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The Gibbons V. Ogden Fetish

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THE GIBBONS V. OGDEN FETISH.

IT was, we believe, Huxley who once said something to the effect that, as soon as one becomes an authority in science, he becomes a nuisance. In many a field of human activity, we find illustrations of the influence of a great name in retarding the progress of thought. Cuvier and Agassiz furnish notable instances in the realm of natural science. For centuries the great authority of Galen operated to paralyze progress in medicine. Still better known are instances of supposedly infallible individuals, or organizations, or writings, in retarding progress in theology. The same influence has notoriously operated in jurisprudence. Not to go outside of England, the names of Blackstone, Mansfield and Eldon immediately suggest themselves. But we are here specially concerned with the influence of three opinions of Chief Justice MARSHALL, delivered in cases involving the effect of the commerce clause: *Gibbons* v. *Ogden*,[1] decided in 1824; *Brown* v. *Maryland*,[2] in 1827; *Willson* v. *Black Bird Creek Marsh Co.*,[3] in 1829.

Now MARSHALL'S service as Chief Justice continued from 1801 until 1835, that is, from the age of forty-five until seventy-nine. Conceding the great merit of his constitutional opinions delivered in the earlier years of his career, is it an unreasonable conjecture that these three opinions belong to the period of his intellectual decadence? But we forbear to urge this consideration.

Take first *Brown* v. *Maryland*, commonly regarded as establishing that anomalous—indeed, it seems to us, not too much to say, that absurd—original package doctrine, the practical effect of which is to allow transportation within the scope of the commerce clause to continue even after arrival at the destination. So far as the commerce clause is concerned, the point was unnecessary to the decision; the constitutional provision chiefly relied on being the prohibition against a State laying "imposts or duties on imports or exports." Furthermore, so far as concerns interstate, as distinguished from foreign commerce, the point was likewise unnecessary, though it was tersely said: "*We suppose* the principles laid down in this case, to apply equally to importations from a foreign State." What a slender foundation upon which to erect "so formidable a structure," to use the language of the court in *Austin* v. *Tennessee*![4] The doctrine, in

[1] 9 Wheat. 1.
[2] 12 Wheat. 419.
[3] 2 Pet. 245.
[4] (1900), 179 U. S. 343.

its entirety, has not yet been repudiated by the Supreme Court, which however seems to have manifested a disposition to look askance upon it, as in *Austin* v. *Tennessee*, where it was said: "Whether the decision would have been the same if the original packages in that case, instead of being bales of dry goods or hogsheads, barrels or tierces of liquors, had been so minute in size as to permit of their sale directly to consumers, may admit of considerable doubt * * * It is safe to assume that it did not occur to the Chief Justice that, by a skilful alteration of the size of the packages, the decision might be used to force upon a reluctant people the use of articles denounced as noxious by the legislatures of the several States."

The doctrine has certainly been repudiated as to ordinary property taxation. Thus, by a singular course of reasoning, the soundness of which is not apparent (assuming the validity of the original package doctrine), it is established that, in case of transportation into a State it is within the authority of the State to tax after arrival at the final destination, though before sale in the original package, or breaking thereof.[5] It seems a reasonable conclusion that the court would hold the same as to a tax imposed, not strictly on property, but on the privilege of selling.[6]

It seems likely that the doctrine would ere this have subsided into "innocuous desuetude," had it not been galvanized into continuity of existence by the astonishing decisions that gave it application to State legislation imposing restrictions upon the sale of intoxicating liquors;[7] so as to oleomargarine.[8] But the great practical mischief of such application was generally realized, and relief was promptly obtained through Congressional legislation designed to nullify the effect of these decisions. On the whole, the original package doctrine, considered in the light of its history, seems to add but little luster to the fame of MARSHALL as a jurist.

In *Willson* v. *Black Bird Creek Marsh Co.* was sustained the construction of a dam across a navigable creek, though obstructing the navigation thereof. We believe this decision to be correct as to result, this being merely a proper exercise of a power reserved to the States. Nevertheless, the reasoning of MARSHALL on the point is very brief and seems unsatisfactory. Perhaps with reason, it has not infrequently been regarded as scarcely consistent with *Gibbons* v.

[5] American Steel & Wire Co. v. Speed (1904), 192 U. S. 500.

[6] See Saulsbury v. State (1901) 43 Tex. Crim. 90, discussing effect of Emert v. Missouri (1895), 156 U. S. 296. See also Crenshaw v. State (Ark. 1910), 130 S. W. 569.

[7] See in particular Leisy v. Hardin (1890), 135 U. S. 100.

[8] See Schollenberger v. Pennsylvania (1898), 171 U. S. 1.

Ogden. It was cautiously said by McLEAN, J., in the *Passenger Cases*[9] that "it must be admitted that the language of the eminent Chief Justice who wrote the opinion is less guarded than his opinions generally were on constitutional questions."

But we come now to *Gibbons* v. *Ogden*, which has become a judicial fetish, regarded with little less than superstitious veneration and awe. "It has been cited and approved many times; whether cited or not, its doctrine, as that doctrine is now understood, is the accepted basis of all decisions upon the portion of the Constitution which is developing more rapidly and is the subject of a larger number of cases than any other." [10] This process of approval has been carried to what seems to us to be an absurd extent; casual allusions to topics having but remotely, if at all, connection with the questions actually involved, for instance, inspection, pilotage, tonnage, and so on, have been solemnly made the bases of decisions of importance. Indeed, the decision has been regarded as authority for so many distinct propositions, that it is frequently overlooked how simple was the situation actually involved. The case was that of a person employed in operating steamboats between points in different States, that is, New Jersey and New York, the question relating to legislation of the latter State, that, if valid, had the effect of depriving him of the right of employing the boats for that purpose. That is to say, the question was as to the right of *transportation* of personal property, or of a particular kind of personal property, from one State to another; or, to put it more broadly, of transportation of personal property from place to place.

Before proceeding, however, to a consideration of the great fundamental question involved, let us clear the way by eliminating certain subsidiary questions.

The use of the word *commerce* in the commerce clause has justly been regarded as unfortunate. It being etymologically based on the Latin word *"mcrx,"* defined as "goods, wares, commodities, merchandise," there may have been some plausibility in the claim made by counsel in *Gibbons* v. *Ogden* that its meaning was limited "to traffic, to buying and selling, or the interchange of commodities." But this view has long since been repudiated, and it seems now to be generally understood that, for practical purposes, the word, as used in the commerce clause, is synonymous with *transportation*. Now if it includes transportation by land, it seems obvious enough that it includes transportation by water, that is, navigation. Hence MARSHALL rightly concluded that "commerce among the States"

[9] (Jan. Term, 1849), 7 How. 283, 397.

[10] Prentice, Federal Power over Carriers and Corporations, p. 58.

"comprehends navigation," though, from a present day standpoint, his argument seems rather cumbrous and labored. Indeed, here, as elsewhere in our discussion, his own language seems applicable: "The tediousness inseparable from the endeavor to prove that which is already clear, is imputable to a considerable part of this opinion."

Nor do we find any reason to doubt the soundness of his conclusion that the power of Congress does not include "the completely internal commerce of a State," though it "does not stop at the jurisdictional lines of the several States," and "must be exercised within the territorial jurisdiction of the several States."

Nevertheless, certain language that he employed in the discussion of these points, though perhaps proper in the connection in which used, has, it seems to us, been extremely mischievous in its practical effect, in aiding to produce an inadequate and misleading definition of commerce. What he said was this: "Commerce, undoubtedly, is *traffic,* but it is something more—it is *intercourse.*" Now he was not here attempting to frame any formal definition of commerce, but, by a process of distortion, his language has been employed as if he had. It is obviously traceable into what seems to be the definition most approved by the Supreme Court: "Commerce with foreign countries and among the States, strictly considered, consists in *intercourse and traffic,* including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities."[11] Now it is, we submit, capable of easy demonstration that, in the opinion of the Supreme Court, at least, commerce but partially and imperfectly comprehends *intercourse.* And it scarcely seems to need pointing out that it does not comprehend mere *traffic* as such at all, or "the purchase, sale and exchange of commodities,"[12] these being of themselves merely internal transactions. Yet underneath many decisions lurks the fallacy that a sale is an essential element of commerce within the meaning of the commerce clause. thus notably in the decisions excluding contracts of insurance from its operation.[13]

[11] County of Mobile v. Kimball, (Oct. 1880), 102 U. S. 691. This was approvingly quoted in McCall v. California (1890), 136 U. S. 104; Williams v. Fears (1900), 179 U. S. 270; Champion v. Ames (1903), 188 U. S. 321, 351. See also Adair v. U. S. (1908), 208 U. S. 161, 176.

[12] For instance, in N. Y., ex rel. Hatch v. Reardon (1907), 204 U. S. 152, the commerce clause was held not to apply to a mere sale of stock. See Butler Shoe Co. v. U. S. Rubber Co. (C. C. A. 8th cir. 1907), 156 Fed. 1, 17; Atlas Engine Works v. Parkinson (D. C. Wis. 1908), 161 Fed. 223, 229.

[13] Paul v. Virginia (Dec. 1868), 8 Wall. 168. So generally as to contracts "negotiated between citizens of different states." Ware v. Mobile County (1908), 209 U. S. 405. Another instance of this fallacy seems furnished by Williams v. Fears (1900), 179 U. S. 270.

The general observations on the nature and scope of the power to regulate require little consideration here. The "power to *regulate*" is said to be the power "to prescribe *the rule* by which commerce is to be governed." This seems scarcely more than a barren definition in terms, the words "regulate" and "rule" having the same etymological basis. It is added: "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." Beyond their effect as constituting a rather broad rule of construction, these observations seem too general to be of much practical value, though they have, we submit, been mischievously used in attempting to justify legislation that constitutes a clumsy usurpation of powers reserved to the States, as in the *Lottery Case*,[14] sustaining an act prohibiting the carriage of lottery tickets; and so as to anti-trust legislation.[15]

But, leaving behind these subsidiary questions, we come to the fundamental question of the case. How was it that this power of Congress to regulate what we may call transportation, operated to invalidate State legislation that, if valid, took away the right of transportation from State to State?

What was the principle involved? It seems thus well stated by BALDWIN, C. J., in *Hoxie* v. *N. Y., N. H. & H. R. Co.*:[16] "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." 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."

Nor was this ancient rule overlooked by MARSHALL in *Gibbons* v. *Ogden*, for he there said: "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

[14] (1903), 188 U. S. 321, 347, 354.

[15] See Northern Securities Co. v. U. S. (1904), 193 U. S. 197, 335.

[16] (1909), 82 Conn. 352, 364. The author, by the way, is the recently elected governor of Connecticut, and the opinion cited obtained some notoriety during the campaign.

the world. This is true. The Constitution found it an existing right, and gave to Congress the power to regulate it." [17] Why then was not this obvious rule applied? The answer seems plain. The decision of a State court was under review, and the jurisdiction of the Supreme Court was confined, so far as the particular proceeding was concerned, to cases arising either under the Constitution itself or "laws of the United States." The Fourteenth Amendment was not then in existence, and, with exceptions not necessary to here consider, "the entire domain of the privileges and immunities of citizens of the States * * * lay within the constitutional and legislative power of the States, and without that of the Federal government." [18] Hence the resort to the commerce clause, for the purpose of overthrowing the decision of the State court, which otherwise would, it seems, have been final. It remains to consider the method of application of such provision, and some of the mischievous consequences thereof.

Congress had provided for the enrollment and license of vessels, and MARSHALL concluded that such legislation had the effect of conferring the right of transportation denied by the State legislation. This conclusion involved a narrow question of statutory construction, and does not specially concern us, though in passing we submit that the contrary conclusion of JOHNSON, J., furnishes the better reason. In view of this conclusion of MARSHALL, there was involved nothing more than the now established doctrine that the exercise of the power of Congress excludes the exercise of any conflicting power under authority of a State, inconsistent State legislation being to that extent superseded. We are not concerned to discuss either this doctrine or such application thereof.

But, whatever the actual decision in *Gibbons* v. *Ogden*, it has come to be the fountain head of the doctrine that the power of Congress is, even in the absence of exercise thereof, exclusive of exercise of the power of regulation of commerce under the authority of a State. Yet the following is the explicit language of MARSHALL: "In discussing the question, whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry,

[17] The argument of counsel contains a discussion of "the foundation of the right of intercourse among the States, either for the purposes of commerce, or residence and travelling" (p. 66). It was said that "from the declaration of independence, in 1776, until the establishment of the confederation, in 1781 * * * the right of intercourse among them rested solely on the jus commune of nations." It was contended that as "the constitution does not profess to give, in terms, the right of ingress and egress for commercial or any other purposes, or the right of transporting articles for trade from one State to another," the right "of intercourse with a State, by the subject of a foreign power, or by the citizens of another State, still rests on the original right, as derived from the law of nations."

[18] Slaughter-House Cases (Dec. 1872), 16 Wall. 36, 77.

whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry, because it has been exercised, and the regulations which Congress deemed it proper to make, are now in full operation. The sole question is, can a State regulate commerce with foreign nations and among the States, while Congress is regulating it?"

We are not here specially concerned to deny the soundness of the doctrine of the exclusiveness of the power of Congress to regulate commerce. It is still steadfastly adhered to by the Supreme Court, so far as mere explicitness of declaration suffices to produce that result.[19] But what we do propose to point out is that this alleged doctrine is a mere pseudo-doctrine, an empty form of words, though even in this aspect its existence has been a source of much confusion.

To make this plain, we distinguish between what may be called *the subject of transportation,* and *the agency of transportation,* the one being what is transported, be it a person or property, the other usually a carrier and the instrumentalities employed by the carrier.[20] For instance, in case of transportation by railroad, the passengers, baggage and freight constitute *the subject of transportation;* the carrying corporation, besides its employees, the engine, cars, track, etc., constitute *the agency of transportation.*

As applied to *the subject of transportation,* regulation of commerce or transportation ordinarily, if not necessarily, takes the form of prohibition, absolute or qualified. Nothing is better settled, as a rule, than that no restriction by way of prohibition or otherwise may be validly imposed under the authority of a State upon transportation from State to State. The qualifications of this rule need not here be discussed. Now, in view of what has already been said, we submit that the basis of this doctrine is not, as has commonly been supposed, the commerce clause, but either the ancient rule already discussed, or the Fourteenth Amendment, forbidding to deprive of "life, *liberty* or property, without due process of law." If this be so, it is an obvious conclusion that the lack of power in a State to impose restrictions upon the transportation of persons or property from State to State, depends in no wise on the exclusiveness of the power of Congress.

[19] See for instance Atlantic Coast Line R. Co. v. Wharton (1907), 207 U. S. 328; Asbell v. Kansas, (1908), 209 U. S. 251; Adams Express Co. v. Kentucky (1909), 214 U. S. 218; Southern Ry. Co. v. King (1910), 217 U. S. 524.

[20] In Cooley v. Port Wardens (Dec. Term, 1851), 12 How. 209, 316, "the power to regulate navigation" was said to extend "to the persons who conduct it, as well as to the instruments used." See U. S. v. Southern Ry. Co. (D. C. Ala. 1908), 164 Fed. 347, 353, 354.

It may be objected that this is merely an academic conclusion. But for the sake of clearness of thought, at least, it seems not unimportant that a far reaching doctrine be referred to its true basis. Take for instance *Bowman* v. *Chicago & Northwestern Ry. Co.*[21] and *Leisy* v. *Hardin*,[22] where it was held beyond the power of a State to interfere with the interstate transportation of intoxicating liquors; this on the distinct ground that such action was repugnant to the commerce clause. Is it an unreasonable conjecture that if the court had understood that the Fourteenth Amendment, and not the commerce clause, controlled, it would have been apparent that liberty of transportation, whether or not between points both within the State, does not include liberty to transport what, in the judgment of the legislature of the State, endangers the public morals and the public safety?

As applied to *the agency of transportation*, regulation of commerce or transportation ordinarily takes the form of regulation of conduct and liability of a carrier, by virtue of the broad rule applied in *Munn* v. *Illinois*,[23] by which "when private property is devoted to a public use, it is subject to public regulation."

Now, nothing can be clearer than that it is largely within the power of a State to regulate the conduct and liability of a railroad or other carrier engaged in interstate transportation. This is so when the regulation is for the benefit of the non-traveling or non-shipping public generally, particularly as to matters involving health or safety.[24] In every State there is a considerable mass of legislation of this character, of unquestionable validity. Good illustrations are requirements as to checking the speed of trains, and that a whistle be blown before reaching a crossing.[25] Surely the doctrine of the exclusiveness of the power of Congress has no application here.

And so as to legislation for the benefit of intrastate, as distinguished from interstate travelers and shippers, a good illustration being the power to regulate rates for transportation.

The only question then is as to the power of regulation for the benefit of interstate travelers and shippers. Now there are at least two comparatively early decisions that seem to rest substantially on the proposition that such legislation is beyond the power of the States, *Hall* v. *DeCuir*[26] and *Wabash, St. Louis & Pac. Ry. Co.* v.

[21] (1888), 125 U. S. 465.

[22] (1890), 135 U. S. 100.

[23] (Oct. 1876), 94 U. S. 113, 130.

[24] See Western Union Tel. Co. v. Kansas (1910), 216 U. S. 1, 26; Herndon v. Chicago, Rock Island, etc., Ry. Co. (1910), 218 U. S. 135, 157.

[25] See Erb v. Morasch (1900), 177 U. S. 584; Southern Ry. Co. v. King (1910), 217 U. S. 524.

[26] (1877), 95 U. S. 485.

Illinois,[27] in the latter a statute prohibiting discrimination in rates for transportation being held invalid. Nevertheless the decisions of the court, taken as a whole, suggest that, apart from the vague rule that the regulation shall not be "onerous"[28] or "amount to a burden,"[29] the court recognizes no definite limitation upon the power of a State to regulate the conduct and liability of a carrier, even though such regulation be for the benefit of interstate travelers and shippers. That is to say, as applied to *the agency of transportation*, the States have a power of regulation concurrent with that of Congress.

A notable instance is *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio*,[30] where was sustained a statute requiring trains to stop at certain points, as applicable to transportation between points outside the State, this being clearly regarded as a provision for the benefit of interstate passengers. If this be not regulation of commerce pure and simple, we are at a loss to see what is. To the same principle may be referred *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Solan*,[31] sustaining a statute relating to exemption from liability; *Richmond & Alleghany R. R. Co.* v. *R. A. Patterson Co.*,[32] sustaining a provision as to the obligation assumed by a carrier accepting for transportation beyond his own line; *Missouri, Kansas & Texas Ry. Co.* v. *McCann*,[33] sustaining the imposition of liability for negligence of a connecting carrier. These instances are merely illustrative; others might be cited.

This examination of the decision in *Gibbons* v. *Ogden* calls to mind the famous distinction between what is new, but not true, and what is true, but not new. It may readily be conceded that MARSHALL enunciated therein certain principles of unquestioned validity, but, generally speaking, they lack novelty and are fairly obvious. On the other hand, much of the language of his opinion has been mischievous in its effect. The fault, however, is not so much to be charged to him as to those that have made of his opinion a fetish. We have seen that by a process of distortion his language has been made the basis of an inadequate and misleading definition of *commerce*, as the word is used in the commerce clause; also the basis of the alleged doctrine of the exclusiveness of the power of Congress to regulate commerce, which turns out on examination to be a mere pseudo-doctrine, an empty form of words, and a source of much confusion.

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[27] (1886), 118 U. S. 557.
[28] Central of Georgia Ry. Co. v. Murphey (1905), 196 U. S. 194.
[29] Houston & Texas Central R. R. Co. v. Mayes (1906), 201 U. S. 321, 329.
[30] (1899), 173 U. S. 285.
[31] (1898), 169 U. S. 133.
[32] (1898), 169 U. S. 311.
[33] (1899), 174 U. S. 580.

Was the case prejudged by MARSHALL and his associates? Probably there is not sufficient ground for so concluding. But we submit that they were unduly astute to resort to a forced application of the constitution, for the purpose of overturning the carefully considered and unanimous decision of the State court,[84] which included among its members Chancellor James Kent and Smith Thompson, afterward a member of the United States Supreme Court. The decision in *Gibbons* v. *Ogden* doubtless finds some explanation in the unusual circumstances incident to the case, which excited widespread public interest and provoked an intensity of feeling such that three of the States were said to be "almost on the eve of war."[85] Let it be conceded that, from a practical standpoint, the decision finds justification, as sometimes does the destruction of valuable property in order to prevent further loss from conflagration. But this furnishes a bad precedent for the destruction of property under normal conditions. MARSHALL and his associates but imperfectly foresaw, if they did at all, the extent to which, many years later, under essentially different conditions, their language would be employed for the purpose of denying to the States the exercise of their constitutionally reserved powers, and of allowing to Congress the usurpation thereof.

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[84] Livingston v. Van Ingen (1812), 9 Johns. 507.
[85] 9 Wheat. 184.