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The Use and the Abuse of the Commerce Clause

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THE USE AND THE ABUSE OF THE COMMERCE CLAUSE.

THE visible universe, from the giant constellation down to the infinitesimal corpuscle, is in a condition of eternal movement, or, we may say, a condition of eternal *transportation*. Indeed, there seems to be no phenomenon more universal than this transportation. But we are to here consider it merely as a phenomenon of life, in particular, of human life. In common with other higher animals, man possesses organs that characterize him as a being eminently fitted for transportation; his arms; his legs; even his vocal organs, fitted for transportation (or transmission) of the intangible, that is, of intelligence communicated from one being to another. And some of the animals inferior to man, such as the camel, the elephant, and the horse, are, by their physical constitution, eminently fitted for transportation of men and tangible articles. We need not speak in detail of the artificial aids to transportation, gradually, sometimes even painfully, acquired, during the long period of progress through barbarism to higher civilization; the cart, the boat, the ships, the locomotive, the automobile, the telegraph, the telephone.

Perhaps it would be scarcely an exaggeration to say that the record of progress in civilization is little more than a record of improvement in transportation of persons and property. Certainly, throughout human history, whatever the social institutions, whatever the form of government, men have always enjoyed liberty of transportation from place to place, even though frequently, as in the case of the medieval serf, or the slave in the rice swamps or cotton fields, within narrowly prescribed limits. There never was a time in the history of imperial Rome, when, generally speaking, freemen did not enjoy perfect liberty of transportation, of themselves, or of property, from Jerusalem to Rome, or from Athens to Alexandria.

But this use of the word *liberty*, in a qualified sense, must not be misunderstood. We here mean nothing more than absence of restriction actually imposed by governmental authority. Although in this sense, liberty of transportation has always extensively existed, even under the most despotic governments, the conception of liberty of transportation, beyond the reach of restriction imposed by governmental authority, is one of very recent growth. Even in England today, it would seem that in this sense liberty of transportation does not exist, it being in theory within the power of a particular governmental authority, that is, Parliament, absolutely to deprive any person within its jurisdiction of the liberty of transportation of per-

sons or property. It is otherwise, however, as to the power of the Crown, now so narrowly restricted, as a result of the centuries-long struggle for liberty generally. Not to speak of guaranties of a more general character, there long ago appeared in Magna Charta the following provision specially applicable to liberty of transportation: "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."

It may here be assumed (though the point seems not free from doubt[1]) that, in the sense just considered, there existed no liberty of transportation during the colonial period, in the portion of America subject to Great Britain. That is to say, while, as a rule, restrictions upon transportation were not imposed by any governmental authority, such transportation was, as in the mother country, always subject to restriction, even to the extent of absolute prohibition, imposed by Parliament or other governmental authority.

But the separation from the mother country was largely precipitated by restrictions imposed upon transportation. One of the grievances against the King, specified in the Declaration of Independence, was "cutting off our trade with all parts of the world." And long before such separation, there had become widely current in the colonies, the conception,—traceable back to Locke, Rousseau, and others—of liberty existing as a *"natural," "inalienable"* right, not subject to restriction imposed by Parliament or other governmental authority. This conspicuously appears in, for instance, the Declaration of Independence, and in the Bills of Rights adopted in Massachusetts, and in Virginia. And the decisions of the Supreme Court, not to speak of other courts, contain much that seems to sanction this conception of liberty.[2] It seems fair to assume that such conception includes liberty of transportation of person and property. Was it not in the mind of MARSHALL, C. J., when, in *Gibbons* v. *Ogden*,[3] he spoke of "the right of intercourse" that the Constitution found "existing," a right that "derives its source from those laws whose authority is acknowledged by civilized man throughout the world?"

But it is important to notice that if there existed such liberty of

[1]See Story on the Constitution, §§ 187 et seq.

[2]Calder v. Bull (Feb., 1798) 3 Dall, 386; Fletcher v. Peck, (Feb., 1810) 6 Cranch, 87, 135; Terrett v. Taylor (Feb. 1815) 9 Cranch, 43, 52; Wilkinson v. Leland (Jan. 1829) 2 Pet. 627, 657; Loan Ass'n. v. Topeka (Oct. 1874) 20 Wall. 655, 663; Sinking-Fund Cases (Oct., 1878) 99 U. S. 700, 765; Butchers' Union Co. v. Crescent City Co. (1884) 111 U. S. 746, 762.

[3]9 Wheat. 1 (1824).

transportation, as a matter of "natural," "inalienable" right, during the period of the Confederation, it seems to have existed (save for the special provisions about to be considered) only as between points in the same State: that is to say, it was a right of *intrastate* transportation merely, and not of *interstate* transportation. The Confederation was among colonies or States, each of which expressly retained "its sovereignty, freedom and independence." Mr. Oakley of counsel in *Gibbons* v. *Ogden*,[4] in entering upon an inquiry "into the foundation of the right of intercourse between the States, either for the purposes of commerce, or residence and travelling," seems to have thus fairly stated the situation: "From the Declaration of Independence in 1776, until the establishment of the Confederation in 1781, the States were entirely and absolutely sovereign, and foreign to each other, as regarded their respective rights and powers as separate societies of men. During that period the right of intercourse among them rested solely on the *jus commune* of nations. * * * Any State has a natural right to purchase of any other the articles which it needs, and to open a commercial intercourse for that purpose; but every State, being under no obligation to purchase of another, may at its pleasure prohibit the introduction of any foreign merchandise. * * * It depends upon the will of each nation, whether it will carry on any commerce with another, or upon what terms, and under what regulations. * * * The right of travelling, or of entering into and residing in one nation, by the citizens or subjects of another, depends on the same principles of international law. But the sovereign may forbid the entrance into his territory, either to foreigners in general, or in particular cases, and under particular circumstances, or as to particular individuals, and for particular purposes. * * * Each State enjoyed the right of intercourse with all the others, at the will of those others, both as respects the transit and residence of persons, and the introduction and sale of property." But the right of interstate transportation was to an extent, expressly provided for by the Articles of Confederation. The "free inhabitants" of each State, "paupers, vagabonds and fugitives from justice excepted," were to be "entitled to all privileges and immunities of free citizens in the several States;" the people of each State were to have "free ingress and regress to and from every other State," and to "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 restriction 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."

[4] 9 Wheat. 1, at 66 and 67.

But the adoption of the Constitution involved a fundamental change in the relation of the States to one another. Their independent existence continued indeed, but there was now something more than a mere league or confederacy among States, each of which retained its "sovereignty, freedom and independence." It was *"we, the people of the United States,"* that ordained and established the Constitution "in order to form *a more perfect union."* And is it necessary to argue at length that (even without reference to the effect of the commerce clause) it was no longer true, if indeed, it had been true during the period of the Confederation, that "the right of intercourse among them (the States) rested solely on the *jus commune* of nations," that "each State enjoyed the right of intercourse with all the others, at the will of those others, both as respects the transit and residence of persons, and the introduction and sale of property?"

In *Gibbons* v. *Ogden,*[5] Mr. Oakley argued that because "the Constitution does not profess to give in terms the right of ingress and regress for commercial or any other purposes, or the right of transporting articles for trade from one State to another," therefore "the right of intercourse with a State by the subjects of a foreign power, or by the citizens of another State, still rests on the original right as derived from the law of nations." But we draw precisely the opposite inference from such omission. Mr. Oakley seems to have overlooked or ignored the radical alteration of interstate relation produced by the transition from the Confederation to the Constitution. The reason that such right of ingress and regress was not in terms given by the Constitution seems plain enough: it was no longer necessary that it should be. The welding of the hitherto "sovereign States" into national unity *ipso facto* caused whatever right of *intrastate* transportation existed under the Confederation to be amplified into the right of *interstate* transportation, that is, between any points whatever within the territorial limits of the nation.

Although what we shall presently see to be erroneous views of the effect of the commerce clause have largely prevented realization of this effect of the creation of national unity, there is at least one instance of the true view having been, even if but approximately, apprehended by the Supreme Court in a brief interval of lucidity. In *Crandall* v. *Nevada*[6] was condemned a restriction imposed by a State upon transportation of persons out of the State. The court, refusing to concede that the question was to be determined, either by the commerce clause, or by the prohibition against a State laying imposts

[5] 9 Wheat. 1, at 69.
[6] 6 Wall. 35 (Dec. 1867).

or duties on imports or exports, said: *"The people of these United States constitute one nation."* Although the decision rested somewhat on the supposed right of the government to call its citizens to aid in its service, it was also said as to rights of a citizen: "He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. *He has a right to free access to its seaports, through which all the operations of foreign trade and commerce are conducted,* * * * and this right is *in its nature* independent of the will of any State over whose soil he must pass in the exercise of it." Certainly this is something more than the right possessed by a citizen of a member of a mere confederation of States, each "retaining its sovereignty, freedom and independence."

It is proper to say in passing that what has just been said, though applicable to what we may call the bald right of transportation from State to State, is not, necessarily at least, applicable to transportation *under conditions of special privilege*; as for instance, by a corporation exercising the power of eminent domain. This important distinction[7] has, however, frequently been overlooked or ignored, with resultant confusion.

The present discussion is not intended to have any special reference to transportation to or from a foreign country. It is, indeed, largely applicable thereto, but there are principles and constitutional provisions that, for the sake of clearness, make desirable separate consideration thereof.

We have thus far assumed that the liberty of transportation existing under the Confederation, as liberty of intrastate transportation, and amplified under the Constitution into liberty of interstate transportation, rested not on any provision of Bill of Rights or Constitution, but on the basis of "natural," "inalienable" right, and, as already pointed out, there seems to be much to give plausibility to this view. But it is no longer necessary to rest on this assumption. The Fifth Amendment, practically contemporaneous with the Constitution, seems adequate for the purpose, so far as concerns restrictions sought to be imposed by Congress. It is said to forbid "a regulation of interstate commerce, not merely affecting the mode or manner of transportation, but excluding from interstate transportation altogether certain classes of persons, or imposing conditions on such transportation as would wantonly and arbitrarily affect personal liberty."[8] And we submit that the corresponding prohibition of the

[7]See discussion thereon in 24 Harv. L. Rev. 635.

[8]United States v. Delaware & H. Co. (C. C. Pa. 1908) 164 Fed, 215, 231.

Fourteenth Amendment has likewise for more than forty years, secured (if security be necessary), such liberty against restrictions imposed by the States, to say nothing of like provisions, in some instances existing long previously, contained in the State constitutions.

It is well understood that liberty generally, whether regarded as a matter of "natural," "inalienable" right, or as resting on express constitutional guaranty, is not unrestricted, unqualified liberty. We are here dealing with no local, temporary phenomenon, but with a fact of universal application throughout human history, or, if there are any exceptions, the cases are those of rudimentary, transitional forms of civilization. Nor is the truth of this statement affected by the circumstance that, as between age and age, and nation and nation, conceptions of the extent of liberty have widely varied under the influence of, for instance, current views of what is desirable in social, religious, business or political conditions, to say nothing of differences in race, climate, etc.

Thus it is, generally speaking, true in this country that all persons have liberty to produce, sell, or transport any article whatever, thus, an article of food, or of clothing. But this does not include liberty to rear, for the purpose of furnishing food, a diseased calf, lamb or pig, or to sell such an animal. So while, generally speaking, all persons have liberty to transport cows, or sheep or hogs, whether between points in the same State or points in different States,[9] this does not include liberty to transport them, if diseased so as to be unfit for food.[10] The same is true of quarantine regulation preventing the transportation of persons.[11] All this seems elementary enough, yet there is here involved a principle that the Supreme Court has frequently failed to grasp (or rather, having once grasped, has later lost hold of). As we shall presently see, much confusion has resulted. But to continue with our illustrations:

In some communities, such is the result of views as to Sunday observance that liberty does not include liberty to perform on Sunday certain acts that there is liberty to perform on secular days, for instance, acts of manufacture or sale. Thus, while there is, generally speaking, liberty to transport, whether between points in the State, or between points in different States, this does not include liberty to transport on Sunday.[12]

In some communities, such is the result of views as to the effect

[9]Railroad Co. v. Husen (Oct. 1877) 95 U. S. 465, 470.

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

[11]Compagnie Francaise, &c v. Louisiana State Board of Health (1902) 186 U. S. 380, 387.

[12]Hennington v. Georgia (1896) 163 U. S. 299.

of indulgence in intoxicating liquors, that liberty does not include liberty to manufacture or sell them. So, while there is, generally speaking, liberty to transport, whether between points in the State, or between points in different States, this does not, we submit, as a matter of principle, include liberty so to transport intoxicating liquors.[13]

In some communities, such is the result of views as to the effect of restrictions upon competition produced by what are commonly known as "monopolies" or "trusts," that liberty does not include liberty to manufacture or sell under such conditions of restriction. Thus a State may enact what is commonly known as "anti-trust" legislation, so far at least as concerns manufacture or sale. But further, while there is, generally speaking, liberty to transport, whether between points in the State, or between points in different States, this does not, we submit, include liberty so to transport under such conditions of restriction.

It is, of course, to be borne in mind that in all these cases the power of a State to impose restrictions, whether upon manufacture, or sale, or transportation, is, like that of any other sovereignty, subject to territorial limitation. The State of New York may not impose restrictions upon manufacture, or sale, or transportation, in Timbuctoo, or Turkestan, or even in California, or New Jersey. But, bearing in mind such territorial limitation, we may conclude generally that, while all persons have liberty to transport, both between points in the same State and between points in different States (whether such liberty is regarded as a matter of natural, inalienable right, or as resting on express constitutional provision), such liberty does not include liberty to transport under conditions producing, or supposed to produce, injury to the health, morals, safety or convenience of the community, the test of what constitutes such injury varying under conditions of time and place.

We are now prepared to consider mischievous results of the supposed application of the commerce clause of the Federal constitution, conferring power upon Congress "to regulate commerce with foreign nations, and among the several States." For present purposes it is perhaps of no great practical value to seek to determine the intent of the framers of the Constitution in introducing this provision. It seems reasonably clear, however, that they had "commerce with foreign nations" principally in mind, there having been much difficulty in negotiating treaties on advantageous terms, in the absence

[13]It will, of course, be understood that this is stated, as a matter of principle merely, for it will presently be seen to be otherwise as a matter of authority. The same general observation is applicable to restrictions upon competition.

of such power in Congress. Commerce "among the States," which was comparatively insignificant in amount (at any rate, that carried on by land), received little or no consideration, save as merely incidental to "commerce with foreign nations." Certainly the framers of the Constitution had no more than the remotest conception of what is nowadays the scope of the application of this provision to interstate transportation. At any rate, for many years, it continued to be a slumbering provision, but little used, and attracting little attention, so far, at least, as concerns its effect by way of restriction upon State legislation.

But the extraordinary development of the use of steam as a motive power unexpectedly brought the commerce clause into a position of unnatural importance, as applied to commerce "among the States." The courts of the State of New York having sustained statutes of that State granting to certain persons the exclusive privilege of using steamboats upon the navigable waters of the State, an appeal was taken to the Federal Supreme Court. Obviously, as illustrated by the particular case presented to the court, the effect was the imposition of a restriction, amounting to prohibition, upon transportation between certain points in the State, and points outside the State. This was, however, not an absolute prohibition upon transportation even between such points, but only upon transportation by a particular method, and that for a limited period. It would seem that such statutes might well have been sustained, as indeed, they were sustained by the State court, as an exercise of the power to encourage by patent "imported improvements no less than original inventions." But, for present purposes, we may ignore this feature of the case, and consider it as one where the State court had sustained a statute baldly and absolutely prohibiting transportation between points in the State and points outside the State.

We are here concerned to consider, not the soundness of the decision of the State court, but what possible ground there was for the Federal Supreme Court to review such decision. Had the Fourteenth Amendment been then in existence, it may be admitted that it would have furnished such ground, in that the statutes in question constituted an unwarrantable restriction upon the liberty of transportation. In the absence of such provision, it became necessary to resort to some existing provision of the Constitution. The difficulty was undoubtedly fully appreciated by the astute mind of WEBSTER, who, as counsel for the appellant, had undertaken to procure a reversal of the decision of the State court. It may be fairly assumed that he proceeded in no judicial frame of mind, and was actuated by the not

unusual motive of counsel to employ all fair means, at least, to win success. He hit upon the commerce clause as his most available weapon, and, though "guardedly," announced in his argument his intention to contend that "the power of Congress to regulate commerce was complete and entire, and to a certain extent exclusive: that the acts in question were regulations of commerce." Though the decision of the Supreme Court was not actually based on this ground[14] we may nevertheless, in accordance with subsequent opinion, fairly assume that it was so based. At any rate, the decision has come to be regarded as the fountain head of the doctrine that the power of Congress to regulate commerce is, even in the absence of exercise thereof, exclusive of exercise of the power of regulation under the authority of a State. Was MARSHALL the dupe of WEBSTER, or merely his co-conspirator? The latter seems the more likely supposition, but the point is one unnecessary to be here determined. What is of importance to consider is the extremely mischievous effect of this doctrine of exclusiveness.

Let those that doubt this reflect upon the dreary morass in which, during the quarter century following *Gibbons* v. *Ogden*,[15] the Supreme Court floundered, as witness (to change the metaphor), the Babel of confused and conflicting opinions in *City of New York* v. *Miln*,[16] *License Cases*,[17] and the *Passenger Cases*.[18] Nor was the situation substantially improved by the interjection of the sorry distinction, or rather attempt at distinction, between "matters national" and "matters of local interest."[19]

The mischievous effect of the doctrine of exclusiveness, referable to *Gibbons* v. *Ogden*,[20] is conspicuously illustrated by its application to State legislation relating to *intoxicating liquors*; to so-called *monopolies or trusts*; to *the conduct and liability of common carriers*; to *taxation*.

(1) *Intoxicating liquors*. It has already been seen that liberty of transportation, on whatever basis resting, is not unrestricted and unqualified; that while, generally speaking, all persons have liberty to transport, whether between points in the State, or between points in different States, such liberty does not include liberty to transport under conditions producing, or supposed to pro-

[14]Congress had provided for the enrollment and license of vessels, and it was concluded by the court that such legislation had the effect of conferring the right of transportation denied by the State legislation.

[15]9 Wheat. 1.

[16]11 Pet. 102 (Jan. T. 1837).

[17]5 How. 504 (Jan. T. 1847).

[18]7 How. 283 (Jan. T. 1849).

[19]Cooley v. Port Wardens (Dec. T. 1851) 12 How. 299.

[20]9 Wheat. 1.

duce, injury to the health, morals, safety or convenience of the community. This was illustrated by the cases involving the transportation of diseased animals, and transportation on Sunday. It was concluded that in communities where certain views prevail as to the effect of indulgence in intoxicating liquors, liberty does not include liberty to manufacture or sell them, or to transport them, even as between points in different States. We submit that there is no substantial distinction in this regard between transportation of intoxicating liquors, and transportation of diseased animals, or transportation on Sunday, but as is well known, the Supreme Court does recognize such a distinction.[21] The existence of this glaring inconsistency is directly due to the *Gibbons* v. *Ogden* doctrine of exclusiveness. The court reasoned substantially thus: The power of Congress to regulate interstate commerce is exclusive; the transportation of intoxicating liquors is interstate commerce; therefore, it is beyond the power of the States to regulate the transportation thereof. A further discussion of the fallacy here involved, would seem to tend to weaken the argument.

(2) *Monopolies or trusts.* What has just been said seems substantially applicable to legislation against monopolies or trusts, so called. It has been concluded that in communities where certain views prevail as to the effect of restrictions upon competition, liberty does not include liberty to manufacture or sell under such conditions of restriction, or to transport, even as between points in different States. That is to say, the anti-trust legislation of a State may apply to interstate transportation, thus, by way of prohibition of transportation of a monopolized article into the State. There seems to be no decision of the Supreme Court directly opposed to this view.[22] But it is certain that a contrary view has widely prevailed, and was influential in leading to the enactment of the Federal anti-trust act. Hence it may fairly be said that the *Gibbons* v. *Ogden*[23] doctrine of exclusiveness underlies that act, and is responsible for the failure to give State anti-trust legislation what may be called a "fair chance." The result is exceedingly mischievous, from the standpoint of the theory of the desirability of local as compared with centralized regulation of monopolies, though we are not here concerned to consider this phase of the matter.

(3) *Conduct and liability of carriers.* What has just been said seems likewise substantially applicable to legislation by way of regu-

[21]Bowman v. Chicago & N. W. Ry. Co. (1888) 125 U. S. 465; Leisy v. Hardin (1890) 135 U. S. 100.

[22]Which perhaps finds some support in Louisville & Nashville R. R. Co. v. Ky. (1896) 161 U. S. 677, 701.

[23]9 Wheat. 1.

lation of the conduct and liability of common carriers. That such power of regulation resides in some governmental authority must be regarded as settled since the decision in *Munn* v. *Illinois*.[24] We have here to consider only carriers engaged in interstate transportation. It has never been seriously questioned that it is within the power of the States to regulate such conduct and liability for the benefit of what we may call "the public" generally, as distinguished from interstate travellers or shippers. Good illustrations are requirements as to checking the speed of trains,[25] and that a whistle be blown before reaching a crossing. But we have here to consider only such regulation for the benefit of interstate travellers or shippers, there being no question as to the power of the States to regulate for the benefit of *intrastate* travellers and shippers. Now in comparatively early decisions, there was an abortive attempt to apply the *Gibbons* v. *Ogden*[26] doctrine of exclusiveness, by way of invalidating legislation by the States regulating such conduct and liability for the benefit of interstate travellers and shippers.[27] But such attempt was long since substantially abandoned, and it may now be confidently stated that, generally speaking, the States have full power to regulate such conduct and liability for the benefit of interstate travellers and shippers. Perhaps the most conspicuous instance of this is *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio*,[28] which sustained a statute requiring trains to stop at certain points, as applicable to transportation between points outside the State (Chicago and Buffalo), this being clearly regarded as for the benefit of interstate passengers. To like effect seem *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Solan*,[29] sustaining a statute relating to exemption from liability; *Richmond & Alleghany R. R. Co.* v. *R. A. Patterson Co.*,[30] sustaining a provision as to the obligation assumed by a carrier accepting freight for transportation beyond his own line; *Missouri, Kansas & Texas Ry. Co.* v. *McCann*,[31] sustaining the imposition of liability for the negligence of a connecting carrier. These instances are merely illustrative; others might be cited.

But the point that we here desire to emphasize is that the *Gibbons*

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[24] 94 U. S. 113 (Oct. 1876).

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

[26] 9 Wheat. 1.

[27] See Hall v. DeCuir (Oct. 1877) 95 U. S. 485; Wabash, St. Louis & Pac. Ry. Co. v. Illinois (1886) 118 U. S. 557.

[28] 173 U. S. 285 (1899).

[29] 169 U. S. 133 (1898).

[30] 169 U. S. 311 (1898).

[31] 174 U. S. 580 (1899).

v. *Ogden*[32] doctrine of exclusiveness, though generally repudiated as applicable to this class of cases, is still effective as underlying the Interstate Commerce Act, as it does the Anti-trust Act. For as is well known, the Interstate Commerce Act was enacted under the influence of the idea that it was not, adequately at least, within the power of the States to regulate the conduct and liability of carriers for the benefit of interstate travellers and shippers. It is not so well known that this idea underlying the act has, as we submit, been substantially repudiated by the Supreme Court. And, as was said with reference to the Anti-trust Act, the influence of the doctrine of exclusiveness is mischievous, in that it is responsible for the failure to give a fair chance to State legislation regulating the conduct and liability of carriers. To speak more specifically, the idea that it is beyond the power of a State to regulate rates for interstate transportation,[33] is, as we submit, an application of the doctrine of exclusiveness, that has been repudiated by later decisions of the Supreme Court.

(4) *Taxation.* Nowhere has the doctrine of exclusiveness resulted in greater havoc and confusion than in its application to State tax legislation. It has, indeed, not as a rule been applied so as to prevent the taxation of property merely because of its being owned or controlled by one engaged in interstate transportation, or even because of it being used for the purpose of such transportation. But as to taxation of the *privilege* of engaging therein, the result has been different. Generally speaking, it is absolutely within the power of a State to tax a *privilege,* like other property generally, thus the privilege of engaging in manufacture, sale or transportation. We submit that no earthly objection to taxing the privilege of engaging in transportation arises from the circumstance that the act of transportation in question is partly performed outside of the territorial jurisdiction of the taxing power. As plausibly might it be contended that an objection to taxing land arises from the circumstance that it is part of a parcel that is in part outside the territorial jurisdiction. For a time, indeed, this view seems to have found favor with the Supreme Court,[34] but, according to the rule now established therein, the doctrine of exclusiveness furnishes objection to the taxation of the privilege of engaging in interstate transportation. This is bad enough, but the rule has been carried to the absurd extent of forbidding taxation of tangible property, that is to say, "gross receipts," merely because of it having been acquired in the course of interstate

[32] 9 Wheat. 1.
[33] Wabash, St. Louis & Pac. Ry. Co. v. Illinois (1886) 118 U. S. 557.
[34] See Osborne v. Mobile (Dec. 1872) 16 Wall. 479.

transportation. The effect of this extreme application of the rule has, however, been largely nullified by the establishment of the rule allowing taxation of *"intangible property."*

Having thus far considered the commerce clause as operating by way of restriction upon State legislation, we pass to a consideration of its operation in a substantially different manner, that is, as furnishing authority for legislation by Congress. Now the question of the extent of the power of legislation conferred on Congress under the authority "to regulate commerce" is a comparatively narrow one of construction. If it pleases the Supreme Court to determine that it confers authority to regulate all transactions whatever within the territorial limits of the United States, manufacture, sale, transportation, and what not else, that is an end of the matter, so far as we are here concerned. We do not propose to discuss the mere propriety of the construction that the court has, arbitrarily or otherwise, placed upon certain words.

But what we do propose to show is, that, generally speaking, the power of legislation that has been allowed to Congress under this provision, is, from a legal standpoint, an utterly superfluous power of legislating on matters as to which ample power has been reserved to the States. We do not propose to deal with the question of the comparative desirability of legislation on a given subject, by a single centralized authority operating over an extensive area, as distinguished from legislation thereon by a considerable number of local authorities operating in each instance over a comparatively limited area. Relegating this question to the domain of Political Science, we propose to show that, as to the class of cases under consideration, there is no constitutional objection to the exercise by the local authorities of the power conferred upon the central authority.

The power of legislation supposed to be conferred upon Congress by the commerce clause has been conspicuously exercised in three ways, that is, by way of (1) *prohibition* of transportation; (2) *regulation of the conduct and liability of those engaged therein,* that is, common carriers; (3) *furnishing the means thereof or authority to engage therein.*

(1) *Prohibition of transportation.* We have already concluded that liberty to transport does not include liberty to transport, even as between points in different States, under conditions regarded as injurious to the health, morals, safety or convenience of the community. Thus a State may prohibit the transportation of diseased animals into the State. If Congress has power likewise to prohibit the transportation of such animals into the State, there is duplication of authority. In view of what has already been said, further elaboration is here

unnecessary. As other instances under this head, we may refer to legislation prohibiting the transportation of lottery matter; the Pure Food and Drugs Act; the Anti-trust Act.

(2) *Regulation of the conduct and liability of carriers.* It has already been seen that there has never been any serious question as to the power of the States to regulate the conduct and liability of common carriers, even those engaged in interstate transportation, for the benefit of "the public," as distinguished from travellers or shippers. The same is true of legislation for the benefit of *intrastate* travellers and shippers. It follows then that legislation by Congress for the same purpose is superfluous, even supposing it to be within the constitutional power of Congress. All that is necessary to consider, then, is regulation for the benefit of *interstate* travellers and shippers. But it has been seen that, notwithstanding comparatively early decisions to the contrary, it is now recognized that, generally, speaking, the States have full power to regulate such conduct and liability for the benefit of interstate travellers and shippers. Here, too, it follows that, if Congress has power of legislation for the same purpose, there is a duplication of authority. The most conspicuous instance of such legislation is, of course, the Interstate Commerce Act, but in addition are the Safety Appliance Act and the Employers' Liability Act.[35]

(3) *Furnishing means of transportation, or authority to engage therein.* Congress has conspicuously furnished the means of interstate transportation, by way of legislation for the improvement of interstate lines of communication, particularly waterways. But there can be no doubt of the power of the States to legislate for precisely the same purpose. What is, if possible, a still more superfluous exercise by Congress of its power is the conferring authority, as by the creation of corporations, notably in the case of the Pacific railroads, for the purpose of engaging in interstate transportation.

The salient points of the preceding discussion may thus be succinctly stated.

Liberty of transportation from State to State, beyond the reach of restriction imposed by State, Congressional or other governmental authority has existed, generally speaking, since the adoption of the Federal Constitution, whether regarded as resting on the basis of "natural," "inalienable" right, or on the basis of express constitutional guaranty, *i. e.,* the Fifth and Fourteenth Amendments.

[35]That is to say, if we assume what is perhaps not clear, that such legislation is for the benefit of interstate travelers and shippers. If, however, we assume it to be for the benefit merely of employees of the carrier, it is, if possible, still more superfluous, to say nothing of the question whether, on this assumption, such legislation is within the constitutional power of Congress at all.

Such liberty is not unrestricted and unqualified. Subject to territorial limitation, the States have power to impose restrictions upon transportation from State to State, if under conditions producing injury to the health, morals, safety or convenience of the community.

But the doctrine of the exclusiveness of the power of Congress to regulate commerce, referable to *Gibbons* v. *Ogden,* has been applied with mischievous effect to transportation from State to State, as in case of State legislation relating to (1) *intoxicating liquors*; (2) *monopolies or trusts*; (3) *the conduct and liability of common carriers*; (4) *taxation.*

The power of legislation that has been allowed to Congress under the commerce clause is a superfluous power of legislating on matters as to which ample power has been reserved to the States, as in case of legislation relating to (1) *prohibition* of transportation; (2) *the conduct and liability of those engaged therein*; (3) *furnishing the means thereof, or authority to engage therein.*

It seems a fair general conclusion that, while from the standpoint of the intention of the framers of the Constitution, little or no use has been made of the commerce clause, its actual application has been largely useless and superfluous, even mischievous.

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