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STATE RAILWAYS HAVE NO EXCLUSIVE OR INVIOLABLE FRANCHISES IN REGARD TO TRAFFIC IN OTHER STATES. THE POWERS AND DUTIES OF CONGRESS IN REGARD TO THE REGULATION OF INTERSTATE COMMERCE UPON RAILWAYS. HOW FAR IT MAY BE COMPETENT OR DESIRABLE FOR CONGRESS TO REGULATE FARES AND FREIGHT UPON SUCH RAILWAYS. THE MOST HOPEFUL MODE OF EFFECTING THE SAME. BRIEF SUGGESTIONS IN REGARD TO SOME OF THE PROPOSED EXPEDIENTS. SECRET SOCIETIES AND ITINERANT CONGRESSIONAL COMMITTEES. HOW THE COMPANIES WILL ATTEMPT TO POSTPONE DEFINITE ACTION. THE IMPRACTICABILITY OF ENACTING A CODE UPON THE SUBJECT.

WE have been laboring, in our humble way, ever since we have made the study of Railway Law a specialty, which is now a long time, almost the period of the life of a generation, to make business men, in this country, comprehend, that we could never have a successful railway system, until it was brought effectually under the control of Congress. And although there has been great advance in that direction in the last twenty years, we cannot fairly claim, that it has been, in any appreciable degree, the result of any special efforts of our own, or of any other writer, or speaker, upon the legal questions involved in the change. It seems to have been assumed, all along, that however desirable it might be in the abstract, that the interstate railways of the

country should be brought under the direction and control of Congress, the thing was, in point of law, altogether impracticable. This view has been reached by a sort of jump conclusion, not uncommon, in such matters, with large bodies of men, based, in this instance, largely upon the facts, that all the railways in the country had been chartered by the states, and had been, thus far, altogether under the control of the states, so far as they were under any legal control external to the companies. This was, certainly, a not unnatural conclusion to be made by merely practical and unprofessional persons. But when the question comes to be fairly examined, from a legal point of view, with reference to our complex system of government, it will at once appear that the states have no power to charter, or to build and control highways, except within their own limits, and for the purpose of doing business within the state. The moment any highway, whether for ordinary travel, or for railway transportation, is carried across the line of the state, it ceases, even as an incorporation, to owe any allegiance to the state where it originated. State legislatures can only create corporations within the particular state where chartered, and can confer no exclusive rights, or franchises, with reference to any action beyond the limits of the state where created. These corporations may indeed transact business in other states, under the laws of such states, if so permitted by such other states; but they cannot, so to speak, in any sense, emigrate to other states, or carry any of their exclusive or special corporate franchises into such states. This was fully settled in the leading case of *The Bank of Augusta* v. *Earle*, 13 Pet. U. S. 519, 588; where TANEY, C. J., thus defines the doctrine: "It [the corporation] exists only in contemplation of law, and by force of law; and where the law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty." And much the same language is used by THOMPSON, J., in *Runyon* v. *Lessee of Coster*, 14 Pet. U. S. 122, 131; and this has become the universally accepted doctrine of the American courts. But this, as before said, will not preclude such corporations from transacting business in other states and countries, and being there sued in relation to such transactions: *Newby* v. *Colt's Patent Firearms Co.*, L. R. 7 Q. B. 293, and cases above cited. But all this must be done under and by force of the laws of such foreign state or country. And any exclusive

privileges, or franchises, which such corporation may have obtained by legislative incorporation or grant, in its own state, and which cannot be there infringed, without violating the provision of the national Constitution against the validity of state laws impairing the obligation of contracts, will be of no avail in any other state, or as against any other legislative body, except the one granting such privileges and franchises. Thus it will occur, that if state laws, incorporating railways as common carriers, without reserving the power to regulate their tolls, fares and freights, would put it beyond the power of such state legislature to pass laws regulating such tolls, fares and freights, within the state, which we by no means admit, such acts of incorporation would be of no force for rendering inviolable the rate of fares or freights fixed by the company, and earned by such companies beyond the limits of the state, or as against an Act of Congress regulating fares and freights for transportation across the lines of two or more states, which latter point we shall consider more at length hereafter.

The power of Congress, in regard to interstate commerce, *i. e.* commerce between different states, whether two or more, is most unlimited, by the very terms of the national Constitution. It extends as far as any national sovereignty extends, in regard to the regulation of fares and freights upon existing railways. Congress has the same power to regulate commerce among the states, whether upon land or water, and to the same extent, that any national legislature has to regulate it upon its railways, or its vessels and ships of any kind. This will become very apparent by the consideration, that this power resided, to its full extent, exclusively in the states, before the adoption of the national Constitution, and that it was transferred entire to the national government, by enumerating among the exclusive powers delegated to the national government, "the power to regulate commerce with foreign nations and among the several states." Nothing could be more sweeping or exclusive in its terms. And all the decisions of the national court of last resort have held the power of Congress "to regulate commerce among the several states," to be exclusive of all power in the states upon the subject. The very first case arising under this provision, *Gibbons* v. *Ogden*, 9 Wheaton 1, so declares the power. Mr. Justice JOHNSON, in delivering his opinion in that case, in speaking of the effect of the provision in the national Constitution, upon the subject, as affecting existing state laws, said:

"All the laws bearing upon commerce dropped lifeless from the statute-book." And the leading opinion of Mr. Chief Justice MARSHALL, in the same case, confirms this view, although the exact point of the decision did not require the court to go that length, since Congress had legislated upon the question involved in that case. And the opinion here declared, of the exclusiveness of the power of Congress to regulate commerce among the states, and the invalidity of all state laws enacted for that purpose, is fully confirmed in most of the subsequent cases, upon the point, in that court: *Passenger Cases*, 7 How. U. S. 283; and with slight qualification, not affecting the main question, *Cooley* v. *Port Wardens*, 12 How. U. S. 299; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Crandall* v. *Nevada*, 6 Wall. 35. The only qualification which has ever been attempted to be placed upon the exclusiveness of the power in Congress to regulate commerce, even before any express provision made by them upon the point in question, is that of the right of the states to build bridges across navigable rivers, and other acts pertaining to the regulation of their own internal government and police, and which did not conflict with any positive provision of an Act of Congress, although it might possibly affect commerce, both foreign and interstate, in a remote and incidental manner.

This view is maintained by GRIER, Justice, in *The Passaic Bridges*, 3 Wall. 782, where the learned judge said: "The police power to make bridges over the public rivers is as absolutely and exclusively vested in a state, as the commercial power is in Congress." And the same course of reasoning will apply to state laws, enacted for the purpose of carrying into effect those functions of internal government, which, upon every principle, belong exclusively to the states, such for instance, as pilotage, ferries, health regulations, the support of paupers, the public police, and the punishment of crime—although such state enactments may, incidentally, affect some departments of commerce beyond the limits of the state, and which is therefore under the exclusive regulation and control of Congress. Thus a state law prohibiting the floating of loose logs on the Susquehanna river, was held valid: *Craig* v. *Cline*, 65 Penn. St. 399. And to improve the navigation of an interstate navigable river was held valid: *McReynolds* v. *Smallhouse*, 8 Bush 447. But no state law purposely designed for, and adapted to the regulation of interstate or foreign

commerce, as a system, could be upheld, whether Congress had legislated upon the particular subject or question, or not. This is abundantly maintained in the opinion of Mr. Justice STRONG in the very latest decision of the Supreme Court upon the question: Case of the *State Freight Tax*, 15 Wall. 232 and cases there cited. SWAYNE, Justice, in *Gilman* v. *Philadelphia*, 3 Wall. 713, thus defines the exclusive jurisdiction of Congress over subjects committed to its care in the national Constitution. "The states may exercise concurrent power in all cases but three: 1st. Where the power is lodged exclusively in the Federal Constitution. 2d. Where it is given to the United States and prohibited to the states. 3d. Where from the nature and subjects of the power it must necessarily be exercised by the Federal government exclusively." And Mr. Justice STRONG, in the case of the *State Freight Tax*, *supra*, thus clearly defines the necessity of holding to the exclusive jurisdiction of Congress over the subject now under consideration. "The rule has been asserted with great clearness, that whenever the subjects, over which a power to regulate commerce is asserted, are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation of Congress;" citing *Cooley* v. *Port Wardens*, 12 How. U. S. 299; *Gilman* v. *Philadelphia*, *supra*; *Crandall* v. *The State of Nevada*, 6 Wall. 35, and then concludes: "Surely transportation of passengers or merchandise through a state, or from one state to another, is of this nature. It is of national importance that over that subject there should be but one regulating power." This being the final declaration of the court of last resort, we need occupy no more time in showing that the entire question of the regulation and control of railway fares and freight upon lines of railway, extending across the line of two or more coterminous states, belongs exclusively to Congress; for this very question was directly involved, and squarely decided, in the case from which we have just quoted the language of the opinion of the court. If then there is any control, or power of regulation, over the traffic upon through lines of railway, it must be sought for exclusively in Congress. Unless we are prepared to say, that one of the most unlimited and overwhelming monopolies it is possible to conceive of, after it is once set in operation, may safely be committed to the impulses of its own selfish instincts and interests, without any supervision or

control whatever, we may demand the interposition of Congress in this matter.

We may then inquire how extensive the subjects are which are thus brought under the control of congressional legislation. The extent of the particulars embraced under the general term "commerce," as carried on with foreign nations, and among the several states, is defined in much the same sense, in all the cases decided by the national courts, since the adoption of the national constitution. It is thus expressed by a very eminent judge, Mr. Justice WASHINGTON, in the early case of *Corfield* v. *Coryell*, 4 Wash. C. C. 379: "Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among these states, for the purposes of trade * * and this intercourse must include all the means by which it can be carried on, whether by the free navigation of the waters of the several states, or by a passage over land through the states, where such passage becomes necessary to the commercial intercourse between the states." And Mr. Chief Justice MARSHALL, in *Gibbons* v. *Ogden*, 9 Wheaton 1, uses much the same language: "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 seems to cover the whole question we are discussing, and it is repeated in a very large number of cases, covering the entire period of our national existence. Mr. Justice JOHNSON, in the case last cited, uses language still more explicit: "Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation. Shipbuilding, the carrying trade, and propagation of seamen, are such vital agents of commercial prosperity, that the nation which could not legislate over these subjects would not possess power to regulate commerce." Within all this wide range Congress possesses sovereign and unlimited powers. It may prescribe what trade shall be allowed, and what not. It might, unquestionably, during the existence of slavery, if it had possessed the independence, have declared the interstate slave trade illegal, and thus have materially hastened the abolition of slavery.

Or it might now prohibit the importation of foreign spirits, or wines even, or the trade in such commodities among the several states. It may legislate, as it often has done, for the greater security of life, or property, on board American vessels, or steamboats, engaged in foreign or interstate navigation, or it may modify or relax the stringency of the responsibility of common carriers, as in the Act of Congress of 1851, limiting the responsibility of ship owners or masters for goods on board, injured by fire, without design or negligence, which has been held to extend to the baggage of passengers: *Chamberlain* v. *Western Transportation Co.*, 44 N. Y. 305.

And Congress must possess the same power to regulate traffic upon railways, extending into different states, which it does in regard to that which is carried on upon the ocean, or the navigable interstate rivers. It may prescribe what trade is permissible and what contraband, or illegal, both in times of peace and war. It may also define the precautions and appliances which shall be had, in order to secure life and property, in such transportation of passengers and goods as shall be carried across the line of different states. And this supervision, or right of supervision by Congress, will extend to all the appliances of transportation, to the men and to the machinery. It may require every passenger train to be fully equipped with the Miller-platform upon every carriage in the train, and with the air-brakes, to such an extent as to insure the speediest arrest of the train, in case of impending peril. It may prescribe the number of hands on each train, and the precautions to be resorted to, in order to prevent the misplacement of switches, or the collision of trains, whether with trains in the opposite or in the same direction. In short, there is nothing, affecting the conduct of the entire business of through trains upon railways, which the enactments of Congress cannot reach.

But the most interesting question, just now, affecting the regulation of this traffic by Congress, is how far and in what mode the legislation of Congress may control and define the rate of charge, upon interstate railways, whether by way of tolls, or of fare and freight. We need not here discuss the difference between the two modes of collecting these dues—whether by tolls, or by fare and freight. Fare and freight are now the chief modes in exercise by railway companies, and are those most familiar to all readers. Fare and freight then, upon all interstate railway traffic, are wholly

under the control of Congress, to the same extent they are in England, under the Acts of Parliament, or in any other sovereignty, under the governing power, whether legislative or executive. And this congressional regulation and control attaches to interstate traffic, not only where it has actually been carried across the dividing line of two states, but from the moment it is taken in charge by the carrier, as traffic, whether in goods or persons, and which is destined to cross state lines in its transit: *The Daniel Ball*, 10 Wall. 557.

We are not aware that any fair question can be raised in regard to the right of Congress to control the fares and freights upon interstate railways. No such question has ever been raised in England in regard to the power of Parliament, and we do not comprehend how one could be raised in any country, unless there were some constitutional restriction upon the sovereign power. In the absence of all such restriction the supreme power might impose conditions upon existing companies which would annihilate their business at once. But of course we name this only to show the unlimited nature of the power, and not because we suppose it would ever be resorted to; this is admitted by all in regard to the legislative power of the British Parliament, and we have never been able to find any one, who could assign any sensible reason why the legislative power of the American legislatures, both state and national, in the absence of constitutional restrictions, should be less than that of the British Parliament: *Thorpe* v. *Rt. & B. Ry.*, 27 Vt. 142; 2 Redf. Am. Ry. Cases 587.

But there have been some decisions and some discussion upon the question of regulating fares and freights upon existing railways, by the state legislatures where they exist, which may possibly puzzle some, who have given the subject no special study. It is conceded, we believe, upon all hands, at the present time, that all railways, which become common carriers, are bound by the rules of the common law, and one might almost say, by the very law of their being, which the term "common carrier" sufficiently evinces, to carry for all who apply, for reasonable compensation, and to make no unreasonable or unjust discrimination among those who desire to employ them: *Harris* v. *Packwood*, 3 Taunt. 264; *Fitchburg Ry.* v. *Gage*, 12 Gray 393; *Ch. & Alton Railroad* v. *The People*, 5 Chicago Legal News 266; *Bennett* v. *Dutton*, 10 N. H. 481; *Jencks* v. *Coleman*, 2 Sumner 221, 224; *Gaston* v. *Bristol &*

Exeter Ry., 1 B. & S. 112; *Express Co.* v. *Maine Central Ry.*, 9 Am. Law. Reg. N. S. 728; *McDuffie* v. *Portland & Rochester Ry.*, 52 N. H. 430. The last two cases hold that railway companies cannot give greater privileges and facilities upon their trains to one express company than to others.

But it has sometimes been held in the state courts, that railway companies having obtained legislative power by charter to become common carriers, and to charge toll, or fares and freight, to those who employ them, no right to alter or amend their charters being reserved therein, have thus acquired an indefeasible vested right to fix their own rates of charge, in their own discretion, independent of all legislative control, under that provision in the national Constitution, prohibiting the states from passing any law impairing the obligation of contracts: *Philadelphia & Baltimore Railroad* v. *Bowers*, Delaware Ct. of Appeals, Jan. T. 1873. And the newspapers report a decision of the Supreme Court of Minnesota, in the opposite direction. We need not discuss this question, upon its merits, here, having said all we desire to say in *Thorpe* v. *Rect. & R. Ry.*, *supra*. But it is important here to show, that no such question can possibly arise in regard to railways chartered by Congress, for the purpose of carrying on interstate commerce, or as to state railways which are carrying on the same commerce, by means of voluntary junctions on state lines, under the enabling Act of Congress for that purpose, "entitled an act to facilitate commercial, postal and military communication among the several states," passed June 15th 1866; inasmuch as the restriction upon the states in regard to laws impairing the obligation of contracts does not embrace Congress or apply to any law of the national legislature, but only to state laws: *Evans* v. *Eaton*, Pet. C. C. 322. As to the railways chartered by the states, if we admit the state legislatures have no power to control their rates of charge or modes of doing business, which we by no means admit, as doubtful even, yet if it were true to the full extent claimed by the Delaware Court of Appeals, it could not affect state railways after they engage in interstate traffic: 1st. Because they have no charter franchise for any such business, nor can they obtain any such franchise from any other source except Congress—and if they enter upon such service they must do it subject to the unlimited supervision and control of Congress, secured to it by the express provisions of the national constitution. 2d. Whatever exclusive franchises state railways

may have secured by state legislative grants, must have been accepted by the companies, under the express knowledge and consent that such franchises were to be, and must for ever remain, subject to the lawful control of Congress in the regulation of interstate commerce. So that, in no view, have the state railways any the slightest ground of claim, that in attempting to carry on interstate commerce, a business to which their charter powers could not, by state laws, be extended, they can demand the same exemption from Congressional control, which some of the states (upon very unsatisfactory grounds as it seems to us) have extended to them as to state legislation.

Having shown in this brief manner, the exclusive power of Congress, in the regulation and control of all the departments and appliances of commerce among the several states, and how very extensive and unquestionable this power is, it only remains to say a few words in regard to the duty of Congress in the matter, and the most hopeful mode of reaching the desired end. And here we feel the difficulty of saying anything, which is likely to be of much service. The object is one, no doubt, of most unquestionable magnitude, scarcely less than that which existed under the old confederation, when every state was struggling to enact commercial regulations of such a character as to bring the most advantage to itself, and at the expense of any or all the others. If this was then felt to be intolerable in a commercial country, not less so is the present complication, where all business, and almost existence itself, is at the mercy of railway transportation. It has become so indispensable to the very existence of the country, and such an overwhelming monopoly, that the very life of all the internal trade and commerce of the country is already at its mercy and must for ever remain so, unless Congress shall interpose some effective remedy. The states have, as we have seen, no power to act in the matter of interstate communication, and this is the principal seat of the difficulty, and if the states had now the same power they had under the old confederation, it needs no argument to show, that forty independent legislatures could never agree upon any effective system of interstate commercial intercourse, or even if they could agree upon such a plan, which is scarcely less than impossible, they have no combined judicial machinery to carry it into effect. There could be no hope of relief from any imaginable source but in the national prerogatives.

And we believe the most rampant advocate of free trade, and the "let alone" policy, would not quite feel prepared to argue, that the true remedy, in this case, lay in the line of his favorite theory. The result is entirely certain, that if the railways are allowed to pursue the unrestrained course now entered upon by them, the expenses of transportation will ultimately absorb all the profits of interstate trade and manufactures. Foreign transportation, and that upon the coast, or the navigable rivers, among the states, requires no such stringent rules of limitation; competition is so free and unrestrained there, as to correct any evil tendency in this direction. But railways are absolutely beyond all healthy competition. The only competition centres in a few important points, to which fares and freights become merely nominal, and the profits thus lost to the railways are assessed upon way transportation where there is no competition; thus creating a double injustice, which requires the constant supervision of stringent enactments, vigorously and vigilantly enforced by an energetic and impartial judicial administration. The language of an able writer in 85 Westminster Review 310, is both pertinent and just, in regard to this point: "Now applying these pervading rules of our policy to the particular question before us, it is manifest, that all talk of free competition in the matter of railways is so much loose and inaccurate verbiage, or *rather irrational cant.* * * From the nature of the case no traffic but their own can compete with them on their roads. The distinct character and excellence of their mode of conveyance has diverted all the chief traffic from the ancient highways, and it is only through occasional competition with each other, that they find for a time, any natural and spontaneous check upon their exactions. It is obvious, that the concession of what is practically an exclusive right of carriage throughout the entire kingdom * * never could have been granted simply for the advantage of the companies themselves." The writer concludes that if the exorbitant exactions of the English railways, for the transportation of the indispensable necessities of life, such as coal, continue, the outcries of the public are justified until Parliament interposes an effective remedy by way of a "reformed tariff," which shall only secure to the companies a reasonable return for the money actually invested. The attempt of some able writers in this country, to argue, that the American expedient of issuing shares from time to time, based upon no actual increase of capital

expended, has nothing to do with the overcharges of such roads, must be regarded as a practical illusion, since this process of what is called "watering the stock," is resorted to as a blind to cover the exorbitance of their demands for transportation. It is the sham plea of the brigand, in justification of his exactions, *for the support of his wife and children, who have no existence, save in his false pretences:* it is the tattered dress of the mendicant, assumed to justify his importunities.

That some remedy is imperiously demanded for such a fatal malady all must, we think, admit. That many of those hitherto attempted will prove more disastrous than even the disease itself, need not be argued, to sober and thoughtful persons, who have much knowledge of the nature of the evil. The favorite remedy for all evils and for all discomforts in our day, secret societies, in the nature of conspiracies and counter conspiracies, which in the good old days of the rugged enforcement of the sturdy morality of the English common law, would have been abated by indictment, as nuisances, too offensive to be endured by a free people, will be found only suited to a state of society and government, where might overrides right, and where despotism, in one form or another, either has, or is destined to crush out every liberal sentiment, both of law and morality. Whenever the time comes, that government must be approached, or moved to action, by secret combinations, by devices, evasions and subterfuges, the substance of free and constitutional government will have ceased, however much longer its forms and ceremonial may abide with us. If we cannot reform this evil, through independent legislation in the rightful quarter, and pure judicial administration, we shall attempt it in vain by other inventions.

And it does not seem to us very hopeful of any settled determination on the part of Congress to afford speedy redress in this matter, that we have a congressional committee, parading the country, under the pretence of collecting information relative to these questions. Whenever an individual, or a community, becomes in earnest upon any question, these preparatory evolutions cease, and action begins, at once. This committee upon transportation looks more like a blind, than an earnest movement, in the direction of effective action.

What we most need is a few earnest men, of the right stamp, either in or out of Congress, to push the matter to an issue. We have no doubt that facts exist, if properly collected and presented,

to set the whole country in a blaze. We know of many cases in New England, where charges for transportation are made, by some device, to double the advertised rates, and thus render the products valueless to the consumer, as well as the producer. These rates are sometimes fourfold the charges for transportation of the same commodities ten, or even twenty times as far in the same direction, and over the same lines, and the undercharge in one instance covers the overcharge in the other, often. What we need is a national tariff of interstate freights, that shall cure both these excesses in opposite directions, and of the legality of such a tariff no good lawyer can entertain any doubt.

We do not feel it to be our province to enter into detail in regard to the particular remedy required in this case. We are satisfied it will come more naturally, and more effectively, by successive enactments of Congress, applied to existing evils, and to those hereafter occurring, as they develop. The roads, we presume, will ask for a code upon the subject, to be prepared by a commission, a favorite evasion in our day, which will naturally contain so many weak points that it will never be enacted by Congress, and thus a long delay will be secured, just what the opposers of action desire.

The first enactment of Congress should contain a declaration, that the act shall extend only to such transportation as passes, or is intended to pass, the line of two or more states. It should also give the national courts jurisdiction in all cases arising under the act, and provide the form of redress, to some extent. It should make the subject of commerce among the states, either a distinct department of the national government, or subject to the control of a board of commissioners, paid for their whole time, which shall be devoted to the enforcement of the law. The law should require uniform rates, for the same service, and no discrimination. There is much more we desire to say, but we forbear. I. F. R.

We have omitted to discuss one very important practical view of this subject, but which will readily occur to all. The existence of a judicious tariff of fares and freights, upon all through lines, which must prevent all destructive competition, at the more important points, which now exists to such an extent as to compel the companies to carry a considerable part of their through freight for merely nominal pay, cannot fail to be of the greatest benefit to them as well as to the public. And if the companies maintain a factious opposition to such a tariff which will compel them to charge a remunerative compensation upon all their traffic, it must proceed from one of two causes; either that they do not well comprehend the effect of such a tariff, or else that they do not intend to limit their demands to a merely living compensation for their services, which is all they can fairly expect, in any capacity of public service, which theirs undoubtedly is.