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William Carey Jones

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Justice Field’s Opinions on Constitutional Law

I. COMMERCE UNDER THE CONSTITUTION.

The act of Congress of March 3, 1863, entitled “An Act to provide Circuit Courts for the Districts of California and Oregon,” authorized the appointment of one additional Associate Justice of the Supreme Court of the United States. Stephen J. Field, then Chief Justice of the Supreme Court of California, was appointed by President Lincoln to fill the position thus created, and was allotted to the district covering California and Oregon. Justice Field’s first opinions appear in the 23rd volume of Wallace’s Reports, and, down to 163 United States, covering nearly one hundred volumes, every volume, except three, namely, 23 Wallace, 126 United States and 135 United States, contains opinions written by him. These opinions cover many branches of both public and private law.

Justice Field’s service in the Supreme Court extended over a period of thirty-four years, from May, 1863, to December, 1897, extending over a period longer than that of any other justice. The two judges, whose terms almost equalled that of Justice Field, were Chief Justice Marshall and Justice Harlan. His appointment came in the midst of the Civil War, and Justice Field had to deal with the great problems growing out of that struggle. The Reconstruction period furnished its series of important cases. The adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments opened up a vast field of new constitutional construction. The economic and industrial expansion of the eighties and nineties presented numerous questions which came before the Supreme Court for final review. In the judicial consideration given to these cases Justice Field took a part, always active, important and influential, and frequently commanding.

When Justice Field took his place on the bench at Washington, the Supreme Court was presided over by Chief Justice Taney, and the Associate Justices thereof were Justices Wayne, Nelson, Clifford, Miller, Catron, Grier, Swayne, and Davis. He served throughout

1 (1863), 2 Black 7.
the terms of Chief Justices Chase and Waite, and during nine years of the term of Chief Justice Fuller. Other justices who sat with him, for longer or shorter times, during his extended term of service were Justices Strong, Bradley, Hunt, Harlan, Woods, Matthews, Gray, Blatchford, L. Q. C. Lamar, Brewer, Brown, Shiras, Jackson, White, and Peckham. The mention of these names gives the personal color of the court.

The purpose of these papers is to make a study of the constitutional opinions of Justice Field. Characterization and appreciation of his work will come better after, rather than before, the examination of his opinions.

The subject of constitutional construction before the Supreme Court during Justice Field's term which demanded the largest attention was that of interstate and foreign commerce. The close of the Civil War was attended with expanding commercial interests, and consequent conflicting views of the sphere of state and national control of the subject of commerce show themselves. Before the year 1840, the construction of the commerce clause of the Constitution had been involved in but five cases submitted to the Supreme Court. In 1860 the number of cases in the court on that subject had increased to twenty; in 1870 the number was thirty; in 1880 the number had increased to seventy-seven; in 1890 it was one hundred and forty-eight; and by the time of Justice Field's retirement the number was not less than two hundred.

Justice Field's position in the determination of all questions involving the conflicting jurisdiction between state and nation on the subject of interstate and foreign commerce was clear, logical and undeviating. It has been a subject that has perplexed the court on many occasions, and the court has not found it easy to establish a rule or especially, to apply a rule when established to difficult and delicate adjustments of jurisdiction. One of Justice Field's earliest opinions was in the well known case of The Daniel Ball. Several important principles were laid down in this case, making it a leading authority. It is most frequently cited for its definition of what constitutes the navigable waters of the United States. Wherever interstate and foreign commerce extends, the

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2 U. S. Const. Art. I, § 8: "Congress shall have power . . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."


4 (1870), 10 Wall. 557, 19 L. Ed. 999.
The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water.

On the other hand, Justice Field has held that a river “can only be deemed a navigable water of the United States when it forms, by itself or by its connection with other waters” a “continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water. If, however, the river is not itself a highway for commerce with other states or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the
state, then it is not a navigable water of the United States, but only a navigable water of the state."

On the doctrine thus established it was held in The Daniel Ball that a steamer transporting, on a navigable water of the United States as there defined, goods destined for other states, was engaged in interstate commerce; that whenever a commodity has begun to move as an article of trade from one state to another, commerce between the states in that commodity has commenced; and the fact that several different and independent agencies are employed in transporting the commodity, some acting in one state, and others through two or more states, does not affect the character of the transaction, each agency, to the extent to which it acts in such transportation, being subject to the regulations of Congress. Hereon Justice Field said:

We are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the states when that agency extends through two or more states, and when it is confined in its action entirely within the limits of a single state. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a state, its entire authority over interstate commerce may be defeated.

It has been said that it may be doubted whether any one decision of the Supreme Court has placed so much power within the hands of Congress as the case of The Daniel Ball. Justice Brown has summed up the law of the constitutional construction of the commerce power, by saying that the adjudications of the Supreme Court with respect to the power of the states over the general subject of commerce are divisible into three classes. First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the states cannot interfere at all. The first class,

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6 The Montello (1870), 11 Wall. 411, 415, 20 L. Ed. 191. In this case the court held that from the information presented they could not affirm that the Fox River, in Wisconsin, formed such a continued highway as to be considered a navigable water of the United States. But in a later case, [The Montello (1874), 20 Wall. 430, 22 L. Ed. 391] it was held that the Fox River was to be brought within the class of streams forming continued highways of commerce, although its navigability was interrupted by rapids and falls around which portages had to be made.

6 The Daniel Ball (1870), 10 Wall. 557, 566, 19 L. Ed. 999.

7 Great American Lawyers, 73.

including all those wherein the states have plenary power, and Congress has no right to interfere, concerns the strictly internal commerce of the state, and while the regulations of the state may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference. In a case to which we have already referred the court held, speaking through Justice Field, that a state might regulate the navigation of the strictly internal waters of the state, such waters, that is, as do not by themselves or by connection with other waters form a continuous highway over which commerce may be carried on with other states or with foreign countries.9

In the second class mentioned by Justice Brown, those concerning what may be termed concurrent jurisdiction over commerce, Justice Field rendered a number of decisions. Among the subjects of concurrent jurisdiction is the regulation of pilots. Accordingly, Justice Field upheld a law of California which regulated the pilotage of vessels through the Golden Gate.10 There was a dissent in this case, which did not, however, impugn the general principle. Justice Miller, who wrote the dissenting opinion, said that the point of difference was whether the act of Congress of 1852 covered the subject-matter of the California statute so as to oust the state of jurisdiction. The majority of the court held that it did not.

In County of Mobile v. Kimball11 it was held that the improvement of harbors, bays and navigable rivers was within the concurrent power of the states. Justice Field's opinion in Mobile v. Kimball, however, cuts a larger figure than the determination of this mere question, and was destined to play an important role in furnishing a test for the general validity of the state's action. Justice Curtis had, in the case of Cooley v. Port Wardens,12 formulated a rule, previously suggested by Webster as counsel in Gibbons v. Ogden,13 and taken up by Justice Woodbury in both the License Cases14 and the Passenger Cases.15 Justice Curtis said: "The power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike

9 The Montello (1870), 11 Wall. 411, 20 L. Ed. 191.
10 Steamship Co. v. Joliffe (1864), 2 Wall. 450, 17 L. Ed. 805.
11 (1880), 102 U. S. 691, 26 L. Ed. 238.
12 (1851), 12 How. 298, 13 L. Ed. 996.
13 (1824), 9 Wheat. 1, 6 L. Ed. 23.
14 (1847), 5 How. 504, 624, 625, 12 L. Ed. 256.
15 (1849), 7 How. 283, 559-561, 12 L. Ed. 702.
in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation. Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them what is really applicable to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." What had hitherto been a contest concerning the exclusiveness of the federal power over commerce became, after Justice Curtis' statement of the rule, a dispute over the determination whether the power in question was local or national in its nature, requiring or not requiring a rule capable of uniform application. Now, Justice Field's opinion in Mobile v. Kimball sought to furnish a clue to the determination of this question, by declaring that the controlling purpose of the commerce clause in the Constitution was to secure interstate commerce from conflicting or discriminating state regulations, and that the application of Justice Curtis' rule must be made in the light of that purpose. Accordingly, the discriminating or non-discriminating nature of a state statute would afford the test of its constitutionality. If, however, it was meant to imply that that was the only test, the court has taken a different view, saying that the question of discrimination "does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce."16 Justice Field saw this as quickly as any one, for he said in another case: "What is an article of commerce is determinable by the usages of the commercial world, and does not depend upon the declaration of any state. The state possesses the power to prescribe all such regulations with respect to the possession, use and sale of property within its limits as may be necessary to protect the health, lives and morals of its people; and that power may be applied to all kinds of property, even that which in its nature is harmless. But the power of

regulation for that purpose is one thing, and the power to exclude an article from commerce by a declaration that it shall not thenceforth be the subject of use and sale, is another and very different thing. If the state could thus take an article from commerce, its power over interstate commerce would be superior to that of Congress, where the Constitution has vested it.”

However, the Bowman case, from which we have just quoted, exemplifies not so much the aspect of the commercial power we are now considering as that which falls under the third head, where the power of Congress is exclusive.

In several important cases, in which Justice Field wrote the opinion, the Supreme Court held that a state might make provision for the improvement of navigation in streams by removing obstructions and deepening channels; and, even, for the sake of the general commerce of the state, obstruct the free navigation of the stream by bridges and highways. The general principle underlying such cases is thus expressed:

The states have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the states than by a distant authority. They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in their wise management. . . . If the power of the state and that of the federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it, as the supreme law of the land. But until Congress acts on the subject, the power of the state over bridges across its navigable streams is plenary.

18 Escanaba Co. v. Chicago (1882), 107 U. S. 678, 683, 27 L. Ed. 442, 7 Sup. Ct. 185. In this case the City of Chicago had constructed drawbridges across the Illinois River, and the navigation of the stream was interrupted by the closing of the draws, which was regulated in the interest of traffic across the stream as much of that along the stream. The other cases referred to are: Cardwell v. American Bridge Co. (1885), 113 U. S. 205, 28 L. Ed. 959, 5 Sup. Ct. Rep. 423, where the state authorized the construction of a bridge over the American River in California, Hamilton v. Vicksburg, S. & P. R. R. (1886), 119 U. S. 280, 30 L. Ed. 393, 7 Sup. Ct. Rep. 206, where the principle was reiterated and it was held that wherever the exercise of a right, conferred by law for the benefit of the public is
On the other hand, restrictions upon interstate commerce or upon the free navigation of the navigable waters of the United States cannot be tolerated under the guise of being police regulations. Thus, an ordinance of the city of Chicago, imposing a license tax for the privilege of navigating the Chicago River and its branches upon steam tugs licensed by the United States authorities, was held unconstitutional as conflicting with rightful federal power. Justice Field said: 19

The decisions of this court in Huse v. Glover, 119 U. S. 543, and in Sands v. Manistee River Improvement Co., 123 U. S. 288, are particularly referred to and relied upon. The attempt is made to assimilate the present to those cases from the fact that it is conceded that the Chicago River is from time to time deepened for navigation purposes by dredging under the direction and at the expense of the city. The license fee provided for in the ordinance of the city is treated as in the nature of a toll or compensation for the expenses of deepening the river. But the plain answer to this position is that the license fee is not exacted upon any such ground, nor is any suggestion made that any special benefit has arisen or can arise to the tugs in question by the alleged deepening of the river. The license is not exacted as a toll compensation for any specific improvement of the river, of which the steam barges or tugs have the benefit, but is exacted for the keeping, use or letting to hire of any steam tug, or barge or tow-boat, for towing vessels or craft into the Chicago River, its branches or slips connected therewith. The business of the steam barge or tow-boat is to aid the movement of vessels in the river and its branches and adjacent waters; that is, to aid the commerce in which such vessels are engaged.

A series of cases has been decided by the Supreme Court on the question of the validity of state laws seeking to control the manner of running and operating railroad trains. When the provisions of these laws have been found reasonably appropriate to the safety and convenience of the public, and not discriminating against interstate commerce, they have been sustained even

though they incidentally affected interstate trains. One of the
earlier of these cases was Nashville, C. & St. L. R. R. v. Ala-
bama,20 upholding a requirement by the state that railway engi-
neers be examined from time to time with respect to their ability
to distinguish colors. Justice Field said:

It is conceded that the power of Congress to regulate
interstate commerce is plenary; that, as incident to it, Con-
gress may legislate as to the qualifications, duties and liabili-
ties of employees and others on railway trains engaged in
that commerce; and that such legislation will supersede any
state action on the subject. But until such legislation is
had, it is clearly within the competency of the states to pro-
vide against accidents on trains whilst within their limits.
Indeed, it is a principle fully recognized by decisions of
state and federal courts, that whenever there is any business
in which, either from the products created or the instru-
mentalities used, there is danger to life or property, it is not
only within the power of the states, but it is among their
plain duties, to make provision against accidents likely to
follow in such business, so that the dangers attending it
may be guarded against so far as is practicable.

In a much later case,21 in which was declared void an order
of a state railroad commission requiring a railway company to
stop its interstate trains at a specified county seat, already pro-
vided with adequate passenger facilities, the court said:

We by no means intend to impair the strength of the
previous decisions of this court on the subject, nor to
assume that the interstate transportation, either of passengers
or freight, is to be regarded as overshadowing the rights of
the residents of the State through which the railroad passes
to adequate railroad facilities. Both claims are to be con-
sidered, and after the wants of the residents within a state
or locality through which the road passes have been adequately
supplied, regard being had to all the facts bearing upon the
subject, they ought not to be permitted to demand more,
at the cost of the ability of the road to successfully com-
pe
cete with its rivals in the transportation of interstate pas-
sengers and freight.

It had been found that during certain seasons of the year
cattle brought from Texas and other portions of the South often
communicated to Northern cattle a disease known as Texas

21 Per Peckham, J., in Mississippi Railroad Comm. v. Illinois Central
fever, and for that reason a number of states passed laws excluding Southern cattle from their territory during the part of the year when danger was apprehended. A statute of Missouri was in question in the case of Railroad Co. v. Husen, in which an action was brought to recover damages for communication of disease to plaintiff's cattle. The statute forbade the transportation of Southern cattle, not specifying those infected with disease, into Missouri between the 1st of March and the 1st of November of each year, and made carriers transporting them responsible for damages resulting from Texas fever communicated by such cattle. The court held that these restrictions went beyond the danger to be apprehended, and declared the act unconstitutional. The fact remained, however, that cattle brought from the low lands of the South during the warm months were likely to carry Texas fever, and of this fact the court took judicial notice in the case of Kimmish v. Ball. In this case the court, speaking through Justice Field, sustained a law of Iowa, which made persons who permitted Southern cattle to run at large in the state during the warm season liable for resulting damage. The statute in this case, as in the Husen case, excluded all Southern cattle from the state during a large part of the year. The court said no attempt had been made in the Husen case to show that all cattle from the malarial districts of the South were infected, or that so many were infected as to make separation impracticable. Had such proof been given, a different question would have been presented.

The paramount authority over interstate commerce resting in Congress, state laws must not, by way of taxes or other restrictive measures, discriminate against products of other states, against non-resident traders, or against companies doing an interstate commerce business. In attempting to indicate the line of division between state and federal power, Justice Field, in a leading case, spoke as follows:

22 (1877), 95 U. S. 465, 24 L. Ed. 527, per Strong, J.
24 Welton v. Missouri (1876), 91 U. S. 275, 281, 23 L. Ed. 347.
There is a difficulty, it is true, in all cases of this character, in drawing the line precisely where the commercial power of Congress ends and the power of the State begins. A similar difficulty was felt by this court, in Brown v. Maryland, in drawing the line of distinction between the restriction upon the power of the states to lay a duty on imports, and their acknowledged power to tax persons and property; but the court observed, that the two, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them; but that, as the distinction exists, it must be marked as the cases arise. And the court, after observing that it might be premature to state any rule as being universal in its application, held, that, when the importer had so acted upon the thing imported that it had become incorporated and mixed up with the mass of property in the country, it had lost its distinctive character as an import, and become subject to the taxing power of the State; but that, while remaining the property of the importer in his warehouse in the original form and package in which it was imported, the tax upon it was plainly a duty on imports prohibited by the Constitution.

Following the guarded language of the court in that case, we observe here, as was observed there, that it would be premature to state any rule which would be universal in its application to determine when the commercial power of the Federal Government over a commodity has ceased, and the power of the State has commenced. It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character.

In the Welton case a state statute was held invalid which prohibited dealing without a license, by going from place to place to sell the same, if any of specified articles not the growth, produce or manufacture of the state, no such license being required as to articles grown, produced or manufactured in the state. In Tiernan v. Rinker, a person, who was pursuing in Texas the occupation of selling wines and beer, filed his petition setting forth that the goods which he sold were the manufacture,

25 (1880), 102 U. S. 123, 26 L. Ed. 103. In Downham v. Alexandria (1870), 10 Wall. 173, 19 L. Ed. 929, a municipal ordinance imposed a license on dealers in beer or ale by the cask when not manufactured in the city. It was held, Justice Field writing the opinion of the court, that where it is not shown that the beer and ale in which the plaintiffs deal was manufactured either in a foreign country or in another state, there is no violation of the commerce clause.
not of Texas, but of other states and of foreign nations, and praying that the county treasurer be enjoined from collecting the tax imposed by an act of 1873, on the ground of its repugnance to the Constitution of the United States. Speaking through Justice Field, the court affirmed the doctrine of the Welton case, but held that as the plaintiff was also engaged in selling other liquors, the injunction should be refused.

Again in Webber v. Virginia, a statute was held invalid which required a license to be taken out by any person who should sell the manufactured articles or machines of other states, unless he were the owner and taxed as a merchant. Justice Field said: "If, by reason of their foreign character, the state can impose a tax upon them or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several states."

It has come to be an accepted doctrine that the business of all transportation companies may be regarded as a single homogeneous unit, and their property, wherever situated, so long as used for the business of transportation, may also be considered as a unit for the purpose of taxation. The leading case setting forth this doctrine, and the first case before the Supreme Court involving taxation of an interstate railroad as such, was the case of the Delaware Railroad Tax. In this case the tax was in form laid upon the capital stock of the railroad in proportion to the mileage within the state. It was shown that the value of the property within the state was less than the mathematical proportion based upon the mileage of the railroad within and without the state. It was accordingly claimed that this was an attempted taxation of property beyond the jurisdiction of the state, and that there was no relation between the capital invested and the number of shares of the company owned in the state. Justice Field, speaking for the court, replied that the tax was not upon the shares, nor upon the property of the corporation, but a tax upon

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26 (1880), 103 U. S. 344, 350, 26 L. Ed. 565.
27 (1874), 18 Wall. 200, 21 L. Ed. 888.
the corporation, measured by a percentage upon the cash value of a certain proportional part of the shares, and that, although the rule was arbitrary, it was approximately just, and within the power of the legislature to adopt. He said: "The state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion."

The case of Gloucester Ferry Co. v. Pennsylvania\(^{28}\) did not modify the rule of the Delaware Railroad Tax, when it announced unequivocally that interstate commerce could not be taxed at all. Here the tax which the court refused to sustain was upon the entire capital stock of a foreign corporation on account of its property within the state. The land which the ferry company owned in Pennsylvania could of course be taxed, but the business of ferriage between states was wholly beyond the jurisdiction of Pennsylvania. Justice Field remarked: "However great her power, no legislation on her part can impose a tax on that portion of interstate commerce which is involved in the transportation of persons and freight, whatever be the instrumentality by which it is carried on."

The rule of the Delaware Railroad Tax Case, while sustained in subsequent cases, has also been greatly extended. In the State Railroad Tax Cases\(^{29}\) and the Kentucky Railroad Tax Cases\(^{30}\) the value of the road in question was ascertained by adding together the cash value of the bonds and stock of the company. In all these cases the tax was upon corporations of the state's own creation, and the method of appraisement was not considered open to objection. In two other railroad cases\(^{31}\) the mileage rule of taxation was again approved. Justice Brewer, for the court, said: "It is ordinarily true that when a railroad consists of a single continuous line, the value of one part is fairly estimated by taking that part of the value of the entire road which is measured


\(^{29}\) (1876), 92 U. S. 575, 23 L. Ed. 663.


by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this court several times as eminently fair.”

In two successive cases from Massachusetts and one from Indiana, the Supreme Court sustained the taxation of the Western Union Telegraph Company under the mileage rule of apportionment, that is, by taking as a basis of assessment such portion of the capital stock of the company as equaled the ratio of the company’s mileage within the state to its total mileage. And so, as to railroad, telegraph and sleeping-car companies, the rule, as stated in a later case is “that their property in the several states through which their lines of business extends may be valued as a unit for the purpose of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular state, without violating any federal restriction. [Citing the telegraph cases just reviewed] The valuation was, thus, not confined to the wires, poles and instruments of the telegraph company; or the roadbed, ties, rails and spikes of the railroad company; or the cars of the sleeping-car company; but included the proportionate part of the value resulting from the combination of the means by which the business was carried on, a value existing to an appreciable extent throughout the entire domain of operation. And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular state is, in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole (Pittsburgh, etc. Railway v. Backus, 154 U. S. 421); or taking as the basis of assessment such proportion of the capital stock of a sleeping-car company as the number of miles of railroad over which its cars are run in a particular state bears to the whole number of miles traversed by them in that and other states (Pullman’s Palace


Car Co. v. Pennsylvania, 141 U. S. 18); or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a state bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the state (Western Union Tel. Co. v. Taggart, 163 U. S)."

The next extension of the doctrine was to express companies. On the face of it, at least, the step forward was considerable, for the actual tangible property of the express company within the state was relatively small, whereas the value of the entire concern measured by the amount of business done was very great. In the case applying the unit principle of valuation to express companies,34 the court said: "Doubtless there is a distinction between the property of railroad and telegraph companies and that of express companies. The physical unity existing in the former is lacking in the latter; but there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use. A strong dissent was made by Justices White, Field, Harlan and Brown. The opinion filed by Justice White on behalf of those dissenting insisted that there was no power in the state to tax property outside of its jurisdiction, which in effect it had done in this case under the theory of a homogeneous unit; and that the mere fact that the same owner has property in different states which contribute to his earnings does not create such a unity for the purposes of taxation as to make the property located in one state taxable in another. It was asked, why could not the same rule be applied to a corporation or partnership engaged in the dry goods business, or any other business having branches in different states, on the theory that there was a unity of earnings between the agencies in all the establishments. This would warrant any state, in which one of the branches was established, in taxing the whole on the theory of unity.35

The taxation of the receipts of a corporation engaged in interstate business has occasioned not a little difficulty. The State Freight Tax Case,36 held that a state tax directly upon and measured by the amount of freight carried was, as to interstate

35 Judson on Taxation, 284n.
36 (1872), 15 Wall. 232, 21 L. Ed. 146.
freight, a tax on interstate commerce and as such void. But in State Tax on Railway Gross Receipts, a tax on the gross receipts of railways, including receipts from interstate commerce, was upheld, the amount of such receipts being assessed in proportion to the mileage in the state. The authority of this case was shaken in Fargo v. Michigan, and was expressly disapproved in Philadelphia & Southern Mail Steamship Co. v. Pennsylvania. Then came the case of Maine v. Grand Trunk Ry., in which the opinion was written by Justice Field, and was concurred in by Chief Justice Fuller and by Justices Gray, Blatchford and Brewer. Four judges dissented, Justices Bradley, Harlan, Lamar and Brown. The dissenting opinion was written by Justice Bradley, being his last reported opinion. The statute of Maine required that every corporation, person or association operating a railroad in the state should pay an annual excise tax for the privilege of exercising its franchise in the state. The amount of the tax was to be ascertained as follows: the gross receipts were to be divided by the number of miles of road operated, and the resulting average, multiplied by the number of miles operated within the state, was to be the basis of the taxation. The tax was sustained on the ground that it was an excise tax for the privilege of exercising its franchises within the state of Maine; that it might be enacted, since the state had the right to exclude the corporation, if a foreign one, or refuse it a franchise, if a domestic one; and, further, that it was not a regulation of commerce because it was not a direct tax on the receipts. The minority could not regard it otherwise than as a tax on gross receipts, for interstate as well as intrastate business, and, therefore, as in conflict with the decisions which we have reviewed above.

While the case of Maine v. Grand Trunk Ry. has been approved, it has also met with adverse criticism. Professor Beale, says

37 (1872), 15 Wall. 284, 21 L. Ed. 164.
39 (1887), 122 U. S. 326, 30 L. Ed. 1200, 7 Sup. Ct. Rep. 1118. This case was in turn followed by Ratterman v. Western Union Tel. Co. (1888), 127 U. S. 411, 32 L. Ed. 229, 8 Sup. Ct. Rep. 1127, in which it was attempted to tax the gross receipts of an interstate telegraph company; and it has been approved later: Norfolk & Western R. v. Pennsylvania (1890), 136 U. S. 114, 34 L. Ed. 394, 10 Sup. Ct. Rep. 958.
41 Cooke, Commerce Clause of the Federal Constitution, 149.
that the ground seemingly taken by the majority, that the tax might be supported as an excise tax for the privilege of coming into the state, is certainly unsound; for later as well as earlier cases agree that a state cannot exclude from its territory a corporation or an individual engaged in interstate commerce or in the service of the national government. Justice Field, of course, recognized this, for he himself said: "Only two exceptions or qualifications have been attached to it [exclusion of foreign corporations] in all the numerous adjudications in which the subject has been considered, since the judgment of this court was announced more than half a century ago in Bank of Augusta v. Earle, 13 Pet. 519. One of these qualifications is that the state cannot exclude from its limits a corporation engaged in interstate or foreign commerce, established by the decision in Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 12. The other limitation of the power of the state is, where the corporation is in the employ of the general government, an obvious exception, first stated, we think, by the late Mr. Justice Bradley, in Stockton v. Baltimore & New York Railroad, 32 Fed. 9, 14."43 Professor Beale suggests that some more tenable ground must be found, which he thinks may be in that rule, which we have already discussed, where a tax had been laid, as upon telegraph companies, for the privilege of carrying on their business, graduated upon the amount of property in miles and its value, and exempting them from all other taxation. Such a mileage basis for apportioning a tax is well established, as we have seen. The authority of the case of Maine v. Grand Trunk Ry. has been sustained by the Supreme Court, and the meaning of its holding explained, as may be seen from the following extract of an opinion by Mr. Justice Holmes:44

The lines of railroads concerned are wholly within the state, but they connect with other lines, and a part, in some instances much the larger part, of their gross receipts is derived from the carriage of passengers and freight coming from, or destined to, points without the state. In view of this portion of their business, the railroads contend that the case is governed by Philadelphia & Southern Mail Steamship Co. v. Pennsylvania, 122 U. S. 326. The counsel for the

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state rely upon Maine v. Grand Trunk Ry. Co., 142 U. S. 217, and maintain, if necessary, that the latter overrules the earlier case.

In Philadelphia & Southern Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, it was decided that a tax upon the gross receipts of a steamship corporation of the state, when such receipts were derived from commerce between the states and with foreign countries, was unconstitutional. We regard this decision as unshaken and as stating established law. It cites the earlier cases to the same effect. . . . In Maine v. Grand Trunk Ry. Co., 142 U. S. 217, the authority of the Philadelphia Steamship Company Case was accepted without question, and the decision was justified by the majority as not in any way qualifying or impairing it. The validity of the distinction was what divided the court. . . .

Since the commercial value of property consists in the expectation of income from it, and since taxes ultimately, at least in the long run, come out of income, obviously taxes called taxes on property and those called taxes on income or receipts tend to run into each other somewhat as fair value and anticipated profits run into each other in the law of damages. The difficulty of distinguishing them became greater when it was decided, not without much debate and difference of opinion, that interstate carriers’ property might be taxed as a going concern. In Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S. 379, the measure of property by income purported only to be prima facie valid. But the extreme case came earlier. In Maine v. Grand Trunk Ry. Co., 142 U. S. 217, “an annual excise tax for the privilege of exercising its franchise,” was levied upon every one operating a railroad in the state, fixed by percentages, varying up to a certain limit, upon the average gross receipts per mile multiplied by the number of miles within the state when the road extended outside. This seems at first sight a reaction from the Philadelphia & Southern Mail Steamship Company Case. But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the state was to reach that value and not to fasten on the receipts from transportation as such was shown by the fact that the scheme of the state was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together may be called a commutation tax.
The authority of Congress over the subject of commerce by the telegraph with foreign countries or among the states is supreme, whenever Congress chooses to exercise its power; and the states can impose no impediment thereto. An Indiana statute required that a telegraphic message must be delivered to the person addressed if residing within a certain distance of the receiving office. After reviewing the two cases in which the Supreme Court had already considered the respective powers of Congress and the states over intercourse by the telegraph, Justice Field, in holding the Indiana statute void in requiring the delivery of a message to a person addressed in another state, said:

In these cases the supreme authority of Congress over the subject of commerce by the telegraph with foreign countries or among the states is affirmed, whenever that body chooses to exert its power; and it is also held that the states can impose no impediments to the freedom of that commerce. In conformity with these views the attempted regulation by Indiana of the mode in which messages sent by telegraphic companies doing business within her limits shall be delivered in other states cannot be upheld. It is an impediment to the freedom of that form of interstate commerce, which is as much beyond the power of Indiana to interpose, as the imposition of a tax by the state of Texas upon every message transmitted by a telegraph company within her limits to other states was beyond her power.

In a later case, however, a statute of Georgia imposing liability on a telegraph company for failure to transmit and deliver with due diligence, was upheld, as to a despatch from a point without to a point within the state. Justice Peckham said: "While it is vitally important that commerce between the states should be unembarrassed by vexatious state regulations regarding it, yet on the other hand there are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those who are engaged in interstate commerce. We think the statute in question is one of that class, and in the

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45 Pensacola Tel. Co. v. Western Union Tel. Co. (1878), 96 U. S. 1, 24 L. Ed. 708; Telegraph Co. v. Texas (1882), 105 U. S. 460, 26 L. Ed. 1067.
absence of any legislation by Congress the statute is a valid exercise of the power of the state over the subject. Justices Shiras and White dissented on the ground that the decision was in conflict with Western Union Tel. Co. v. Pendleton. There is certainly a distinction between regulating the delivery of a telegram within a state and regulating the delivery of a telegram without the state; but it is still a question whether the former as well as the latter is not an interference with interstate commerce.48

Justice Field’s dissenting opinion in the case of O’Neil v. Vermont49 should be noted. O’Neil was convicted of selling liquor in Vermont contrary to statute. He was a wholesale and retail dealer in wines and liquors at Whitehall, N. Y. He received orders by mail from persons residing in Rutland, Vt. In reply to such orders, liquors were sent C. O. D. to the purchasers in Vermont. The majority of the court held that no question of interference with the commerce clause had been taken in the state court, and that no federal question was presented and that the Supreme Court had no jurisdiction. Justice Field, in a characteristic opinion, dissented on several grounds. On the question of interference with the commerce clause, he spoke as follows:

I assume for this case as correct the position of the majority of this court and of the supreme court of Vermont, that the sales were only initiated in New York, and were there merely executory contracts, and were not consummated until delivery of the goods to the purchaser in Vermont. As such they were transactions of interstate commerce which the latter state could not prevent, and for which she could not impose any penalty upon the defendant, though she might place such restrictions upon the disposition of the liquor, as the safety and health of the community might require, after it was brought within her limits, and had become part of the general property there. Against the proceedings resulting in the penalty inflicted, the defendant invoked—and in my judgment was entitled to receive—protection under the clause of the Constitution of the United States vesting in Congress the exclusive power to regulate commerce among the states. The refusal of the state court to afford the protection is sufficient ground for this court to take jurisdiction to review the judgment of that court, and I dissent from my associates in their declining to take such jurisdiction.

A state may tax all property within its jurisdiction. The

power to regulate interstate commerce is granted to Congress in terms as absolute as is the power to regulate foreign commerce. No state can lay any restrictions upon interstate transportation. When goods are held in a state for any other purpose than for transportation, the transit has ceased, and the goods are subject to state taxation. The adjustment of these several principles in concrete cases has given some difficulty. In Brown v. Houston it was held that coal from another state, unsold, and for sale upon the barges upon which it had been brought, was taxable by the state. Later the emphasis came to be placed upon the absolute freedom of interstate commerce, and the court was urged to overrule Brown v. Houston on the ground that it had been discredited by the later cases. The subject was brought to a head in Pittsburg & Southern Coal Co. v. Bates, where coal, which had been brought down the river from Pittsburgh, was afloat at Baton Rouge in the original barges in which it had been shipped from Pennsylvania. The decision in Brown v. Houston was reaffirmed, Justice Field saying: "The coal in this case, as in that, still belongs to the original owners in Pennsylvania, but is brought on the navigable waters of the United States in boats and barges to Louisiana for purposes of sale, and is subject to taxation and sale as any other property of the citizens of the United States is subject when it becomes incorporated into the bulk of the property of the country, unless there be some special exemption set forth why it should not be thus taxed and sold, of which there is none here."

William Carey Jones.

Berkeley, California.

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