AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 7: The Republican Era – Federalism

Wabash, St. Louis and Pacific Railway Company v. Illinois, 118 U.S. 557 (1886)

In the latter half of the nineteenth century, the economics of railroads provoked bitter political struggles in the Midwest. The railroads were subject to fierce competition on long-haul routes across the country but frequently held monopolies on the short-haul branches that linked to these longer railways. That often meant that farmers, ranchers, and small merchants and producers in the small towns and the countryside frequently paid higher rates on a per-mile basis to ship goods than did the big economic players who operated on a national scale and shipped between the major cities. Competition on the long-haul lines could drive prices below the costs of operating the lines; the short-haul business subsidized the long-haul routes, helping the railroads maintain overall profitability. Short-haul shippers demanded an equalization of rates, ending the price discrimination between shippers, and state governments responded.

The Illinois legislature took the direct route, prohibiting rates that discriminated between short-haul and long-haul shippers. Railroads could not charge more for the transportation of any passenger or freight within the state than it charged for an equivalent shipment "over a greater distance." The Wabash, St. Louis and Pacific Railway Company was charged with violating the act or charging ten cents per hundred pounds more for shipping goods to New York City from Gilman, Illinois, than from Peoria, Illinois, even though the trip from Peoria was eighty-six miles longer within the state than was the trip from Gilman. The railway company was found guilty in state court, and the verdict was affirmed by the state supreme court. From there, the railway company appealed to the U.S. Supreme Court, arguing that the shipments from the cities in Illinois to New York City were part of interstate commerce and that the Illinois legislature could not constitutionally regulate such acts. In a divided opinion, the U.S. Supreme Court agreed, reversing the judgment of the state court.

Unlike the state legislatures in the Midwest, whose constituents were largely united against discriminatory fares, Congress faced competing pressures. Unable to balance the conflicting demands of railroads, big shippers, and small shippers, Congress remained silent on the issue of railroad rates. There was no federal law in place that could preempt state action such as that of Illinois. In the absence of congressional action, the Court created the doctrine of the "dormant commerce clause." The Court would henceforth defend a constitutional presumption that the United States was internally a free trade zone. The states could not regulate interstate commerce in a manner that would obstruct the free flow of goods without explicit congressional authorization. If Congress was frozen by competing interests, the Court would make sure that the states would be frozen also. Large economic interests in the east haled the Court's decision as "fundamental to the existence of the Union and to the existence of trade." The dormant commerce clause was an important tool with which the federal judiciary would help construct a national market, creating the constitutional basis for weaving together regional economies into a single, interconnected national economy in which goods could flow freely from the Pacific to the Atlantic and all points in between and large corporations could flourish to take full advantage of economies of scale and drive down the cost of goods. It was a constitutional project that was resisted by Populists and localists but that was fundamental to the vision of conservative Democrats and Republicans alike.

JUSTICE MILLER delivered the opinion of the court.

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If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be

made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton. The charges for these might be within the competency of the Illinois Legislature to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State, and is not commerce among the States, or interstate commerce, but is exclusively commerce within the State. So far, therefore, as this class of transportation, as an element of commerce, is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among the States. . . .

It might admit of question whether the statute of Illinois, now under consideration, was designed by its framers to affect any other class of transportation than that which begins and ends within the limits of the State. The Supreme Court of Illinois having in this case given an interpretation which makes it apply to what we understand to be commerce among the States, although the contract was made within the State of Illinois, and a part of its performance was within the same State, we are bound, in this court, to accept that construction. . . .

The Supreme Court of Illinois does not place its judgment in the present case on the ground that the transportation and the charge are exclusively State commerce, but, conceding that it may be a case of commerce among the States, or interstate commerce, which Congress would have the right to regulate if it had attempted to do so, argues that this statute of Illinois belongs to that class of commercial regulations which may be established by the laws of a State until Congress shall have exercised its power on that subject . . .

In *Munn v. Illinois* (1877), the language of this court upon that subject is as follows:

> ". . . . The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. . . . Their regulation is a thing of domestic concern, and certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a State, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to interstate commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done."
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. . . . [I]t must be admitted that, in a general way, the court treated the cases then before it as belonging to that class of regulations of commerce which, like pilotage, bridging navigable rivers, and many others, could be acted upon by the States in the absence of any legislation by Congress on the same subject.

By the slightest attention to the matter it will be readily seen that the circumstances under which a bridge may be authorized across a navigable stream within the limits of a State, for the use of a public highway, and the local rules which shall govern the conduct of the pilots of each of the varying harbors of the coasts of the United States, depend upon principles far more limited in their application and importance than those which should regulate the transportation of persons and property across the half or the whole of the continent, over the territories of half a dozen States, through which they are carried without change of car or breaking bulk.

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. . . . These two questions were of primary importance [in *Munn*]; and though it is true that, as incidental or auxiliary to these, the question of the exclusive right of Congress to make such regulations of charges as any legislative power had the right to make, to the exclusion of the States, was presented, it received but little attention at the hands of the court, and was passed over with the remarks in the opinions of the court which have been cited.

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It is impossible to see any distinction in its effect upon commerce of either class, between a statute which regulates the charges for transportation, and a statute which levies a tax for the benefit of the State upon the same transportation; and, in fact, the judgment of the court in the *State Freight Tax Case* rested upon the ground that the tax was always added to the cost of transportation, and thus was a tax in effect upon the privilege of carrying the goods through the State. . . .

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. . . . Whatever may be the instrumentalities by which this transportation from the one point to the other is effected, it is but one voyage, as much so as that of the steamboat on the Mississippi River. It is not the railroads themselves that are regulated by this act of the Illinois Legislature so much as the charge for transportation, and . . . if each one of the States through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery, and all the other incidents of transportation to which the word "regulation" can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to. "It was," in the language of the court cited above [*Hall v. De Cuir* (1877)], "to meet just such a case that the commerce clause of the Constitution was adopted."

It cannot be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the State might choose to impose upon it, that the commerce clause was intended to secure. This clause, giving to Congress the power to regulate commerce among the States and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the Constitution. . . . And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States which was deemed essential to a more perfect union by the framers of the Constitution, if at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce.

The argument on this subject can never be better stated than it is by Chief-Justice Marshall in *Gibbons v. Ogden* (1824). He there demonstrates that commerce among the States, like commerce with foreign nations, is necessarily a commerce which crosses State lines, and extends into the States, and the power of Congress to regulate it exists wherever that commerce is found. Speaking of navigation as an element of commerce, which it is, only, as a means of transportation, now largely superseded by railroads, he says; "The power of Congress, then, comprehends navigation within the limits of every State in the Union, so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes.' It may, of consequence, pass the jurisdictional line of New York and act upon the very waters [the Hudson River] to which the prohibition now under consideration applies." So the same power may pass the line of the State of Illinois and act upon its restriction upon the right of transportation extending over several States, including that one.

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We must, therefore, hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a State which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law.

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Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State it may be very just and equitable, and it certainly is the province of the State legislature to determine that question. But when it is attempted to apply to transportation an entire series of States a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be overestimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution.

The judgment of the Supreme Court of Illinois is therefore reversed, and the case remanded to that court for further proceedings in conformity with this opinion.

JUSTICE BRADLEY, with whom concurred THE CHIEF JUSTICE and JUSTICE GRAY, dissenting.

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The principal question in this case . . . is whether, in the absence of congressional legislation, a State legislature has the power to regulate the charges made by the railroads of the State for transporting goods and passengers to and from places within the State, when such goods or passengers are brought from, or carried to, points without the State, and are, therefore, in the course of transportation from another State, or to another State. It is contended that as such transportation is commerce between or among different States, the power does not exist. The majority of the court so hold. We feel obliged to dissent from that opinion. We think that the State does not lose its power to regulate the charges of its own railroads in its own territory, simply because the goods or persons transported have been brought from or are destined to a point beyond the State in another State.

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. . . . Does it follow . . . that because Congress has the power to regulate this matter (though it has not exercised that power), therefore the State is divested of all power of regulation? That is the question before us.

We had supposed that this question was concluded by the previous decisions of this court: that all local arrangements and regulations respecting highways, turnpikes, railroads, bridges, canals, ferries, dams, and wharves, within the State, their construction and repair, and the charges to be made for their use, though materially affecting commerce, both internal and external, and thereby incidentally operating to a certain extent as regulations of interstate commerce, were within the power and jurisdiction of the several States. That is still our opinion.

It is almost a work of supererogation to refer to the cases. They are legion. A few only will be selected and referred to.

The first great case on the subject was that of *Willson v. The Blackbird Creek Co*. (1829), where the State of Delaware had authorized a dam in a navigable tide-water creek of that State, communicating with Delaware Bay; and Chief Justice Marshall, delivering the unanimous opinion of the court, said: "The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States. . . . We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

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The doctrines announced in these cases apply not only to dams in, and bridges over, navigable streams, but to all structures and appliances in a state which may incidentally interfere with commerce, or which may be erected or created for the furtherance of commerce, whether by water or by land. It is matter of common knowledge that from the beginning of the government the States have exercised almost exclusive control over roads, bridges, ferries, wharves, and harbors. No one has doubted their right to do so. It is recognized in the great case of *Gibbons v. Ogden*, where Chief Justice Marshall, after enumerating some of the powers reserved to the States, says: "They form a portion of that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass." And he adds (what is very pertinent to this discussion): "No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation. . . ."

The case of *Transportation Co. v. Parkersburg* (1883) related to wharves. The city of Parkersburg had built certain wharves for the accommodation of vessels, principally steamboats, navigating the Ohio River. The Transportation Company, being the owner of several steamboats plying on that river, complained of the wharfage charges as being extortionate, and an unconstitutional interference with the commerce of the Ohio River. . . . "Until Congress has acted, the courts of the United States cannot assume

control over the subject as a matter of Federal cognizance. It is Congress, and not the judicial department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several States. The courts can never take the initiative on this subject."

There is a class of subjects, it is true, pertaining to interstate and foreign commerce, which require general and uniform rules for the whole country, so as to obviate unjust discriminations against any part, and in respect of which local regulations made by the States would be repugnant to the power vested in Congress, and, therefore, unconstitutional; but there are other subjects of local character and interest which not only admit of, but are generally best regulated by, State authority. This distinction is pointed out and enforced in the case of *Cooley v. The Port Wardens of Philadelphia* (1851). . . .

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Now, since every railroad may be, and generally is, a medium of transportation for interstate commerce, and affects that commerce; and since the charges of fare and freight for such transportation affect and incidentally regulate that commerce; and since the railroad could not be built, and the charges upon it could not be exacted, without authority from the State, it follows as a necessary consequence that the State, in the exercise of its undoubted functions and sovereignty, does, in the establishment and regulation of railroads, to a certain and a very material extent, not only do that which affects but incidentally regulates commerce. It does so by the very act of authorizing the construction of railroads and the collection of fares and freights thereon. No one doubts its powers to do this. The very being of the plaintiffs in error, the very existence of their railroad, the very power they exercise of charging fares and freights, are all derived from the State. And yet, according to the argument of the plaintiffs in error, pursued to its legitimate consequences, the act of the State in doing all this ought to be regarded as null and void because it operates as a regulation of commerce among the States. . . . And since its being, its franchises, its powers, its road, its right to charge, all come from the State, and are the creation of State law, how can it be contended that the State has no power of regulation over those charges, and over the conduct of the company in the transaction of its business whilst acting within the State and using its railroad lying within the bounds of the State? . . .

It is evident from what has been said, that the dealing of a State with a railroad corporation of its own creation, in authorizing the construction and maintenance of its road and the charge of fares and freights thereon, is, in its purpose, a matter entirely aside from that kind of regulation of commerce which is obnoxious to the provisions of the Constitution. There is not a particle of doubt that it was the right of the State to prescribe the route of the plaintiff's road -- it might be in a direction north and south, or east and west; it might be by one town, or by a different town; it was its right to prescribe how the road should be built, what means of locomotion should be used on it, how fast the trains might run, at what stations they should stop. . . .

Suppose the original charter of the railroad company in this case had contained precisely the provision against discriminating charges which is contained in the general law now complained of, could the company disregard the conditions of its charter, and defy the authority of the State? We think it clear that it could not. But if the State had the power to impose such a condition in the original charter, it must have the same power at any time afterwards; for the exercise of the power in the original grant would be just as repugnant to the Constitution, and no more, as the exercise of it at a subsequent period. The regulation of charges is just as unconstitutional in a charter as in a general law.

To sum up the matter in a word: we hold it to be a sound proposition of law, that the making of railroads and regulating the charges for their use is not such a regulation of commerce as to be in the remotest degree repugnant to any power given to Congress by the Constitution, so long as that power is dormant, and has not been exercised by Congress. . . .

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It is true, and this we concede, that if the laws of a State discriminate adversely to the citizens or products of other States, whether the railroads belong to the State or to private corporations, the courts might interfere on the ground of the repugnancy of such regulations to that freedom of commerce which Congress by its non-action on the subject has indicated shall exist. . . . But no such discrimination is made by the law in question.

We also concede that any taxes, duties, or impositions upon interstate commerce (that is, upon the commerce itself), carried on over the railroads of the State, would interfere with the freedom of such commerce, and would be repugnant to the presumed intention of Congress. . . .

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The inconveniences which it has been supposed in argument would follow from the execution of the laws of Illinois, we think have been greatly exaggerated. But if it should be found to present any real difficulty in the modes of transacting business on through lines, it is always in the power of Congress to make such reasonable regulations as the interests of interstate commerce may demand, without denuding the States of their just powers over their own roads and their own corporations.