UNCONSTITUTIONAL TRADE LEGISLATION.

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One of the most beneficial and effective clauses in the Federal Constitution — that granting to Congress the authority to regulate foreign and inter-State commerce — was the result of a compromise in the convention between the representatives of three of the New England States and those of South Carolina and Georgia. Few provisions in this instrument gave rise to such earnest and extended debate. The trade relations between the Colonies or States had for several years been in a most deplorable condition. The commercial advantages afforded by the fine harbors of several of the States, notably New York and Rhode Island, had been utilized to force tribute from their less favored neighbors for merchandise landed there, until those exactions amounted to a revenue of no inconsiderable proportions, greatly to the satisfaction of the levying State, but always a source of irritation and complaint to the contributors. Previous efforts to adjust and harmonize these differences had resulted in failure, and it was clearly evident that the present selfish interests of the few must give way to the future advantage of all and the power of regulation be vested in central authority, if the unity and growth of the country was desired. Under these circumstances it is, perhaps, not strange that three New England States should have been willing to permit the foreign slave trade to continue unmolested for twenty years. Slavery was then fast dying out north of Maryland and no such demand for negro labor in the South then existed as was induced later by the invention of the cotton-gin.

The commercial clause in the Constitution has a wider range for its application than any other provision ; or, more accurately, its impress is more widely felt and its restraint oftener invoked than any other provision of the instrument. This must be so ; for commerce is a creature of gigantic size. It reaches to all parts of the earth and employs human ingenuity and invention in every conceivable form. The history of civilization itself is but

the story of trade. It is not, however, the purpose of this paper to enter into that wide domain. There is ample material for discussion in the subject of inter-State commerce and the validity of certain State and municipal laws in respect thereto. It is said of an eminent Greek scholar, that as he was nearing his end he called his son, who was preparing himself to follow in his father's footsteps, and said to him: "My son, I am convinced that my life has been a failure. I have attempted too much. I thought to master the dative case, but I should have confined myself to the iota subscript."

The United States Constitution being a grant of powers and the States being supreme in all matters not confided to the National legislature, it is essential at the outset to define the power granted to Congress.

The third clause of Art. I, Section 8, provides that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The leading case on this subject is *Gibbons v. Ogden*, 9 Wheaton 1. In delivering the opinion of the Court the illustrious Ch. J. Marshall said:

"The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

This statement of the law has received the constant approval of the court since that time and may be considered final. It will be observed that the definition is general and capable of being applied, as indeed it frequently has been, to different phases or conditions as they from time to time arise. But it may be urged, if Congress has these plenary powers there can be no reserved rights in the States over this subject. That would seem to be the logical conclusion, and is apparently the one toward which the Supreme Court is rapidly approaching. While it is true that in several cases the Supreme Court has said, in effect, that the power of Congress is exclusive of State authority only when the subjects upon which it is exerted are national in character and require uniformity of regulation, yet it is probable that all powers which a State might exercise affecting commerce, are not in a legal

sense of the same character as those accorded to Congress, and therefore not a regulation of commerce, but rather an exercise of the police power which has never been surrendered.

The policy of the country is undoubtedly to have commerce between the States uniform and free. That can be accomplished only by uniform national regulation or by absence of any regulation at all. But if in the latter event the right at once springs up in each State to enact such regulations as it sees fit, uniformity would disappear and no end of disputes and conflict arise. This view of the case is strengthened by the language of court in quite a number of cases. Thus, in *Wilton v. Missouri*, 91 U. S. 275, the court say :

“The fact that Congress has not seen fit to prescribe any specific rules to govern inter-State commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-State commerce shall be free and untrammelled.”

If then, action by Congress is exhaustive, and inaction is also equivalent to a declaration that inter-State commerce shall be free, there is no power left in the States to regulate the subject.

Allusion has been made to the police power of the States. Under this power the States have undoubtedly authority to enact statutes which relate to and indirectly affect inter-State commerce. And it is believed that a careful examination of the cases decided by the Supreme Court of the United States in favor of the rights therein claimed by or on behalf of the States, will disclose that such rights can be justified and maintained under the police or taxing powers of the States. The navigable waters of the country are one of the indispensable means of commerce and undoubtedly subject to congressional control ; yet cases are cited to sustain the proposition that the control of Congress is not exclusive. An obstruction authorized by the State would be subject to removal by Congress, and such a removal would probably not require compensation to be made to the parties erecting the obstacle. In the case of *Newport and Cincinnati Bridge Company v. United States*, 105 U. S. 470, the Chief Justice in the opinion said :

“But the power of Congress in respect to legislation for the preservation of inter-State commerce is just as free from State interference as any other subject within the sphere of its legislative authority. The action of Congress is supreme, and overrides all that the States may do. When, therefore, Congress in a proper way declares a bridge across a navigable river of the United States to be an unlawful structure, no legislation of a State can make it lawful. Those who act on State authority alone necessarily assume all the risks of legitimate congressional interference.”

If then, State authority to erect a bridge over navigable rivers confers no immunity upon those erecting it, provided it is in fact an obstruction to commerce, how can the State be said to possess any power, in this respect, to regulate commerce? The question is not whether a State may authorize the bridging of a navigable stream, but whether it may regulate, control, or interfere with commerce by authorizing such construction. And this question must be answered in the negative.

But without pursuing this line of inquiry further, let us consider a moment the powers reserved to the States under what is denominated the police power. That this term is difficult to define is admitted on all hands. Many of its acknowledged spheres of action are closely connected with intercourse and traffic, and the line of separation between legitimate exercise of this power and the regulation of commerce is oftentimes indistinct and shadowy. Generally speaking, the police power extends to making regulations promotive of public order, morals, health and safety. A common exercise of this power is seen in the different license systems established by the State or by towns and cities under its authority.

In the New England States where the town has long been the unit of political power, the statutes very generally provide that towns may make by-laws of a "prudential" nature for the regulation of their local affairs.

These enabling statutes are very general in their terms, but it is not likely that extended powers of legislation were thereby intended to be granted to the towns. The statute of Massachusetts provides that "towns may make for the following named purposes, in addition to other purposes authorized by law, such necessary orders and by-laws, not repugnant to law, as they may judge most conducive to their welfare, and may affix penalties, not exceeding twenty dollars for one offense, for breaches thereof: For directing and managing the prudential affairs, preserving the peace and order, and maintaining the internal police thereof." (Pub. Stat. Mass. 1882, p. 228, § 15.)

In commenting upon the power thus granted, Chief Justice Shaw, in *Commonwealth v. Turner*, 1 Cush. 495, said: "The power is given in general words; but the words are so general as to indicate, that some restriction as to reasonable limits was in the mind of the legislature; and that such restriction was intended to apply, with a just regard to the objects to be attained, and the subject matter on which it was to operate; that is, the power conferred was to be limited to such objects as are usually sought and

“obtained by municipal by-laws.” While this quotation does not define the power it does restrict the idea that towns are bound only by their own notions of what may be “conducive to their welfare.”

Somewhat recently, however, the towns assuming that these statutes gave them the requisite authority, have enacted all sorts of by-laws to regulate trade in their respective jurisdictions. They exact license fees of persons, generally non-residents, who sell or offer for sale goods, wares and merchandise, and provide penalties in case of violation. The reason ordinarily given for this action is that these vendors pay no taxes, and compete with their own merchants who reside and pay taxes in the town, and that the latter are therefore entitled to protection. They are in fact local tariff and protective laws. Some of them are so crude it is difficult to understand their meaning. It is not necessary to quote them here, but in order to present fairly the questions that arise respecting the validity of this general class of municipal legislation, it may be as well to quote in full a city ordinance as a sample :

“§ 1. All persons who are not residents or tax payers of the city of ——— who shall hereafter engage in or carry on any mercantile or trading business in any store, shop, room or building in said city shall obtain from the mayor, or acting mayor, a license therefor.

“§ 2. The authority granting such license shall fix and determine the license fee which shall be paid, which fee shall not be less than five dollars and not more than forty dollars for each day of the continuance of said business, and it shall be the duty of said authority to require from said licensee a good and sufficient bond to secure the payment of said fee, with a surety who shall be a freeholder of the city.

“§ 3. Said license shall be in writing, and shall state the nature of the business licensed, the amount of the license fee, and, if deemed advisable, the term during which said business may be carried on.

“§ 4. The mayor, or acting mayor, may at any time change the license fee which shall be paid by such trader, and may require additional or increased bonds for the payment of the same, and any failure to give such increased or additional bonds, shall operate to annul any license already granted to such persons.

“§ 5. If any person licensed as aforesaid, shall continue to carry on said licensed business uninterruptedly for a period of three months, said license fee may be remitted and said bond surrendered at the discretion of the licensing authority.

“§ 6. If the licensing authority shall be of the opinion that any tradesman intends in good faith to establish and conduct a permanent and continuing business in the city, he may waive the payment of said license fee and the giving of said bond.

“§ 7. Any resident or tax-payer of the city who shall conduct, superintend or carry on, or pretend to conduct, superintend or carry on any business

as aforesaid, in which any person not a resident or tax-payer of the city has the actual interest, or for, or as the agent of such non-resident or non-tax-payer, shall be deemed to be subject to the foregoing provisions, and the mayor, or acting mayor, may require any person whom he has reason to believe should obtain a license to take out the same and furnish a suitable bond for the payment of the fees therefor.

"§ 8. Any person who shall conduct or carry on business contrary to the foregoing provisions shall be deemed guilty of a misdemeanor, and shall be fined not less than five dollars and not more than fifty dollars for each offense, and each day's continuance of any business in violation of the foregoing provisions shall be deemed a separate offense.

"§ 9. The foregoing provisions shall not apply to any person whose sole business is to deal in the produce of the farms and gardens of this State."

This by-law or ordinance was passed under express authority of the legislature "to require a suitable license fee from, and "grant licenses to all persons who desire to sell any kinds of goods, "wares or merchandise for a short space of time at holiday seasons, "or at other times, and who only temporarily occupy storerooms," etc., * * * "provided that such ordinances shall not "hinder or interfere within said city with the sale of the produce of "the farms and gardens of this State." But this fact can make no difference with the constitutional validity of the ordinance. If the State could not pass the ordinance itself it could not authorize the city to do so.

It will require little effort or citation of authority to show that the by-law in question is not a police regulation. How can a sale of goods by a non-resident affect the health, morals, peace, or safety of the community, any more than a sale of similar goods by a resident or tax-payer? And again, how can it make any difference whether the non-resident proposes or intends to sell for a period of one year or one day? The public health, morals, peace and safety is not affected a particle by his intent.

The very fact that the ordinance does not require the payment of the license fee from a non-resident, provided he be a tax-payer of the city, is a clear intimation that the fee is in the nature of a tax; as it is only required in cases where the vendor is not a resident or tax-payer.

Furthermore the sum required—from five to forty dollars a day—can hardly be considered a suitable license fee.

A recent New Jersey case, *Muhlenbrinck v. Commissioners*, 42 N. J. L. 364, very clearly illustrates the distinction stated above. The Long Branch Commissioners were created a corporation and were given powers of regulation and control over a large number of subjects, with authority to pass by-laws for the general welfare of the town. Accordingly, they provided that no person should

hawk or peddle any merchandise without a license, for which residents were required to pay a smaller sum than non-residents. When the validity of this by-law came before the Supreme Court of New Jersey, one question was whether it constituted a police regulation, or was the exercise of the power of taxation for revenue. The court held that it was an exercise of the taxing power ; saying : " Authority under a charter to pass by-laws and ordinances to license, control, regulate or prohibit a business or traffic within a municipality, gives no power to impose a tax for revenue purposes. The powers are essentially different and distinct. When the grant is not made for revenue but for regulation merely, a fee for license may be exacted, but it should not exceed the necessary or proper expenses of issuing the license."

The same principle is enunciated in *Commonwealth v. Stodder*, 2 Cush. 572, where under legislative authority to make by-laws for the due regulation of omnibuses, stages, etc., the city council had provided for license fees of different amounts. The court held that they operated as a direct tax upon the vehicles and that no authority for such measures was given the city. The opinion says : " If the sum here required to be paid were a mere provision for paying the expenses incident to giving a license * * * it may be unobjectionable, if the requiring the license was itself well authorized : but the dissimilarity in the sums required to be paid, varying as they do from one dollar to twenty dollars for a vehicle, precludes any assumption of that sort."

The distinction between a license and a tax was also recognized in *Welch v. Hotchkiss*, 39 Conn. 140 ; but the fee of fifty cents required by the ordinance, was very properly held not to be a tax but a reasonable sum for defraying in part the necessary expense of issuing and recording the license.

The ordinance, in question, being an exercise of the power of taxation which power certainly resides in the several States, it becomes necessary to examine more closely the circumstances under which the power is in this particular instance exercised. It should be noticed that property is not taxed at all by this ordinance, nor is the owner of the property taxed on account of such ownership merely. It is only the right or privilege to sell that is taxed, but herein is the objectionable feature of the by-law. The power of Congress to regulate inter-State commerce does not prohibit State taxation of property engaged in that line of commerce ; such property must share its burden with all other kinds of property. But if such property is taxed merely for that reason, so that the tax is to be regarded as levied on the privilege of transacting that

particular business, then unquestionably the by-law or statute imposing the tax is but a disguised regulation of commerce, and on that account void.

A tax upon all horses in the State would be good ; but a tax upon all horses brought into the State for sale would be a regulation of inter-State commerce and unauthorized. This point is made clear in the recent case of *Pullman's Palace Car Co. v. Penn.*, 141 U. S. 18. Pennsylvania had taxed the cars used in that and other States, and the claim was urged on the part of the company that the statute operated as a regulation of inter-State commerce. In the opinion the court say : " Much reliance is also placed by " the plaintiff in error upon the cases in which this court has " decided that citizens or corporations of one State cannot be taxed " by another State for a license or privilege to carry on inter-State " or foreign commerce within its limits. But in each of those cases " the tax was not upon the property employed in the business, but " upon the right to carry on the business at all, and was therefore " held to impose a direct burden upon commerce itself. * * * " The cars of this company within the State of Pennsylvania are " employed in inter-State commerce ; but their being so employed " does not exempt them from taxation by the State ; and the State " has not taxed them because of their being so employed, but " because of their being within its territory and jurisdiction."

The ordinance in hand is, however, plainly a tax for the privilege of doing business at all ; and not upon the property employed in doing it. If a non-resident of the city desires to transact any temporary business in the city of an inter-State character he is compelled to pay a tax of perhaps forty dollars a day for the privilege.

When one casually thinks of commerce between the States the prominent element in it is naturally transportation ; and the thought is often limited to that idea. This is an error ; to which much of the unconstitutional legislation may doubtless be attributed. But the power of Congress would be of little avail if it were construed to end with the transit of the merchandise. If the importer could not sell the goods in the State where imported, without the payment of a tax, the State might just as well impose the tax upon the privilege of bringing the goods across the State line. The sale of the goods, in itself a purely domestic act, is but the consummation of an inter-State transaction, and forms one of its essential parts. Thus, in *Leisy v. Hardin*, 135 U. S. 100, decided in 1889, the court holds that the right of transportation from one State to another, free from tax, includes the right to

sell in unbroken packages at the place where the transportation ends ; and that it is only after the property so introduced, is mingled with and becomes a part of the general property of the State, by a sale by the importer, that State regulations can affect it. The by-law quoted interferes with this right and to that extent is void.

But there are other considerations to be observed. While it is not necessary that the State regulation should work any discrimination against citizens of other States, as was decided in *State of Minnesota v. Barber*, 136 U. S. 313, where the court say : "A burden imposed by a State upon inter-State commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute,"—yet in most cases of this character the discrimination was an important feature of the legislation. And the discrimination may be directed either against the individual or against the property. In the by-law under consideration both these discriminating features are present. These discriminations violate Section 2 of Article IV. of the Constitution of the United States, which provides that : "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

The cases wherein these discriminating commercial State regulations have been held void are numerous and harmonious. *Ward v. Maryland*, 12 Wall. 418, is the leading case. The plaintiff in error was indicted in Baltimore for violating a statute of Maryland providing that within a certain district of the State, no one not a resident of the State, should sell any goods, except agricultural products and articles manufactured in that State, without first taking out and paying for a license. It was claimed that the statute violated the commercial clause of the Constitution and also that giving citizens of each State all privileges and immunities of citizens of the several States. In its opinion the court said :

"Attempt will not be made to define the words, privileges and immunities, or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt those are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the rights of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business without molestation ; to acquire personal property ; to take and hold real estate ; to maintain actions in the courts of the State ; and to exempt from any higher taxes or excises than are imposed by the State upon its own citizens. Comprehensive as the power of the States is to lay and collect taxes and excises, it is, nevertheless, clear, in the judgment of the court, that the power cannot be exercised to any

extent in a manner forbidden by the Constitution; and, inasmuch as the Constitution provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, it follows that the defendant might lawfully sell, or offer to expose for sale, within the district described in the indictment, any goods which the permanent residents of the State might sell, or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents."

That there is a good deal of this objectionable statutory legislation now in existence is evident from the repeated adjudications of the courts. In his recently published work on the Constitution of the United States, the late Justice Miller says: "Notwithstanding for nearly one hundred years we have had in the Federal Constitution the declaration that Congress shall have power to regulate commerce among the several States, there are at this hour upon the statute books of almost every State, laws violating that provision; and there is no doubt that if that clause were removed to-morrow this Union would fall to pieces, simply by reason of the struggles of each State to make the property owned in other States pay its expenses."

We cannot but conclude, therefore, that this by-law would be held inoperative and void in so far as it might interfere with inter-State commerce. Whether it is valid as a regulation of commerce within the State is an interesting question, but one which cannot be discussed in this paper without carrying it to an extreme length. But it is manifest that the policy which makes inter-State commerce free to all other citizens of the United States, wherever they may reside, should likewise apply to citizens of the State wherein the regulation is enacted. Otherwise these regulations will have the strange effect to punish as an offense in its own citizens what becomes lawful when done by citizens of other States. It is impossible to believe that such was the intent of the legislature in conferring the power of local regulation, or that of the municipal body in passing the ordinance.

To summarize the results it may be said:

1. Congress has the exclusive power to regulate inter-State commerce.
2. The apparent exceptions are but cases of the exercise of the police or taxing powers of the States.
3. The exclusive control of congress continues until a sale of the merchandise by the importer.
4. No State or municipal body can regulate this commerce under the guise of license or tax laws.
5. Such laws must operate uniformly upon all citizens of the United States.