, and I submit that such reserved power should include the imposition of restrictions upon transportation within the scope of the commerce clause. But the established rule is otherwise.

Let me then, by way of summary and conclusion, state the situation first, *as it actually is,* and then, as it seems to me, *it should be,* with reference to this question of the right of a corporation to engage in interstate and foreign commerce.

Notwithstanding the well established general doctrine of the exclusiveness of the power of Congress to regulate interstate and foreign commerce, Congress and the States seem, singularly and inconsistently enough, to have concurrent power to create a corporation to engage in such commerce. If created by Congress, it is not, as to such commerce, subject to restriction under the authority of State legislation, while of course it is otherwise as to legislation by Congress. If created by a State, it is not, as to such commerce, subject to restriction under the authority of either Congressional or State legislation. It is to be understood, that I merely state this as a general rule, without claiming that it has been consistently applied by the Supreme Court. Furthermore, I do not here consider the extent to which such corporations are subject to restriction as to purely intrastate business, or by way of exercise of the "police power."

Ignoring for present purposes, judicial interpretation of the commerce clause and of other constitutional provisions, let me attempt to

[25] 122 U. S. 326 (1887).

suggest what the situation *should now be,* this being a statement of the ideal, as contrasted with the actual.

It seems clear enough to me that the commerce clause was never intended as anything more than an emergency provision, suggested by evils that were, though pronounced, yet, comparatively speaking, temporary. This view seems to me to find confirmation in the circumstance that for some eighty years after the adoption of the Constitution scarcely any use was made of it. Of late, however, it has been dragged out of comparative obscurity and oblivion into an unnatural importance.

It also seems clear to me that it was never intended by the founders of the Constitution that the power conferred on Congress to regulate commerce should be exclusive, or include the power to authorize the creation of corporations. In this view, the power to create corporations to engage in interstate and foreign commerce is exclusively in the States, being among their reserved powers. Furthermore, a corporation created by a State for that purpose is, speaking generally, absolutely subject to its control, as to such commerce, as well as to purely intrastate transactions, though, as in case of corporations generally, the power of a State over its own corporations is qualified by the power of other States in which the corporation operates.

There has existed a widespread impression that much confusion would result from the application of diverse rules in different States to, for instance, a railroad corporation engaged in interstate commerce. This impression seems first to have gained prominence in connection with the "Granger" legislation of some forty years ago. It appears in the following utterance of the court in *Wabash &c. Ry. Co.* v. *Illinois,*[26] "When it is attempted to apply to transportation through an entire series of States a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be overestimated."

But I incline to think that this apprehension is without sufficient basis. Those engaged in interstate commerce are already, and long have been subject to diverse rules in different States, without serious inconvenience necessarily resulting. Thus as to the considerable mass of legislation in every State for the purpose of regulating the conduct and liability of carriers, for the benefit of the public, particularly as to matters involving health or safety, good illustrations

[26] 118 U. S. p. 577.

being requirements as to checking the speed of trains.[27] So has been sustained as not repugnant to the commerce clause legislation for the benefit of interstate travelers and shippers, thus by way of requirement that trains stop at certain points,[28] so of legislation relating to exemption from liability,[29] or as to the obligation assumed by a carrier accepting for transportation beyond his own line,[30] or as to liability for the negligence of a connecting carrier.[31] Why then, should not a State be allowed generally power to regulate interstate and foreign commerce, untrammeled by any supposed prohibition in the commerce clause?

It may be admitted that the existence of such diverse rules in different States, as applicable to interstate commerce, is not free from objection. But I submit that this is but a special application of an objection of wide application, as, for instance, in case of legislation relating to divorces or negotiable instruments. But there already exists a powerful tendency to produce uniformity of State legislation without resort to legislation by Congress, which, indeed, is, generally speaking, without power as to these matters. Take, for instance, the enactment in many States of uniform legislation relating to negotiable instruments. Cannot the same tendency be trusted to gradually work out a harmonious adjustment of the problems that would be involved in a recognition of the exclusiveness of the power of the States to, for instance, confer authority to engage in interstate and foreign commerce? It seems to me that it reasonably can. As to corporations generally, whether or not engaged in interstate or foreign commerce, the tendency seems very strong to allow, either expressly or tacitly, a foreign corporation to exercise the precise powers allowed it by the State that created it.

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[27] See for instance Erb v. Morasch, 177 U. S. 584 (1900).
[28] See Lake Shore and Mich. So. Ry. Co. v. Ohio, 173 U. S. 285 (1899).
[29] See Chicago, Mil. &c Ry. Co. v. Solan, 169 U. S. 133 (1898).
[30] See Richmond & Alleghany R. R. Co. v. R. A. Patterson Co., 169 U. S. 311 (1898).
[31] Missouri, Kan. &c. Ry. Co. v. McCann, 174 U. S. 580 (1899).