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The Right of a State to Interfere with Inter-state Commerce through the Exercise of its Police Power

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THESIS PRESENTED BY

JEAN I. WEEKS

FOR THE DEGREE OF BACHELOR OF LAWS.

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CORNELL UNIVERSITY.

SCHOOL OF LAW.

1895.

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THE RIGHT OF A STATE TO INTERFERE WITH INTER-STATE
COMMERCE THROUGH THE EXERCISE OF ITS POLICE POWER.

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STATEMENT OF THE QUESTION.

Article 1, Section 8, Clause 3 of the Constitution of the United States provides that, "The Congress shall have power to regulate commerce with foreign nations, and among the several States and with the Indian tribes;" and the tenth amendment provides that, "The powers not delegated to the United States by the Constitution nor prohibited to it by the States, are reserved to the States respectively, or to the people".

Among the powers so reserved to the States is the police power. Now in order to effectually exercise this power it is frequently necessary for a State to enact legislation which incidentally interferes with commerce among the States. Here then is an apparent overlapping of powers. Which shall prevail? The fact that the constitution provides in Art. 6, Sec.2, that, "This Constitution,.....shall be the supreme law of the land;.....anything in the Constitution or laws of any State to the contrary notwithstanding," does not solve the difficulty; for here we are confronted with a question of construction. The clause of the Constitution last referred

to cannot be called in until it is ascertained what the phrase " regulate commerce " means; for otherwise the scope of the Constitution would be broadened each time a question of construction presented itself. The natural meaninf of the words must be adopted. But what is their natural meaning as they are used ? Evidently a limited construction must be placed upon them, or the pālice power of the State must suffer a limitation.

The question therefore is, is State police legislation which incidentally interferes with commerce among the States unconstitutional as a regulation of commerce ?

WHAT IS THE POLICE POWER?

The first question to be disposed of is, what is the police power and what sort of legislation springs from it ? The phrase "police power" has two popular meanings, one a broad and general meaning and the other a narrow and limited one. Under the broad meaning falls all the legislation which a State is capable of passing, and under the other comes a class of legislation which is intended to protect health and

life, to promote happiness, to preserve quiet and to guard against the evils of vice, disease, pauperism, crime &c. The phrase will be used in its latter sense in this paper.

THE POLICE POWER SUPREME IN THE STATE.

The purpose of this paper is to show that this branch of the general police power has suffered no limitation by reason of the grant to Congress of power to regulate commerce among the States. It is unprofitable to look back into history very minutely to find the meaning of this clause. But it is important to note that one of the main causes leading up to the adoption of the Constitution of the United States was the fact that Congress under the Articles of Confederation had not the power to regulate commerce. Prior to the adoption of the Constitution, each State had the power to regulate commerce between itself and other States as it saw fit. This it did by means of the exercise of its general police power under which it imposed taxes directly on imports from other States for revenue purposes. The States retaliated in this manner one against another to such an extent as to operate as a great restriction on trade. (a)

Now the intent of the framers of the Constitution in

(a) Laws of N. Y. 1784 ch. 10. Laws of Ct. 178-. ch.--.

in drawing this clause probably was to guard against this sort of legislation, to prevent the States from regulating commerce. There is nothing to show that it was the intent to take from the States the right to affect inter-state commerce where it is necessary to a legitimate exercise of the police power. This would be unreasonable. For to take from the State the right to produce these remote and incidental effects would rob the State of the police power itself. This was not intended. The police power is one of the essential powers of the State. Without it she would be defenseless, and unable to protect herself against the evils and dangers which might invade her borders.

Speaking of a police law the Kansas Court in *Railway v Finley* 28 Kansas - says, "If this law is not constitutional, and within the police power of the State, then the State is absolutely powerless to protect the property of its citizens. If this and similar statutes are in conflict with the Constitution of the United States, the State is wholly disarmed and defenseless to exclude from the State that which is dangerous and injurious to the property of its citizens".

The police power was not transferred to Congress. There is no clause of the Constitution which has this effect. It

has been claimed that the 14th amendment in declaring that no State "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws", had this effect. But the case of *Barbier v Connolly* 113 U.S. 27 holds that the 14th amendment does not take from the State any of its police power.

Therefore we would conclude that the police power still resides in the States, and that legislation strictly within this power is constitutional regardless of the extent to which it interferes with inter-state commerce.

But there has been a mass of litigation bearing more or less directly upon the question. An examination of some of the leading cases will follow.

STATE OF THE LAW.

The cases which arise under this clause naturally fall under three general classes.

1. Cases where the statute whose constitutionality is in question is a direct regulation of inter-state commerce and not in any sense a police regulation.

2. Cases where the statute oversteps the police power, where it is only partly a police regulation and as a whole

interferes with inter-state commerce.

3. Cases where the statute is strictly a police regulation and interferes with inter-state commerce.

CLASS I

This class establishes the following propositions:

1. The right of Congress to regulate commerce among the States is exclusive of direct State interference.

2. Silence on the part of Congress in regard to subjects of Commerce National in their nature and admitting of an uniform system of rules and regulations, indicates that Congress desires commerce in those subjects to remain free and untrammelled.

3. Silence on the part of Congress in regard to subjects of commerce local in their nature not admitting of an uniform system of rules and regulations but rather requiring a multitude of systems indicates that Congress is willing the States should act, so long as it remains silent.

In *Gibbon v Ogden*,⁹ *Wheaton* 1, the question was before the court as to how far the right of the United States to regulate commerce was exclusive. A statute of the State of New York gave to Robert Livingstone and Robert Fulton the exclusive right to navigate the waters of the State of New York with

boats moved by fire or steam. It was held void so far as it prohibited United States vessels licensed according to United States laws navigating said waters. The court declared the right of Congress to regulate commerce to be complete in itself, and to acknowledge no limitations other than those prescribed in the Constitution.

The case of *Brown v Maryland* 12 Wheaton 436, is a similar one. Here the State of Maryland passed a statute requiring an importer to take out a license and pay \$50. before he should be permitted to sell a package of imported goods. The statute was held unconstitutional as being an encroachment upon the power of Congress to regulate commerce. See also *Robbins v Shelby Taxing District* 120 U.S. 489.

In the case of *Wabash & R.R. v Illinois*. 118 U.S.557,571 the court had before it a statute of Illinois which forbade railroad companies to charge more for a short distance than for a greater. It held the statute void as an interference with inter-state commerce. Clearly the subject was one of National importance as the statute applied to roads running out of the State as well as those wholly within the State, and Congress had remained silent.

The opinion in the above case quotes with approval the

following extract from Hall v DeCuir 95 U.S.485, " But we think it may safely be said that State legislation which seeks to impose a direct burden upon inter-state commerce or to interfere directly with its freedom does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position.It was to meet just such a case that the commercial clause in the Constitution was adopted".

That silence on the part of Congress in regard to interstate commerce where the subject is of local importance will be construed as an implied consent to the States to act until Congress does, is shown by the case of County of Mobile v Kimball 102 U.S.691-696, A statute was before the court entitled, "An Act to provide for the improvement of the river, bay and harbor of Mobile" The statute was held valid. The court said, "Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being and until it sees fit to act they may be regulated by State authority".

CLASS II

This class of cases establishes the following proposition:

State statutes which as a whole affect inter-state commerce will be held valid so far as their provisions are necessary to accomplish a police purpose, that is, so far as they do not overstep legitimate police power.

Some courts have drawn a distinction between health and inspection laws on the one hand and other police laws on the other, holding that the former are valid and the latter void when they interfere with inter-state commerce. The distinction is not of importance. Health and inspection laws are police laws, but so are many others as well, and it is not desirable to make any distinction between them for our purpose.

In the case of *Henderson v Mayor of New York City* 92 U.S. 259, a statute of New York was declared void which required of ship-masters a burdensome bond, or an alternative sum of money as a pre-requisite to his landing his passengers. The intention of the statute was, undoubtedly, to protect the State against the importation of paupers. But it imposed the burden indiscriminately upon all passengers. This case is often quoted as sustaining the proposition that police laws affecting commerce are void. But the case does not sustain

the proposition. The case holds that where a State statute consists of various provisions some of which are police in their nature, and the others are not but operate as a direct interference with commerce, the statute is wholly void if the valid part cannot be enforced without the void part. This statute was not within the police power but was in excess of it, as the burden extended to the desirable as well as to the undesirable passengers. The court says, "The portions of New York statute which concern persons who on inspection, are found to belong to these classes, are not properly before us, because the relief sought is as to the part of the statute applicable to all passengers alike, and is the only relief which can be given on this bill". Whether in the absence of such (Congressional) action, the States can, or how far they can, by appropriate legislation, protect themselves against actual paupers, vagrants, criminals' and diseased persons, arriving in their territory from foreign countries, we do not decide."

The case of *Chy Lung v Freeman* 92 U.S. 275 is like the *Henderson* case. The court in deciding it says, "We are not called upon by this statute to decide for or against the right of a State in the absence of legislation by Congress to protect

herself by necessary and proper laws against paupers and convicted criminals from abroad; nor to lay down the definite limit of such right, if it exist. Such a right can only arise from a vital necessity for its exercise and cannot be carried beyond the scope of that necessity. When a state statute limited to provisions necessary and appropriate to that object alone, shall in a proper controversy come before us, it will be time enough to decide that question. The statute of California goes far beyond what is necessary or even appropriate for this purpose, as to be wholly without any sound definition of the right under which it is supposed to be justified".

In the case of Railroad v Husen 95 U.S.465, a statute of Missouri was before the court which prohibited Texan, Mexican or Indian cattle to be driven into the State of Missouri between the months of February and November each year. This act was designed to keep diseased cattle out of the State but its effect was to keep out healthy cattle as well. It was not a reasonable police regulation. So far as it overstepped the police power it was a direct regulation of commerce under guise of police power and was properly declared void. On page 472, the court says, "While we unhesitatingly admit that

a State ^{may} pass sanitary laws, and laws for the protection of life, liberty and health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases or convicts etc., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond which is absolutely necessary for its self-protection. It may not under cover of its police power substantially prohibit or burden either foreign and inter-state commerce". And on page 473 the court continues, "Tried by this rule, the statute of Missouri is a plain intrusion upon the exclusive domain of Congress.....Such a statute we do not doubt is beyond the power of the State to enact".

Bowman v Chicago R.R. 125 U.S. 465 is a case of this class. A statute of Iowa forbade common carriers to carry intoxicating liquors into the State from any other State or Territory unless furnished with a certificate of the auditor of the county certifying that the consignee was authorized to sell. The law was declared unconstitutional because it came in conflict with the right of Congress to regulate commerce. This case is often cited as holding that police laws are void

when they interfere with inter-state commerce.. In fact the particular section before the court was not a police law at all. The court speaks as follows at page 498, "The section of the statute of Iowa, the validity of which is drawn in question in this case does not fall within this enumeration of legitimate exertions of the police power.....It is, on the other hand, a regulation directly affecting inter-state commerce in an essential and vital point. If authorized in the present instance upon the grounds and motives of the policy which have dictated it, the same reason would justify any and every other State regulation of inter-state commerce upon any grounds and reason which might prompt in particular cases their adoption. It is, therefore, a regulation of that character which constitutes an unauthorized interference with the power given to Congress over the subject".

Failing to keep liquor out of the State by the statute just considered, the legislature of the State of ~~Iowa~~ passed another intended to accomplish the same purpose but not in terms prohibiting importation. The statute passed for the purpose prohibited the sale of intoxicating liquor except for certain purposes unless the seller first obtained a license from a County Court of the State. The statute by pro-

hibiting the sale within the State, of course, defeated the object of importation and consequently operated as a prohibition on importation.

The case of *Leisy v Hardin* 135 U.S.100 came up under this statute. The facts were substantially as follows: Leisy, the plaintiff, was a resident of Peoria, Ill., and from that place shipped to his agent in Keokuk, Iowa a quantity of intoxicating liquor. Hardin, the defendant, a constable, seized the liquor while it was exposed for sale by the agent. Replevin was brought against the constable and was held maintainable, the law under which sale was forbidden being held unconstitutional when applied to a sale of imported liquor still in the original package. The reasons assigned for its unconstitutionality were the same substantially that were given in the *Bowman* case. The section of the law in question when applied to imported liquor was not adapted to accomplish a police purpose, and it operated as a direct regulation of inter-state commerce and of course was void. But the court did not decide that the statute was void when applied to liquors which had ~~at~~ once become incorporated into the general mass of property within the State, that is to say to liquors which had lost their inter-state commercial character.

In fact the court had already decided in *Mugler v Kansas* 103 U.S.623 that a similar statute when applied to sales of liquor which had become so incorporated was constitutional.

But returning to the *Leisy* case. The statute was held void because it was an unjustifiable interference with interstate commerce. Taking the two cases together, the *Leisy* case and the *Mugler* case, it is easy to see how the former might be misunderstood. In the *Mugler* case, so long as the statute did not interfere with interstate commerce it was held constitutional, and in the *Leisy* case, as soon as the statute did interfere with interstate commerce it was held unconstitutional.

There is a peculiarity growing out of the nature of the subject matter in question which gives rise to this misunderstanding. Police measures differ with different articles according as the articles are more or less dangerous. That intoxicating liquor is dangerous is unquestioned. That it is a sound article of commerce is also unquestioned. Now how dangerous is it and what regulations are necessary in order to prevent the evils which it produces? Intoxicating liquor is dangerous only when it is consumed as a beverage. The evils it produces all follow its consumption. It is not

dangerous to handle, not dangerous as an article of commerce, and not dangerous to ship it into the State or to sell it in the original package. So a law prohibiting importation, or sale in original package, although its ostensible purpose is the prevention of the evils of intemperance within the borders of the State, is a regulation of commerce and not a police law at all. Police laws on the subject are unnecessary until after the liquor has lost its inter-state commercial character. Had the subject matter been dynamite or cholera-infected rags, there is no question but that a like or even more severe regulation would have been upheld regardless of interference with inter-state commerce. The difference between the two cases is one of fact and not of principle.

The following cases are in point: *Minnesota v Barber* 136 U.S. 313; *Commonwealth v Huntley* 30 N.E. 1187; *State v Gooch* 44 Fed. 276; *In Re Worthen* 58 Fed. 467; *Bangor v Smith* 33 Me. 422; *Grimes v Eddy* 27 S.W. 479;

CLASS III:

This class of cases sustains the following proposition:

State statutes strictly within the police power are constitutional regardless of the extent to which they affect inter-state commerce.

No case of this class has yet reached the Supreme Court of the United States, so we will examine the decisions that have been rendered in the other courts.

In State v Railroad 24 W. Va. 783, a statute was before the court which was recognized to be both a police regulation and an interference with inter-state commerce. The statute forbade any person to work at their regular calling on Sunday except those engaged in works of necessity or charity and those engaged in transporting the mails or passengers or their baggage. The statute was sustained and the opinion contains the following, "It was intended for and was only an internal police law and though it may have some incidental effect upon the inter-state commerce carried on by the Baltimore and Ohio Railroad Co., that fact according to all the authorities does not make such a law unconstitutional as regulating inter-state commerce; for it does not regulate it in the constitutional sense of the term.....It is a misnomer to call the exercise of such police power, because it may or does affect inter-state commerce, a regulation of commerce between the States".

The next case on the subject was Norfolk v Commonwealth 88 Va. 95. The constitutionality of a statute of the same nature was in question. The statute was held unconstitution-

al as a regulation of commerce, although it was admitted to be a reasonable police regulation. The case is wrongly decided and is entirely out of line with the drift of judicial opinion. There is not a case, State or Federal, which has followed it as authority, and that it is unsupported by authority will appear by an examination of the authorities upon which it relies. None of the cases cited are exactly in point. Each one falls within one or the other of the two classes of cases already considered. The attempt made to distinguish the West Virginia case was unsuccessful.

Hennington v State 90 Ga. 396 considering the constitutionality of a similar statute said, "Nor is the statute a regulation of commerce. It applies alike to all business, vocations and occupations. It concerns the general police of the State and of all interests, whether agricultural, mechanical or manufacturing, commercial, professional, or what not. It is universal, and rigidly impartial, making no discrimination whayever for or against commerce or anything else.Trade may go on when anything else can; it stops only when, and so long as, there is a complete suspension of worldly enterprise and activity. It is required to take no rest which is not appointed for everything else to take".

The statute was held constitutional as a legitimate police regulation.

In *Burdick v People* 36 N.E.943, a statute was under consideration which forbade persons to sell steamboat tickets without having a certificate of authority from the company to sell. The statute was held constitutional, the court saying, " It is held by the Supreme Court of the United States that inter-state commerce, the regulation of which is within the exclusive power of Congress, includes inter-state transportation of passengers. But the deposit in Congress of the power to regulate commerce between the States was not intended to deprive the States of their police power. Under its police power a State may legislate to promote domestic order, morals, and safety; to protect lives, limbs, quiet, and property of all persons within the State; to secure the general comfort, health, and property of the State; to prevent crime, pauperism, disturbance of the peace and all forms of social evils. The State cannot invade the domain of the National government or assume powers belonging to Congress..... But many acts of a State may affect or influence commerce without amounting to a regulation of it. State legislation which is not an obstacle to inter-state commerce and imposes no burden upon it and

which comes within the proper exercise of the police power is not unconstitutional as infringing upon the powers of Congress."

In *Minnesota R.R. v Milner* 57 Fed. 276, a statute which provided for the detention and disinfection immigrants was held valid. The statute made no discrimination. The healthy were detained as well as the diseased. The statute was similar in nature to the one held void in *Henderson v Mayor et. al. supra*. The latter however was so extreme a measure as to be deemed an unreasonable exercise of police power. To establish the reasonableness of the statute in the present case the court says, "To the objection that passengers from non-infected countries and localities are detained the answer is that such detentions are in the nature of the case, to a certain extent, unavoidable; and passing from such countries and localities may have become properly subject to such detention by reason of having mingled with others who would communicate pestilence and disease to which they themselves had been exposed or subject.....The inconvenience resulting to immigrants and travelers from being halted and subjected to examination and detention at State lines is of trifling importance at a time when every effort is required and is being put forth to prevent the introduction and spread

of pestilential and communicable diseases."

Our treatment of this question would be incomplete unless we referred to the case of Walling v Michigan 116 U.S.446. A statute was before the court which forbade the sale of imported liquor but permitted the sale of liquor of domestic manufacture to continue. It was held void for two reasons: (1) It deprived citizens of the United States of equal protection of the laws and (2) It was a regulation of inter-state commerce. This case has been cited as authority for the statement that police regulations are void when they affect inter-state commerce. The case is not authority for the statement because this police regulation not only affected commerce but it also violated the 14th amendment. The law might have been held valid had the only objection to it been that it incidently^{al} affected inter-state commerce. It is impossible to say which is the controlling reason in the decision, and consequently cases of its kind are not authority against the proposition last laid down.

CONCLUSIONS.

1. The right of Congress to regulate commerce among the States is exclusive of direct State interference.

2. Silence on the part of Congress in regard to subjects of commerce National in their character and admitting of an uniform system of rules and regulations, indicates that Congress desires commerce in those subjects to remain free and untrammelled.

3. Silence on the part of Congress in regard to subjects of commerce local in their nature not admitting of an uniform system of rules and regulations but rather requiring a multitude of systems indicates that Congress is willing the States should act, so long as it remains silent.

4. State statutes which as a whole affect inter-state commerce will be held valid so far as their provisions are necessary to accomplish a police purpose, that is, so far as they do not overstep legitimate police power, regardless of the extent to which they affect inter-state commerce.

5. State statutes strictly within the police power are constitutional regardless of the extent to which they affect inter-state commerce.

Jean I. Weeks.

