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State and Federal Control of Carriers

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STATE AND FEDERAL CONTROL OF CARRIERS.

The legal problems that confront the carriers of our country, and the laws and decisions that make for the prosperity or destruction of these necessary arteries of commerce, are of vital interest to our profession. A great mass of our citizenship is directly or remotely interested in the proper management and control of common carriers, and thousands of interdependent industries are likewise affected thereby. The State and Federal Governments, in their dual capacities, have, of recent years, taken over the control and regulation of common carriers, and they are thus directly concerned in securing the most scientific laws for the regulation of carriers, since the development of the resources of the State and Nation and the commercial prosperity of our people are largely dependent thereon. Clearly, then, that which is of such vital importance to our country necessarily concerns the laywer, for he is interested in all governmental questions.

It is not with the rights of the shareholders or security holders of these *quasi*-public companies, as opposed to the right of the State or Federal Government to regulate and control these privately owned properties, that we shall concern ourselves, since this discussion would be purely academic at the present day. Nor shall we enter the broad field of legal learning to consider, under our basic organic system, whether the foundations for such a fourth department of government, known as "Government by Commission", which is not judicial, legislative or executive, yet limits and controls the rights of property, were wisely or legally laid beside the

beneficent institutions of our Constitutional Government.[1] Omitting from the discussion, therefore, the idea of the sacrifice of individual right from such a system of government and the constitutional right or power, according to our principles of government to enter upon such a policy, confining the discussion alone to the interest of the people served by these privately owned State and Government controlled agencies of commerce, let us see if the present system is along scientific lines.

If the present State and Federal control and regulation of carriers result in conflicts and inconsistencies, with resulting penalties and burdens, which injuriously affect the service, which these State and Federal controlled agencies of transportation are able to render the people, then there is something radically wrong with the system. Organized originally to preserve the public interest, through the control and regulation of these public service corporations whose general conduct, by public statutes, the legislatures were unable to properly regulate and control, since the establishment of Commission Government, the passing years have brought such a mass of inconsistent and conflicting legislation and burdens[2] that railroad receiverships have become the order of the day, and financial ruin to the carriers and their interdependent industries, with increasing inability to render the service demanded by the public, has resulted. This deplorable condition of the interstate carriers in the United States is due largely to the fact that they have had to meet at one and the same time, not only the two conflicting legislative theories of unrelated and opposite character, of the State and Federal Governments, but they have, at the same time, been

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[1] "In spite of the judicial bulwark there lurks a real danger in the existence and operation of this fourth department of government, for in democracies there is a consistent distrust of officials who are outside of popular control, and commissions appointed by the executive for definite terms, and removable only by him upon charges, are not responsible to the body from which they get their power or to the people." (See article "Government by Commission," by Lindsay Rogers, 21 "Case and Comment," No. 11, p. 907, April, 1915.)

[2] "The State of New York was the pioneer, establishing a railroad commission in 1855. Massachusetts followed in 1869, but the former experiment was unsuccessful. In New York, however, the problem was most acute, as is natural by reason of the services necessary for the congested population, and the State was the first to begin commission regulation upon an extensive scale. Wisconsin acted at the same time (1907), but the New York law, as amended in 1910, 1911 and 1912, probably delegates most comprehensive powers, the commission being authorized to regulate rates and service, to make investigations, require reports on business conditions," etc. Article by Lindsay Rogers, "Government by Commission," *supra.*

bound and controlled by the inconsistent and conflicting laws, rules and orders of the various States through which the lines of railroads run, while primarily obligated to obey the lawful orders of the Interstate Commission. The application, at the same time, of such opposite and conflicting theories of supervision must ultimately lead to Government ownership or exclusive Federal control of these interstate agencies of commerce, if their service and usefulness to the people is to be maintained.[2a] I have always been a firm believer in what is popularly termed "State's Rights" and have been thoroughly grounded in the principle that the power resides in the several States, when not forbidden by the Constitution, to regulate and control, by law, the relative rights and duties of all persons and corporations within the State, and thereby to provide for the public convenience and the good of society,[3] and have always viewed with alarm any encroachment by the Federal Government upon this constitutional power of the States. However, to give due effect to our Constitution, when the State police power and the Federal commercial power come in conflict, the State power, under the organic law, must yield, for otherwise we could not have a Federal Government at all, if the various States could set at naught its constitutionally delegated power.[4]

This naturally suggests the question: What is the source of power of the respective Federal and State governments over carriers?

Section 8, Article I, of the Constitution of the United States grants to Congress the power: "to regulate commerce with foreign nations and among the several States."

Section 2, Article VI, of the Federal Constitution, provides that: "This Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

By the Tenth Amendment to the Federal Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

Under these constitutional provisions, while the Federal Gov-

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[2a]There are now 41,988 miles of railroad in the United States in the hands of receivers, representing a total funded debt of $1,475,385,755.00. (Railway Age Gazette, October 15th, 1915, Vol. 59, No. 15, p. 676.)

[3]Lake Shore vs. Ohio, 173 U. S. 285; 43 L. Ed. 702.

[4]Arkansas vs. K. & T. Coal Co., 183 U. S. 185; 46 L. Ed. 144.

ernment exercises delegated power only over carriers engaged in interstate commerce, in the exercise of such power it is supreme, and the power of the several States, over this subject, as to any of the powers delegated to Congress, depends upon whether Congress has exercised the power so delegated. In the exercise of their respective powers over carriers, both the Federal and State Governments are limited by the provisions of the Fifth and Fourteenth Amendments to the Constitution, guaranteeing due process of law in the protection of life, liberty or property, and preventing the taking of private property for public use without just compensation. These provisions of the Constitution furnish the basis for the control by the courts of the unbridled power on the part of the commissions, State and Federal.[5]

While the United States Supreme Court recognizes the right of the several States, under the Constitution, to regulate the charges of public service companies[6], the courts not only hold that it is within the judicial power, but a duty of the courts, to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection of the laws which, by the Fourteenth Amendment, no State can deny to any citizen.[7] The ill-advised and extreme legislation of various states against carriers has caused the Federal courts, in many cases, to apply the constitutional guaranty to the owners of property devoted to the business of transportation, and the wholesome tendency of the United States Supreme Court seems to be in the direction that interstate carriers must, in substantial respects, be subject to but one power, and that regulations of intrastate commerce, which have the immediate or indirect effect of imposing a burden upon interstate commerce are inconsistent with the power delegated to Congress by the Constitution.[8] The Supreme Court of the United States, in construing the Interstate Commerce Act[9], in the case of *Texas & Pacific R. R. Co. vs. Interstate Commerce Commission*, said: "It would be difficult

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[5]See Article, "Judicial Control of Commissions," by Lawrence B. Evans, 21 "Case and Comment," No. 11, P. 895.

[6]Atlantic Coast Line R. Co. vs. N. C. Com., 206 U. S. 1; 51 L. Ed. 933.

[7]See Justice Brewer's Opinion in Regan vs. Farmer's Loan & Trust Co., 154 U. S. 362; 38 L. Ed. 1014; 4 I. C. C. Rep. 560; 14 Sup. Ct. Rep. 1047.

[8]Chicago, etc., Ry. Co. vs. Iowa, 233 U. S. 334.
Robbins vs. Taxing District, 120 U. S. 489; 30 L. Ed. 694; 162 U. S. 197; 40 L. Ed. 945.

[9]Sec. 8563, Vol. IV, U. S. Comp. St. 1913. And see Houston Ry. Co. vs. United States, 234 U. S. 341; 58 L. Ed. 1341.

to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a State), as well that between the States and Territories, as that going to or coming from foreign countries.

"In a later part of the section it is declared that 'the term transportation shall include all instrumentalities of shipment or carriage.'

"It has thus included in its scope the entire commerce of the United States, foreign and interstate, and subjected to its regulations all carriers engaged in the transportation of passengers or property, by whatever instrumentalities of shipment or carriage."

In the case of *New York Central R. R. vs. Hudson County*, 227 U. S. 248, it was said: "An assertion of power by Congress over a subject within its domain must be treated as coterminous with its authority over the subject, and leaves no element of the subject to control of the State."

"The operation at one time of both the power of Congress and that of the State over a matter of interstate commerce is inconceivable; the execution of the greater power takes possession of the field and leaves nothing upon which the lesser power can operate."

In the case of *Erie R. R. Co. vs. New York*, 233 U. S. 671, it was said: "When Congress acts in such manner as to manifest its constitutional authority in regard to interstate commerce, the regulating power of the State ceases to exist, and if there is conflict between State and Federal legislation, the former must give way. After Congress acts on a matter within its exclusive jurisdiction, there is no division of the field of regulation."

As recently shown in an excellent paper before the Tennessee State Bar Association[10], this constitutional right to have an exclusive regulation of interstate commerce by Congress is a right of the several States to prevent discrimination against the citizens of each, since it is a matter of supreme importance to each State to prevent anything calculated to injure its trade and commerce or to paralyze the industrial development of the State. The constitutional power was lodged in Congress to overcome the greed and selfishness of the various individual States, in the race for commercial supremacy, following the Revolutionary War, when Virginia, by her export duties and inspection laws, sought to keep her tobacco at home; Massachusetts prohibited the exportation of

[10]See Address of Hon. Alfred P. Thom before the State Bar Association of Tennessee, June 25th, 1915, at Chattanooga.

grain and leather; New York, by her import duties, sought to exclude the firewood from Connecticut and the butter and dairy products from New Jersey; and these and various other States, by a narrow system of local retaliatory laws regulating various articles of commerce, materially retarded the development of the country[11].

When adopted originally, to prevent the serious results of sectional strife, this salutary constitutional provision is certainly broad enough to prevent a similar result of such ill-advised State legislation as now threatens to destroy the usefulness of the country's interstate transportation system. It is of the greatest practical importance to maintain an adequate and efficient transportation agency, and any policy of legislation or regulation that fails to preserve the continuity of the service of the carriers of the country is at variance with the fundamental reasons which gave rise to the lodgment of the constitutional power in Congress regarding commerce. Just as it was originally essential to adopt a provision of organic law to protect the commerce of the country from ill-advised laws of the several independent and sovereign States, and, later, an act of Congress, to render more efficient to the public the service of interstate carriers, so it is now essential that the efficiency of this service shall not be destroyed by the imposition of burdens which must eventually bankrupt such agencies of transportation, and the carriers must be preserved from the legislation of States which reduce rates below the fair cost of transportation for the benefit of their own citizens, or laws intended solely to preserve the local markets for State trade, thus discriminating against the citizens of adjoining States and interfering with the efficiency of the agencies of transportation by demanding service at less than its actual cost. If the efficiency of the service and the financial responsibility of interstate carriers is to be left to State regulation, then each of the several States can and will establish a standard all its own and the service of the other States and the success of a financial plan that may meet with the approval of a majority of the States through which a line of road is built can be jeopardized or set aside by the action of any one State.

Every bond issue, for instance, of companies engaged in interstate commerce must meet the approval of the commissions of the different States through which the railroad runs, and different fees for the required authority to issue such negotiable instruments must

[11]Fiske's "Critical Period of American History," p. 144.

be paid upon the total issue in all the States, where such legal requirements obtain. Thus, the Illinois Utility Act[12] provides that

> "All stock * * * and every bond, note or other evidence of indebtedness * * * issued without an order of the Commission authorizing the same then in effect shall be void", etc.

That this Act, requiring the financial indebtedness which has the approval of the State of the domicile of the carrier to be approved by another State at the price of the fees to be paid, under the law, or suffer the penalty of having the lien upon the property and contract of the foreign State voided, denies full faith and credit to the Acts of the sister State and imposes a direct burden upon interstate commerce, I have no doubt[13], yet it is but one of many similar Acts upon the statute books. The financial responsibility and the legality of the commercial paper of a carrier, whose lines of road extend through many States, are matters of most vital concern to the citizens of all such States which should not be left to the determination of the legislatures of any one of such States or to the whim or caprice of any State Commission.[14]

If such important contract rights as these can be stricken down unless the fiat of a given State Commission is procured, then the sacred right of contract, guaranteed by Section 10, Article I, of the Constitution, and the full faith and credit clause of Section 1, Article IV, of this immortal document, are but high-sounding phrases.

Space will only permit the mention of a few of the many State laws and regulations which discriminate against the commerce of the other States or against interstate commerce. Although the Interstate Commerce Commission has provided for no penalty for a delay in furnishing freight cars, the laws of many of the different States prescribe penalties ranging from a dollar a day to several dollars a day for failure to furnish such cars. Thus, in times of a car shortage, to avoid the penalty, the carrier would be compelled to favor the most prejudiced or unreasonable State because no disinterested authority is provided for the regulation of the distribution of cars. Although Congress has enacted an ade-

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[12]Section 23, Illinois Utility Act of 1913.

[13]Laird vs. B. & O. R. Co., 131 Md. 179; 88 Atl. Rep. 348.
Western Union Co. vs. Kansas, 216 U. S. 1.
Canada Southern R. Co. vs. Gebhard, 109 U. S. 527.

[14]"And yet sixteen States have enacted statutes, each asserting for itself the individual right to control the issue of stocks and bonds of interstate carriers." (Paper of Hon. Alfred P. Thom before Tennessee Bar Association, June 25th, 1915, at Chattanooga.)

quate and reasonable Hours of Service Act and Safety Appliance Act, many of the States have passed similar laws, with different hours of service for employees engaged in the operation of trains and additional safety provisions from those required by the Federal law. Although it is to the interest of the general public to have cars and engines repaired where the most efficient work can be obtained, several States have passed laws attempting to compel carriers who have shops in such States, to have all cars and engines repaired inside the State. By the decisions of some of the States, a carrier is liable for a few hours' delay in failing to deliver livestock in time for the early morning market[15], while, under the decision of the United States Supreme Court, the payment of a claim based upon such a delay, in the face of the provisions in the Uniform Livestock Contract, would constitute an unlawful discrimination.[16] Upon beneficent considerations of humanity, Congress, by the Federal Employers' Liability Act of 1908, and the amendment of 1910, has provided for the compensation for injuries or death of employees of carriers engaged in interstate commerce, under the broad grant of power conferred by the Constitution to regulate commerce. A different measure of damages in case of death and a different procedure for the computation of damages for injuries than obtain in most of the States are established by this law, which has given rise to innumerable conflicts with the courts of the different States. Of course, having acted upon the subject, the Act of Congress is exclusive in actions by interstate employees, but the conflicts between the two jurisdictions are a source of no little concern to the interstate carrier.[17]

The utter impracticability and destructive policy of the present dual system of regulation of interstate carriers is best illustrated, however, in the efforts on the part of the carriers to procure sufficient revenue to meet the fixed charges necessary to give the service required by the public. Although created, among other things, to perform impartially the duty of fixing reasonable intrastate rates, some of the various State Commissions have not only consistently and arbitrarily refused to grant reasonable increases asked in State rates, but have conceived it to be within the line of their duty to

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[15]Anderson vs. Ry. Co., 93 Mo. App. 677.
Lay vs. R. R., 157 Mo. App. 474.
[16]Chicago & Alton R. R. Co. vs. Kirby, 225 U. S. 155; 56 L. Ed. 1033.
[17]See Roberts' "Federal Employers' Liability Act."
Recent paper by Hon. Jacob Trieber before Arkansas State Bar Association, 49 American Law Review, P. 481.

defend, through their representatives, in the name of the people of the State, all efforts on the part of the carriers to secure reasonable increases in interstate rates.[18] It is clearly a misconception of the duty of a State Commission to assume that they were created to appear in the role of counsel against the carriers in another forum where they are seeking relief, yet we find the records of the Interstate Commerce Commission replete with instances where State Commissions have so recorded themselves.[19] In the most recent of these cases before the Interstate Commerce Commission, where some of the Western State Commissions appeared, by their representatives, to oppose the increases asked by the carriers, the argument was advanced that the increases should be refused because the interstate rates were already higher than the State rates, although the revenue realized on both classes of business showed a loss to the carriers.[20] It was shown in this case that, of the eleven two-cent passenger fare States in the United States, while the railroads enjoyed less advantages and received the lowest passenger fares of any section of the country, the nine Western two-cent fare States of Illinois, Michigan, Wisconsin, Minnesota, Iowa, Nebraska, Missouri, Oklahoma and Kansas were, comparatively, the most prosperous subdivision of agricultural territory in the United States and the cost of the service to the carrier was above the average in this section.[21] In the Eastern Advance Rate Case[22], the Interstate Commerce Commission found that the passenger rates were too low to pay the cost of the service, yet the average density of population per mile in these States was 1,036, while, in the nine Western States above referred to, the average density of population per mile was only 323.

Upon the reasonableness of the three-cent per mile interstate passenger rate charged by the carriers in Missouri, Arkansas and Oklahoma, the Interstate Commerce Commission recently held, in the case wherein the Commissions of these States attacked this rate as unreasonable, that:

> "While the method of estimating values and apportioning cost and revenues are not accurate, we are satisfied, after a

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[18] 35 I. C. C. Rep. 498-501.
[19] Western Advance Rate Case, 35 I. C. C. 498-500.
Eastern Advance Rate Case, 31 I. C. C. 351; 32 I. C. C. 343; 24 I. C. C. 380
Mo., Kan. and Ark. Passenger Rate Case, 22 I. C. C. 160.
[20] Western Advance Rate Case, 35 I. C. C. 668.
[21] *ante idem.*
[22] 31 I. C. C. 351.

careful examination of the evidence, that the margin of error which may be imputed to them is not sufficient to change our conclusion, which is that, from all the evidence, to base interstate passenger rates from and to Arkansas, Missouri and Oklahoma on, three cents a mile does not result in rates that we are convinced are unreasonable, in violation of the Act to Regulate Commerce.

" * * * We do not feel justified in condemning the rates complained of as unreasonable."[23]

Notwithstanding this decision by the Commission, delegated by Congress with the duty of regulating commerce between these States, the discrimination between interstate and State passengers in this territory and the confiscation of the property of the carriers in these States in thus being required to furnish transportation at less than cost have continued. And not only have these States failed to grant relief against this condition, which the Federal Commission recommended should be remedied, but, generally, they have exhibited a tendency to require unreasonable and extravagant expenditures by the carriers, in the erection of expensive passenger stations at relatively small towns, elimination of grade crossings, increasing the number of employees upon trains, and increased passenger trains in sections where the travel did not justify such service.

In the *Minnesota Rate Case*, when the same was before the United States Court of Appeals, Judge Sanborn, answering the argument that "The reduction of local rates does not interfere with interstate rates, as a matter of law," conclusively showed that while such reduction did not, "as a matter of law," interfere with interstate rates, yet that it did, as a matter of fact, have that effect. It was conclusively established in the *Minnesota Case*, and, ever since, has been a question of which the courts have taken judicial notice, that the schedules fixed for intrastate transportation necessarily disturbed the equilibrium existing between State and interstate rates. All interstate rates naturally embrace the border cities and, when rates to these cities are included in a general reduction on intrastate rates, there is, of course, a change in the relation of rates theretofore existing to adjacent towns across the State line. For instance, a low intrastate rate to St. Louis, Missouri, would result in a corresponding decrease in the rate to East St.

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[23]Commissions of Oklahoma, Missouri and Arkansas vs A., T. & S. F. Ry. Co. *et al.* (July 18th, 1914), 31 I. C. C. 532.

Louis, Illinois. This, and the general effect upon interstate rates on given commodities resulting from an unreasonably low intrastate rate have the natural effect of discriminating between the rates, interstate and intrastate.

In the recent case involving the validity of the Missouri rate on grain from various interior points to St. Louis, where the State rate was less than the interstate rate, the same conclusion reached by Judge Sanborn in the *Minnesota Rate Case* was applied by the Interstate Commerce Commission and it was held that, in the maintenance of interstate rates higher than the intrastate rates from interior Missouri points to St. Louis, an unlawful prejudice and advantage was given to St. Louis and an unjust discrimination was effected against the interior Missouri cities, East St. Louis and Southern Illinois points.[24] The carriers are daily compelled by the different States to continue equally discriminatory rates in effect which should be remedied by the same extra-state authority, since the States, for one reason or another, fail or refuse to remedy. In States where the intrastate freight and passenger rates are lower than the interstate rates, the interstate rate is frequently discriminated against by the quite prevalent custom of "scalping" the interstate rate. Interstate passengers frequently buy tickets to the last station in the State, to take advantage of the State rate, and again buy tickets for the remainder of the interstate journey and interstate freight is often billed and rebilled the same way. Of course, this constitutes an unlawful discrimination against the interstate rate and the Interstate Commerce Commission has recently so held[25], but the carriers are, themselves, powerless to prevent the practice, and thus discrimination and confiscation of property continues because of the conflicts in the matter of rates between the State and Federal regulating bodies.

Another notable conflict between the Federal and State regulation of carriers arises in the inconsistent provisions regarding the valuation of the properties of the carriers. Congress has provided, in what was intended as a very comprehensive law, for the valuation of the properties of interstate carriers under certain rules and orders of the Interstate Commerce Commission.[26] Under the supervision of the Interstate Commission, the valuation of various properties

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[24]Merchants Exchange vs. B. & O. R. R. Co., 34 I. C. C. 341.
And see Houston R. Co. vs. United States, 234 U. S. 341; 40 L. Ed. 1341.
[25]Kanatex Ref. Co. vs. A. T. & S. F. Ry. Co., 34 I. C. C. 271.
[26]37 U. S. Statutes at Large, ch. 92, p. 701.

of interstate carriers has been completed at a tremendous cost to both the Government and the carriers. Speaking of the comprehensive character of this Federal Valuation Act, Commissioner Clark, of the Interstate Commerce Commission, recently said:[27]

> "The law which was adopted for this purpose is exhaustive and requires the performance of a vast amount of detail work and the determination of many vexed and vastly important questions. No one has blazed the path. The results ought to be sound, equitable and right. When these valuations are finally fixed, they will be of great assistance to the Commission and to the courts in connection with cases which involve alleged confiscation of property of carriers."

But, notwithstanding this work of Federal valuation, carried on in pursuance of this exclusive power of Congress over the subject of interstate carriers, the laws and orders of many of the States have also provided for a separate and distinct valuation of the properties of interstate carriers, located within the several States, by different rules and according to various standards of efficiency.[28]

The Twentieth section of the Act to Regulate Commerce prohibits interstate carriers from keeping any accounts or records other than those approved by the Commission, yet, in many States, other and additional records and accounts are required, as in Kansas under the Mahin Act.[29] Cuspidors, combs and brushes are required by the laws of some States to be kept in the coaches for the use of the passengers, while adjoining States make the presence of such articles a violation of law and different inconsistent provisions exist in adjoining States as to drinking water and other beverages upon a train. If space would permit, we could continue the catalogue of inconsistent State and Federal laws and orders regulating interstate carriers until the reader's patience was exhausted.

Too frequently the opinion has prevailed with the State regulating bodies that the right to regulate carries with it the implied obligation that the regulation shall always be in favor of the patrons of the regulated agency and against the agency itself. The President of one State Commission has publicly proclaimed that this is the sole and sufficient object of State regulation, since the industry to be regulated is more than able to take care of itself.[30] When

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[27]Article, "Interstate Commerce Commission and Its Work," Railway Age Gazette, Sept. 17, 1915, P. 494.

[28]Sec. 28, ch. 238, Laws Kansas 1911.

[29]Kansas Acts, 1913.

[30]Paper of J. M. Eshleman, President, California R. R. Com., 21 Case and Comment, No. 11, p. 1.

the rights of the carrier can frequently only be enforced by the State Commission, where such a policy obtains, it must, inevitably, result in financial ruin, just as the continued and daily loss of important cases, involving valuable personal or property rights, must inevitably produce financial ruin and bankruptcy of the individual citizen. With such regulation, the railroads, like Micawber, have been forced to contract obligations, with a view to their immediate liquidation, which remain unliquidated through their sheer inability to liquidate. The investor in the securities of the carrier and the patrons of the road are almost as directly interested in the carrier's regulation as the carrier itself, for the regulation of the business of the carrier will determine its ability to meet its obligations and render efficient service to the public.[31]

Although the public interest in transportation is that it should be efficient and adequate, the plain fact remains that a conditon now exists in which almost every burden has been placed upon the transportation agencies that human ingenuity can devise. Legislation, in accordance with sound economic principles, formulated with a due regard to justice and individual right, is what we should all be striving for. It is high time that the sober common sense of the American lawyer was aroused upon this subject of State and Federal regulation of carriers. It is intolerable that the commerce of the country should be made to depend upon the whim or caprice of any four or five members of a State Commission, and it was to remedy this condition that the constitutional power was lodged in Congress to regulate commerce among the several States. What right has an individual State to impose a burden upon interstate commerce, which the people of another State should bear? The Constitution, itself, reflects the prevalent demand of the people of all the States for protection in trade against the barriers imposed by the individual States, and it is peculiarly a right of the several States to enjoy this constitutional protection. The commerce of a country that seeks all markets without regard to political subdivisions cannot be halted at State lines, either by physical interruption or inconsistent local regulation. Nor can its efficiency and usefulness be left to the conflicting views of many masters with differing sentiments of public policy and varying conceptions of the problems presented. The interest which demands that the transportation facilities shall extend in physical continuity across State lines necessarily requires the same unity of con-

[31]See Article of H. A. Smith, Vol. 21, Case and Comment, No. 11, p. 879.

trol, which is only possibly by Government regulation. These are the underlying reasons why the States, by the Constitution, confided to the general Government the regulation of interstate commerce. We move along our daily paths, in periods of public tranquility, without much concern about the great business of the public's interest. Our patriotic President and members of the Interstate Commerce Commission have recently given public utterances of their apprehensions regarding the grave problem of Federal and State regulation of carriers.[32]

The ray of danger that confronts our Republic is, that, to escape from the disappointing and unsatisfactory results arising from the conflict of the State and Federal authorities over railroads, the condition may add to the already growing movement in favor of the nationalization of our interstate railroads. Public ownership is, of course, opposed to the traditional policy of our Government and the historic development of its institutions. The danger of abuse through party control of such vast properties, representing such a large share of the wealth of our country, and the voting strength of the army of railway employees, would be inimical to the interests of the institutions of any popular Government. It is claimed that public ownership would secure lower rates of transportation, but this has not been the effect in Europe nor on the only publicly owned railways which this Government has, for, upon the Alaska and Panama Railways the rates for both freight and passengers are largely in excess of those upon the privately owned railways in this country. The fair adjustment of rates between different communities and on different articles of traffic is of the highest consequence to the people of the country because, upon that adjustment, depends the commercial interests of the country. The adjustment of rates, along with the other problems which are now handled by the State and Federal Commissions, would demand precisely the same solution that they are receiving at present, but, with the Government owning the railways, then the powers of the State would cease entirely and the danger would be that these questions would become political issues to be settled by the action of the party majority at popular elections, rather than by the cool, deliberate decision of those best qualified to settle

[32]Commissioner Clark, of the Interstate Commerce Commission, recently spoke of the tremendous interest to the country of a successful and broad policy of regulation for the carriers of the country, and referred to the present dark days for the railroads and looked forward to a dawn of better times. (Railway Age Gazette, September 17th, 1915, p. 496.)

such problems. And when we contemplate Government ownership we are irresistibly led to the conclusions that, if Government regulation is a failure, Government ownership will likewise prove fallacious and, if Government regulation can be made successful, then the reason for Government ownership is eliminated.

The Constitution, as the highest expression of the will of the people, in our popular government, does not empower the Government or the several States to, themselves, engage in commerce, but Congress, by our Constitution, is given the power only to *regulate* commerce.

This constitutional power should be exercised within the limits imposed by the framers of our organic law, to the end that the conditions which hamper the commerce of our country today may be relieved so that our Government may sway the business of the world tomorrow. The entire power and duty of regulation of interstate carriers should be placed in the hands of the general Government, except as to matters so essentially local that they cannot be used to interfere with the efficiency of the service or the just rights of the carrier. State control conflicts more and more with other State control and, while State rights is all right in theory, the making of railroad rates calls for such broad general treatment as only the National body can give. The Federal Government should also be given the exclusive power to supervise and regulate the issue of stocks and bonds of carriers engaged in interstate commerce, to the end that the securities, now vitiated by the laws of the different States, unless reasonable fees are paid for authority to issue them, may be given a stability which is essential to the financing of the business of the carriers. This, the carriers, the investors and the general public have a right to demand, in the name of Good Government.

We cannot separate the idea of Good Government from one which furnishes proper protection to all who are subject and worthy of its protection and regulation. A conflict between the authorities by which this object is frustrated is, therefore, a mistaken idea of Government. It is a right of all the States to have the Constitution enforced, to the end that Congress may regulate commerce between the States and, if the representatives of the people of any State or section usurp this constututional right of all the States, then, to that extent, the fundamental law of our country has been denied. The ancient distrust of the Federal Government and the undue emphasis upon the rights of the States are responsible for many of our existing legislative evils, and, according to the im-

mutable decree of history, our States have not always been right in the assertion of their power regarding personal rights. Notwithstanding the urgent necessity that exists for uniform procedure, divorce laws, negotiable instrument laws and uniform corporation laws, our experience has shown that it is practically impossible to secure concerted State action upon any of these subjects. Individual freedom, the right to life, liberty and property and the consummation of the higher aims of government are not always consistent with the asserted prerogatives of our individual States. Just as the power of the Federal Government was necessary in the cause of humanity to free the country from the "peculiar institution" known as human slavery, maintained by an erroneous theory of State's rights, so it is today essential to strike from the commerce of the country the shackles of a bondage forged by ill-conceived State regulation.

These ideas should be placed on a plane above the narrow limit of prejudice or the arbitrary boundaries of any section or State, to the end that we may always adhere to the correct doctrine proclaimed by Webster: "Liberty and Union, Now and Forever, One and Inseparable," and enjoy the fullest measure of blessings incident to this broad principle of our free Government.

The problems we have mentioned, following the advent of a new departure of government into our complex civilization, are but the natural results of untried human action along unblazed trails. Regulation of the agencies of commerce is necessary both for the public interest and to protect the commerce, itself, and, to the end that these State and Federal agencies, which means so much to the commercial prosperity of the country, may be administered in the most efficient manner, the present conflicts between State and Federal control should be eliminated and the regulation should be conducted under Federal authority, as the Constitution provides.

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