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Cooley's Constitutional Limitations (1927 Ed.)

Lewis on Eminent Domain (1909 Ed.)

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Motor Carrier Act, 1935, Ch. 8, Title 49, U. S. Code Anno.

Federal Highway Act of 1921, Title 23, U. S. Code, Anno.

Sections 481-482, Title 39, U. S. Code Anno.

Section One, South Carolina Statutes at Large of 1933, p. 341.

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House Reports, 64th Congress, 1st session, 1915-1916, Vol. I, Miscellaneous, page 4.

Report of Joint Committee on Federal Aid, House Document No. 99, 63rd Congress, 3rd Session.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937.

No. 161.

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, SOUTH CAROLINA PUBLIC SERVICE COMMISSION, ET AL, APPELLANTS,

v.

BARNWELL BROS. INC., POOLE TRANSPORTATION, INC., HORTON MOTOR LINES, INC., ET AL, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

BRIEF OF OTTO KERNER, ATTORNEY GENERAL OF ILLINOIS, AS AMICUS CURIAE.

STATEMENT OF CASE.

The Appellees have challenged the validity of a statute of the State of South Carolina which places a legal limit upon the widths and weights of motor vehicles permitted to use the public highways of the State.

The court below found that the statute is so unreasonable and arbitrary that it places an undue burden upon interstate commerce.

State roads are the property of the respective states. The importance of the case from the standpoint of the states is that the Appellees assail the right of the states to regulate the manner of use of their property, viz., the use of their highways.

The chief concern of the *amicus curiae,* the Attorney General of Illinois, is the application of the Commerce Clause of the Constitution of the United States to the facts involved in the appeal in so far as the decision of this court may, as a rule of law, affect the power of Illinois to regulate the use of its highways.

Public roads are artificial facilities furnished by the states to provide for transportation of persons or property, on foot or in vehicles. In this they differ essentially from waterways the ownership of which, is held by the states subject to the servitude of Congress to control navigation. Waterways are natural facilities used for transportation between the States and the United States and foreign countries. The distinction between waterways and roads is very broad and was commented upon at length in the case of *Railroad Company* v. *Maryland,* 88 U. S. 456, at page 470.

In the *Minnesota Rate Cases,* 230 U. S. 352, this court, in citing *Railroad Company* v. *Maryland, supra,* had this

to say, (p. 416) "It has never been doubted that the state could, if it saw fit, build its own highways, canals and railroads. (*Railroad Company* v. *Maryland,* 21 Wall. 456, 470, 471.) It could build railroads traversing the entire state and thus join its border cities and commercial centers by new highways of internal intercourse to be always available upon reasonable terms. *Such provision for local traffic might indeed alter relative advantages in competition, and, by virtue of economic forces, those engaged in interstate trade and transportation might find it necessary to make readjustments extending from market to market through a wide sphere of influence; but such action of the state would not for that reason be regarded as creating a direct restraint upon interstate commerce and thus transcending the state power.*"

Public roads are maintained by the states in their sovereign capacities in the discharge of their duties to their citizens. They are designed and built primarily for the use of their own citizens who may desire to use them within the limits of the states. Although they may furnish the means for the carrying on of commerce between states by motor vehicle, yet that is but an incident of their use. Their primary purpose is to provide for commerce within the limits of the respective states.

The important question before the court is whether or not the Commerce Clause is broad enough to give this court jurisdiction over the manner of use of state property, if

such property may be used incidentally in the carrying on of interstate commerce. It is to be observed that the states themselves do not engage in interstate commerce. They merely furnish facilities over which it is possible for others to do so. In this discussion, we do not deal with the jurisdiction of the court provided by the Equal Protection and Due Process Clauses of the Fourteenth Amendment or Section Two of Article Four of the Constitution of the United States insuring the citizens of each state all privileges and immunities of citizens in the several states. Our argument is only concerned with the Commerce Clause.

SUMMARY OF ARGUMENT.

I.

A statute with a legitimate object and employing means related to the object is not open to attack because it indirectly affects interstate commerce. (*Everard's Breweries* v. *Day,* 265 U. S. 545-559; *N. Y. N. H. and H. Railroad* v. *New York,* 165 U. S. 628-629; *Bayside Fish Co.* v. *Gentry,* 297 U. S. 422-427). If the means provided by a statute are related to the object, the legislative power is not to be disturbed. Whether such means are reasonably necessary is not for the determination of a court. (*Arizona* v. *California,* 283 U. S. 423-455-456.)

That heavy motor vehicles are destructive of roads is a fact of common knowledge. That has been observed by this court in *Hendrick* v. *Maryland,* 235 U. S. 610, and in other cases. Limitations of sizes and weights of motor vehicles have a direct relation to the conservation of roads. The question of what degree of limitation is reasonably necessary is, therefore, not open to judicial inquiry, since the limitation is related to the object. The efficacy of the means employed is a legislative question. Whether or not the limitations of the South Carolina statute are more than necessary to conserve its highways would necessitate the court to determine what degree is necessary. That would be an invasion of the legislative field.

II.

A state may indiscriminately refuse to permit the use of its highways for the purpose of gain or condition the manner of use for such gainful purpose as it sees fit according to its uncontrolled judgment.

The use of public highways for the purpose of gain is special and extraordinary. It is a privilege, not a right. (*Stephenson* v. *Binford,* 287 U. S. 251-264; *Packard* v. *Banton,* 264 U. S. 140-144; *Hodge Co.* v. *Cincinnati,* 284 U. S. 335-337;*Frost Trucking Co.* v. *Railroad Commission,* 271 U. S. 583-562.) Congress can regulate the business of an interstate motor carrier, if the state permits him to operate at all; but it is the inherent right of the state to condition the carried's manner of use of its highways, or his right to use the highways, provided its action is indiscriminate.

III.

In its prohibitions legislation may properly include the innocuous where its exclusion would make the enforcement of the law more difficult and the statute less effective. Its inclusion has its justification because it is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of government. (*Purity extract Co.* v. *Lynch,* 226 U. S. 192; *Village of Euclid* v. *Amber Realty Co.,* 272 U. S. 365; *Semler* v. *Oregon State Board,* 294 U. S. 608; *Booth* v. *Illinois,* 184 U. S. 425; *Otis* v. *Parker,* 187 U. S. 606; *Pierce Oil Co.* v. *City of Hope,* 248 U. S.

498.) Applying the foregoing principle to the type of statute in question, we say that a state has the right to adopt one set of limitations for the regulation of all of its highways, wide and narrow, strong and weak. To apply limitations varying with the width or bearing power of each particular highway or set of highways upon the entire road system of a state, all of which are interconnecting, would involve such a labyrinth of different regulations as to make the statute unenforceable. Without one set of limitations applicable to all highways, the statute could not be enforced. Any statute of this nature is to be judged by its application to all of the rural highways, city streets and bridges in a state. It is not to be judged by the selection of a few of the stronger and wider highways from the state system and applying it to them alone.

IV.

The sole and exclusive power to regulate the manner of use of highways by vehicles operated for gain is in the States. The Commerce Clause gives no jurisdiction to Congress in such matters. For that reason the court below was without jurisdiction to nullify the South Carolina statute under the authority of the Commerce Clause.

State legislation, limited to internal commerce is not invalid because it may affect the latter indirectly. (*The Minnesota Rate Cases,* 230 U. S. 352-410; *Schechter Corp.* v. U. S., 295 U. S. 495.)

V.

The regulatory power of Congress over state roads is limited to the power to regulate the business of interstate commerce. State regulations for the protection of state property do not regulate the business of interstate commerce and Congress has no jurisdiction in such a field.

The Commerce Clause has no application to state statutes enacted for the purpose of conserving assets of the States. (*Geer* v. *Connecticut,* 161 U. S. 519; *Ward* v. *Race Horse,* 163 U. S. 504; *Silz* v. *Hesterberg,* 211 U. S. 31; *Carey* v. *South Dakota,* 250 U. S. 118; *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349; *U. S.* v. *Shauver,* 214 Fed. 154; *U. S.* v. *McCullogh,* 221 Fed. 288.)

VI.

A regulation by Congress of State power to conserve its roads would not be a regulation of the business of interstate commerce. It would be a taking of property for a public use without compensation in violation of the Fifth Amendment to the Constitution of the United States.

Congress could not provide for the manner of use of state roads without properly exercising the power of eminent domain. The provisions of the Fifth Amendment protect state roads from seizure by the United States without payment of compensation just as much as private property. (*St. Louis* v. *Western Union Telegraph Co.,* 148 U. S. 92-100; *Western Union Telegraph Co.* v. *Richmond,* 224 U. S. 160-169). So full is the ownership of their roads

that the States may even exact tolls for their use from the United States. (*Searight* v. *Stokes,* 44 U. S. 150-170, per Chief Justice Taney.) (Note—The States may have bargained away the right to collect tolls by accepting the benefits of the Federal Highway Acts, See Part X of Argument.)

The Fifth Amendment is a limit upon Congress in the exercise of its powers under the Commerce Clause, (*Monangahela Navigation Co.* v. *U. S.,* 148 U. S. 312-336.) as well as a limit upon the exercise of other great powers of Congress, such as the bankruptcy power (*Louisville Bank* v. *Radford,* 295 U. S. 555-589) and the power to tax (*Heiner* v. *Donnan,* 285 U. S. 312-326).

Taking from the states the power to determine how their property shall be used is a conversion of property.

The right of ownership of property, within the meaning of constitutional provisions requiring the making of compensation upon the taking of property for a public use, includes not only the tangible subject matter or corpus, but every right to use and exercise full dominion and control over it. (*Scott* v. *Manhattan Ry. Co.,* 17 N. Y. S. 364-365; *Old Colony and Fall River R. R. Co.* v. *County of Plymouth,* 14 Gray 155-161, per Chief Justice Shaw; *Pumpelly* v. *Green Bay Company,* 80 U. S. 166-167.)

There is a distinction beween governmental interference with the use of private property as a police power measure and the taking of property for a special public

use. Whenever a legislative act attempts to deprive the owner of some substantial interest in his property, the act becomes one of eminent domain. (*1 Lewis on Eminent Domain,* Sec. 6, 1909 Ed.) Even though the title to property be not taken, a deprivation of the right of use is a taking within the scope of the Fifth Amendment. (*U. S.* v. *Lynah,* 188 U. S. 445.) Whenever the right of the possession, use or enjoyment of property is in any degree abridged by the power of eminent domain, the property is pro tanto taken and the owner is entitled to compensation. (*Vol. 4, McQuillen on Municipal Corporations,* Sec. 1589, Second Ed.) Subjecting property to a public servitude is a taking. (*Peabody* v. *U. S.,* 231 U. S. 530.) Cooley's definition of eminent domain includes the controlling of the use of private property for the public benefit, without regard to the wishes of the owner. (Cooley's *Constitutional Limitations,* 1927 Ed., pp. 1109-1110.)

There is a vast difference between a police regulation restricting the owner in his own use of his property, such as a zoning ordinance, and a governmental fiat requiring him to suffer restrictions to be placed upon his property, *not for his own use, but for a special use by others.* The latter situation is exactly what would result in case Congress should require the states to permit the use of their roads by private parties engaged in interstate commerce with vehicles having whatever weights and dimensions which Congress might allow without regard to the wishes of the States. The States would not only be restricted

to whatever use of the roads they might want to make themselves, *but they would be required to submit the use of their property to third persons against their will and in accordance with the will of Congress.*

Such regulations by Congress would amount to the nationalization of state property without the consent of the states.

Since it is a taking of private property for a public use without just compensation for a state to compel a private business to dedicate its property to the public use by converting it into a public utility against its will (*Producers Transporation Co.* v. *R. R. Co.,* 251 U. S. 228-230; *Michigan Commission* v. *Duke,* 266 U. S. 570-578) then by the same token we say that Congress cannot compel the dedication of state property for the use of interstate commerce against the will of the States without complying with the Fifth Amendment. The states have never dedicated their roads to the national government for the use of interstate commerce.

The power of Congress over state roads is limited to regulating the business of interstate commerce, such as the fixing of interstate rates, the issuance of certificates of convenience and necessity and the like. The determination by Congress of the dimensions and weights of vehicles permitted to use state roads would be a usurpation of the power of the States to conserve their own property and not a regulation of *the business of interstate commerce.*

VII.

In the ownership of their roads, the states are not engaged in the business of interstate commerce as in the case of a manufacturer who ships goods in interstate commerce or a railroad company which transports cars from state to state. We contend that property of a State held in its sovereign capacity, not used by the state in carrying on the business of interstate commerce, built entirely within the confines of the State, and used, not by the State, but by third parties as an incident to the passage of vehicles in interstate commerce is not subject to the imposition by Congress of the servitude of interstate use by whatever type of vehicle Congress may will the freedom of use. Two sovereigns cannot control the manner of use of property at the same time. A concurrent power in two distinct sovereigns to regulate the same thing at the same time is inconsistent with sovereignty. (*The Passenger Cases,* 7 Howard 282-398.)

Bridge companies which furnish the instrumentality by which those engaged in interstate commerce may pass from state to state or from this country to Canada are not engaged in interstate or foreign commerce. It is the persons who use the bridges who are engaged in such commerce. (*Henderson Bridge Co.* v. *Kentucky,* 166 U. S. 150-153;*Detroit International Bridge Co.* v. *Corporation Tax Appeal Board,* 294 U. S. 150-153.) Such a situation is strikingly similar to state owned roads. It is unlike that of

intrastate instrumentalities owned or controlled by railroads engaged in interstate commerce, as units in an interstate system. (*Railroad Commission* v. *Southern Pacific Co.,* 264 U. S. 331; *Texas and Pacific Ry. Co.* v. *Gulf etc. Ry. Co.,* 270 U. S. 266; *Venner* v. *Michigan Central R. R. Co.,* 271 U. S. 127.) It is not like that of a state owned railroad engaged in the business of hauling freight with its own engines and making connections with interstate lines. (*U. S.* v. *California,* 297 U. S. 175.)

VIII.

No analogy can be had in the case of governmental regulation of public utiltiy companies. Such companies, by devoting their businesses to the public use grant the public an interest in that use to the extent of that interest and must submit to public control for the common good. (*Munn* v. *Illinois,* 94 U. S. 113-126;*Wolf* v. *Industrial Court,* 262 U. S. 522-535.)

Equally inapplicable is the analogy of the interstate railroad company or the manufacturer who ships his goods in interstate commerce. They must submit to control by Congress as the price of the privilege of engaging in interstate commerce. A state is not engaged in the business of interstate commerce. Its roads are held in its sovereign capacity and are not designed for the carrying on of interstate commerce by the state. The roads do not leave the confines of a state. Neither are they intrastate units or local branches or extensions of an interstate system as in the case of railroads.

The foundation of Congressional jurisdiction over the abandonment of an intrastate railroad is that it is operated as a branch of an interstate system and its continued operation at a deficit might impair the business of the system as an artery of interstate commerce. (*Colorado* v. *U. S.*, 271 U. S. 153.) The continued operation, solely in intrastate commerce, of an intrastate railroad owned by a local corporation is of purely local concern. (*Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204-216.) The underlying theme in all of the cases sustaining the regulations of Congress over the intrastate operations of railroads is that an interstate system uses the same instrumentalities to serve both intrastate and interstate commerce and regulation by Congress is necessary to secure efficient performance of interstate functions. A resume of such cases was made by the court in the case of *Colorado* v. *U. S.*, *supra,* at pages 163-164-165.

IX.

The power of Congress to regulate navigable waters cannot be made the basis of establishing similar power in Congress over state roads. This power of Congress is *sui generis.* It is based upon the power to control navigation. The word "commerce" as used in the Constitution includes navigation. The power over commerce, including the control of navigation, was one of the primary objects for which the people adopted their government. (*Gibbans* v. *Ogden,* 9 Wheaton 1-190; *Gilman* v. *Philadelphia,* 3 Wallace 713-724.) State roads, which are artificially con-

structed, and waterways, which are natural highways, have no similarity as far as control of Congress is concerned. (*Railroad Company* v. *Maryland,* 88 U. S. 456-470.)

The reason that the Fifth Amendment does not protect the owners of beds and shores of navigable waters from damages done by the United States in performing work in aid of navigation is that their ownership is subject to the servitude to control navigation created in favor of the Federal government by the Constitution. (*Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251-259; *Gibson* v. *U. S.,* 166 U. S. 269; *Scranton* v. *Wheeler,* 179 U. S. 141.) State roads are subject to no such servitude.

X.

The previous decisions of this Court, touching upon state regulations of roads do not sustain the power of Congress to remove from the states the right to conserve their roads.

XI.

State power to conserve state roads has not been surrendered by the States to Congress by the acceptance of the benefits of the Federal Highway Acts. The history of the legislation in Congress is to the contrary. The aim of Congress in making its appropriations to the States was to aid them in building post roads which roads should be free from toll. The only obligation placed upon the states by the Federal Highway Acts was that the highways should remain open for the passage of the mails and the roads should be toll free.

ARGUMENT.

I.

A state statute with a legitimate object and having means related to the object is not open to attack because it indirectly affects interstate commerce.

Admittedly, if the avowed object of a state statute is to discriminate between residents and non-residents or to regulate the passage of commerce in or out of a state, then such a statute is a regulation of the business of interstate commerce, which is forbidden by the Commerce Clause. On the other hand, if the real or apparent object of the statute is that of the management and control of the property of a state, the regulation is not one of interstate commerce, even though those entering or leaving the state and using its highways for the purpose of gain may not do so without subscribing to the regulations of the State. The efficacy of the statute is to be determined by the owner of the property, the State. It is not for others to say that the statute has fallen short of its goal if its end be legitimate and the means employed are related to it.

The judicial power to inquire into the motives of legislation is lacking. If the means provided by a statute are not unrelated to its object, the legislative power is not to be disturbed. Whether such means are reasonably necessary is not for the determination of a court. Such was the gist of the opinion of the court in the case of *Arizona* v.

California, 283 U. S. 423-455-456. There Arizona contended that the pretension of Congress that the construction of Boulder Dam was for the purpose of navigation was false. The Court refused to inquire into the motives of Congress for the reasons just given.

The reasoning in that case applies exactly to the case at bar.

(1) Congress has full power to regulate and control navigation,	(1) The states have full power to govern the manner of use of their property.
(3) Where the means provided by Congress to control navigation are not unrelated thereto, then whether or not they are reasonably necessary to achieve the result is not for the determination of the court.	(2) Where the means adopted by a state to conserve its property are not unrelated thereto, then whether or not they are reasonably necessary to achieve the result is not open to judicial inquiry.

The General Assembly of South Carolina has left no doubt but that the object of the statute in question is for the protection of its roads. Section One of the Act (South Carolina Statutes at Large of 1933, p. 341) is as follows:

> "Public Policy—Be it enacted by the General Assembly of the State of South Carolina: It is hereby declared to be the public policy of this State that heavy motor trucks, alone or in combination with other trucks, increase the cost of highway construction and maintenance, interfere with and limit the use of the highways for normal traffic thereon, and endanger the safety and lives of the traveling public, and that the

> regulations embodied in this Act are necessary to achieve economy in highway costs, and to permit the highways to be used freely and safely by the traveling public."

In *Hendrick* v. *Maryland,* 235 U. S. 610, this Court specifically stated that heavy vehicles are abnormally destructive of the roads upon which they are operated. In many other cases, too numerous to mention, this Court has made similar statements. That is a fact of common knowledge with which all agree. Therefore, the object of the South Carolina statute is legitimate. The grievance of those who challenge the validity of the statute is not, whether the object sought by South Carolina is legitimate or that the means used are unrelated to the object. Their contention is that the *means employed* are not reasonably necessary to attain the result sought. We say that because the object sought by South Carolina is one over which it has exclusive power and the means employed are related to it, then the efficacy of the statute is not open to inquiry. There can be no question but that restricting the weights and dimensions of heavy motor vehicles has a very definite relation to the conservation of the highways; but the appellees while not able to deny this, say, in effect, that the particular means used by South Carolina go beyond what is necessary to satisfy the object, and that as a consequence interstate commerce is burdened.

Judicial inquiry is always open to whether or not the means adopted by a legislative body are related to the object. Here, there can be no question but that they are.

The only question raised by the plaintiffs is one of degree. We say that since the means are related to the object, then the degree employed is not open to inquiry.

The oft repeated words taken from the opinion of Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 316-421-423, are not inappropriate here: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the spirit and letter of the constitution, are constitutional. * * * Where the law is not prohibited and is reasonably calculated to effect any of the objects intrusted to the government, to undertake to inquire here into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This Court disclaims all pretensions to such power." Of like tenor, this Court said in *Everard's Breweries* v. *Day,* 265 U. S. 545-559: "It is likewise well settled that where the means adopted by Congress are not prohibited and are calculated to effect the object intrusted to it, this Court may not inquire into the degree of necessity." In the case of *N. Y., N. H. and H. Railroad* v. *New York,* 165 U. S. 628, 629, it is said: "There may be reason to doubt the efficacy of regulations of that kind. But that was a matter for the state to determine. We know from the face of the statute that it has a real, substantial relation to an object as to which the state is competent to legislate." In the case of *Bayside Fish Co.* v. *Gentry,* 297 U. S. 422-427, the Court said: "These provisions have a reasonable

relation to the object of their enactment; namely, the conservation of the fish supply of the state, *and we cannot invalidate them because we might think, as appellant in effect urges, that they will fail or have failed of their purpose.*"

A state highway regulation which would have for its purpose the preferment of residents over non-residents, or would forbid the use of the highways as to one while permitting it as to another would be unconstitutional, both as to means and as to object. That would be a direct regulation of the business of interstate commerce. But a statute, such as the one under consideration, whose object and means are within the reserved powers of the states, and is not a regulation of the business of interstate commerce, is not rendered unconstitutional simply because it indirectly affects interstate commerce. Little, if any, interstate commerce can be carried on without being subjected to the burden of local regulations.

II.

A state may indiscriminately refuse to permit the use of its highways for the purpose of gain or condition the manner of use for such gainful purpose according to its uncontrolled judgment. Nothing in the Constitution of the United States overrides this right. The use of public highways for the purpose of gain is a privilege, not a right.

We have already stated that this case does not involve the use of highways for private purposes. It was brought

by the operators of motor trucks who use the highways for the purpose of gain.

There is a broad distinction between the two classes of persons just mentioned in so far as the right to use public highways is concerned. In the case of *Stephenson* v. *Binford,* 287 U. S. 251-264, this court said, "It is well established law the highways of the state are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the legislature may prohibit or condition as it sees fit." In other cases, such as *Packard* v. *Banton,* 264 U. S. 140-144, and *Hodge Co.* v. *Cincinnati,* 284 U. S. 335-337, and *Frost Trucking Co.* v. *Railroad Commission,* 271 U. S. 583-592, this court has enunciated the same principle.

It is true that in the case of *Frost Trucking Co.* v. *Railroad Com., supra,* this court invalidated the action of California in requiring a private contract carrier to obtain a certificate of convenience and necessity in order to use the public highways; but this court pointed out in *Stephenson* v. *Binford, supra,* (p. 267) that the basis upon which the decision of the court hinged in the Frost case was that a private contract carrier was obliged to dedicate his property to the business of public transportation in order to avail himself of the privilege of using the highways. The carrier could not be compelled to surrender his constitutional rights of having his property dedicated to the public

service against his will in order to exercise the privilege of using the highways. No such situation is presented in the case at bar. We assert that the cases just cited sustain the power of a State to wholly exclude commercial vehicles from its highways or to condition their operation according to whatever in its judgment the state may believe will preserve its highways to their best advantage. The *Frost* case did not involve the right of California to exclude motor vehicles for the reason of the conservation of the highways. It was an arbitrary refusal to permit private persons to engage in business by attaching unconstitutional conditions upon the exercise of the privilege. It involved an illegal regulation of the right to engage in business at all. The use of the highways was only incidentally involved. The right to conserve the highways was not involved. California did not defend the suit upon those grounds. In the Stephenson case this very distinction was made of the *Frost* case. In the *Stephenson* case, the court said (p. 275), "There as we pointed out (pp. 591-592) the California act, as construed by the highest court of that state, was in no real sense a regulation of the use of the public highways. Its purpose was to protect the business of those who were common carriers in fact by controlling competitive conditions. *Protection or conservation of the highways was not involved. The condition which constrained the private contract carrier to become a common carrier, therefore, had no relation to the highways. In this view, the use of the highways fur-*

nished a purely unrelated occasion for imposing the unconstitutional condition, affording no firmer basis for that condition than would have been the case if the contract carrier were using a road in private ownership.'' Elsewhere we comment upon the the case of *Buck* v. *Kuykendall,* 267 U. S. 307. There much the same idea is expressed upon the action of the State of Washington in refusing to permit a common carrier to use a highway in interstate commerce. The court pointed out (p. 315) that the primary purpose of the action taken by the State "is not regulation with a view to safety or conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used."

An interstate railroad company or telegraph company desiring to use the state highways for gainful purposes, could not put their tracks or telegraph poles in public streets (1) without authorization from Congress, and (2) without paying rental therefor and submitting to the conditions laid down by local governments. Unless both of those conditions would be present a State might refuse permission. Under the authority of *Buck* v. *Kuykendall* and related cases, a State may not refuse to permit interstate commerce to enter the State for the sole reason that it is interstate commerce; but neither the *Frost* nor the *Buck* cases give any clue that a State in the interest of conservation, may not refuse to permit its highways to be

used for gainful purposes. While it is true that a State may not refuse to permit a telegraph company to enter a state under the express authority of Congress for the purpose of engaging in interstate business, still the authorities are uniform that the company can be compelled by the State to pay compensation in the nature of rent for the use of streets. (*Western Union Telegraph Co.* v. *Massachussetts,* 125 U. S. 530-548; *St. Louis* v. *Western Union Telegraph Co.,* 148 U. S. 92-102.) In the case of telegraph companies, the Act of Congress conveys no title and does not attempt to found one by delegating the power to take by eminent domain. *"It made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a State to exclude them because they were foreign corporations or because of its wish to establish a monopoly of its own."* Except in a negative sense such a statute is ony permissive, not a source of positive rights. (*Western Union Telegraph Company* v. *Richmond,* 224 U. S. 160-169.) Underlying the denial to a State of the right to refuse to permit telegraph companies from entering the state to do business is that such a company is regarded as a part of the postal service. It is in reality a branch or agency of the government for that purpose. (*Pensacola Telegraph Co.* v. *Western Union Telegraph Co.,* 96 U. S. 1). Even though such companies be regarded as part of the postal service, they must submit to state regulations. The power of a state to exclude vehicles using its roads for the purpose of gain does not include, of course, the use

of highways by the government in the exercise of its powers under the Constitution, such as its war powers, the transmittal of the mail, etc.

If Congress had not provided that telegraph companies might enter upon and use post roads, they could not enter upon and use state highways for their commercial purpose; and with or without an Act of Congress, they are not at liberty to use them without paying just compensation and being subject to local regulations. A much stronger case is made out for state's rights in the case of vehicles operated for the purpose of gain. Such vehicles perform no governmental function, unless they happen to carry the mail.

The Federal Motor Carrier Act has not authorized them to enter upon and use state highways with whatever weight or dimension of motor truck they may want to employ, nor could it. Neither have they been authorzied to use the highways without making just compensation. All that is sought by the Federal Motor Carrier Act is to regulate the business of interstate commerce by motor vehicle. There is nothing in the Act that forbids a State from withholding the privilege of the use of its highways from all owners of commercial vehicles, residents and nonresidents alike. Neither is there anything in the Act which forbids a State to provide that the weights and dimensions of motor vehicles shall be in accordance with the will of the State, giving equal treatment in that respect to both

residents and non-residents. There is nothing in the Federal Motor Carrier Act which provides that a State must permit the use of its highways by commercial vehicles. *The most that can be said of the Act is that in case a State permits such use, then Congress shall regulate, not the manner of use, but the business of the interstate carrier.*

We insist that the States have the right to have their property rights protected by this court; that those rights include the right to either refuse to permit the use of their highways for gain at all or to condition the manner of such gainful use in accordance with their own judgments. If the States are of the opinion that the interests of their residents and those of non-residents will be best served by barring the use of their highways to commercial users entirely or by regulating the manner of use by some means related thereto, that right can not be abridged until a superior power, Congress, does so in compliance with the Fifth Amendment.

III.

The statute in question is to be judged by its application to all of the highways in the state system, not by selecting a few of the strongest highways in the system and complaining that it is unfair in its application to them alone.

Most state roads are usually classified in three groups, viz: (1) City Streets, (2) Local rural roads, and (3) Statewide or through rural roads. As a general rule, city

streets are built with funds of the local community. Local rural roads are built by the respective counties with county funds. Statewide roads are built with funds from the state treasury. The bearing power or durability of city streets and local rural roads varies with wealth and topography of the particular community. Each road in the state, from the shortest and most poorly constructed dirt road to the longest and most durable highway is a component part in an elaborate state highway system. This can be truly compared with the multiplicity of veins, arteries and tiny blood vessels which go to make up the blood stream of the human body. Traffic is fed from the central arteries of traffic to the less important ones and vice versa, so that it is diffused throughout the system. As far as the main highways are concerned, a short stretch of weak pavement or a weak bridge is an embolism in the artery of commerce. A statewide highway system is no stronger than its poorest roads or the weakest links upon its most durable roads. To classify each particular highway in a state or any particular part of the highway system for vehicles weighing in proportion to the durability of the particular highway or system is just as hopelessly impractical as it would be to suspend the law against gambling in law abiding communities and to keep it in force in others. Placing a load limit of 10,000 pounds per vehicle upon a main highway and 5,000 pounds on a side road is a tacit invitation for the truck operator, the point of origin of whose load is on the side road and whose destination is the main high-

way, to carry a 10,000 pound load on both highways. If the point of origin is on the main highway and the destination is the side road, the temptation to violate the law is just as great, if not greater.

In enacting statutes, a legislature must consider that not all men are honest and law abiding; that motor vehicle laws are scorned by many and are commonly violated; that such laws are exceedingly difficult to enforce; and that there are infinitely more violators of motor vehicle laws than there are those who pay the penalty.

This court has said that there is a strong presumption that a legislature understands and correctly appreciates the needs of its own people and that its laws are directed to problems made manifest by experience. (*Middleton* v. *Texas Power and Light Co.,* 249 U. S. 152-157). That is quite pertinent in the consideration of the type of statute in question here. Legislation passed for the protection of an entire state highway system appreciates and understands the character, extent, durability and age of the roads of a state taken as a whole. It considers the topography of the country, the amount of usage of particular roads or roads in particular sections of the state and a multitude of other things regarding physical conditions. It considers the ability of its police officers to enforce the law and the probability or improbability for the law to be violated. It also considers the financial conditions of the respective communities, their ability to pay past indebtedness incurred in road construction and their ability to raise

funds for future construction and maintenance. No such legislation can exclude a single factor which we have mentioned and it will be presumed that it considered them all. These considerations crystalize themselves into law expressing the legislative judgment. Such a statute strikes a balance which must be presumed to be fair for the entire road system taken as a unit.

The object of such a statute is the protection of all the highways of a state, not just a few. Without considering the controverted factual questions in the case at bar, the validity of the statute is not to be considered in connection with the strongest and most durable highways of the state, but in connection with all of them. The means used are related to all of the highways. The inclusion of strong highways in a statute enacted to protect the weak does not invalidate the statute. A state is not bound to classify its highways, by excluding some from its operation and including others. Legislation has a right, and very often does, include innocuous things in its prohibitions in order to make its action effective.

In the case of *Purity Extract Co.* v. *Lynch,* 226 U. S. 192-201, this court said, "It is also well established that, when a State exerting its reorganized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition, the scope of which is regarded as

essential in the legislative judgment to accomplish a purpose within the admitted power of government." In the case of *Village of Euclid* v. *Amber Realty Co.,* 272 U. S. 365, it was contended that a zoning ordinance included in its regulations and prohibitions industries which were neither dangerous nor offensive. The court said, (p. 388), "But this is no more than happens in respect of many practice forbidding laws which this court has upheld although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the prescribed class." In sustaining the validity of a dental practice act of the State of Oregon this court said in the case of *Semler* v. *Oregon State Board,* 294 U. S. 608-613, "The legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule, even though in particular instances there might be no actual deception or misstatement."

The principle to which we have referred has been sustained many times. In *Booth* v. *Illinois,* 184 U. S. 425, an Illinois statute was upheld which made it criminal to give an option to buy grain at a future time, which although it was aimed at gambling on the Board of Trade, included transactions which did not amount to gambling and were not immoral. In *Otis* v. *Parker,* 187 U. S. 606, substantially the same type of statute as in the Booth case was directed at the sale of shares of capital stock of corporations on margin. In the case of *Silz* v. *Hesterberg,* 211 U. S. 31, a New York statute prohibited the possession of certain game during the closed season. While it was a statute aimed to protect the wild game of the state, its prohibitions embraced not only domestic but imported game. It appeared that unless both domestic and foreign game were included, dealers in game might easily sell birds of a domestic kind under the claim that they were taken in another state. In *Pierce Oil Co.* v. *City of Hope,* 248 U. S. 498, an ordinance was sustained which forbade the sale of gasoline within 300 feet of any dwelling house. The court said, (p. 500), "If it were true that the necessarily general form of the law embraced some innocent objects, that of itself would not be broad enough to invalidate it to remove such an object from its grasp."

Even if the means employed by the South Carolina statute had no relation to the object as applied to a part of roads in the state system, their inclusion in the statute would not defeat its validity. Excluding such roads from

the statute would only bring about the opportunity to violate the law upon the highways included. The inclusion of the strong highways with the weak is necessary to protect the latter. The legislature was not bound to sacrifice its city streets and local rural roads in order to promote the operation of heavy vehicles upon its main highways. It was not required to heap maintenance and construction costs upon local governmental units in the repair of local roads. It was not required to increase its police force or rely upon the honesty of the motor vehicle operator not to violate the law. It was not required to adopt an intricate system of highway classifications, fixing different limitations as to each highway or bridge in the state according to its capacity. It had a right to, and did, adopt a statute which would produce the greatest good for the greatest number.

IV.

The sole and exclusive power to regulate the manner of use of state highways by vehicles operated for the purpose of gain is in the states. Congress has no authority in such a field. In the case at bar, the jurisdiction of the court below must depend upon whether or not the Commerce Clause invested Congress with jurisdiction in such a field. If it did not, then the court was without jurisdiction.

The power of the States to regulate their purely internal affairs has never been surrendered to Congress.

(*New York* v. *Miln,* 11 Pet. 102-139; *Slaughter House Cases,* 16 Wall. 36-63.) A regulation by Congress of the internal commerce of a state is void. (*U. S.* v. *Dewitt,* 9 Wallace 41.) State power to impose restraints and burdens upon persons and property in conservation and promotion of public health, good order and prosperity is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution, and essentially exclusive. (*In Re Rahrer,* 140 U. S. 545-554.) It is well established that an abridgment of rights by a State, unless it comes in conflict with the constitution or a law of the United States, is an affair between the State and its citizens, of which this court can take no cognizance. (*Transporation Co.* v. *Chicago,* 99 U. S. 635-643.)

The Commerce Clause is a delegation of power from the States to Congress to regulate. It follows, therefore, that if Congress would have no power to regulate the weights and dimensions of motor vehicles using state roads, then such power is reserved in the States; and the judicial branch of the National government would have no authority to prevent state regulation in a field over which Congress has no control.

(1) The South Carolina statute does not discriminate against non-residents in favor of residents. It treats all alike.

(2) The statute places no restrictions upon the interstate use of the highways by either residents or non-residents who may desire to use them. The limitations of the statute are more than ample for such use. The statute is aimed at the use of highways by heavy all commercial vehicles operated for the purpose of gain. The use of public highways for the purpose of gain is an extraordinary one which may be granted or withheld by a State. It is a privilege, not a right as in the case of a non-profit use. No burden is placed upon the interstate use of the highways by citizens of the several states, who may desire to use them for non-profit purposes as of right. The regulation falls upon those who exercise a privilege; and it operates upon them equally and without discrimination. It does not operate against the assertion of a right.

(3) The statute does not forbid or curtail either residents or non-residents to enter or leave the state for the purpose of transacting ordinary business within the state or in interstate commerce. They are free to do so. The import or export of goods is not forbidden or curtailed.

(4) No complaint is made as to the imposition of taxes or license or inspection fees.

We contend that the States alone have power to grant or withhold the privilege of using their highways for the purpose of gain or to condition the manner of use for such purpose however they see fit, provided that such conditions do not discriminate among those of that class or between

citizens of the several states and accord equal privileges to all. Since no discriminations are practiced and residents and non-residents are accorded equal privileges, the jurisdiction of the court below must stand or fall solely upon whether or not the regulation of the manner of use of the highways by vehicles operating for the purpose of gain was a field in which Congress might enter. If it were such a field, then no state could burden the operation of such vehicles in interstate commerce by that type of regulation. On the other hand, if the sole and exclusive power is in the states, and the field is one in which Congress may not enter, then in the absence of discriminatory action and with the accordance of equal privileges, the States are free to regulate in whatever manner they see fit. Therefore, the question with which we shall hereinafter concern ourselves is whether or not and under what conditions Congress might enter such a field. Merely because a State regulation may incidentially effect interstate commerce does not suffice to give Congress jurisdiction if the field is the internal affairs of the States. State legislation, limited to internal commerce, which does not include the subjects of interstate commerce is not invalid because it may affect the latter indirectly. (*The Minnesota Rate Cases,* 230 U. S. 352-410.) (*Schechter Corp.* v. *U. S.,* 495-546). The subject matter for congressional action must be one of interstate commerce. The manner of use of a state road does not fall within such subject matter.

It may be stated as a general proposition that all cases sustaining the jurisdiction of this court to prevent the enforcement of state regulation under the authority of the Commerce Clause may be classified as follows:

(1) Cases where the jurisdiction of Congress is immediately exclusive; that is, exclusive without any action taken on the part of Congress.

(2) Cases in which Congress has already entered the field.

(3) Cases in which (a) the jurisdiction of Congress is not immediately exclusive, and (b) Congress has not yet entered the field, but the regulations of the State are burdensome.

It is to be noted that in each of the three foregoing classes of cases the jurisdiction of this court is made to depend upon the jurisdiction of Congress. If the jurisdiction of Congress is lacking, then the subject matter is not one of interstate commerce in which this court may intervene. This is dramatically illustrated by a comparison of *U. S.* v. *Dewitt,* 9 Wallace 41, with *Minnesota* v. *Barber,* 136 U. S. 313. In the latter case a Minnesota statute forbade the sale of meat within the state unless it was inspected by state authorities. As applied to meat shipped into the state from without, it was a subject matter of interstate commerce, over which Congress had control, thus giving this court jurisdiction to enjoin state action. In the *Dewitt* case, this court held an Act of Congress invalid

which forbade the sale of illuminating oils. There this court said, (p. 43-44), "That Congress has power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, the Constitution expressly declares. *But this express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States.*"

In *Transportation Co.* v. *Parkersburg,* 107 U. S. 691, it was pointed out (p. 701) that it is Congress and not the Judicial Department to which the Constitution has given the power to regulate commerce; that there are cases where the courts will interpose to prevent state action where Congress has not yet acted; but those are cases where states have interfered with the freedom of interstate commerce and the non-action or silence of Congress is an indication of its will that no such restraint shall be imposed. In view of the *Parkersburg* case and other cases, we say that the jurisdiction of this Court in matters of interstate commerce is co-extensive with the jurisdiction of Congress.

V.

The power of Congress over state roads consists only in the power to regulate the business of interstate commerce, per se, not the power to displace the local police power having for its purpose the conservation of state property. The latter is not a regulation of the business of interstate commerce.

The regulation of the business of interstate commerce is one thing. State regulations which are aimed to conserve state property and may incidentally affect interstate commerce are quite another. The former is under the control of Congress. The latter has never been surrendered to the central government, but is in the states.

Without doubt, regulations of the dimensions and weights of motor vehicles do affect interstate commerce; but they only affect interstate commerce in the same way in which state laws punishing the crime of murder may affect those who happen to be engaged in interstate commerce at the time of the commission of such an offense.

This Court has repeatedly held that the Commerce Clause has no application to state statutes having for their aim the conservation and protection of state property. In *Geer* v. *Connecticut,* 161 U. S. 519, a statute of Connecticut was upheld which prohibited the exportation of wild game from the state upon the theory that wild game are the property of the state, and the state has the inherent power to provide for their conservation. The same principle was approved in *Ward* v. *Race Horse,* 163 U. S. 504; in *Silz* v. *Hesterberg,* 211 U. S. 31, and *Carey* v. *South Dakota,* 250 U. S. 118. The inherent power of a state to preserve its natural resources was given additional sanction in *Hudson Water Co.* v. *McCarter,* 209 U. S. 349. This same doctrine was recently approved. (*Bayside Fish Co.* v. *Gentry,* 297 U. S. 422-427.)

Two well considered District Court decisions nullified the first Federal Migratory Bird Act upon the theory that the Commerce Clause gave no authority to Congress to regulate the property of the states. (*U. S.* v. *Shauver,* 214 Fed. 154; *U. S.* v. *McCullogh,* 221 Fed. 288.) The second Migratory Bird Act, which was enacted under the treaty making power of Congress, was upheld by this Court upon the theory that such power transcends all state action. (*Missouri* v. *Holland,* 252 U. S. 416.) Such Act was not sustained under the Commerce Clause. The case of *Oklahoma* v. *Kansas Natural Gas Co.,* 221 U. S. 229, is not contra to the previous cases upholding the right of the states to preserve their natural resources. That decision nullified an Oklahoma statute having to do with the exportation of natural gas from the state; but the Court carefully distinguished between the inherent power of a state to protect its own property by prohibiting the exportation of natural resources which are its property, such as wild game, as distinguished from such property as natural gas, which is the property of the surface proprietors and not that of the state. It is our position that the Oklahoma case is an authority confirming the power of a state to protect its property, without being fettered by the Commerce Clause.

It is true that a state road is not a natural resource. It is an artificial structure. But it is state property, built and maintained by the state in discharge of one of its great-

est sovereign powers, that of providing its citizens with means of transportation and communication. The essence of *Oklahoma* v. *Kansas Natural Gas Company, supra,* and the other cases just cited is that it is the property right or right of ownership of a state which gives the state immunity from the Commerce Clause. Consequently, a state road comes within the same category as any other property of a state.

Elsewhere we refer to Justice Taney's pronouncement regarding the power of a state to regulate its own highways (*Searight* v. *Stokes,* 44 U. S. 150-170). A more comprehensive discussion of the same subject by Justice Bradley is to be found in the case of *Railroad Company* v. *Maryland,* 88 U. S. 456. Permit is to pause a moment to quote a sentence from Justice Bradley's opinion in the latter case which is quite pertinent at this point: "This unlimited right of the State to charge, or to authorize others to charge, toll, freight or fare for transportation on its roads, canals and railroads, *arises from the simple fact that they are its own works, or constructed under its authority. It gives them being.*"

The power of a state to own, maintain and conserve its property for a public purpose, be it a statehouse, a penitentiary or a road is a sovereign power. Without such power, there could be no sovereignty. The decisions of this court previously alluded to indicate that the Commerce Clause does not in any way take from or limit this power. For

that reason, when a state builds a road, which may be traversed by interstate commerce, it does not dedicate the road for regulation by Congress under the Commerce Clause. That power of regulation is in the state.

VI.

A regulation by the Federal government of the power to control the conservation of the highways of a state would not be a regulation of the business of interstate commerce. It would be a taking of property for a public use without compensation in violation of the Fifth Amendment to the Constitution of the United States.

Assume that state roads were so much unoccupied state lands. Could the Federal government build roads across those unoccupied lands without making compensation to the state as required by the Fifth Amendment? If the answer is "no", then what difference does it make if the state lands are occupied by a slab of concrete or a covering of gravel and are used as roads? There are thousands of miles of unimproved rural dirt roads in this country which, save for a small amount of grading, are in a state of nature. From a physical standpoint they are in much the same condition as an equal amount of state-owned land used for farming or reserved for future public use. Could it be possible that the Federal government could seize either a state farm or a dirt road for the purpose of building its own highway without making the state whole? It is obvious that the answer does not lie in the character

of the property. A state has as much a property right in a road as it has in a farm or a state house. The questions to be considered are (1) whether or not the Fifth Amendment requires that the United States must compensate a state before taking one of its highways and (2) whether or not a regulation by Congress of the nature under consideration here constitutes a taking within the inhibition of the Fifth Amendment.

(1)

In regard to whether or not the Fifth Amendment requires compensation to be made by the United States for the taking of a state highway, the question has been definitely settled in the affirmative by this court. (*St. Louis* v. *Western Union Co.*, 148 U. S. 92). There a telegraph company had attacked the constitutionality of an ordinance which exacted a charge of five dollars a pole for the use of city streets. The court upheld the ordinance. In delivering the opinion of the court, Justice Brewer said the following (p. 100):

> "It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a State. It is like any other franchise, to be exercised in subordination to public as to private rights. While a grant upon one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty. No one would suppose that a franchise from the Federal government to a corporation, State or national, to construct interstate roads or lines of travel, transportation or communica-

tion, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a State. It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the state-house grounds of the State, and construct its depot there, without paying the value of the property thus appropriated. Although the state-house grounds be property devoted to public uses, it is property devoted to the public uses of the State, and property whose ownership and control are in the State, and it is not within the competency of the national government to dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are the public property of the State. *While for purposes of travel and common use they are open to the citizens of every State alike, and no State can by such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another state or a corporation of the national government, it is within the competency of the State, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation.* It matters not for what the exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the State may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated."

In *Western Union Telegraph Co.* v. *Richmond*, 224 U.S. 160-169, the court said, "The inability of the State to prohibit the appellant from getting a foothold within its territory, both because of the statute and of its carrying on of Commerce among the states, gives the appellant no right to use the soil of the streets, even though post roads, as against private owners or as against the city or state where it owns the land."

The principle of law enunciated by the court in the cases just cited is not a far cry from the statement of Justice Taney in the case of *Searight* v. *Stokes*, 44 U. S. 150-170. There it appeared that the Cumberland Road had been ceded to Pennsylvania by the United States upon the proviso that vehicles carrying the United States mails should be permitted to use the road free from tolls. The court was called upon the determine whether or not such proviso should apply to a private contract hauler who, in addition to carrying the mails, transported passengers and baggage. The court held that such private party came within the proviso. In considering the case, Justice Taney said the following:

> "* * * * If the state had made this road herself, and had not entered into any compact upon the subject with the United States, she might undoubtedly have erected toll-gates thereon, and if the United States afterwards adopted it as a post-road, the carriages engaged in their service in transporting the mail, or otherwise, would have been liable to pay the same charges that were imposed by the state on other vehicles of the same kind. And as any rights which the United States might be supposed to have acquired

> in this road have been surrendered to the state, the power of the later is as extensive in collecting toll as if the road had been made by herself, except in so far as she is restricted by her compact; and that compact does nothing more than exempt the carriages laden with the property of the United States, and the persons and baggage of those who are engaged in their service. Toll may therefore be imposed upon every thing else in any manner passing over the road; restricting, however, the application of the money collected to the repair of the road, and to the salaries and compensation of the persons employed by the State in that duty."

It is apparent, from what has just been quoted that the court considered the property right of the State of Pennsylvania in its roads was of such magnitude that it is beyond the power of the Federal government to use them without paying compensation. It is quite possible that the states have surrendered the right to collect tolls from the national government by the acceptance of the benefits of the Federal Highway Acts of 1916 and 1921. (See Point X of Argument.) However, no other right of the States in their roads has been surrendered.

That the Fifth Amendment is a limit upon Congress in the exercise of its authority under the Commerce Clause, there can be no doubt. (*Monongahela Navigation Co.* v. *U. S.*, 148 U. S. 312-336.) In that case, Justice Brewer said, "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment, we have heretofore quoted. Congress has supreme control over the

regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post-offices and post-roads; but, if Congress wishes to take private property upon which to build a post-office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. And if that property be improved under authority of a charter granted by the State, with a franchise to take tolls for the use of the improvement, in order to determine the just compensation, such franchise must be taken into account. Because Congress has power to take the property, it does not follow that it may destroy the franchise without compensation. Whatever be the true value of that which it takes from the individual owner must be paid to him, before it can be said that just compensation for the property has been made. And that which is true in respect to a condemnation of property for a post-office is equally true when condemnation is sought for the purpose of improving a natural highway. Suppose, in the improvement of a navigable stream, it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of Congress to condemn whatever land may be necessary for such canal, there can be no question; and of the equal necessity of paying full compensation for all private property

taken there can be as little doubt. If a man's house must be taken, that must be paid for; and, if the property is held and improved under a franchise from the State, with power to take tolls, that franchise must be paid for, because it is a substantial element in the value of the property taken. So, coming to the case before us, while the power of Congress to take this property is unquestionable, yet the power to take is subject to the constitutional limitation of just compensation. It should be noticed that here there is unquestionably a taking of the property, and not a mere destruction. It is not a case in which the government requires the removal of an obstruction. What differences would exist between the two cases, if any, it is unnecessary here to inquire. All that we need consider is the measure of compensation when the government, in the exercise of its sovereign power, takes the property."

Not only is the Fifth Amendment a limit upon the power of Congress over interstate commerce, but over other great powers given by the Constitution, such as the bankruptcy power (*Louisville Bank* v. *Radford,* 295 U. S. 555-589) and the power to tax (*Heiner* v. *Donnan,* 285 U. S. 312-326).

(2)

The next question regards whether or not the regulation in question of a state road by Congress would amount to a taking within the inhibition of the Fifth Amendment. In other words, we maintain that a basic regulation by

Congress of the manner of use of state property would violate the very letter and spirit of the Fifth Amendment.

Elsewhere we argue that a regulation of the nature we are considering is not *per se* a regulation of interstate commerce; but that such a regulation by Congress would deprive a state of the power to conserve its own property. We insist that such a situation would result in a taking of property. Virtually all courts of last resort agree that the term "property" as used in constitutional provisions requiring compensation for taking private property includes not only the tangible subject matter or corpus, but also every right which accompanies ownership, such as the right to use and exercise full dominion over the property. The rule is well stated in the case of *Scott* v. *Manhattan Ry. Co.,* 17 N. Y. S. 364-365, where it is said: "As the value of property results wholly from its use, it follows that to deprive the owner of its most advantageous use is a deprivation of property. Indeed, all that is beneficial in property arises from its use, and the fruits of that use; and whatever deprives a person of them deprives him of all that is desirable or valuable in the title or possession; and whatever limits or interferes with the most advantageous use of the property does a substantial injury to the title and possession, which is not compensated by nominal damages." In the case of *Old Colony and Fall River R. R. Co.* v. *County of Plymouth,* 14 Gray, 155-161, Chief Justice Shaw said: "The word 'property' in the tenth article of

the Bill of Rights, which provides that 'whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor' should have such a liberal construction as to include every valuable interest which can be enjoyed as property and recognized as such." The Supreme Court of Illinois expressed the rule succinctly in the case of *Bailey* v. *People,* 190 Ill. 28-33, where it is said: "The term property includes every interest any one may have in any and everything that is the subject of ownership by man, together with the right to freely possess, use, enjoy and dispose of the same." In the case of *Pumpelly* v. *Green Bay Company,* 80 U. S. 166-177, Justice Miller said: "It would be a very curious and unsatisfactory result if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for a public use. Such a construction would pervert the

constitutional provision into a restriction upon the rights of the citizen, as those rights stood at common law, instead of the government, and make it an authority for the invasion of private rights under the pretext of public good, which had no warrant in the law or practices of our ancestors.''

The situation in the case at bar has no analogy whatsoever to the decisions of this Court upholding statutes outlawing the use of intoxicating liquor, even though it might have been lawfully acquired or owned prior to the passage of the statute. (*Samuels* v. *McCurdy,* 267 U. S. 188; *Crane* v. *Campbell,* 245 U. S. 304.) Those statutes were upheld upon the ground that the evils attendant upon the use of intoxicating liquor are such that the state has the absolute power to prohibit their sale or possession in the interest of the welfare of its citizens; but no court has ever taken it upon itself to permit the seizure or use by the sovereign of private property which has no inherent qualities of evil requiring its confiscation. Such a rule of law would violate the very foundations of democratic government.

As far as the Fifth Amendment is concerned, could there be any difference between the United States entering upon and building a road upon unoccupied state land without making compensation therefor and the United States fixing regulations for the use of state land occupied as a public road? Since the right of property includes the right

to manage it and exercise dominion and control over it, where does any right of property remain if a non-owner arrogates to himself the power to manage and control it? Is property any the less taken if the right of control is taken from the owner than if it is seized in its entirety by an intruder? If the right of control vanishes, where does the right of property remain?

It is hornbook law that the right of ownership of private property is subject to reasonable local police regulations, such as building ordinances, restrictions upon the sale of intoxicating liquor, zoning laws and the like; but beyond that point, governmental control over property amounts to a taking for a public use. Wherein lies the point at which police regulations over private property end and the taking for a public use begins? There is a vast difference between an incidental injury to private property resulting from the exercise of proper police regulations and the taking of property by the sovereign for a public use without paying compensation as required by the constitution.

The distinction is apparent between a governmental interference with property rights (1) as the result of the exercise of police powers and (2) where there is a taking and using for a public use. The object sought in each case is different, although there may be an interference with the use in both instances. In the first case, the interference is not primarily for a special use by the public but is for

the protection of the health, morals and general welfare of the citizens. In the case of a reasonable exercise of police power to attain that end, the property owner must submit. In the second case the end sought is primarily the special use of private property for a public purpose. The public is to use the property. The property taken has no inherent qualities which require regulation for good order or for the protection of society. This distinction was well put by the Court of Claims in the case of *Heflebower* v. *U. S.*, 21 Ct. Cl. Reports 228-237, where it is said: "But there is a distinction to be drawn between property used for government purposes and property destroyed for the public safety. If the conditions admitted of the property being acquired by contract and of being used for the benefit of the government, the obligation attaches, and must be regarded as acquired under an implied contract; but if the taking, using or occupying was in the nature of destruction for the general welfare or incident to the inevitable ravages of war, such as the march of troops, the conflict of armies, the destruction of supplies, and whether brought about by casualty or authority, and whether on hostile or national territory, the loss in the absence of positive legislation, must be borne on whom it falls, and no obligation to pay can be imputed to the government." Further expression of the same thought is to be found in *1 Lewis on Eminent Domain, Sec. 6, 1909 Ed.*, where the author says: "But the moment the legislature passes beyond mere regulation, and attempts to deprive the individual of his prop-

erty, or of some substantial interest therein, then the act becomes one of eminent domain, and is subject to the obligations and limitations which attend an exercise of that power."

This Court has held that where the government floods lands belonging to a private owner, there is a taking within the scope of the Fifth Amendment; that while the title may not be appropriated, yet such an invasion takes away the use of property so that it is of little consequence in whom the fee may vest. (*U. S.* v. *Lynah,* 188 U. S. 445.)

In *Vol. 4, McQuillen on Municipal Corporations (2nd Ed.), Sec. 1589,* the author says: "The question of what constitutes a 'taking' of property within the meaning of such constitutional provisions has been the subject of many decisions, and in connection therewith the question of what is 'property' has been necessarily involved. The law as to what constitutes a taking has undergone a radical change during the last few years. Formerly it was limited to the actual physical appropriation of property or a divesting of title, but now the rule adopted in many jurisdictions and supported by the better reasoning is that when a person is deprived of any of certain rights in and appurtenant to tangible things, he is to that extent deprived of his property, and his property may be taken in the constitutional sense, though his title and possession remain undisturbed; and it may be laid down as a general proposition, based upon the nature of property itself, that, whenever the law-

ful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, *pro tanto,* taken, and he is entitled to compensation."

There is a marked difference between a police regulation, such as a zoning ordinance, which only requires the owner of property to submit to restrictions *in his own use of his own property,* and a governmental fiat requiring the owner of property to suffer restrictions to be placed upon his property, *not for his own use, but for a special use by others.*

Police regulations which are reasonable and which do not require the owner to turn over his property to the public for a special use do not amount to taking of property in the constitutional sense of the term. Property is not taken when the owner enjoys its exclusive use, even though he may be restricted in the enjoyment of it. On the other hand, when the owner is forbidden to regulate the use which the public may make of his property, a taking occurs *for the reason that there occurs a burden of public servitude upon the property.*

It is the subjection of private property to a public servitude that marks it as a taking of property for a public use. For example, this Court has held that where the War Department fired its guns so that the shells would cross in the air over private property, the property was subject

to such a servitude as to constitute a taking within the meaning of the Fifth Amendment. (*Peabody* v. *United States,* 231 U. S. 530.)

In *Cooley's Constitutional Limitations (1927 Ed.), pp. 1109-1110,* the learned author defines eminent domain as follows: "The right itself is generally defined as if it were restricted to such cases, and is said to be that superior right of property pertaining to the sovereignty by which the private property acquired by its citizens under its protection may be taken *or its use controlled for the public benefit without regard to the wishes of the owner.*"

The point we desire to make clear is that any Act of Congress which would permit the use of state roads by persons engaged in interstate commerce with any type of vehicle which Congress would consent to be used without regard to the wishes of the owner (the States) would not be a mere regulation of the business of interstate commerce. *Such action would compel the States to permit a special use of their lands against their will by third persons.* Requiring the states to submit the use of their property to third persons against their will would bring the action of Congress squarely within Mr. Cooley's definition of what is an exercise of the power of eminent domain, *"its use controlled for the public benefit without regard to the wishes of the owner."* That would be compulsory dedication of property for the unbridled use of those who had no interest or right of ownership in it whatever. The

property would pass from the domain of the States to the domain of the United States through eminent domain without compliance with the Fifth Amendment.

The manufacturer who ships his goods in interstate commerce, though submitting to the regulation by Congress in the use of his property, is not required to permit the general public to make a special use of his property. Regulations of such a nature by Congress do not amount to an exercise of the power of eminent domain. On the other hand, regulations by Congress which would compel private property itself to be dedicated for a special public use; regulations which would require private property to submit to a public servitude for a use by other than the owner without compensation pass from the realm of legitimate regulations to that of the unlawful exercise of the power of eminent domain.

In case Congress would take from the states the power to regulate traffic upon their highways what rights would the states have in the residue? We submit that, save for the right to collect taxes, the naked power of ownership alone would remain. Because of their peculiar nature, roads can only be used for the bearing of traffic, nothing else. When the power to regulate traffic is gone all power of management or control departs with it. Taking from the states the power to regulate traffic upon their roads strikes at the very heart of ownership. That is a taking of property. Such action upon the part of Congress would deprive

the States of the exclusive use of their property and devote it to the service of the national government against their will.

In the case of *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 229, this court held a state statute invalid which prevented the owner of natural gas from exporting it from the state. The court said, (p. 254), "It does not protect the rights of all surface owners against the abuses of any. It does not alone regulate the right of reduction to possession of the gas, but when the right is exercised, when the gas becomes property, takes from it the attributes of property, the right to dispose of it; indeed, selects its market to reserve it for future purchasers and use within the state on the ground that the welfare of the state will thereby be subserved. * * * Gas, when reduced to possession, is a commodity; it belongs to the owner, and, when reduced to possession, is his individual property, subject to sale by him * * *."

A clear statement is to be found in the case *In Re Jacobs,* 98 N. Y. 98-105, where it is said, "The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed or its value annihilated; it is owned and enjoyed for some useful purpose and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived;

and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property."

The regulation of traffic by Congress upon the roadways of a state would amount to the nationalization of state property without the consent of the states. A state has no authority to convert a private enterprise into a public utility under the guise of its police powers. (*Producers Transportation Co.* v. *R. R. Co.,* 251 U. S. 228-230; *Michigan Commission* v. *Duke,* 266 U. S. 570-578.) In the Producers Transportation Company case, the court said, "The State could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; *for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment.*" By the same token we say that Congress has no power to nationalize state roads against the will of the states without making compensation therefor as required by the Fifth Amendment. If the ordinary police powers of a state do not permit private property to be converted into a public utility—if that is a taking of property without making compensation in violation of the Constitution, then what is to be said about an Act of Congress which would convert state roads into national highways by taking the regulatory powers of the states away from them and vesting them in Congress?

Since it is clear that the Fifth Amendment protects the states just as much as it does private parties from seizure of their property by the United States, and that the deprivation of the owner of property of his right to manage and regulate its use is a taking of property just as much as if the owner were physically ousted from possession, then we maintain that the Fifth Amendment is a limitation upon the power of Congress to control the traffic upon state roads.

If, as Justice Bradley said, in *St. Louis* v. *Western Union Telegraph Co., supra,* Congress is without power to permit a telegraph company to use city streets with its poles without making compensation, then what authority has Congress to permit an unbridled use of traffic upon those same streets? The only difference is in the character of use. If the power of regulation of traffic is in Congress and Congress should elect to act under that power, then the power of Congress is subject to no restraints. Its power under the Commerce Clause knows no limits, save those fixed by the Constitution itself.

If the Fifth Amendment is not a bar to Congress, what is there in the Constitution to prevent Congress from removing all restraints upon traffic? If the states have dedicated their highways to Congress for the purpose of regulation under the Commerce Clause, what restraint upon Congress remains? It is undeniable that if the power to regulate the weights of motor vehicles is exclusively in the

states, then the people of the states, speaking through their legislative representatives, might choose to remove all restrictions so that the rapid destruction of the highways would follow. If, on the other hand, such power is in Congress when it chooses to act, then it too might lift all restrictions with the resulting loss of millions of dollars of property paid for by the people of the respective states. Thus, it is seen that the use of public roads, whether by a telegraph company by the occupancy of poles, or by the unbridled use of traffic, while differing in kind, might both arrive at the same result, a complete eviction of the state from its property, unless we say that the bar of the Fifth Amendment is as full in the one case as it is in the other.

VII.

In maintaining and owning roads the states are not engaged in interstate commerce.

True it is that when Congress regulates *the business of interstate commerce,* private property rights must yield to a reasonable exercise by Congress of its powers under the Commerce Clause. The railroad company must submit to a multitude of regulations which in each instance interferes with the management and control of its property. The same applies to a common carrier by motor vehicle who elects to cross state lines. The manufacturer who would ship his products in interstate commerce must also yield.

What is there, then, that sets the states apart in the regulation of their roads so that they are immune from the Congressional action?

The states are not engaged in the business of interstate commerce. Except in certain extraordinary cases, they can cross no state lines to exercise their sovereign powers elsewhere. Their exercise of sovereignty is ordinarily limited to their own confines. They build their highways in their sovereign capacities in discharge of their duties to their own citizens. Their highways do not cross state lines. They do not maintain highways in other states. The only connection the highways of the states have with interstate commerce is that they may be used by vehicles passing from one state to another. One of the inherent powers of sovereignty is to exercise police powers for the protection of sovereign property. This power is as inherent as the power to tax. Congressional powers cannot subordinate this indispensable power of sovereignty without taking the property of the states. When the power of the sovereign to control its property goes, its property rights follow. Its sovereignty is gone. There cannot be two rights of sovereignty in the same property, one state and the other Federal. The power of conservation cannot exist in both governments at the same time. It is inconceivable how the property of a state, not used by the state in the business of interstate commerce, never dedicated by the state to the use of interstate commerce, built within the

confines of the state and used, not by the state, but by third parties, as an incident to the passage of vehicles in interstate commerce, can be controlled by Congress without the exercise of the power of eminent domain. Such Congressional action would not be the regulation of interstate commerce. It would be the control by Congress of state property, a management of sovereign property other than its own; a government of property, not a management of interstate commerce; a superintendent of state assets not used by the states in interstate commerce; *the foisting of the same Federal management upon state property as Congress may assert upon commercial enterprise as the price the latter must pay for the privilege of engaging in commerce between the states.* It would be an exclusive exercise of power by Congress in which the states might not interfere. The exercise of control by one sovereign excludes control by the other. As Justice McLean expressed it in The Passenger cases, (7 Howard 282-398): "A concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impracticable in action. It involves a moral and physical impossibility. - - - - If the powers be equal, as must be the case, both being sovereign, one may undo what the other does, and this must be the result of their action."

The management and control of public property is government. Without this, there could be no government. Without it, the States could not be sovereign.

While it is true that the Commerce Clause extends to every instrumentality used by one engaged in interstate commerce, provided that the instrumentality is under the ownership or control of the person engaged in interstate commerce, it by no means extends to instrumentalities owned or controlled by those not engaged in interstate commerce. There is a wide difference between instrumentalities of interstate commerce which are owned and employed by operators engaged in interstate commerce, and instrumentalities of interstate commerce used by such operators, but not owned or controlled by them. That was the effect of the cases of *Detroit International Bridge Co.* v. *Corporation Tax Appeal Board,* 294 U. S. 83-86, and *Henderson Bridge Co.* v. *Kentucky,* 166 U. S. 150-153.

The first named case involved the power of the State of Michigan to assess a privilege tax upon a toll bridge corporation which maintained a bridge between this country and Canada. The opinion of the court discloses that the bridge corporation collected tolls from vehicles and pedestrians crossing its structure, but that it operated no vehicles. Upon the authority of the case of *Henderson Bridge Co.* v. *Kentucky, supra,* the court held that the bridge corporation was not engaged in interstate commerce. The case of *Henderson Bridge Company* v. *Kentucky* involved the power of the State of Kentucky to include franchises that state had granted to the corporation in determining the valuation of the company's property for taxation. The court said, (p. 153):

> "The company was chartered by the State of Kentucky and the state could properly include the franchises it had granted in the valuation of the company's property for taxation. * * * The regulation of tolls for transportation over the bridge considered in *Covington and Cincinnati Bridge Co.* v. *Kentucky,* 154 U. S. 204, presented an entirely different question. Clearly the tax was not a tax on interstate business carried on over or by means of the bridge, *because the bridge company did not transact such business. That business was carried on by the persons or corporations which paid the bridge company tolls for the privilege of using the bridge.*"

It is to be observed from these cases that the *res* or instrumentality incidentally used in interstate commerce was not owned or controlled by the persons who were engaged in carrying on interstate commerce. The bridge corporations did not transact the business of interstate commerce although they owned instrumentalities capable of such use by others.

Substantially the same thought underlies the decisions of this court in connection with the control of Congress over the intrastate activities of railroad companies. We refer to some of those cases elsewhere. However, we shall refer to a few of them here to illustrate our point.

The power of Congress is supreme in the following cases:

When state authorities seek to compel the erection of a union state so expensive as to deplete the financial resources of the railroad, *Railroad Commission* v. *South. Pac. Co.,* 264 U. S. 331; when a railroad seeks to construct an

intrastate branch line which will deplete its own financial resources or those of another interstate carrier, *Texas & Pac. Ry. Co.* v. *Gulf etc. Ry. Co.*, 270 U. S. 266; the issuance of securities by a railroad company, *Venner* v. *Michigan Cent. R. R. Co.*, 271 U. S. 127.

In all of those cases the intrastate instrumentality over which the control of Congress was exercised was but a unit in an interstate system; and the unit was under the control or ownership of the interstate system.

No case has ever been brought to our attention where an instrumentality or commerce not owned or controlled by one engaged in interstate commerce has been held to be an instrumentality of interstate commerce. The situation in the case of state-owned roads is strikingly similar to that of the bridge cases just referred to. It is unlike that of the railroad cases.

The case of a state-owned railroad is to be sharply distinguished. Such a railroad if engaged in interstate commerce is subject to control by Congress. (*U. S.* v. *California*, 297 U. S. 175.) In that case the railroad had track connections with an interstate line and linked that and three other interstate lines with yards in San Francisco. It received and transported freight by its own engines, and hauled freight and cars offered it by railroads, steamship companies and industrial plants for a flat charge per car. It is important to note that the railroad was engaged in the business of hauling freight for interstate lines.

VIII.

In so far as interstate commerce is concerned, there is no analogy between the states in the ownership of their roads and railroad companies and other commercial enterprises engaged in business of an interstate character.

No analogy is furnished in the case of governmental regulation of public utility companies unless it can be said that by building a road a state dedicates it for the use of the United States. That which gives the inherent power of government to regulate public utitlities is that a public utility company by devoting its business to the public use, grants the public an interest in that use to the extent of that interest, and must submit to be controlled by the public for the common good to the extent of the interest it has thus created. (*Munn* v. *Illinois,* 94 U. S. 113-126; *Wolff* v. *Industrial Court,* 262 U. S. 522-535.) In the case of one who seeks to engage in an interstate business, he must submit to the power of Congress under the Commerce Clause to regulate interstate business so that no analogy is furnished there. Submitting to the control of Congress over interstate commerce is a prerequisite to the right to engage in an interstate business.

The interstate railroad company or the manufacturer who ships his goods in interstate commerce must submit to the control of Congress as the price for the privilege of engaging in interstate commerce. Cases of this Court upon the subject matter of those two groups clearly have no

application to the right of a state not engaged in interstate commerce to insist upon the right to say how it shall preserve its property. The business of operating a railroad and all of its ramifications are so clearly subjects of interstate commerce within the sphere of Congressional action that but little comment need be required to distinguish such a situation from that of state owned roads. The railroad is a public utility. It dedicates its property to the public service and to the control of Congress in engaging in the business of interstate commerce. It is a corporation organized for pecuniary profit. Its roadbed may extend from state to state. Its primary object is for the carrying on of commerce intrastate and interstate. It ships goods and carries passengers. The state is not a public utility. It does not dedicate its property to the use of Congress. It does not engage in the business of interstate commerce. It does not ship goods or carry passengers from state to state. It does not engage in private commercial enterprise. Its roads are held in its sovereign capacity. Its roads are not designed for the purpose of carrying on interstate commerce by the state. The mere fact that one engaged in interstate commerce may have the privilege of using the property of one not engaged in interstate commerce does not subject the property of the latter to the control of Congress. However beneficial property may be to interstate commerce, Congress can acquire no jurisdiction over it if the owner does not engage in the business of interstate commerce. This is especially true when the owner of the

property is one of the states and is not in the business of engaging in commercial intercourse with its sister states.

That which gives Congress jurisdiction to permit the abandonment of an unprofitable intrastate railroad over the protest of the state in which it is located is that it is operated as a branch of a road which is engaged in interstate commerce and its unremunerative operation might impair the main line as an artery of interstate commerce. (*Colorado* v. *U. S.*, 271 U. S. 153.) Not long before the decision of the court in the case just cited, this Court refused to permit the Interstate Commerce Commission to authorize the abandonment of a Texas railroad upon the protest of the Attorney General of that State. (*Texas* v. *Eastern Texas R. R. Co.*, 253 U. S. 204.) In that case the road was owned and operated by a Texas corporation. It was an intrastate road and did not itself engage in interstate commerce, although interstate roads used its track. In the *Colorado* case the Court distinguished the *Texas* case and said of it (p. 169): "There the railroad was permitted to be relieved only from continuing operations in interstate commerce. It was being operated independently and not as a branch of any railroad engaged in interstate commerce." In the *Texas* case the Attorney General challenged the constitutionality of the power of the Commission to invade the field of intrastate commerce by permitting such an abandonment. The Court stated that while such a challenge provoked a serious constitutional question, it

was not necessary to pass upon it for the reason that the Interstate Commerce Act gave no jurisdiction to the Commission to permit such an abandonment. While it is true that in the *Texas* case the court did not pass upon the constitutionality of the power of Congress to permit the abandonment of an intrastate line, merely remarking that the question was a serious one, the Court made the following statement which we think is quite significant (p. 216): "The road lies entirely within a single state, is owned by a corporation of that state, and is not a part of another line. *Its continued operation solely in intrastate commerce cannot be of more than local concern.* It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce."

Although the Court did not in either case pass upon the power of Congress to invade the field of state power by permitting the abandonment of an intrastate railroad not a part of a railroad system engaged in interstate commerce, it is important to observe that the basis of the decision of the Court in the *Colorado* case was that the intrastate line was a part of a road which was actually engaged in interstate commerce and that the continuance of its operation would directly affect the interstate operations of the interstate system. We contend that this is the basis, and the only basis, which gives Congressional power over the construction of railroad station and terminal facilities.

If it is necessary that railroad affairs of an intrastate nature must have such a direct and substantial bearing upon an interstate system as would seriously impair the operations of the interstate business of the road before Congress can have jurisdiction, then how can it be said that a sovereign state, not engaged in interstate commerce, must submit its roads to the control of Congress for the only reason that persons engaged in private commercial enterprise in which the state has no interest, may avail themselves of the privilege of using its roads?

IX.

The control of Congress over navigation affords no analogy to the situation in the case at bar.

In the case of damages suffered by the owners of beds and shores of navigable waters resulting from governmental works in and of navigation, this court has refused to require that compensation be made and has held that the Fifth Amendment has no application. (*Gibson* v. *U. S.*, 166 U. S. 269; *Scranton* v. *Wheeler*, 179 U. S. 141.) These cases and others upon the same subject were fully discussed in the case of *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251. The comments made by the court in that case make it manifest that those cases have no application to the case at bar for the reason that, as the court expressed it, (p. 259) "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore

and the submerged soil is in the various states and individual owners under them, *it is always subject to the servitude in respect to navigation created in favor of the Federal government by the Constitution.''*

No such situation is present in the case at bar for the reason that artificial structures, such as roads, have been built upon land owned by the states without being subject to the servitude of the Federal government which was the condition imposed upon all navigable waters when the states were admitted to the Union. Title to the navigable waters passed from the United States to the States at that time subject to the servitude.

The Greenleaf Lumber Co. case comments upon substantially all of the cases decided by the Supreme Court prior to that time in which it had been held that the Fifth Amendment gave no protection to a property owner. It is to be observed that all of the cases reviewed by the court in the Greenleaf Lumber Co. case were bottomed upon the theory that a property owner can acquire no interest in a navigable waterway which is not subject to the servitude of the Federal government to make improvements in aid of navigation. We are familiar with no other line of cases, either before or after the Greenleaf Lumber Co. case, which justify the United States in taking property without making just compensation. We are confident there are none.

The jurisdiction of Congress over navigable waters is *sui generis*. Their very nature subjects them to the con-

trol of Congress. The term "commerce" includes navigation. The grant of power to Congress is to regulate navigation per se; and it is the right to regulate navigation that accounts for the plenary power of Congress over all navigable waterways. This was tersely expressed in the case of *Gilman* v. *Philadelphia,* 3 Wallace 713-724, where it is said, "*Commerce includes navigation.* The power to regulate commerce comprehends the control for that purpose, of all the navigable waters of the United States which are accessible from a State other than those in which they be. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress." In the historic case of *Gibbons* v. *Ogden,* 9 Wheaton 1, Chief Justice Marshall said, (p. 190), "All America understands and has uniformly understood the word 'commerce' to comprehend navigation. * * * * The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated when forming it." Since *Gibbons* v. *Ogden,* there has been no doubt but that the power of Congress over navigable streams is within the special province of Congress arising from the fact that navigation is commerce. We have already stated that the power to regulate navigation was retained by Congress when the states were admitted to the Union. In the case of the thirteen original states this power was surrendered by them to the United

States when the constitution was adopted. (*Shively* v. *Bowlby,* 152 U. S. 1.) In the case of *Railroad Company* v. *Maryland,* 88 U. S. 456-470, the court stated that while Congress had power to regulate and control navigable waterways, such power does not extend to artificial means of travel, such as roads built and maintained by the States.

All navigable waters are subject to the servitude of Congress to control navigation. State roads are subject to no such servitude.

X.

The previous decisions of this Court touching upon state regulations of roads do not sustain the power of Congress to remove from the states the right to conserve their roads.

All of these decisions may be generally classified in three groups, viz:

(1) Cases involving motor vehicle taxes, which is by far the largest group.

(2) Cases involving the validity of regulations of weights and dimensions.

(3) Cases involving the right of a motor vehicle operator to engage in interstate commerce.

So far, but two cases which have had the attention of this court have dealt directly with the power of the States to regulate the weights and dimensions of motor vehicles,

Morris v. *Duby,* 274 U. S. 135 and *Sproles* v. *Binford,* 286 U. S. 374. In both cases the validity of the state statutes was upheld. In neither of those cases did the court say that Congress might regulate the use of state roads without exercising the power of eminent domain. While it is true that in both opinions the court made the general statement that in the absence of national legislation the States may prescribe uniform regulations for motor vehicles and such statement might connote that Congress has power to defeat state power in this respect, yet an analysis of those cases does not sustain such a construction.

Congress might conceivably fix the weights and dimensions of vehicles engaged in interstate commerce, so long as such weights and dimensions would be within the limits allowed by the particular states. For example, assume that the weight limits of a particular state would be 20,000 pounds per vehicle. Congress might consider that the business of interstate commerce would be facilitated by the use of light weight commercial vehicles and might forbid the use of vehicles in interstate commerce weighing more than 10,000 pounds, or any other weight up to 20,000. Congress, having entered the field, its jurisdiction would be exclusive up to the point of the limit fixed by the State. One could not engage in interstate commerce by motor vehicle without complying with the limits fixed by Congress. Beyond that point, Congress would be substituting its judgment as to what might be a reasonable limit to conserve

the highways for that of the State. Below the limit of 20,000 pounds the regulation of Congress would not trench upon the power of the State to protect its property. The State could not permit a vehicle having a weight of 20,000 pounds to engage in interstate commerce, if the limit fixed by Congress were 10,000 pounds. That and no more was intended by the court in *Sproles* v. *Binford,* and *Morris* v. *Duby,* when it said that in the absence of national legislation the States may prescribe uniform regulations applicable alike to vehicles moving in interstate commerce and those of its own citizens.

The phrase used in the Sproles and Morris cases concerning the power of the States to regulate motor vehicles in the absence of national legislation has been frequently employed by the court in motor vehicle cases during the last twenty or more years. It had its origin in the case of *Hendrick* v. *Maryland,* 235 U. S. 610. We maintain that the oft repeated use of such phrase has never amounted to a ruling by this court that Congress might invade the field of State power to regulate the conservation and safety of use of State property for the following reasons:

(1) *Hendrick* v. *Maryland* was a motor vehicle tax case. It involved the power of Maryland to exact registration and license fees from the owners of motor vehicles. There was no issue in the case about the power of the State to regulate the weights and dimensions of motor vehicles. In sustaining the power of Maryland to require

the registration of drivers and the payment of license fees the court made the abstract statement that in the absence of national legislation, a state may prescribe uniform regulations for public safety and order in respect to the operation of motor vehicles and to that end might require the registration of drivers and payment of license fees. There was nothing said in that case, and the court did not pass upon the power of the State to conserve its property. The remarks of the court were directed solely to the extent to which the State might go in regulating the business of interstate commerce. The Commerce Clause prevents a State from taxing interstate commerce or burdening interstate commerce with taxes. And this applies equally to motor vehicle taxes as well as other forms of state taxes. It is manifest that what the court said in the Hendrick case about the application of the Commerce Clause to state regulations of drivers and the exaction of motor vehicle taxes was limited solely to the issue in that case and was not intended to include anything about the conservation of state property.

(2) The decisions of this court cited in the Hendrick case were those sustaining the power of a State to enact reasonable police regulations. Most of them, such as *Smith* v. *Alabama,* 124 U. S. 465, deal with the police power of a State over railroad companies. *Nowhere in the opinion did the court refer to Geer* v. *Connecticut,* 161 U. S. 519, or *any of the other cases sustaining the inherent power of a State to protect its property.* That would seem to make

it very clear that the remarks of the court were limited to the power of Congress to limit the business of interstate commerce .

It is important to note that in *Morris* v. *Duby,* after the Court cited *Hendrick* v. *Maryland* in support of the power of a state to regulate in the absence of national legislation, (p. 143) the Court proceeded at pp. 144-145 to say: "*Conserving limitation is something that must rest with the road supervising authorities of the state, not only on the general constitutional distinction between national and state powers, but also for the additional reason that under convention between the United States and the state, in respect of these jointly aided roads, the maintenance after construction is primarily imposed on the State.*" We submit that the statement just quoted makes it plain that in the opinion of the Court the power of a state to conserve its property is inherent. And that all that was intended by the citation of *Hendrick* v. *Maryland* was that the states may not regulate the business of interstate commerce by imposing burdensome taxes and the like or by permitting the use of motor vehicles engaged in interstate commerce having weights and dimensions exceeding those forbidden by Federal regulations. Any other construction of the opinion of the Court would result in an irreconcilable conflict within the opinion. *Sproles* v. *Binford,* while citing *Hendrick* v. *Maryland,* as we have already observed, makes no statement in derogation of state power to conserve state

property. *Sproles* v. *Binford* cites *Morris* v. *Duby,* which latter case, we maintain, is strong authority to sustain the state power.

What gives jurisdiction to a Federal Court in cases involving the validity of state motor vehicle taxes is that a state has no power to *burden the business of interstate commerce.* The question of the power of the states to protect and conserve their property does not enter into those cases. In such cases as *Interstate Transit, Inc.,* v. *Lindsey,* 283 U. S. 183, and *Sprout* v. *South Bend,* 277 U. S. 163, motor vehicle taxes were held invalid for the reason that the taxes imposed were not of a compensatory nature, but were taxes upon the privilege of engaging in the business of interstate commerce. Hence they amounted to a regulation of the business of interstate commerce and were invalid for that reason. It may be safely said that wherever this Court has held a motor vehicle tax invalid it has been upon the grounds that the tax was one upon the privilege of engaging in interstate commerce.

Carrying the thought still further, support for our position is found in the case of *Buck* v. *Kuykendall,* 267 U. S. 307. There the Director of Public Works of the State of Washington, acting under a statute of that state, refused to issue a certificate of convenience and necessity to the operator of an interstate auto stage line. In holding the statute unconstitutional, this Court said (pp. 315-316): "Its primary purpose is not regulation with a view to saftey

or conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. * * * *Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce.*" In a more recent case, *Bradley* v. *Public Utilities Commission,* 289 U. S. 92, Bradley, who was an interstate operator, had been denied a certificate of convenience and necessity by the Public Utilities Commission of Ohio upon the grounds that the route selected by him was already too congested with traffic. In upholding the action of the Commission, this Court distinguished the *Buck* case by pointing out that in that case, safety of operation was merely an incident of the denial of the certificate; that its purpose was to prevent competition. But that in the *Bradley* case the denial of the certificate was primarily in the interest of safety and its effect upon interstate commerce was merely an incident.

Underlying all of the cases upon the subject of motor vehicle use of state roads is the liberal policy of this Court in giving the police powers of the states as wide a latitude as possible but at the same time preventing any interference upon the part of the states in the regulation of the business of interstate commerce. The cases involve a multitude of different types of statutes, facts and circumstances. Each case presents a different factual problem.

But the one yardstick by which all are measured is whether or not there has been an unreasonable interference with the business of interstate commerce. In none of them was anything said which might subtract from state power to regulate the use of state property or that Congress might do so without following the Fifth Amendment.

We think that Congress has full authority to regulate the business of interstate commerce by fixing the rates of motor carriers, providing for uniform systems of accounts, regulating the hours of service of drivers and all other matters touching upon the business of interstate commerce by motor vehicle. All those matters are regulations of the business of interstate commerce. But beyond that point, permitting Congress to enter into the field of determining for the states what type of vehicle would or would not be ruinous to its roads; substituting its judgment in the matter of conservation of state property for that of the owner; and taking control of such conservation away from the owner would constitute an unlawful exercise of the power of eminent domain.

There is not a syllable contained in any of the decisions of this Court which would even hint that the Commerce Clause gives Congress such unlimited powers. We repeat that statements found in these opinions to the effect that the states are free to act until Congress enters the field mean no more than that in matters affecting *the business of interstate commerce* the states are free to act so long

as their regulations are reasonable. Nothing more was intended.

XI.

State power to control the manner of use of state roads has not been surrendered by the states to Congress by the acceptance of the benefits of the Federal Highway Acts.

An excerpt from the report of the House Committee on Roads of January 6, 1916 is quite pertinent. It is as follows:

"FEDERAL PARTICIPATION"

"Roads are local concerns, and primarily it is the duty of the States to provide them for their people.

To carry and deliver the mail is a function of the Federal Government, and it is its duty to provide itself with the facilities necessary to a proper performance of this function, such as postmasters, post-offices and post-roads. A post-road is just as truly a postal facility as is a post-office. As in most rural communities it has been found less expensive and more expedient to rent post-offices than to build them, so it would be less expensive and more expedient to use the roads of the States as post-roads than it would to construct and maintain an independent system. In such case it would seem but just that the General Government should make some contribution to the construction and maintenance of the roads which it thus uses.

In times past when the volume and weight of postal matter were negligible the interest of the General Government in the condition of the roads was not substantial, but with the advent of rural free delivery came a Federal necessity for better roads, and with the now rapidly expanding parcel post that necessity has become acute.

JURISDICTION OVER ROADS.

Primarily roads are local concerns and jurisdiction over them belongs to the States and local authorities. This jurisdiction should never be disturbed by the General Government.''

House Reports, 64th Congress, 1st Session, 1915-1916, Vol. I, Miscellaneous I, page 4.

The following is taken from the report of the Joint Committee on Federal Aid in the Construction of Post Roads, House Documents No. 99, 63rd Congress, 3rd Session:

> ''That Congress should avoid criticism of the character above mentioned is no more important than that it should make careful provision for such administration of the Federal highway participation as will protect the several states in their right to control their local highway affairs and guard against dictatorship from a Federal Bureau in Washington.'' (pp. 22-23.)

The foregoing makes it plain that in 1916, when the first of the two highway acts was passed by Congress, there was no intention upon the part of Congress that the states should be compelled to surrender their sovereignty in ex-

change for the appropriations to be made by the central government. The Federal Highway Act of 1921 is only amendatory of the 1916 Act and makes no substantial changes in the earlier Act. The House Committee stated, in its report in substance, that since it had been less expensive for the government to use the existing roads of the states for the purpose of post roads than to build an independent system, it would be just for the government to return the obligation to the states by making some contribution to the states covering the cost of maintenance and construction; *But that in accepting contributions, the jurisdiction of the states over their roads would not and should not be disturbed.*

While it is true that reports of legislative committees cannot be resorted to for the purpose of construing a statute contrary to natural import (*U. S.* v. *Shreveport Grain and Elevator Co.*, 287 U. S. 77-83), yet, if the meaning of a statute be uncertain, the court is at liberty to have recourse to its legislative history and the statements of those in charge of it during its consideration by Congress for the purpose of ascertaining the intent of the legislative body (*U. S.* v. *Great Northern Ry. Co.*, 287 U. S. 144-154.) There is no direct language in either highway act providing for the extension of Federal power to state roads. It is our position that if the court should consider the intention of Congress uncertain, all doubt about the construction of the statute as to state power, if there be any, is

expunged by reference to the Congressional authorities just cited.

In the case of *Morris* v. *Duby, supra,* the court reviewed the three Federal Highway Acts quite extensively (pp. 140, 141) and reached the conclusion (p. 144) that there was nothing in the legislation of either the State of Oregon or of Congress to bind the State to continue the weight limits in force in Oregon prior to the acceptance of the Federal legislation by Oregon. In concluding, the court said (p. 145), "Regulations as to the method of use, therefore, necessarily remains with the State and cannot be interfered with unless the regulation is so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contribution to bettering the highway systems of the Union and to facilitating the carrying of the mails over them."

It is important to observe that immediately preceding the statement just quoted, the court had stated that conserving limitation was something that must rest with the State upon the constitutional distinction between national and state powers. What then did the court mean by saying next that state regulations must not be so arbitrary and unreasonable as to defeat the useful purpose for which Congress has made its appropriations? The Federal Highway Act of 1921 is entitled "An Act to amend the Act entitled 'An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes' approved July 11, 1916 as amended

and supplemented, and for other purposes." (Sec. 1. U. S. Code Anno, Title 23.) The only substantial limitation in the use of the highways placed upon the States by the Act of 1921 also found in the 1916 Act was that "All highways constructed or reconstructed under the provisions of this chapter shall be free from tolls of all kinds." (Sec. 9—Title 23, U. S. Code Anno.) None of the amendments to the Act subsequent to the year 1921 place any further limitations upon the States, save Section 9-B (U. S. Code Anno. Supplement) which permits the charging of tolls upon State-owned toll bridges only until such time as the cost of reconstruction shall have been paid.

When the title of the Act and the limitations just referred to are considered together, it is apparent that the useful purpose for which Congress appropriated funds was to aid the States in the construction (*by the states, not by Congress*) of roads which might be used as rural post roads by the former, *free from tolls.* Any other construction of what was the purpose of the Act and how far the States are bound by it must rest in implication; and sovereign powers of the States are not surrendered by implication. This court said in *Wheeling and Belmont Bridge Co.* v. *Wheeling Bridge Co.,* 138 U. S. 287-293, "An alleged surrender or suspension of a power of government respecting any matter of public concern must be shown by clear and unequivocal language; it cannot be inferred from any inhibitions upon particular officers, or special tribunals, or from any doubtful or uncertain expressions."

It must be remembered that, with a few notable historical exceptions, the United States has never built post roads. Roads built by the states have been designated by Congress as post roads and post routes by the Acts of Congress of 1872 and 1884. (Secs. 481-482, Title 39, U. S. Code Anno.) In recent years Congress has contributed funds to aid the states in post road construction; but the contribution made is negligible by comparison with the total local investment in city streets, county roads and rural highways.

If, as the court said, conserving limitation, must rest with the states, then if we construe the remainder of the opinion to mean that Congress may say what limitation may be placed upon the manner of use of the roads in order to prevent the defeat of the useful purpose for which Congress made its contribution, it would follow that the first part of the court's statement (concerning the power of conserving limitation being in the states) would be rendered meaningless. How could conserving limitation rest in the states if Congress could say what in its judgment would be such a limitation as to defeat the purpose for which it made its contribution? We believe that the court intended this and no more, viz: (1) The States cannot employ any indirect methods or subterfuge to exact tolls for the use of the roads. (2) The States cannot by arbitrary or capricious action so burden the use of the roads as to interfere with their use for the purpose of carrying the mails.

The States might not by arbitrary regulation prevent vehicles carrying the mails from rendering efficient service. In other words, this court might say, that a state statute regulating the weights and dimensions of motor vehicles, as applied to vehicles carrying the mails, is so lacking in any reasonable basis as to defeat the useful purpose for which Congress made its contribution. By accepting the benefits of the contributions by Congress, the States may have agreed not to burden the use of roads by vehicles carrying the mails; but they did not agree to let Congress say what regulations might be reasonable. They did not agree to give Congress further power under the Commerce Clause. This court may prevent the States from violating their pacts with Congress by enacting legislation which, when applied to vehicles carrying the mails, is unreasonable and arbitrary. Such power is in this court because it has the right to prevent a State from violating its agreement with Congress; but not because the State has delegated to Congress the power to regulate. That power was not surrendered to Congress by the States. This court said so in *Morris* v. *Duby*. Permit us to again repeat the language of the court. "An examination of the Acts of Congress disclosed no provision, express or implied, by which there is withheld from the State its ordinary police power to conserve the highways——— Conserving limitation is something that must rest with the road supervising authorities of the State."

Finally, the application of canon of statutory construction, *expressio unius,* should remove any doubts about holding against the retention of state authority. By expressing the particular conditions set forth in the Highway Acts, Congress limited the obligation of the States to those limitations. By accepting the benefits of the Acts, the States had the right to expect that no other particular conditions might be added by implication.

Respectfully submitted,

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AMICUS CURIAE.