

# The Regulation of Motor Transportation\*

IN 1833 the first railroad in the United States of considerable length was completed from Charleston, South Carolina, to a point in that state opposite Augusta, Georgia, on the Savannah River. This line of 135 miles, then the longest railroad in the world, was primarily designed to bring to Charleston traffic theretofore moving via the Savannah River to Savannah. The construction of this railway was followed by an era of railroad building, culminating in a great railway web and the diversion of traffic from the rivers to the rails.

One hundred years later finds us in another period of transportation transition. Thousands of miles of hard surfaced roads have been constructed and, with these improvements, there has been a diversion of traffic from the rails to the roads. In reality, this is merely a return to the roads, for the stage coach had preceded the steamboat. But the back-to-the-roads movement was not occasioned by a return to the stage coach; it was the advent of the motor vehicle which brought this about.

For a time, motor traffic was largely by private automobile and a feeling of irresponsibility and freedom, with regard to highway use, prevailed as it had in the horse-drawn vehicle days.<sup>1</sup> Then came the commercial motor carriers, with their busses and trucks, engaged in the transportation of persons or property for hire and using the highways as a place of business, instead of a way to business. With the arrival of these carriers highway use has taken on a different aspect. The publicly constructed and maintained roads have become the roadbeds of these carriers. Public property is thus being used for purposes of private gain. The roads have become more congested and travel more hazardous. Highway construction and maintenance costs are mounting, inasmuch as the trucks and busses used by these carriers are of such size and weight as to require more substantial highways than are necessary to meet the demands of ordinary travel and they are also more destructive to the roads.<sup>2</sup>

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<sup>1</sup> See Duncan, *Rail and Road Transport: At Home and Abroad*, an address before the Atlantic States Shippers Advisory Board, Rochester, N. Y., Sept. 29, 1932.

<sup>2</sup> See Duncan, *Who Pays for the Highways?* (Aug. 13, 1932) 93 RAILWAY AGE, 210, 211-213. But see Hunter, *Commercial Motor Transportation—Its Regulation and Taxation*, 1 ASSOCIATED TRAFFIC CLUBS BULL. 106, 107, where he says:

Another, and distinct, aspect of highway use by commercial carriers is their competition with the railroads which are government-supervised and highly regulated in the interest of the public. Motor busses, which at first were used only for intracity transport, are today engaged in extensive state and interstate operations. As a result, passenger traffic is being diverted from the railroads to the highways.<sup>3</sup> Estimates of the proportion of this diversion attributable to the private automobile vary from forty per cent, in the case of some railroads, to as much as ninety per cent in the case of others.<sup>4</sup> But, granting that the private automobile has taken the greater part of this traffic diverted from the rails, the operators of motor busses are left with substantial passenger patronage. These carriers, with their lighter equipment, are able to furnish better local service than the railroads can provide. Except in the city suburban territory, the railroads, with their clumsy facilities, are in no position to compete for this local business. The merchant today is buying in less than carload lots and the motor truck furnishes him with quick, efficient, and economical service. Although the force of this competition with the railroads is keenest in the relatively short hauls of three hundred miles and under, trucks are hauling increased tonnage and for increasing distances. This competition by the motor carriers is resulting in the abandonment of thousands of miles of rail lines,<sup>5</sup> and likewise, the closing of thousands of local railway stations.<sup>6</sup> The continued existence of a dependable railroad system is thus threatened and the social and material welfare of the people of the country affected.

No less than fifty billions of dollars have been invested by the public, either by voluntary subscription or through taxation in our road

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"The consensus of the best opinion seems to be that, with a reasonable limitation of weight per axle or wheel, and, with pneumatic tire equipment, busses and trucks cause no more highway deterioration than ordinary cars."

<sup>3</sup> There has been no increase of railway passenger equipment in the past twelve years. H. W. Siddall, Chairman of the Western Passenger Association and the Transcontinental Passenger Association, says that the present number of passenger train cars in service is approximately the same as in 1921—slightly in excess of 51,000 units. See 1 ASSOCIATED TRAFFIC CLUBS BULL. 114, 115. The Interstate Commerce Commission reports 52,096 passenger cars in service at the end of 1931 and 56,950 in service at the close of 1921. See 46th Annual Report of the Interstate Commerce Commission (1932) p. 131.

<sup>4</sup> Report of Attorney-Examiner Flynn, *Coördination of Motor Transportation* (Jan. 6, 1932) I. C. C. Docket No. 23,400, at 28.

<sup>5</sup> *Ibid.* at 76. About seventy-five per cent of the applications for authority to abandon rail lines during the past five years allege motor vehicle competition as one of the grounds for loss of traffic and decreasing revenue.

<sup>6</sup> Duncan, *op. cit. supra* note 1, at 12, says that since 1917 over 17,500 local railway stations in the United States have been closed.

and rail transportation plant.<sup>7</sup> About one-half of this total investment has been put into streets and highways used in motor traffic. This latter amount has, for the most part, been invested in the brief period since the war<sup>8</sup> as contrasted with the amount invested in railroads, (estimated at twenty-six billion dollars<sup>9</sup>) which is the result of over one hundred years of development. This enormous investment in both road and rail transport facilities has brought about much duplication of service and an excess of such facilities. The railroads are in a dangerous position financially with their resources invested in plant and equipment now in part obsolete and unused. The treasuries of the states have been depleted almost to exhaustion by the programs of road building.

The motor bus, with its frequent intercity street-corner service, and the motor truck, with its store-door-pick-up-and-delivery, furnish a flexible and desirable service. They are fine additions to our transportation system. But no one would contend that they can do the entire transportation job. The railroads are indispensable. Their network of rail lines is, and will continue to be, the foundation of our national transportation system. Motor operations can only supplement the rail service. The solution of our transportation problem, then, would seem to lie in the coordination of road and rail facilities and the coordinated regulation of both to the best advantage of the public.

While there has been no national legislation on the subject, attempts at motor carrier regulation have been made by the states. With Pennsylvania taking the initiative in 1913,<sup>10</sup> all of the states, with the exception of Delaware,<sup>11</sup> have enacted laws regulating the operations of motor vehicles as common carriers of passengers. Thirty-nine states and the District of Columbia have laws regulating common carriers of property by motor vehicle and thirty-four states have endeavored to subject the contract carriers of property to some regulation.<sup>12</sup> Many of these statutes were hastily drawn and ill considered and most of them are inadequate either as highway conservation and traffic safety measures,<sup>13</sup> or as measures designed to secure a dependable system of

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<sup>7</sup> Whitridge, *The Future of Railway Transportation in the United States*, 1 ASSOCIATED TRAFFIC CLUBS BULL. 119, 120.

<sup>8</sup> *Ibid.* at 121.

<sup>9</sup> See the 46th Annual Report of the Interstate Commerce Commission (1932) p. 133.

<sup>10</sup> See *Coordination of Motor Transportation* (1932) 182 I. C. C. 263, 410-413. The District of Columbia's first act went into effect in 1913.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.* at 263, 371, 410.

<sup>13</sup> The maximum permissible length for a combination of vehicles varies from 30 to 85 feet and the permissible gross vehicle weight in the case of pneumatic-

transportation. Some of the laws enacted in 1931 and 1932 indicate an effort on the part of the states to impose more restrictive measures and to effect a complete regulatory scheme, including therein all carriers for hire.<sup>14</sup>

Regulation of the motor bus as an agency of commerce is not meeting with general opposition. The Associated Manufacturers of Motor Trucks, Busses, and Passenger Automobiles, the National Association of Motor Bus Operators, and individual carriers engaged in extensive operations favor federal regulation.<sup>15</sup> But regulation of the motor trucks is strenuously objected to by the truckers and they have the very able support of the manufacturers of automotive vehicles.<sup>16</sup> This diversity of position as to regulation, with the motor bus operators on one side and the motor truck operators on the other, can be accounted for. Motor bus operations are confined largely to common carriers operating on regular schedules and between fixed termini. They want protection against private operators with their fly-by-night and rate-cutting practices. The common carriers of property are in the minority in their field. The majority of the truckers are private contract carriers with no regular routes or established rates to protect.<sup>17</sup> Many, if not most, of these carriers are engaged in the practices which the proponents of regulation seek to check.

The motor truck operators take the position that their business is an infant industry, in the process of development, which should be let alone, unregulated, to grow strong through the natural course of meeting competition. They say that they are furnishing transportation at a reasonable price and that what the country needs is cheap transportation. Further, they assert that the motor vehicles are paying their way, and more. In support of this, it is said that motor taxes for 1931

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tired, 6-wheel vehicle varies from 16,000 to 48,000 pounds. A typical combination of vehicles, including a 4-wheel tractor, 4-wheel semi-trailer and 6-wheel full trailer, has maximum weight limits on pneumatic tires varying from 24,000 to 102,000 pounds. It would appear that most of the states permit the operation of a combination of units of this size. See Kelly, *The Problem of Motor Vehicle Regulation* (1932) 13 PUBLIC ROADS 153, 156-157.

<sup>14</sup> See Ala. Stats. 1932, pp. 68, 178; Colo. Stats. 1931, cs. 120, 121, 122; Fla. Stats. 1931, c. 14764; Kan. Stats. 1931, c. 236; Ky. Stats. 1932, cs. 99-106; Mich. Stats. 1931, p. 363; Mo. Stats. 1931, §§ 5264-5280; Mont. Stats. 1931, c. 184; Tex. Stats. 1931, cs. 121, 277, 282; Wyo. Stats. 1931, c. 133.

<sup>15</sup> See Flynn Report, *op. cit. supra* note 4, at 96; Report of Hearings before Senate Committee on Interstate Commerce, March 28, 1932, at 603, 607, 610, 643, on Sen. Bill 2793 (a bill to regulate transportation of persons in interstate and foreign commerce by motor carriers operating on public highways and for other purposes).

<sup>16</sup> *Ibid.*, Feb. 3, 1932, at 58 *et seq.*

<sup>17</sup> *Ibid.*, at 65-66; Kelly, *op. cit. supra* note 13, at 154.

amounted to the grand total of over a billion dollars, and that motor vehicles pay ten per cent of all taxes.<sup>18</sup>

The railroads' answer is, that motor truck transportation, if cheap, is possible only through subsidy. They deny that the motor vehicles pay their own way. Their figures show that in the eight-year period from 1923 to 1930 inclusive, four billion dollars were raised by motor vehicle fees and gasoline taxes; that this was the total contributed by motor vehicles for the use of the roads and streets of the country, and of this sum, over three billions were spent on the so-called state highways, which constitute only ten per cent of our total highway mileage.<sup>19</sup> The railroads then call attention to the fact that almost a like amount, raised from other sources was put into state highways during the same period, and that over five billion dollars, derived from sources other than motor vehicles, went into local roads.<sup>20</sup> It is said that the railroads pay approximately twenty-five cents of each dollar of revenue in providing and maintaining their right-of-way, while their highway competitors have a publicly provided right-of-way.<sup>21</sup>

If it were conceded that the free use of the highways is in reality a "subsidy," this would not necessarily be fatal to the case of the motor carriers. Whether a subsidy is evil depends on the object it promotes. If cheap and convenient, motor service is a public need and may be worth achieving through a subsidy. Governmental subsidies made it possible for the railways to supplant the river barges and the stage coaches.<sup>22</sup> That it is the railways' turn to be in part supplanted represents perhaps only the irony of progress.<sup>23</sup>

Among the shippers, chief customers of the carriers, there is some apparent inconsistency, for example, the manufacturers of cement, although direct beneficiaries of the recent program of highway expansion necessitated by the tremendous growth in the use of automobiles, busses, and trucks, appeared before the Senate Committee on Interstate

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<sup>18</sup> See Hunter, *op. cit. supra* note 2, at 107. See also Kelly, *op. cit. supra* note 13, at 158 (on total taxes of motor vehicles).

<sup>19</sup> See Gormley, *A Summary and Criticism of the Various Programs of Public Policy Relative to Highway Transport Advanced by Interested Groups*, 1 ASSOCIATED TRAFFIC CLUBS BULL. 108, 110. On financing the highways, see *Coördination of Motor Transportation* (1932) 182 I. C. C. 263, 413 *et seq.*

<sup>20</sup> Duncan, *op. cit. supra* note 2, at 212; Gormley, *op. cit. supra* note 19, at 110-111.

<sup>21</sup> *Coördination of Motor Transportation* (1932) 182 I. C. C. 263, 414.

<sup>22</sup> See Flynn Report, *op. cit. supra* note 4, at 89-90, on grants of land made by the federal government in aid of railway construction. While approximately 128,000,000 acres were granted to the railroads, the grants were upon condition that reduced rates be given on mail, government materials and troops, and the railroads contend that as a result, there was a *quid pro quo* in nearly all cases.

<sup>23</sup> Hunter, *op. cit. supra* note 2, at 106.

Commerce and asked for legislation regulating trucks.<sup>24</sup> They take this stand because they find it advantageous to have transportation rates published and filed so that the shipper may know, not only his own freight costs, but also those of his competitor.<sup>25</sup> The National Association of Commission Merchants favors regulation. This organization contends that the irregular movement of trucks has brought about a demoralization of markets.<sup>26</sup> On the other hand, the Aluminum Company of America, which probably has no worry concerning competitors' freight costs, is opposed to motor truck regulation. The traffic manager of that concern says: "Fortunately for business," Congress has not taken a hand in putting the motor truck under regulation.<sup>27</sup> This latter view, *i.e.*, the "not to regulate" policy, is the one supported by the majority of the shippers.<sup>28</sup> They are playing the motor carriers against the railroads just as they played one railroad against another, before the railway regulation preventing preferences, discriminations, and rebates.

Highway use by motor carriers and the competition between these carriers and rail carriers has created a problem which is by no means local to the United States. This problem is receiving attention in all progressive commercial and industrial nations. In Germany the principal railways belong to the government, and are so operated. By a recent order of the president of that country the rates of highway carriers were ordered adjusted on such terms as would protect rail rate structures. In France the trend seems to be to protect certain rail movements absolutely from highway competition. There are similar tendencies in Italy and Switzerland. A commission has been at work on the problem in England. This commission has concluded that the costs of highway construction and maintenance should be borne entirely by those using the highways and that licenses should be refused high-

<sup>24</sup> See Report of Hearings before Senate Committee on Interstate Commerce, March 30, 1932, at 662.

<sup>25</sup> *Ibid.*, March 26, 1932, at 583-584, March 30, 1932, at 664-665; Gormley, *op. cit. supra* note 19, at 109.

<sup>26</sup> Flynn Report, *op. cit. supra* note 4, at 97; Report of Hearings before Senate Committee on Interstate Commerce, March 22, 1932, at 461 *et seq.*

<sup>27</sup> Jack, *Some Desirable Changes in the Policy of Regulating Railroads in the United States*, 1 ASSOCIATED TRAFFIC CLUBS BULL. 124, 126. See also the editorial *Making Bad Worse*, Chicago Tribune, Jan. 5, 1933, attacking the recommendation of the United States Chamber of Commerce that rate regulation be extended to highway and water carriers, and saying: "The argument that competing transport should be equalized by regulation is unsound. It would be an equalization only of misfortune. It would not free the railroads, but only enchain their competitors. The only intelligent policy is to relieve the railroads from restrictions which have obstructed their development and now threaten their solvency, and foster both their progress and that of the new agencies of transport."

<sup>28</sup> Flynn Report, *op. cit. supra* note 4, at 96.

way carriers where adequate transportation facilities are already available.<sup>29</sup> The recommendations of the commission, if acceptable to Parliament, can be enacted into law by that body and it is an end to the problem there.<sup>30</sup> Under our form of government, with constitutional limitations imposed upon legislation, and with our dual system of state and federal jurisdiction, the problem is not so easily solved. Some of the operators of motor vehicles engaged in the business of carrying for hire are not common carriers. Regulation of the carrier practices of these operators must meet the requirements of the Fifth and Fourteenth Amendments. Where interstate operations are involved, the commerce clause of the Federal Constitution furnishes a barrier to effective state regulation. Our National Transportation Committee in its recent report says: "These questions are of mixed State and Federal bearing and very difficult of determination."<sup>31</sup> Many articles have been published which treat of the legal problems involved in motor carrier regulation in the United States.<sup>32</sup>

<sup>29</sup> See Duncan, *op. cit. supra* note 1, at 7 *et seq.*; *Railroads and Trucks*, 13 THE GIRARD LETTER 1, 3 (published by the Girard Trust Company, Philadelphia).

<sup>30</sup> "What the parliament doth, no authority upon earth can undo . . . the power of parliament is absolute and without control." 1 BL. COMM. \*161-163. Holden v. James (1814) 11 Mass. 396, 403, 6 Am. Dec. 174; Maxwell v. Goetschius (1878) 40 N. J. L. 383, 29 Am. Rep. 242.

<sup>31</sup> U. S. Daily, Feb. 17, 1933, at 2188.

<sup>32</sup> Asbill, *Regulation of Motor Freight Vehicles Under Motor Carrier Acts of 1929 and 1931* (1931) 1 GA. LAWYER 256, 272, *State Regulation of Motor Vehicles Operating in Interstate Commerce* (1931) 17 A. B. A. J. 87; Beckett, *The Extent to Which the Mississippi Railroad Commission May Regulate and Control the Operation of Busses* (1930) 2 MISS. L. J. 416; Brown and Scott, *Regulation of the Contract Motor Carrier under the Constitution* (1931) 44 HARV. L. REV. 530; Chamberlain, *Motor Bus Regulation in Iowa* (1923) 9 IOWA L. BULL. 26; Cleland, *Regulation of Interstate Motor Busses* (1928) 53 A. B. A. REP. 738; Gavit, *State Highways and Interstate Motor Transportation* (1927) 21 ILL. L. REV. 559; George, *Principles of Motor Carrier Regulation* (1929) 63 AM. L. REV. 72, *Regulation of Motor Carrier Service and Rates* (1929) 3 CIN. L. REV. 269, *Motor Carrier Regulation in Missouri* (1928) 40 U. OF MO. BULL. LAW SER. 22, *Factors in Granting Motor Carrier Certificates of Public Convenience and Necessity* (1930) 5 IND. L. J. 243, *State Regulation of Interstate Motor Carriers* (1929) 14 ST. LOUIS L. REV. 136; Hall, *Certificates of Convenience and Necessity* (1929) 28 MICH. L. REV. 107, 276; Ingram and Breckenridge, *Motor Bus Competition with Established Carriers* (1924) 9 IOWA L. BULL. 268; Kelly, *The Problem of Motor Vehicle Regulation* (1932) 13 PUBLIC ROADS 153; Light, *The Supreme Court and Commerce by Motor Vehicle* (1929) 7 N. C. L. REV. 268; Lilienthal and Rosenbaum, *Motor Carrier Regulation in Illinois* (1927) 22 ILL. L. REV. 47, *Motor Carrier Regulation by Certificates of Convenience and Necessity* (1926) 36 YALE L. J. 163; McNeese, *Regulation of Motor Transportation* (1933) 37 DICK. L. REV. 81; Phelps, *The Right to Regulate Contract Motor Carriers for Hire* (1932) 10 PUBLIC UTILITIES FORTNIGHTLY 202; Pierson, *Recent Legislation Affecting Carriers by Motor* (1926) 12 A. B. A. J. 473; Rosenbaum and Lilienthal, *Motor Carrier Regulation in Ohio* (1927) 1 CIN. L. REV. 288, *Motor Carrier Regulation: Federal, State and Municipal* (1926) 26 COL. L. REV. 954, *The Regulation of Motor Carriers in Pennsyl-*

## I. CLASSIFICATION OF MOTOR VEHICLES

Carriers are divided into two general classes, the common and the private carrier. The former holds himself out to the public to carry persons or property for hire, offering to carry for anyone and everyone, while the latter undertakes to carry persons or property in particular cases by special agreement for hire or reward.

The motor vehicles engaged in the transportation of persons are classified as a practical matter, according to the character of the service they perform, as: (1) common carrier busses—both those operating over regular routes or between fixed termini, on regular schedules, and those operating as anywhere-for-hire carriers, such as taxicabs; (2) chartered busses, or contract carriers of persons, such as those used in transporting athletic teams, delegations attending conventions, and other groups; (3) busses not operated for profit, such as school and hotel busses; (4) the private passenger automobile.

The motor vehicles engaged in the transportation of property are generally classified as: (1) common carrier truckers, both those operating over regular routes or between fixed termini, generally on fixed schedules, and those operating as anywhere-for-hire truckers who, although not operating over regular routes or on fixed schedules, hold themselves out to carry for the public generally (the latter are sometimes referred to as common carrier contract truckers<sup>33</sup>); (2) contract carriers, who do not hold themselves out to carry property for the public generally without special agreement, but who enter into specific contracts for such transportation with one or more shippers; (3) the privately operated truck, such as that used by the farmers, manufacturers, jobbers, and others, for the transportation of their own products or goods and in the conduct of their own business.

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*vania* (1927) 75 U. OF PA. L. REV. 696; Schnader, *The Taxicab—Its Service and Regulation* (1924) 116 ANN. AM. ACAD. POL. SCI. 101; Spurr, *A New and Significant Test of the Right to be Regulated* (1932) 9 PUBLIC UTILITIES FORTNIGHTLY 195, 284, *The New Curb on the Contract Carrier* (1933) 11 *ibid.* 106; Stecher, *A Review of Common Carrier Motor Vehicle Regulation* (1931) 6 WASH. L. REV. 1, *Proposed Federal Regulation of Interstate Carriers by Motor Vehicle* (1932) 17 MINN. L. REV. 1; Stevens, *Regulation of Common Carriers of Passengers by Bus* (1930) 2 MISS. L. J. 404; Warner, *Regulation of Motor Vehicles Engaged in Interstate Commerce* (1929) 32 ARK. B. A. J. 133; Wilcox *Public Regulation of Motor Bus Service* (1924) 116 ANN. AM. ACAD. POL. SCI. 107. See also *Motor Bus and Motor Truck Operation* (1928) 140 I. C. C. 685; *Coördination of Motor Transportation* (1932) 182 I. C. C. 263; Flynn Report, *loc. cit. supra* note 4; Peterson, *Motor-Carrier Regulation and Its Economic Bases* (1929) 43 Q. J. OF ECON. 604; Notes (1929) 3 CIN. L. REV. 354; (1931) 1 IDAHO L. J. 173; (1926) 21 ILL. L. REV. 166; (1929) 35 W. VA. L. Q. 152; Legis. (1932) 80 U. OF PA. L. REV. 1008.

<sup>33</sup>Flynn Report, *op. cit. supra* note 4, at 93.

At the end of 1931 there were some twenty-six million motor vehicles registered in the United States. Of this number approximately 98,900 were motor busses. One-half of these busses were operating as common carriers, while the remainder were chartered busses and non-revenue busses (school, hotel, industrial, and others). Three and one-half million of these registered vehicles were motor trucks. It is estimated that fifteen per cent of these trucks, or over one-half million, are operating either as common or contract carriers.<sup>34</sup>

It is the so-called contract carriers of property who are the disturbing element in the transportation business.<sup>35</sup> They have been the rate cutters and rebaters<sup>36</sup> and have been quite generally referred to as the fly-by-nighters and the catch-as-catch-can carriers.<sup>37</sup> A marked distinction has been recognized between these carriers and the common carriers<sup>38</sup> and while the latter have been subjected to state regulation, which is more or less effective, the former have ordinarily enjoyed immunity. These carriers contend that they are not engaged in a public undertaking and that their rates and carrier practices are not subject to regulation. It is to the legal problems involved in the regulation of these carriers that this paper will be principally devoted.

The first difficulty encountered in the regulation of the so-called contract carrier is in determining the status of the particular operator as common or private carrier. This being a question of fact, it is not always an easy one to determine;<sup>39</sup> it depends upon whether there has been a holding out to serve anyone and everyone. Contract carriers generally perform every character of carriage usually performed by common carriers and customarily make contracts with anyone offering almost any kind of freight. Some, of course, are "private in name, but public in fact."<sup>40</sup> The determination of the class into which the particular contract carrier falls is also of importance in determining the nature of the liability in the case of loss or damage to the property carried. The common carrier's liability is, generally speaking, that of an insurer of the goods carried,<sup>41</sup> while the liability of the private car-

<sup>34</sup> Kelly, *op. cit. supra* note 13, at 154; see Report of Hearings before Senate Committee on Interstate Commerce, Feb. 3, 1932, at 66, 96.

<sup>35</sup> While the contract carriers of passengers, or the so-called chartered busses, are a disturbing factor, they are not engaged extensively in transportation. Flynn Report, *op. cit. supra* note 4, at 34.

<sup>36</sup> Coördination of Motor Transportation (1932) 182 I. C. C. 263, 306.

<sup>37</sup> Legis. (1932) 80 U. OF PA. L. REV. 1008, 1014.

<sup>38</sup> Bekins Van Lines, Inc., v. Riley (1929) 280 U. S. 80.

<sup>39</sup> Motor Bus and Motor Truck Operation (1928) 140 I. C. C. 685, 742.

<sup>40</sup> Stephenson v. Binford (S. D. Tex. 1931) 53 F. (2d) 509, 515, *aff'd*, (1932) 287 U. S. 251.

<sup>41</sup> York Manufacturing Co. v. Illinois Cent. R. R. (1866) 3 Wall. (70 U. S.) 107.

rier of property is that of an ordinary bailee.<sup>42</sup> A conclusion of this question is also important in determining the validity of contracts limiting liability, as the authorities seem agreed that contracts by private carriers stipulating against liability for ordinary negligence are valid.<sup>43</sup> This difficulty, however, is not limited to the contract carrier, but may arise in connection with the recognized common carrier. Such a carrier may not be a common carrier in every respect and on all occasions. The United States Supreme Court has held that a finding that a railway is a common carrier does not have the necessary effect of impressing all its property with the character of property devoted to the public use.<sup>44</sup> A similar result has been reached by the Supreme Court in connection with the business of a taxicab company. In *Terminal Taxicab Co., Inc. v. Kutz*,<sup>45</sup> it was held that such part of the business of the taxicab company, as related to furnishing automobiles from its central garage on individual orders, generally by telephone, was not "affected with a public interest" and that its rates charged for such services were not open to inquiry by the District of Columbia Public Utilities Commission, although it was assumed that the taxicab company generally accepted any seemingly solvent customers.

Where the carrier advertises for business and holds itself out to contract for the carriage of certain kinds of property, and there is no showing that it denies haulage to anyone who offers to contract, the statement that it reserves the right to decline any contract has been held not to be persuasive in determining whether the carrier is a common or a private carrier.<sup>46</sup> Nor is the presence or absence of hauling contracts controlling in determining the class to which the particular carrier belongs.<sup>47</sup> A carrier delivering goods by motor vehicle on a definite schedule for everybody signing contracts therefor has been held to be a common carrier.<sup>48</sup>

The preceding discussion would indicate that there is often controversy as to the status of a particular carrier. If, however, the carrier is in fact a contract carrier, it admittedly is not a common carrier. The discussion to follow will be predicated upon the assumption that

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<sup>42</sup> *Varble v. Bigley* (1879) 77 Ky. 698.

<sup>43</sup> See (1932) 30 MICH. L. REV. 979.

<sup>44</sup> *Manufacturers Ry. v. United States* (1918) 246 U. S. 457.

<sup>45</sup> (1916) 241 U. S. 252.

<sup>46</sup> *Red Ball Transit Co. v. Marshall* (S. D. Ohio 1925) 8 F. (2d) 635, appeal dismissed without opinion (1927) 273 U. S. 782; *Grolbert v. Board of R. R. Com'rs* (S. D. Iowa 1932) 60 F. (2d) 321.

<sup>47</sup> *Keystone Warehousing Co. v. Public Service Comm.* (Pa. Super. 1932) 161 Atl. 891.

<sup>48</sup> *Bingaman v. Public Service Comm.* (Pa. Super. 1932) 161 Atl. 892.

the contract carrier involved is a contract carrier in the true sense and, therefore, a private, and not a common carrier.

## II. LEGAL BASIS UPON WHICH MOTOR CARRIER REGULATION IS PREDICATED

In *Hendrick v. Maryland*,<sup>49</sup> decided in 1915, the United States Supreme Court, speaking through Mr. Justice McReynolds, said:

"The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. . . . a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles. . . . This is but an exercise of the police power uniformly recognized as belonging to the states. . . ."<sup>50</sup>

Thus, under the exercise of the state police power, motor vehicle operations over the highways may be subjected to highway conservation and traffic safety regulations. Of course, highway regulation and the regulation of carriers thereon are not new.<sup>51</sup> But in this case, a new form of conveyance was involved. It was held that in the absence of national legislation covering the subject, regulations for public safety and order may be imposed upon interstate as well as intrastate commerce, and that such regulations may be imposed upon the private passenger automobile.

There is, however, a broad line of demarcation between the motor vehicle which is privately operated and the motor vehicle for hire. Such a distinction appears to have been recognized by the United States Supreme Court as early as 1911, in *Fifth Avenue Coach Co. v. City of New York*,<sup>52</sup> in upholding an ordinance of the City of New York, concerning the display of advertising, as constitutionally applicable to automobile stages, although the ordinance expressly exempted business vehicles engaged in the usual business or work of their owners.

Then, in 1924, came the case of *Packard v. Banton*,<sup>53</sup> where Mr. Justice Sutherland, speaking for the Court, said:

"The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary and, generally at least, may be prohibited or conditioned as the legislature deems proper."<sup>54</sup>

<sup>49</sup> (1915) 235 U. S. 610.

<sup>50</sup> *Ibid.* at 622. See *Clark v. Poor* (1927) 274 U. S. 554; *Johnson Transfer & Freight Lines v. Perry* (N. D. Ga. 1931) 47 F. (2d) 900; *Sproles v. Binford* (S. D. Tex. 1931) 52 F. (2d) 730; *Stephenson v. Binford*, *supra* note 40.

<sup>51</sup> 1 ASSOCIATED TRAFFIC CLUBS BULL. 112.

<sup>52</sup> (1911) 221 U. S. 467.

<sup>53</sup> (1924) 264 U. S. 140, Notes (1924) 22 MICH. L. REV. 717, (1924) 2 TEX. L. REV. 523.

<sup>54</sup> 264 U. S. at 144; See *Hodge Drive-It-Yourself Co. v. Cincinnati* (1932) 284 U. S. 335; *Stephenson v. Binford* (1932) 287 U. S. 251; *Sage v. Baldwin* (N. D. Tex. 1932) 55 F. (2d) 968; *Ex parte Sterling* (Tex. 1932) 53 S. W. (2d) 294. See also ELLIOTT, ROADS AND STREETS (4th ed. 1926) c. xlvii, §1171.3; Note (1931)

In addition to the distinction between the motor vehicle for hire and the privately operated vehicle there is another distinction, originally made in a different connection, which is of great importance in motor carrier regulation. It is the distinction made by the courts between the business said to be "affected with a public interest" and, as a consequence subject to governmental control as to its charges and service, and the business which is not affected with such interest and not subject to such control. This distinction was first recognized as a part of our law by the Supreme Court in *Munn v. Illinois*.<sup>55</sup> In this case the Court adopted Lord Chief Justice Hale's monumental phrase: "When private property is 'affected with a public interest, it ceases to be *juris privati* only,'" and said:

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."<sup>56</sup>

We have then, as a legal premise: The right of the states, under the exercise of their police power, to regulate the movements of motor vehicles over their highways; a distinction made, as to highway use, between the privately operated vehicle and the carrier for hire; and the right of the states to control the operations of a business "affected with a public interest." In addition, we have the power of Congress, under the Federal Constitution, to regulate interstate commerce.

### III. REGULATION OF INTRASTATE MOTOR CARRIERS

Those state regulations which are clearly highway conservation and protection, or traffic safety measures, such as those fixing physical standards for vehicles, and the like, may, without legal difficulty, be imposed upon intrastate motor carriers. The source of this power, as expressed by the Supreme Court in *Hendrick v. Maryland*, is the police power of the states. Where the operations are interstate in character, thus involving the question of the application of the commerce clause, the problem is more complex. The various regulations of this kind,

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40 YALE L. J. 469. In *Packard v. Banton*, a New York statute requiring those engaged in the business of carrying passengers for hire in motor vehicles, except street cars and motor vehicles subject to the Public Service Commission law, upon the streets of a city of the first class, to file a bond or insurance policy conditioned for the payment of any judgment secured against the operator for death or injury caused by the operation or the defective construction of the vehicle, was held not to be in violation of the equal protection clause although the statute did not apply to persons operating motor vehicles for their own private ends.

<sup>55</sup> (1876) 94 U. S. 113.

<sup>56</sup> *Ibid.* at 126.

which may be imposed upon all motor carriers, will be discussed in connection with the regulation of the interstate carriers.<sup>57</sup>

It is the effect of the due process and equal protection clauses of the Fourteenth Amendment, upon legislation subjecting motor carriers to control, which presents the legal difficulty in state regulation of the intrastate carriers.

#### A. State Regulation and the Due Process Clause

The legal problem of greatest moment in motor carrier regulation is that arising out of the limitation imposed by the due process clause upon state legislation regulating the rates and service of motor vehicles for hire. Regulation of this character, to be effective in establishing a complete regulatory system for transportation, must take into account the operations of the contract carriers. Various states have enacted legislation designed to subject these carriers to control. Some of this legislation took the form of conditioning the use of the roads by motor carriers for hire. In some instances common carrier obligations were imposed upon the contract carriers as a condition to such use. Other legislation has subjected these carriers to rate regulation and prohibited their use of the highways without a permit from the state, which might be denied if adequate transportation facilities were already available in the territory involved. The contract carriers have taken the view that regulations of this kind are business regulations as distinguished from highway regulations; that their business is not affected with a public interest within the rule of *Munn v. Illinois*, and that the due process clause affords them protection from such legislation. Several cases involving this problem have reached the United States Supreme Court.

The first case on this subject to reach the Supreme Court was *Michigan Public Utilities Comm. v. Duke*,<sup>58</sup> in 1925. The Michigan statute involved provided that any and all persons engaged in the business of carrying for hire upon the state's highways should be common carriers<sup>59</sup> and burdens appropriate to common carriers were imposed by various sections of the act. The carrier here was engaged in this business at the time of the passage of the act. Although engaged in extensive operations, employing seventy-five men and operating forty-seven motor trucks and trailers, he was not a common carrier. He did not hold himself out as a carrier for the public. His operations were limited to transporting automobile bodies from the plants of three manufacturers in Detroit, Michigan, to an automobile manufacturer at

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<sup>57</sup> See p. 62, *infra*.

<sup>58</sup> (1925) 266 U. S. 570, 36 A. L. R. 1105, (1925) 38 HARV. L. REV. 980, (1925) 34 YALE L. J. 675.

<sup>59</sup> Mich. Stats. 1923, p. 327, §3.

Toledo, Ohio, under three contracts. While interstate commerce was involved and the statute was held to violate the commerce clause, the statute was also condemned as being repugnant to the due process clause. On this point Mr. Justice Butler, delivering the unanimous opinion of the Court, said:

" . . . it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public 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 14th Amendment."<sup>60</sup>

It has been contended that this case is authority for the proposition that the business of the contract carrier is not a business "affected with a public interest."<sup>61</sup> It would seem, though, that to treat the case as supporting this proposition, is to fail to distinguish between a common carrier and a carrier whose business may be clothed with a public interest, and as such subject to legislative rate and service regulation. While the carrier here was referred to by the Court as a private carrier, it was only necessary to use the term "private" in the sense in which the term is used to distinguish those carriers who carry only for certain persons by special agreement and are not engaged in or holding themselves out to carry for anyone and everyone. It was the conversion of the private carrier into a common carrier that was held to be unconstitutional. It must be remembered that a much greater burden is imposed upon a business when it is declared to be a common carrier, or public utility, than that imposed upon a business declared to be "affected with a public interest." In the former case there is a right to demand service on the part of the public and a duty to serve on the part of the business, while in the latter case no such duty is necessarily imposed. This distinction was clearly recognized by the Supreme Court in *German Alliance Ins. Co. v. Lewis*.<sup>62</sup>

<sup>60</sup> 266 U. S. at 577.

<sup>61</sup> See Brown and Scott, *op. cit. supra* note 32, at 553; Spurr, *A New and Significant Test of the Right to Be Regulated* (1932) 9 PUBLIC UTILITIES FOR-  
NIGHTLY 195, 199-200; and see Brief on behalf of Intervener Beard filed in the United States Supreme Court in the case of *Stephenson v. Binford*, Oct. Term 1932, No. 326, at p. 14 *et seq.*

<sup>62</sup> (1914) 233 U. S. 389, L. R. A. 1915C 1189; Legis. (1932) 80 U. OF PA. L. REV. 1008, 1009; (1931) 31 COL. L. REV. 1194. See also Note (1929) 39 YALE L. J. 256, at 258, n. 11, recognizing the distinction between industries "affected with a public interest" and "public utilities." The distinction between a common carrier and a business affected with a public interest was recognized in *Cotting v. Kansas City Stockyards Co.* (1901) 183 U. S. 79. In the *German Alliance Ins.* case it was held that the business of insurance is affected with a public interest to such an extent as to justify legislative regulation of its rates. *Accord:* *Continental Life Ins. & Inv. Co. v. Hattabaugh* (1912) 21 Idaho 285, 121 Pac. 81; *Wanberg v.*

The next case to reach the Supreme Court was *Frost v. Railroad Comm. of California*,<sup>63</sup> in 1926. The constitutionality of a California statute, known as the Auto Stage and Truck Transportation Act,<sup>64</sup> was involved. This act provided for the regulation of transportation for compensation over public highways by automobiles, and carriers of persons or property operating under private contracts, as well as common carriers, were subjected to regulative control by the State Railroad Commission. One provision of the act prohibited operation for compensation over the highways without first having secured a certificate of public convenience and necessity from the commission. The Frost Trucking Company was engaged in transporting citrus fruit, for a stipulated compensation, under a single contract, over the public highways between fixed termini. The company had not secured a certificate of public convenience and necessity as required by the act, and was ordered by the Railroad Commission, which conceded that the company was in fact a private carrier, to suspend operations until the required certificate was secured. In upholding the order of the commission, the state supreme court declared that the state having the power to grant or altogether withhold from its citizens the privilege of using the highways for the purpose of transacting private business thereon, might grant the right on such condition as it saw fit to impose. The California court then proceeded to construe the act involved as offering this privilege upon the condition that the user dedicate his property to the quasi-public use of public transportation, or at least submit to the conditions and regulations specified in the act.<sup>65</sup>

In reversing the California court, the United States Supreme Court, referring to the *Duke* case, pointed out that a private carrier can not consistently with the due process clause be converted into a common carrier against its will, by mere legislative command, and that since the statute, as construed by the state supreme court imposed that con-

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National Union Fire Ins. Co. (1920) 46 N. D. 369, 179 N. W. 666; *cf. In re: Opinion of the Justices* (1925) 251 Mass. 569, 147 N. E. 681, upholding the constitutionality of a proposed 1925 Massachusetts statute providing machinery under which an applicant for automobile insurance may compel the insurance company to issue him a policy—thus imposing upon the insurance business the duty to serve; Brown and Scott, *op. cit. supra* note 32, at 553.

<sup>63</sup> (1926) 271 U. S. 583, 47 A. L. R. 457, discussed in Brown and Scott, *op. cit. supra* note 32, at 540; Merrill, *Unconstitutional Conditions* (1929) 77 U. OF PA. L. REV. 879, 884; Lilienthal and Rosenbaum, *Motor Carrier Regulation by Certificate of Convenience and Necessity* (1926) 36 YALE L. J. 163, 177; noted in (1926) 6 B. U. L. REV. 259; (1926) 99 CENT. L. J. 275; (1926) 40 HARV. L. REV. 131; (1926) 21 ILL. L. REV. 380; (1927) 11 MINN. L. REV. 555.

<sup>64</sup> Cal. Stats. 1917, c. 213, p. 330, as amended *ibid.* 1919, c. 280, p. 457.

<sup>65</sup> *Frost v. Railroad Comm. of California* (1925) 197 Cal. 230, 240 Pac. 26.

dition upon the private carrier before he might secure the required certificate, the statute was unconstitutional.<sup>66</sup>

The Supreme Court was divided in this case. Mr. Justice Holmes thought the judgment should have been affirmed, taking the view that whatever the Supreme Court of California may have intimated, the only point really decided was that the order of the commission, which suspended the operations of the company without a certificate, should stand. He was of the opinion that the state could properly require carriers for hire to obtain certificates from the commission that public convenience and necessity required such operation, and said he could see nothing in the act which required private carriers to become common carriers. Mr. Justice Brandeis concurred in this view. Mr. Justice McReynolds also dissented, expressing the opinion that if the California Supreme Court had simply approved the order of the Railroad Commission and had said nothing more, there would be little, if any, difficulty in finding adequate grounds for affirmance. He felt the primary concern was with the decree itself, and not with the reasons advanced by the court below in support of it, and was of the opinion that the decree should be affirmed. Mr. Justice McReynolds also made this observation:

"... if, in so many words, the legislature had said that no intrastate carriers for hire, except public ones, shall be permitted to operate over the state roads it would have violated no Federal law. So far as the rights of plaintiffs in error are affected, nothing more serious than that has been done."<sup>67</sup>

As a result of the *Frost* case, we find that the rule of *Packard v. Banton*, to the effect that the use of the highways for purposes of gain may be prohibited or conditioned as the legislature deems proper, is now qualified. The conditions imposed upon this use must be constitutional conditions. In this connection the comment of United States Circuit Judge Hutcheson, on the position of the private carrier, is worthy of note. He says:

"We think it perfectly plain that, as he never had a right on the roads, but merely a privilege as to them, it is too much to say that, when the state undertakes to impose upon him conditions different from those char-

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<sup>66</sup> It has been questioned whether the Supreme Court did not err in assuming that the state court had construed the statute to turn private carriers into common carriers. (1931) 31 COL. L. REV. 1194. Compare with the *Frost* case, *The Pipe Line Cases* (1914) 234 U. S. 548, to the effect that the pipe lines involved, engaged in carrying their own oil, some of which was purchased just before carriage, although not common carriers in the technical sense, could be required, under the Commerce Act, not to continue in operation except as common carriers, the Court saying: "The control of Congress over commerce . . . may require those who are common carriers in substance to become so in form." *Ibid.* at 560.

<sup>67</sup> 271 U. S. at 602.

acterizing him at common law, his privilege flows under the Fourteenth Amendment into a right which the state may not impair."<sup>68</sup>

But this is the result of the *Frost* case and while the Supreme Court says in this case that the state possesses, in proper cases, the power to prohibit the use of the public highways,<sup>69</sup> the needs of the shippers would seem to dictate that it would be most unwise for a state to adopt such a policy in regard to the contract carriers. There is a need for such carriers and there seems to be no general legislative desire to exclude them altogether from the highways. The desire, as evidenced by recent legislative enactments, is to subject these carriers to such regulation and control as is necessary to protect the general transportation system of the state.

The *Frost* case is relied upon, by those taking the view that the *Duke* case established that the business of the contract carrier is not "affected," as additional authority for that proposition. There may be reasonable grounds for believing that the Supreme Court may have held such an unexpressed view, inasmuch as the act, as applied, was said to be a business regulation.<sup>70</sup> But it was the imposition of common carrier obligations as a condition precedent to highway use for hire which was condemned. To take the position that the case establishes that the business of the contract carrier is not clothed with a public interest is as unwarranted here as in the *Duke* case.

Five years after the *Frost* case, *Smith v. Cahoon*<sup>71</sup> reached the Supreme Court. This case, involving a Florida statute,<sup>72</sup> came up on appeal from a judgment of the Florida Supreme Court, reversing a circuit court of the state, which had discharged Smith, the carrier, in *habeas corpus* proceedings. Smith, who had exclusive contracts with a single shipper, for the hauling of its merchandise within the State of Florida, had been arrested for operating vehicles upon the highways without having secured a certificate of convenience and necessity and paying a tax as required by the statute. This statute, providing for the regulation of "auto transportation companies," which as therein defined included private carriers for hire, with certain exceptions, pro-

<sup>68</sup> *Stephenson v. Binford*, *supra* note 40, at 515. On unconstitutional conditions, see *Merrill*, *loc. cit. supra* note 63; *Oppenheim*, *Unconstitutional Conditions and State Powers* (1927) 26 MICH. L. REV. 176. See also Note (1931) 79 U. OF PA. L. REV. 1119, 1128.

<sup>69</sup> 271 U. S. at 593. On the power to exclude the carrier for hire from the highway, see Note (1931) 40 YALE L. J. 469.

<sup>70</sup> 271 U. S. at 591. A note in (1932) 30 MICH. L. REV. 629 expresses the view that the *Frost* case established that the business of the contract carrier is not "affected with a public interest"; see also authorities cited in note 61, *supra*.

<sup>71</sup> (1931) 283 U. S. 553, (1931) 31 COL. L. REV. 1194, (1932) 30 MICH. L. REV. 629.

<sup>72</sup> Fla. Stats. 1929, c. 13700, p. 348.

hibited operation, except within the limits of an incorporated city or town, without a certificate from the State Railroad Commission that the present or future public convenience and necessity required, or would require, such operation, and the commission was given the power in its discretion to refuse to issue such certificate. The statute required the commission to exact of such carriers bonds, or insurance policies, protecting passengers or goods carried as well as the public, and the validity of the certificates was conditioned upon furnishing such bonds or insurance policies. Power to fix rates, fares, rules, and regulations of such carriers was given to the commission by the statute and such carriers were required to file a schedule of rates and fares, a time schedule, and pay a mileage tax quarterly in advance, graded according to the capacity of the vehicle. Other provisions prohibited discrimination and "free fares," with certain exceptions. Violation of any provision of the act was made a misdemeanor punishable by fine or imprisonment, or both.

There was no separate scheme of regulation for the two types of carriers for hire; both the common and the contract carrier were put by the statute upon precisely the same footing. While the statute did not expressly declare that all private carriers for hire should become common carriers, as was expressly declared in the Michigan statute involved in the *Duke* case and by the Supreme Court's interpretation of the state supreme court's construction of the California statute in the *Frost* case, the private carrier for hire was, by this statute, subjected to the same obligations.

The Florida Supreme Court took a very liberal view of the statute, holding that it did not require private carriers to become common carriers and, that inasmuch as the provisions of the statute were severable, those provisions legally applicable only to common carriers were not intended to be applied to those not common carriers, although engaged in transportation to which the statute referred. This view did not satisfy the United States Supreme Court which reversed the Florida Supreme Court, holding that this construction of the statute did not determine what terms were applicable to the private carrier and left the matter too indefinite and uncertain for a penal statute.<sup>73</sup> The Supreme Court also held the statute objectionable on the ground that

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<sup>73</sup> The Supreme Court pointed out that this was not a suit in equity where the enforcement of a statute awaits the final determination of the court as to its validity and scope; that the carrier here was arrested and held for trial for disobedience to the statute as it stood when enacted; and that the duty of severing the statutory provisions and resolving important constitutional questions could not be thus imposed upon laymen at the peril of criminal prosecution. 283 U. S. at 564.

it attempted to impose common carrier regulations upon the private carrier which, the Court said, is beyond the power of the state. In addition, the statute was condemned upon the ground that it was repugnant to the equal protection clause because certain carriers were exempted from regulation.

Those taking the position that the *Duke* and *Frost* cases established that the business of the contract carrier is not "affected" rely upon the *Cahoon* case as additional authority on the point.<sup>74</sup> There is language in the opinion supporting that view. Chief Justice Hughes, delivering the unanimous opinion of the Court, said:

"On the face of the statute, the scheme was obviously one for the supervision and control of those carriers which, by reason of the nature of their undertaking or business, were subject to regulation by public authority in relation to rates and service. No separate scheme of regulation can be discerned in the terms of the act with respect to those considerations of safety and proper operation affecting the use of highways which may appropriately relate to private carriers as well as to common carriers. . . . Such a scheme of regulation of the business of a private carrier, such as the appellant, is manifestly beyond the power of the state."<sup>75</sup>

The inference would seem clearly to be that a contract carrier is not engaged in a business which may be subjected to rate and service regulation.

With the law on the subject of whether the business of the contract carrier is "clothed with a public interest" in this situation, so far as the United States Supreme Court is concerned, the Forty-Second Legislature of Texas met in 1931. A large part of the Governor's message to this legislature concerned the highways and the business done over them. In addressing the legislature, he said: "Our roads are being taken and badly used by motor vehicles engaged in the transportation of passengers and freight for hire . . .," and, in directing the legislators' attention to what he felt to be an uneconomical situation, resulting from the unrestricted competition of unregulated motor trucks and their use of the highways in hauling freight, he said: "If trucks and busses are to operate in competition with railroads, and at considerable damage to highway development, and if, because of the reduced business of the railroads, the public is made to pay higher railroad rates on commodities moving by rail, it is hardly possible that under such conditions the truck and bus transportation could be economically profitable to the general public."<sup>76</sup> Pursuant to this message a three-

<sup>74</sup> See the Brief upon behalf of Intervener Beard in *Stephenson v. Binford*, *supra* note 61.

<sup>75</sup> 283 U. S. at 563.

<sup>76</sup> *Stephenson v. Binford*, *supra* note 40, at 515. See the similar view expressed by Clyde L. King, Chairman, Public Service Comm. of Pennsylvania, 8 U. S. Daily 74 (April 1 to 8, 1933).

fold statute was enacted at this session, designed to remedy the evil which was felt to exist.<sup>77</sup>

<sup>77</sup> Tex. Stats. 1931, cs. 121, 277, 282. Within the space of a year and one-half this three act statute has had no less than sixteen hearings in the courts. In some of these suits several parties were involved both as plaintiffs and defendants, and sundry parties intervened. Six of the hearings have been had in the United States District Courts before a statutory court of three judges convened under section 380 of Title 28, U. S. C., with Circuit Judge Hutcheson sitting in each instance along with two district judges. See *McLeaish & Co. v. Binford* (S. D. Tex. 1931) 52 F. (2d) 151, *aff'd*, 284 U. S. 598; *Sproles v. Binford*, *supra* note 50; *McLeaish & Co. v. Binford* (S. D. Tex. 1931) 52 F. (2d) 737; *Stephenson v. Binford*, *supra* note 40; *Sage v. Baldwin*, *supra* note 54; and *Sproles v. Binford* (S. D. Tex. 1932) 56 F. (2d) 189, a final hearing on the same question involved in (S. D. Tex. 1932) 52 F. (2d) 730, *aff'd*, (1932) 286 U. S. 374. Two of the hearings were before judges of two of the state's judicial districts and both resulted in subsequent hearings in the Supreme Court of the State of Texas. See *Ex parte Sterling*, *supra* note 54, and *Ex parte Phares* (Tex. 1932) 53 S. W. (2d) 297. One suit was brought in a county court of the state with an appeal later to the Court of Criminal Appeals of Texas, followed by an application for a rehearing. See *Reaves v. State of Texas* (Tex. Crim. App. 1931) 50 S. W. (2d) 286, *reh'g den.*, June 1, 1932. Three of the cases which originated in the United States District Courts were reviewed by the United States Supreme Court. See *McLeaish & Co. v. Binford*, *Sproles v. Binford* and *Stephenson v. Binford*.

Chapter 121, styled "regulating operation of trucks on state highways" purports from the "declaration of policy" set forth in section 1 of the act, to be a traffic, safety and highway protection and conservation measure. The constitutionality of this act was attacked in *McLeaish & Co. v. Binford*, (noted in (1932) 27 ILL. L. REV. 70) and the statute was condemned by the court, as unduly discriminatory against those in the business of hauling cotton, and as a regulation of the business of those engaged in hauling uncompressed cotton rather than a regulation of the use of the highways. A temporary injunction issued enjoining the operation of the statute and upon appeal this order was affirmed by the United States Supreme Court. (1932) 284 U. S. 598. ..

Chapter 282 has for its purpose the regulation of the use of the highways by vehicles, including provisions as to size of the vehicle and fixing the maximum load, with a number of exceptions and exemptions. The validity of this act was contested in the case of *Sproles v. Binford*, 52 F. (2d) 730, (noted in (1932) 6 TEMP. L. Q. 413) where a hearing was had upon a motion for a temporary injunction to restrain its enforcement by the defendant law enforcement officers of the state. It was charged that the act violated the equal protection and due process clauses of the Fourteenth Amendment. An interlocutory injunction was granted to restrain enforcement of only one provision of the act, the other provisions questioned being upheld as constitutional. The section condemned (§3f) was one limiting the weight of loads on the highways made up of packages of more than a stated size and weight. This provision was felt by the court to be unlawfully discriminatory. The same result was reached in the companion case of *McLeaish & Co. v. Binford*, 52 F. (2d) 737. The case of *Sproles v. Binford* came on later for a hearing of the case on its merits. 56 F. (2d) 189. At this hearing the bills for a permanent injunction were dismissed and the interlocutory injunction, restraining the enforcement of the one provision, granted at the first hearing, was dissolved. Upon appeal, the United States Supreme Court affirmed the judgment and declared this act constitutional. (1932) 286 U. S. 374.

Chapter 282 was also approved in the three Texas state decisions, *Ex parte Sterling*, *Ex parte Phares*, and *Reaves v. State*. In *Ex parte Sterling* and *Ex parte Phares*, writs of *habeas corpus* issued discharging from custody law enforcement

One of these measures,<sup>78</sup> is based upon the declaration of legislative policy set out in the act<sup>79</sup> which is to the effect:

"The business of operating as a motor carrier of property for hire along the highways of this State is declared to be a business affected with a public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that more stringent regulation should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear of such highways may be reduced; that discrimination in rates charged may be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity of the general public, and that the various transportation agencies of the State may be adjusted and correlated so that public highways may serve the best interest of the general public."

It will be noted that this act has for its purpose the making of traffic on the highways less hazardous, the conservation of the highways, and the adjustment and correlation of the various transportation agencies of the state in the interest of the general public. In order to accomplish this latter purpose the business of operating as a motor carrier of property for hire along the highways, whether as a common or as a contract carrier, is expressly declared to be a business "affected with a public interest."

Under this statute, before using the highways for hire, the common carrier must secure a certificate of public convenience and necessity, and before thus operating, the contract carrier must secure a permit. The State Railroad Commission is authorized to grant or refuse permits to contract carriers, and section 6(c) of the act provides that such permits shall only be granted after a hearing, and not if the commission is of the opinion that the proposed operation of the applicant will impair the service of authorized common carriers adequately serving the territory. Section 6 (aa) of the act provides that the commission shall prescribe minimum rates to be charged by contract carriers operating in competition with common carriers over the highways, not less than the rates prescribed for common carriers for substantially the same service.

The constitutionality of this act was almost immediately questioned and almost as soon determined, for, on October 26, 1931, just two

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officers who were held for contempt for having violated restraining orders which had issued to enjoin enforcement of the act. In *Reaves v. State*, a conviction for operating in violation of the act was upheld.

Chapter 277 and the cases of *Stephenson v. Binford* and *Sage v. Baldwin*, in which the constitutionality of that act was contested are discussed in the text and in note 82, *infra*.

<sup>78</sup> Chapter 277.

<sup>79</sup> §22b.

months after it became effective, the case of *Stephenson v. Binford*<sup>80</sup> was decided by a three-judge United States District Court. Stephenson alleging himself to be a private contract carrier engaged in hauling freight under a single contract with a freight forwarder at the time of the enactment of this statute, filed a suit before the act became effective to enjoin its enforcement. He contended the act as applied to him was repugnant to the due process and equal protection clauses of the Fourteenth Amendment.<sup>81</sup> Others who claimed to be similarly situated intervened. One of the interveners who thought he might be engaged in interstate commerce was found, by the court, not to be, and the others made no such claims, so the effect of this act upon interstate commerce was not involved.<sup>82</sup>

While the entire act was questioned here by the complainant and interveners, the only serious objection raised was directed to the provision authorizing the commission to refuse permits to contract carriers upon consideration of existing adequate service by common carriers along the proposed route, the provision requiring a bond and insurance policy to insure the payment of any judgment recovered against the carriers for loss or damages arising out of their operations, and the provision directing the commission to prescribe minimum rates not less than the rates prescribed for common carriers for substantially the same service. The carriers contended that these are business regulations, and that while the state may regulate the highways it may not regulate the private business done over them.

The state, upon behalf of the defendants, contended that the business of carrying for hire on the public highways is a business "affected

<sup>80</sup> *Supra* note 40, criticized by Spurr, *op. cit. supra* note 61; approved by Phelps, *The Right to Regulate Contract Motor Carriers for Hire* (1932) 10 PUBLIC UTILITIES FORTNIGHTLY 202; noted in (1932) 17 CORN. L. Q. 699; (1932) 45 HARV. L. REV. 583; (1932) 6 TULANE L. REV. 498; Legis. (1932) 80 U. OF PA. L. REV. 1008.

<sup>81</sup> It was also contended that the terms of the act amounted to an unconstitutional interference with the freedom of private contract. 53 F. (2d) at 512 and s. c. 287 U. S. 251, 263.

<sup>82</sup> This act was challenged by contract carriers engaged exclusively in interstate commerce in *Sage v. Baldwin*, *supra* note 54. In this case the act was charged with being in violation of the commerce clause as well as the Fourteenth Amendment and the complainant carriers sought to restrain enforcement of the statute as against them. While holding the act was not invalid as a whole, and that many of its provisions might be imposed upon interstate carriers, the court took the view that those provisions of the act, which relate to the business of the carrier as distinguished from those provisions which are highway protection or traffic safety measures, were, as to the interstate operators, inoperative under the commerce clause. An order issued restraining the respondent state officers from enforcing against the complainants the provisions of the act which concerned rates, bonds securing shippers, certificates of convenience and necessity and the making of reports or the keeping of accounts.

with a public interest" and that, therefore, the complainant and interveners, although operating only under private contracts for hire, could be constitutionally subjected to the regulations imposed by the statute.

This, of course, raises the question we have been discussing, and, it would seem squarely this time, inasmuch as it is not a case of declaring all carriers of property for hire to be common carriers. The Texas legislature used a finer technique than that used by the Michigan legislature in framing the statute involved in the *Duke* case, or that used by the California legislature in framing the statute involved in the *Frost* case if the effect of that statute was as the Supreme Court interpreted the state supreme court's construction. To avoid the effect of the *Cahoon* case, this act, which was passed just eleven days after the decision by the Supreme Court in that case, while imposing regulations upon the business on the highways of both the common and contract carriers, was very careful to keep the provisions relating to each type of carrier entirely distinct.

Circuit Judge Hutcheson, giving the opinion of the majority of the court, indicates at the start a feeling of the importance of the problem presented. He says:

"Of all the problems pressing upon the state, none present more comprehensive, more far-reaching, more troublesome aspects than do those arising from the effect upon the established common carrier transportation services by rail and road, of the rapidly increasing use of the highways for the carriage of freight for hire by persons assuming the real or pretended status of private contract carriers, and asserting their business to be unregulable."<sup>83</sup>

While recognizing that if the case was the same as that presented in *Frost v. Railroad Comm. of California*, or *Smith v. Cahoon*, the power of the state must be denied, Judge Hutcheson took the view that the statute here was wholly different from the statutes there involved, saying:

"Here is no case of compelling private carriers to become common carriers; no case of granting a right, and thereafter arbitrarily or illegally conditioning that right. Here is a case of a clear, a simple, a complete declaration of policy that the public has an interest in the business of carriage for hire over the highways of the state, a prohibition of the right to engage in such business except under a franchise, and an affixing to the enjoyment of a franchise the condition that the holder must become an integral part of the transportation system of the state, and must submit to the regulations applicable to his franchise as to rates and practices."<sup>84</sup>

That against the charge of invalidity a state statute cannot stand

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<sup>83</sup> 53 F. (2d) at 513.

<sup>84</sup> *Ibid.* at 514.

upon legislative declaration alone was acknowledged, but says the Judge:

"The record in this case teems with evidence supporting the state's declaration of purpose and policy that the use of the highways is affected with a public interest, and that the conduct of unregulated business over it is bringing about the prevalence of the mischiefs and evils which the legislation in question is designed to avoid."<sup>85</sup>

Divided, the court upheld the statute and told the complainant and interveners that if they wished to engage further in their business upon the highways of Texas they must comply with the statute.<sup>86</sup> District Judge Kennerly, dissenting, was of the opinion that the statute, so far as it attempted to regulate the business of the contract carriers, was no different in legal effect from the Michigan, California and Florida statutes involved in the *Duke*, *Frost* and *Cahoon* cases and felt enforcement of such regulations should be restrained.

The Supreme Court affirmed the decree of the United States District Court and upheld the constitutionality of the Texas act.<sup>87</sup> But the ground upon which the statute was upheld was not the same as in the lower court. The Supreme Court side-stepped the important question of whether the business of the contract carriers is "affected with a public interest." Speaking through Mr. Justice Sutherland, with only Mr. Justice Butler dissenting, the Court said:

<sup>85</sup> *Ibid.* at 515.

<sup>86</sup> Statutes subjecting contract carriers to rate or permit regulations have been upheld in several state decisions: *Frost v. Railroad Comm. of California*, *supra* note 65; *Cahoon v. Smith* (1930) 99 Fla. 1174, 128 So. 632; *Riley v. Lawson* (Fla. 1932) 143 So. 619; *Georgia Public Serv. Comm. v. Saye & Davis Transfer Co.* (1930) 170 Ga. 873, 154 S. E. 439, (1931) 31 COL. L. REV. 160 (1931) 1 GA. LAWYER 275; (But see *McIntyre v. Harrison* (1931) 172 Ga. 65, 157 S. E. 499, (1932) 2 GA. LAWYER 22); *Rutledge Co-op. Ass'n, Inc. v. Baughman* (1927) 153 Md. 297, 138 Atl. 29, (1927) 12 MINN. L. REV. 73; *Barney v. Board of R. R. Com'rs* (Mont. 1932) 17 P. (2d) 82; (1933) 10 N. Y. U. L. Q. REV. 369; (1933) 81 U. OF PA. L. REV. 768. See also *Baker v. Glenn* (E. D. Ky. 1933) 2 F. Supp. 880; *Barbour v. Walker* (1927) 126 Okla. 227, 259 Pac. 552; *Savage v. Commonwealth* (1929) 152 Va. 992, 147 S. E. 262. In *Barney v. Board of R. R. Com'rs*, the Montana Supreme Court, upon a rehearing subsequent to the decision of the United States Supreme Court in *Stephenson v. Binford*, *supra* note 40, upheld the right of the state to refuse the contract carrier a permit to use the highways where adequate facilities are, in the opinion of the commission, already available. The court was divided. Justice Angstman in a dissenting opinion took the view that the Montana statute (Mont. Stats. 1931, c. 184) is in no sense a regulation of the highway, but merely regulates competition and is therefore a business regulation, but if by a strained construction it may be treated as a highway regulation measure, it is unreasonably discriminatory. Justice Ford concurred in the dissent.

<sup>87</sup> (1932) 287 U. S. 251; see *Spurr, The New Curb on the Contract Carrier* (1933) 11 PUBLIC UTILITIES FORTNIGHTLY 106; *Notes* (1933) 19 A. B. A. J. 100; (1933) 21 CALIF. L. REV. 496; (1933) 33 COL. L. REV. 156; (1933) 37 DICK L. REV. 185; (1933) 1 DUKE B. A. J. 39; (1933) 27 ILL. L. REV. 942; (1933) 10 N. Y. U. L. Q. REV. 369; (1933) 18 ST. LOUIS L. REV. 228; (1933) 19 VA. L. REV. 413.

"Putting aside the question whether the statute may stand against the attack made under the due process of law clause, upon the theory that appellants, by reason of their use of the public highways, are engaged in a business impressed with a public interest, and the question whether it may be justified on the ground that, wholly apart from its relation to highway conservation, it is necessary in order to prevent impairment of the public service of authorized common carriers adequately serving the same territory, we confine our inquiry to the question whether, in the light of the broad general rule just stated, [the rule of *Packard v. Banton*, that the highways of the state are public property primarily for use for private purposes and that their use for purposes of gain is extraordinary and may generally be prohibited or conditioned as the legislature sees fit] the statute may be construed and sustained as a constitutional exercise of the legislative power to regulate the use of the state highways."<sup>88</sup>

That the statute could be so construed and sustained was the result reached by the Court through circuitous reasoning which must have been distasteful to some of the members of the Court, who, it is likely, acquiesced only in order to see the desired end accomplished.

After expressing itself as being impressed with the manner in which the Texas act was framed, so as to avoid any suggestion of converting the contract carriers into common carriers either expressly or indirectly, by imposing the same obligations upon them as were imposed upon the common carriers, thus taking the case out of the rule of the *Duke*, *Frost* and *Cahoon* cases, the Court proceeded to show how the requirements of the act were only highway regulation measures, premising that to follow with the declaration:

"The assailed provisions, in this view, are not ends in and of themselves, but means to the legitimate end of conserving the highways. The extent to which, as means, they conduce to that end, the degree of their efficiency, the closeness of their relation to the end sought to be attained, are matters addressed to the judgment of the legislature, and not to that of the courts. It is enough if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end. . . ."<sup>89</sup>

As for the requirement providing that the contract carrier must secure a permit before using the highways, the issuance of which is dependent upon the condition that the efficiency of common carrier service then adequately serving the same territory shall not be impaired, the Court points out that as a result of the enforcement of this provision, leaving out of mind common carriers by trucks, some traffic may thus be diverted from the highways to the railroads and consequently there will be conservation of the highways in proportion to

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<sup>88</sup> 287 U. S. at 265. "In view of the conclusions to which we shall come, it is not necessary to determine whether the operation of trucks for the transportation of freight under private contracts, carried into effect by the use of the public highways, is a business impressed with a public interest." *Ibid.* at 269.

<sup>89</sup> 287 U. S. at 272.

the amount of traffic thus diverted. So this provision of the statute is a highway conservation measure.<sup>90</sup>

Proceeding then to the provision of the act directing the state commission to prescribe minimum rates for contract carriers, not less than those prescribed for common carriers, for substantially the same service, the Court found, by the same sort of reasoning, that this was a highway conservation measure also,<sup>91</sup> inasmuch as precluding the contract carriers from charging less than the rates charged by railroad carriers would have a tendency to drive business to the rails, which might otherwise be on the roads.

The Court took the view that it was not obliged to pass upon the constitutionality of that provision of the act requiring the contract carrier to furnish a bond and policy of insurance, construed by the appellant carriers as providing protection for the shipper as well as others suffering loss or injury to property arising from the operations of such carriers, inasmuch as it did not appear that any attempt had been made to enforce this provision against the appellants and that therefore they had no occasion to complain of it. It would seem, however, that by following the same line of reasoning, as was used by the Court in connection with the permit and minimum rate provisions, to its ultimate end, this provision, even as construed by appellants, might also be found to be a highway conservation measure.<sup>92</sup> By requiring the contract carriers to furnish a bond or policy of insurance protecting the shipper, the cost to them would be reflected in their rates, making them correspondingly higher and as a result some traffic might be diverted from the highways to the railways, the highways as a

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<sup>90</sup> Cf. *Frost v. Railroad Comm. of California*, *supra* note 63, at 591. The Supreme Court there says that the California statute, imposing certificate of convenience and necessity requirements upon contract carriers, as construed by the California Supreme Court, ". . . is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions. Protection or conservation of the highways is not involved." Mr. Justice Sutherland in *Stephenson v. Binford* explains (287 U. S. at 275) that the California Supreme Court was responsible for this inasmuch as that court had expressly said that the California statute "'does not purport to be and is not in fact a regulation of the use of the highways.'" *Frost v. Railroad Comm. of California*, *supra* note 65, at 244, 240 Pac. at 32. Cf. also *Legis. (1932) 80 U. OF PA. L. REV. 1008, 1014*: "The Texas 'permit' should be upheld only in the face of the recognition that it is a business regulation . . ."

<sup>91</sup> Cf. on regulation of rates of contract carriers, *Smith v. Cahoon*, *supra* note 71, at 562.

<sup>92</sup> Cf. on requiring bond of contract carriers for protection of persons or property carried, *Michigan Public Utilities Comm. v. Duke*, *supra* note 58, at 577, and *Smith v. Cahoon*, *supra* note 71, at 562-563.

result conserved, and the provision thus, according to the Court's line of reasoning, becomes a highway conservation measure.

As here treated by our highest Court, provisions, which most lawyers had previously felt could only be applied to the contract carriers if and when their business was declared to be "affected with a public interest," we now find, may, without constitutional difficulty, be imposed as highway conservation measures. But the question of whether the business of the contract carriers is "affected" has most likely found only brief repose so far as the Supreme Court is concerned. It will, without doubt, shortly have before it some statute giving a state commission the power of fixing the maximum in addition to or instead of a minimum rate for such carriers,<sup>93</sup> or providing it shall be unlawful for such carriers to subject shippers to any undue disadvantage.<sup>94</sup> The reasoning which supports the minimum rate provision as a highway conservation measure certainly cannot be used to support these regulations. A converse result is the consequence of such reasoning.<sup>95</sup>

The Supreme Court had the opportunity in the case of *Stephenson v. Binford* to decide a really important question and should have decided it. Since inclined to uphold the Texas statute, the Court should have upheld it on the logical ground that the business of the contract carrier is subject to regulation. But not alone from the standpoint of logic was the decision a mistake. The law on this subject is left in a very unsatisfactory state from a practical standpoint. Limited regulation of these carriers engaged in intrastate operations is sanctioned as an exercise of the legislative power to regulate the use of the highways, but complete control of this agency of transportation by the states is inferentially denied. The full force of the failure of the Supreme Court to adopt the ground upon which the statute was upheld by Judge Hutcheson is not felt, however, until it is considered in connection with

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<sup>93</sup> See Mo. Stats. 1931, § 5270, p. 309, which so provides. Schwartzman Service, Inc., v. Stahl (W. D. Mo. 1932) 60 F. (2d) 1034, apparently gives silent approval to this provision.

<sup>94</sup> There is such a provision in the Alabama statute, Ala. Stats. 1932, p. 178; see 7 U. S. Daily, Nov. 10 1932, at 1639. Ky. Stats. 1932, c. 104, art. III, §5 forbids any contract carrier from subjecting the patrons of any common carrier to any undue discrimination or disadvantage. This statute was upheld in *Baker v. Glenn*, *supra* note 86.

<sup>95</sup> It could be argued that by fixing a maximum rate or prohibiting the subjection of shippers to any undue disadvantage, some of the contract carriers might find the business unprofitable and as a result discontinue operations, thus driving some shippers to the railroads and the highways would consequently be conserved. But this would be carrying the reasoning of the court in *Stephenson v. Binford* to an extreme. The reasoning was extended far enough, indeed too far, in supporting the minimum rate and permit regulations as highway conservation measures.

the power of Congress to impose rate and permit regulations upon the contract carriers engaged in interstate operations. We shall see that with the law in this situation, Congress is apparently left in a precarious position in respect to the control which it may exercise over these carriers.<sup>96</sup> This seems to be a place where the Supreme Court failed to take a practical view of a pressing problem. But legislation designed to subject a business to governmental control is considered a delicate matter by the majority of the Court. It is probable that the Court could not resolve its differences and that this was a compromise decision.

The attitude of the Supreme Court in late years toward state legislation fixing the price of commodities or regulating the use of property or services and the "affectation" test by which such statutes are measured have, in recent times, been thoroughly reviewed.<sup>97</sup> It has been pointed out that it was through the diligence of counsel for Messrs. Munn and Scott in the case of *Munn v. Illinois*, that the phrase "affected with a public interest" was brought to the attention of the Supreme Court.<sup>98</sup> The purpose was to show that the operation of grain

<sup>96</sup> See page 72 *et seq.*, *infra*.

<sup>97</sup> For some of the leading articles of the past few years, see Beer, *The Fifth and Fourteenth Amendments Still Protect the Right to Do Business in Cutting Prices or Selling Below Cost* (1931) 7 NOTRE DAME LAW. 442; Bronaugh, *Business Clothed with a Public Interest Justifying State Regulation* (1923) 27 LAW NOTES 87; Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment* (1922) 20 MICH. L. REV. 737; Finkelstein, *From Munn v. Illinois to Tyson v. Banton, a Study in the Judicial Process* (1927) 27 COL. L. REV. 769; Frankfurter, *The Supreme Court and the Public* (1930) 83 FORUM 329; Hamilton, *Affectation with Public Interest* (1930) 39 YALE L. J. 1089; Howard, *The Supreme Court and State Action Challenged under the Fourteenth Amendment, 1930-1931* (1932) 80 U. OF PA. L. REV. 483; Keezer, *Some Questions Involved in the Application of the "Public Interest" Doctrine* (1927) 25 MICH. L. REV. 596; McAllister, *Lord Hale and Business Affected with a Public Interest* (1930) 43 HARV. L. REV. 759; McClain, *The Convenience of the Public Interest Concept* (1931) 15 MINN. L. REV. 546; Merrill, *The New Judicial Approach to Due Process and Price Fixing* (1929) 18 KY. L. J. 3; Powell, *The Supreme Court and State Police Power, 1922-1930* (1931) 17 VA. L. REV. 529, 653, 765, (1932) 18 *ibid.* 1, 131, 270, 379, 481, 597, *State Utilities and the Supreme Court, 1922-1930* (1931) 29 MICH. L. REV. 811; Rabinowitz, *The Kansas Industrial Court Act* (1923) 12 CALIF. L. REV. 1; Robinson, *The Public Utility Concept in American Law* (1928) 41 HARV. L. REV. 277; Rottschaefer, *The Field of Governmental Price Control* (1926) 35 YALE L. J. 438; Scott, *Judicial Logic as Applied in Delimiting the Concept of Business Affected with a Public Interest* (1930) 19 KY. L. J. 16; Simpson, *Constitutional Limitations on Compulsory Industrial Arbitration* (1925) 38 HARV. L. REV. 753; Watkins, *The Law and the Profits* (1922) 32 YALE L. J. 29; Witham, *State Regulation of Business* (1929) 7 TENN. L. REV. 177. See also KEEZER AND MAY, *THE PUBLIC CONTROL OF BUSINESS* (1930) cs. v, vi; Notes (1932) 30 MICH. L. REV. 1277; (1929) 39 YALE L. J. 256.

<sup>98</sup> See KEEZER AND MAY, *op. cit. supra* note 97, at 123-125; Hamilton, *Affectation with Public Interest* (1930) 39 YALE L. J. 1089, 1095.

elevators was not a business within that category and consequently not subject to state regulation as to rates charged. The result, however, was that the Court adopted it as the foundation upon which to rest its decision upholding the statute regulating their business. The misfortune suffered by the business in this case as a result of the adoption of this phrase with its consequent significance has since been felt by legislatures. The phrase may be used by the Court to condemn as well as to support legislation and it has frequently been turned by the judiciary upon the legislators in due process cases.

Those who make bold to criticise the decisions of the Supreme Court, which since 1922 have shown a decided purpose to curb the power of the states to decide for themselves how business should be conducted within their confines,<sup>99</sup> take the view that the adoption of

<sup>99</sup> *Wolff Packing Co. v. Court of Industrial Relations* (1923) 262 U. S. 522 (Kansas statute giving State Industrial Court power to fix wages of employees of certain businesses under certain conditions). See Rabinowitz, *The Kansas Industrial Court Act* (1923) 12 CALIF. L. REV. 1. *Tyson v. Banton* (1927) 273 U. S. 418 (New York statute regulating resale price of theater tickets), noted in (1927) 61 AM. L. REV. 607; (1927) 7 B. U. L. REV. 208; (1928) 2 CIN. L. REV. 80; (1927) 40 HARV. L. REV. 1009; (1927) 22 ILL. L. REV. 192; (1927) 13 IOWA L. REV. 99; (1927) 31 LAW NOTES 104; (1927) 25 MICH. L. REV. 880; (1927) 11 MINN. L. REV. 656; (1927) 75 U. OF PA. L. REV. 778; (1927) 13 VA. L. REV. 554; (1927) 36 YALE L. J. 985. Cf. *Weller v. New York* (1925) 268 U. S. 319 (upholding section of New York statute requiring license for ticket brokers).

*Fairmont Creamery Co. v. Minnesota* (1927) 274 U. S. 1 (Minnesota statute enacted to prevent discrimination in price paid in different communities for milk, cream or butterfat), noted in (1928) 22 ILL. L. REV. 533; cf. *People v. Nebbia* (July 11, 1933) 262 N. Y. 259, 186 N. E. 694; P. U. R. 1933D 225.

*Ribnik v. McBride* (1928) 277 U. S. 350 (New Jersey statute enabling state to fix fees chargeable by employment agencies), noted in Andrews, *Fee-Charging Employment Agencies* (1928) 18 AM. LAB. LEG. REV. 279, 399; Oliphant, *A Decision in the Light of Fact* (1929) 19 *ibid.* 95; (1928) 8 B. U. L. REV. 292; (1928) 17 CALIF. L. REV. 55; (1929) 3 CIN. L. REV. 69, 85; (1928) 28 COL. L. REV. 970; (1928) 14 CORN. L. Q. 75; (1928) 42 HARV. L. REV. 126; (1929) 23 ILL. L. REV. 611; (1929) 13 MARQUETTE L. REV. 114; (1928) 7 N. C. L. REV. 81; (1928) 3 ST. JOHNS L. REV. 104; (1928) 14 ST. LOUIS L. REV. 83; (1929) 2 SO. CALIF. REV. 277, 305; (1929) 7 TEX. L. REV. 307; (1928) 38 YALE L. J. 225. Cf. *Brazee v. Michigan* (1916) 241 U. S. 340, and *National Employment Exchange v. Geraghty* (C. C. A. 2d, 1932) 60 F. (2d) 918, upholding section 186 of the New York Employment Agency Law which makes the charge of employment agencies contingent upon success in obtaining employment for applicants.

*Williams v. Standard Oil Co.* (1929) 278 U. S. 235 (an attempt by Tennessee to fix price at which gasoline might be sold), noted in Haugan, *Vicissitudes of the Price Fixing Doctrine* (1929) 2 DAK. L. REV. 430; (1929) 4 ALA. L. J. 214; (1929) 17 CALIF. L. REV. 309; (1929) 3 CIN. L. REV. 177; (1929) 24 ILL. L. REV. 482; (1929) 14 IOWA L. REV. 357; (1929) 33 LAW NOTES 52; (1929) 13 MINN. L. REV. 378; (1929) 4 NOTRE DAME LAW. 475; (1929) 3 TEMP. L. Q. 321; (1929) 4 WASH. L. REV. 90; (1929) 38 YALE L. J. 674; (1929) 39 *ibid.* 256. Cf. *Standard Oil Co. v. Lincoln* (1927) 275 U. S. 504, *aff'g per curiam* (1926) 114 Neb. 243, 207 N. W. 172, 208 N. W. 962 (upholding city charter authorizing municipality to engage in business of selling gasoline and oil). On state and municipal sale of

Lord Hale's "affectation" phrase has done much to draw the Court away from the proper approach to the question of whether the legislature has exceeded its powers in subjecting this or that business to regulation, and it is suggested that the term should be "permitted to enjoy a well earned rest in that great jurist's learned essay *De Portibus Maris*."<sup>100</sup> This view finds powerful support in the dissenting element of the Court itself. The scrapping of this deceptive phrase, which is acknowledged as one insusceptible of precise definition,<sup>101</sup> has been as forcefully urged in the dissenting opinions in cases where the term has been adopted as anywhere else. Mr. Justice Holmes tells us that:

"... when legislatures are held to be authorized to do anything considerably affecting public welfare it is covered by apologetic phrases like the police power, or the statement that the business concerned has been dedicated to a public use. The former expression is convenient, to be sure, to conciliate the mind to something that needs explanation: the fact that the constitutional requirement of compensation when property is taken cannot be pressed to its grammatical extreme; that property rights may be taken for public purposes without pay if you do not take too much; that some play must be allowed to the joints if the machine is to work.

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gasoline, see (1926) 26 COL. L. REV. 762; (1928) 41 HARV. L. REV. 775; (1926) 21 ILL. L. REV. 178; (1926) 10 MINN. L. REV. 251, 442; (1928) 17 NAT. MUNIC. REV. 46; (1928) 1 SO. CALIF. REV. 390; (1926) 12 VA. L. REV. 498.

New State Ice Co. v. Liebmann (1932) 285 U. S. 262 (Oklahoma statute requiring license from state to engage in ice business which might be refused if facts disclosed that facilities sufficient to meet public needs were already available in community), noted in (1932) 32 COL. L. REV. 913; (1932) 17 CORN. L. Q. 662; (1932) 20 GEO. L. J. 502; (1932) 2 IDAHO L. J. 210; (1932) 30 MICH. L. REV. 1277; (1932) 21 NAT. MUNIC. REV. 328; (1932) 6 ST. JOHNS L. REV. 391; (1932) 6 TEMP. L. Q. 584; (1932) 18 VA. L. REV. 769. See also Cohen, *Ice* (1933) 13 B. U. L. REV. 1.

But see *Frost v. Corporation Comm. of Oklahoma* (1929) 278 U. S. 515 (Oklahoma statute requiring certificate of convenience and necessity before engaging in operation of cotton gins, upheld), noted in (1929) 9 B. U. L. REV. 296; (1929) 29 COL. L. REV. 833; (1930) 24 ILL. L. REV. 812; (1929) 28 MICH. L. REV. 179; (1929) 8 N. C. L. REV. 87.

See also, *O'Gorman & Young v. Hartford Fire Ins. Co.* (1931) 282 U. S. 251 (regulation of commissions of fire insurance agents upheld—adjunct of business, previously held subject to regulation), noted in (1931) 11 B. U. L. REV. 259; (1931) 31 COL. L. REV. 498; (1931) 44 HARV. L. REV. 643; (1931) 26 ILL. L. REV. 47, 242; (1931) 44 U. OF MO. BULL. LAW SER. 53; (1931) 15 MARQUETTE L. REV. 226; (1931) 29 MICH. L. REV. 630; (1931) 15 MINN. L. REV. 707; (1931) 9 N. Y. U. L. Q. REV. 82; (1931) 9 TEX. L. REV. 602; (1931) 79 U. OF PA. L. REV. 806; (1931) 17 VA. L. REV. 490; (1931) 40 YALE L. J. 657; (1931) 41 *ibid.* 262. Cf. *Northwestern Nat. Ins. Co. v. Fishback* (1924) 130 WASH. 490, 228 PAC. 516, (1924) 38 HARV. L. REV. 257.

<sup>100</sup> See Hamilton, *op. cit. supra* note 98, at 1111; McAllister, *Lord Hale and Business Affected with a Public Interest* (1930) 43 HARV. L. REV. 759, 785.

<sup>101</sup> See Mr. Justice Sutherland in *Tyson v. Banton* (1927) 273 U. S. 418, 430; Mr. Justice Stone dissenting in *Ribnik v. McBride* (1928) 277 U. S. 350, 359. Mr. Justice McKenna in *German Alliance Ins. Co. v. Lewis* (1914) 233 U. S. 389, 406, says: "We can best explain by examples."

But police power often is used in a wide sense to cover and, as I said, to apologize for the general power of the legislature to make a part of the community uncomfortable by a change . . . the notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it."<sup>102</sup>

The dissenting opinions of Mr. Justice Stone, as has been said, "emphasize the futility of fumbling with the 'public interest' doctrine,"<sup>103</sup> while Mr. Justice Brandeis, in *New State Ice Co. v. Liebmann*,<sup>104</sup> gives us the latest expression of the dissenting element on this subject. He says:

"Whatever the nature of the business, whatever the scope or character of the regulation applied, the source of the power invoked is the same. And likewise the constitutional limitation upon that power. The source is the police power. The limitation is that set by the due process clause, which, as construed, requires that the regulation shall not be unreasonable, arbitrary or capricious; and that the means of regulation selected shall have a real or substantial relation to the object sought to be obtained. The notion of a distinct category of business 'affected with a public interest,' employing property 'devoted to a public use,' rests upon historical error. The consequences which it is sought to draw from those phrases are belied by the meaning in which they were first used centuries ago,<sup>[105]</sup> and by the decision of this Court, in *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, which first introduced them into the law of the Constitution. In my opinion, the true principle is that the state's power extends to every regulation of any business reasonably required and appropriate for the public protection. I find in the due process clause no other limitation upon the character or the scope of regulation permissible."<sup>106</sup>

The use of the term "public interest" occasions further difficulty inasmuch as varying grades of public interest are recognized. Thus a

<sup>102</sup> Dissenting in *Tyson v. Banton*, *supra* note 101, at 445-446. Mr. Justice Brandeis concurred in this opinion.

<sup>103</sup> Note (1929) 39 *YALE L. J.* at 263; see Mr. Justice Stone's dissenting opinions in *Tyson v. Banton*, 273 U. S. at 451, and in *Ribnik v. McBride*, 277 U. S. at 359-360; see *McAllister*, *loc. cit.*, *supra* note 100, and Note (1928) 38 *YALE L. J.* 225, 233, commending Mr. Justice Stone's approach.

<sup>104</sup> (1932) 285 U. S. 262.

<sup>105</sup> Here Mr. Justice Brandeis in note 43 (285 U. S. at 302) points out that Lord Hale was speaking of duties arising at common law, and not of limitations upon the legislative power of Parliament; that such limitations did not exist in England and that Parliament was accustomed to regulate prices of commodities of all kinds.

<sup>106</sup> 285 U. S. at 302-303. Mr. Justice Stone joined in this opinion. Mr. Cohen in his article entitled "Ice" (1933) 13 *B. U. L. REV.* 1, says the attitude of mind of the minority of the Supreme Court in this case may be expressed in the phrase "Look hopefully to the future"; the attitude of the majority in "Stand fast by the past"; that the policy of the majority is to refrain from playing fast and loose with great economic and political principles, while the minority take the view that states should be permitted to experiment in the field of industrial policy and their actions should not lightly be set aside by the court. *Ibid.* at 15, 16, 21.

slight degree of public interest is sufficient to justify the expenditure of public funds raised by taxation; a greater degree of such interest is required to justify the exercise of the power of eminent domain; a much greater degree to justify price regulation; and it is now questioned whether even a still greater degree, and a different type, of public interest, is to be required before the Supreme Court will uphold the requirement of securing a certificate of convenience and necessity before engaging in a particular business, the purpose of such requirement being, not the regulation of the business, but to preclude persons from engaging in it.<sup>107</sup> All of these purposes represent governmental interference with private property or business, and, since the interference is in varying degrees, depending upon the particular purpose, the requirement of varying degrees of public interest would seem to be entirely justified, but the natural result arising from the association of the term with all these various objects is to give confusion to "public interest."

While the cases dealing with the regulation of business would seem to involve a choice between competing sociological views, which the minority in the Supreme Court feel is a choice which should be made by the legislatures and not by the Court, the majority of the Court would make this choice themselves and have found Lord Hale's phrase a useful weapon with which to combat the on-rush of legislation designed to subject the individual to the will of the many. As a result, the phrase has, during the past ten years, come to be associated with the rugged individualism theory of economics which smacks of "Pioneer Days," and the "Westward Ho" movement.

But the terms "public interest" and "affected with a public interest" are thoroughly established in our law and although we may feel that the latter is a term absolutely lacking in any philosophic content, and is only a convenient method of expressing judicial approval or disapproval of state legislation regulating business, it is clear from the opinions of the majority of the Supreme Court that it is the established test by which such legislation is to be measured for the purpose of determining its constitutionality.

Applying, then, this test of "affectation" to the case of *Stephenson v. Binford* and its Texas statute regulating the contract carrier by motor vehicle, do the operations of the contract carrier affect the community at large and are they of such public consequence as to clothe the business with a public interest?

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<sup>107</sup> See Note (1932) 30 MICH. L. REV. 1277, 1282, referring to the New State Ice case, *supra* note 104. Cf. *Frost v. Corporation Comm. of Oklahoma* (1929) 278 U. S. 515.

It was asserted by the state in this case that state and county expenditures on the highway system of the state, consisting of nearly two hundred thousand miles of roads, had been more than a half billion dollars. It was also asserted that, as a result of the operations of the unregulated carriers for hire, the common carrier service on the roads had been all but practically destroyed.<sup>108</sup> These assertions were not challenged by the carriers involved, they merely maintained that the state was powerless to regulate their business done over the highways. With this enormous outlay of the public's money in the facilities used by the contract carriers, and with the operations of these carriers resulting in the destruction of the common carrier service of the state, it would seem idle to say that the contract carriers are not engaged in a business impressed with a public interest. The public convenience and necessity requires a dependable system of transportation and when it is shown that all of the carriage services, including both road and rail, are so bound together and so interdependent that the public may not continue to have a safe and dependable system of transportation unless the contract carriers are brought under reasonable regulation, it would seem clear that the property of the contract carriers is being used in a manner to make it of public consequence and affect the community at large. A stronger case for the application of the rule of *Munn v. Illinois* could not well be imagined. As said by Circuit Judge Hutcheson, "the record in this case teems with evidence"<sup>109</sup> supporting the declaration that the business of these carriers is affected with a public interest. This, it must be remembered, is not saying that the contract carrier is a common carrier, for certainly if he is carrying only for certain people by special agreement and not engaged in, or holding himself out, to carry for the public generally, he is not a common carrier. But to say that he is not a common carrier is not to say that his business is not affected with a public interest and as such subject to rate and service regulation.<sup>110</sup>

In addition, the fact that the contract carriers use the public's property in their business for their own gain should impress their undertaking with a public interest and remove them from the category of purely private business. It would not seem unreasonable to find that here was an entirely new class of business "affected"—a business which uses the property of the public as its place of business. While those engaged in a purely private undertaking have the right to charge their own price and to contract as they see fit, those using the property

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<sup>108</sup> *Stephenson v. Binford* (S. D. Tex. 1931) 53 F. (2d) 509, 513.

<sup>109</sup> *Ibid.* at 515.

<sup>110</sup> See note 62, *supra*.

of the public in their business should, it would seem, be subjected to the will of the public as to the charges and contracts they make while engaged in the use of its property.<sup>111</sup> It is not easy to understand why those who have been granted the power of eminent domain should be subjected to greater burdens than those who make use of public property in a way other than the normal way in common with all the public. The former will not be permitted to say that their business is not devoted to public use, but the latter, unless their business is declared to be "affected," will apparently be permitted to escape from any substantial duty to the public whose property they use. Having acquired their right of way without paying for it, would seem to place them under even greater obligations to the public than those who acquired theirs through the exercise of the right of eminent domain.<sup>112</sup> The taking of public property for private use, like the taking of private property for public use, should carry with it certain obligations. There is no monopoly here and consequently there is no reason for imposing a burden to serve all the public, if it were possible, but it would appear that an obligation to serve at a charge fixed by the state and subject to reasonable regulations would be only appropriate burdens.

The "bugaboo" of the possible extension of the "affectation" theorem until "the price of everything from a calico gown to a city mansion" be subjected to legislative discretion might well have been put aside in the case of *Stephenson v. Binford*. A precedent here would not have been a dangerous thing. This, it would seem, is a business in a class by itself, so far as other unregulated businesses are concerned—a business making use of the property of the public in its operations for its own gain. As recognized by Mr. Justice Sutherland, himself, in this case, the state, as guardian and trustee of the public's property, should have the power to fix the terms upon which the public's property is used by persons for gain.<sup>113</sup>

With, however, the decision in *Stephenson v. Binford*, upholding state regulation of the intrastate contract carriers to the extent that minimum rates may be imposed upon them and a permit to use the highways denied them where adequate facilities are being furnished by common carriers, either by rail or by road, it is now possible for the

<sup>111</sup> In support of this, see Mr. Justice Sutherland in *Stephenson v. Binford*, 287 U. S. at 276, "It may be said . . . that it belongs to the state, 'as master in its own house,' to prescribe the terms upon which persons will be permitted to contract in respect of the use of the public highways for purposes of gain. See *Hodge Co. v. Cincinnati*, 284 U. S. 335, 337."

<sup>112</sup> This point was made by counsel for appellees in *Stephenson v. Binford*, in their brief (pp. 42-43) filed in the Supreme Court, Oct. Term, 1932, No. 326.

<sup>113</sup> Cf. Mr. Justice Sutherland in *Frost v. Railroad Comm. of California*, 271 U. S. at 591-593.

various states, if they deem it expedient, to take steps toward preventing these carriers from unduly interfering with the state's general transportation system.<sup>114</sup> If fear exists that as a result of their operations certain communities in the state may find themselves without rail facilities, there is no legal obstacle to prevent the state from denying them highway use, or from fixing a minimum rate for them, as well as for common carriers by motor, for the very purpose of driving the business to the railroads.

If the motive of the legislature is to favor transportation by railroad as against transportation by motor trucks, at least to the extent of causing a fair distribution of traffic, we have been assured, by Mr. Chief Justice Hughes, quite recently, in the case of *Sproles v. Binford*,<sup>115</sup> that this does not invalidate the legislation. He says:

"... we perceive no constitutional ground for denying to the State the right to foster a fair distribution of traffic to the end that all necessary facilities should be maintained . . ." <sup>116</sup>

But, in the light of *Stephenson v. Binford*, the constitutionality of such legislation is really made to depend upon the conservation of the highways. As pointed out in this case, by driving business to the railroads, the highways are conserved and it was this result that turned the Texas statutory provisions into constitutional regulations, although the provisions were in reality designed to foster a distribution of traffic which Mr. Chief Justice Hughes had said was not unconstitutional.

### *B. State Regulation and the Equal Protection Clause*

The effect of the equal protection clause upon motor carrier regulation arises in cases involving legislation imposing regulation upon carriers for hire, while leaving the privately operated vehicles free from control, or imposing burdens upon some carriers for hire, while exempting others.

This problem received consideration at the hands of the United States Supreme Court in the *Cahoon* case,<sup>117</sup> involving the Florida statute.<sup>118</sup> This statute, although subjecting carriers for hire to rate and permit regulations, and requiring bonds or insurance policies of such carriers for the protection of passengers or goods carried and the public, expressly exempted certain carriers for hire from regula-

<sup>114</sup> The Texas act, having stood the test before the Supreme Court, will no doubt be adopted by the various states as a model for contract carrier regulation. Ind. Stats. 1933, c. 70, is similar in terms. See 8 U. S. Daily 57 (March 27 to April 1, 1933).

<sup>115</sup> (1932) 286 U. S. 374.

<sup>116</sup> *Ibid.* at 394.

<sup>117</sup> (1931) 283 U. S. 553.

<sup>118</sup> Fla. Stats. 1929, c. 13700, p. 348.

tion. Carriers exclusively engaged in hauling "agricultural, horticultural, dairy or other farm products and fresh and Salt Fish and Oysters and Shrimp from the point of production to the assembling or shipping point en route to primary market or to motor vehicles used exclusively in transporting or delivering dairy products,"<sup>119</sup> were not included within the provisions of the act. The Supreme Court took this to be an arbitrary discrimination, feeling there was no justification for requiring those engaged in carrying "bread or sugar" or "tea or coffee," to furnish a bond to protect the public, which must be deemed to relate to public safety, and to exempt those who carry "milk or butter," or "fish or oysters."

On its face, it is true that this classification seems purely arbitrary and appears to have no relation to safeguarding the public with respect to the use of the highways, which would be the purpose of provisions requiring bonds or policies of insurance to protect the public generally. It has been suggested, though, that the chief trouble here was the failure to marshal sufficient data to show that the discrimination complained of was reasonable and that such classification is not necessarily an arbitrary one.<sup>120</sup> This is a logical view. The exempted carriers of products here were only those carrying certain products from the point of production to the assembling or shipping point en route to the primary market or to motor vehicles used exclusively in transporting or delivering dairy products. Such operations by carriers may have been irregular, not forming continuous traffic on the highways; the hauls may have been short; or the traffic may have been largely in small conveyances or in districts not, as a rule, congested, or, if congested, well policed, so that the hazard of injury to the public may have been of small consequence as compared with the operations of carriers included in the statute.

This line of reasoning is supported by the opinion in the case of *Bekins Van Lines, Inc. v. Riley*.<sup>121</sup> The controversy concerned a 1926 amendment to the constitution and statutes of the State of California. This amendment laid a tax of five per cent of their gross receipts upon common carriers engaged in transporting freight along public highways between fixed termini and over regular routes. Other freight carriers, common and private, by motor vehicles were subjected to different, and allegedly less burdensome, taxation. The validity of this classification was upheld. The Court took the view that the use of the high-

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<sup>119</sup> 283 U. S. 553, 566.

<sup>120</sup> Howard, *The Supreme Court and State Action Challenged Under the Fourteenth Amendment, 1930-1931* (1932) 80 U. OF PA. L. REV. 483, 516-518.

<sup>121</sup> *Supra* note 38.

ways by those carriers coming within the provisions of the amendment would probably be more regular and frequent and, therefore, unusually destructive to the roads. Also that their use of the highways would probably expose the public to greater dangers than those consequent upon the occasional movements of other carriers.

*Liberty Highway Co. v. Michigan Public Utilities Comm.*<sup>122</sup> decided by a three judge United States District Court, also gives support to this reasoning. In this case it is said:

"It is not an unreasonable classification under the police power to make a distinction between those common carriers whose use of the highways is more regular, and hence more frequent, and whose operation on the highways is attended with greater danger to life and property, and greater damage to the highways, and those carriers whose use of the highways is only occasional and spasmodic."<sup>123</sup>

This view finds further support in more recent cases where the validity of a statute was challenged upon the ground that the classification amounted to an arbitrary discrimination and was, therefore, repugnant to the equal protection clause. In *Schwartzman Service, Inc. v. Stahl*<sup>124</sup> the court upheld a Missouri statute<sup>125</sup> exempting motor vehicles used exclusively in transporting farm and dairy products to warehouse, creamery, or other original storage or market, and motor vehicles used exclusively in the distribution of newspapers from the publisher to subscribers or distributors, while motor vehicle carriers generally were included in the act. The court said that the transportation of the farmer's products to the nearest shipping point would involve only short hauls and no extensive use of the state highways, and that the operation of the newspaper trucks would be confined largely to municipalities and suburban territory with small trucks or passenger cars.<sup>126</sup> In *Riley v. Lawson*<sup>127</sup> a Florida statute<sup>128</sup> was upheld which

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<sup>122</sup> (E. D. Mich. 1923) 294 Fed. 703.

<sup>123</sup> *Ibid.* at 709.

<sup>124</sup> (W. D. Mo. 1932) 60 F. (2d) 1034.

<sup>125</sup> Mo. Stats. 1931, §§ 5264-5280, p. 403 *et seq.*

<sup>126</sup> In further support of the reasonableness of the classification the court (60 F. (2d) at 1038) referred to the fact that the evidence disclosed that the farm products were gathered from widely scattered producers upon a co-operative plan and quoted from *Liberty Warehouse Co. v. Burley Tobacco Growers* (1928) 276 U. S. 71, 92, where the Supreme Court said: "Congress has recognized the utility of co-operative association among farmers in the Clayton Act . . .; the Capper-Volstead Act . . .; and the Co-operative Marketing Act of 1926 . . . These statutes reveal widespread legislative approval of the plan for protecting scattered producers and advancing the public interest."

<sup>127</sup> (Fla. 1932) 143 So. 619.

<sup>128</sup> Fla. Stats. 1931, c. 14764. This statute was apparently enacted in an attempt to obviate the objections pointed out by the United States Supreme Court in *Smith v. Cahoon*, *supra* note 71 to Fla. Stats. 1929, c. 13700 which was involved in that case. See 143 So. at 622.

exempted from regulation transportation therein declared to be "casual, seasonal and not on regular routes or schedules, is slow moving, frequently in special equipment, and for comparatively short distances over the improved highways of the state,"<sup>129</sup> while imposing regulations upon transportation continuous and recurring in nature. Included in transportation declared to be casual are the "fish and oyster" carriers, *et al.*, exempted in the 1929 statute involved in *Smith v. Cahoon*, and it will be noted that the Florida law makers have themselves supplied by legislative declaration in this last act the data said to have been lacking to establish the reasonableness of the classification in the former statute.<sup>130</sup>

In *Packard v. Banton*,<sup>131</sup> a New York statute which made a distinction between motor carriers for hire and persons operating motor vehicles for their own private ends, as to requirements for protecting the public against injury caused by their operations, was upheld by the Supreme Court against the charge that it was in violation of the equal protection clause.<sup>132</sup>

Legislation imposing regulations upon contract carriers, while leaving the owner-carrier free from control, was upheld in *Ogden & Moffett Co. v. Michigan Public Utilities Comm.*,<sup>133</sup> the court saying:

"We cannot say that there was no substantial basis for separately classifying the contract-carrier, who is burdened, and the owner-carrier, who is not. There are doubtless instances where the public safety requires regulation and control of some owner-carriers as much or more than of some contract-carriers; but, as classes, those who make the use of the highways the basis of their business, and those who use the highways only incidentally to their main business, may well be thought to require variant treatment in the matter of highway use and regulation."

This case was affirmed by the United States Supreme Court without opinion.

In the light of these cases it is apparent that legislation dealing with highway use and motor vehicle regulation may include within its terms certain carriers for hire and not others, or may be made to apply

<sup>129</sup> *Supra* note 127, at 629; *cf.* *Louis v. Boynton* (D. Kan. 1931) 53 F. (2d) 471, 475.

<sup>130</sup> See Howard, *loc. cit. supra* note 120.

<sup>131</sup> (1924) 264 U. S. 140.

<sup>132</sup> *Supra* note 54; Legis. (1932) 80 U. OF PA. L. REV. 1008, 1010.

<sup>133</sup> (E. D. Mich. 1931) 58 F. (2d) 832, 833, *aff'd*, (1932) 286 U. S. 525. The Michigan statute involved (Mich. Stats. 1931, p. 363) requires contract carriers to obtain permits from and conform to regulations of the Public Utilities Commission. The act was upheld, and an injunction to restrain enforcement of the act denied. The court pointed out that the act did not undertake to regulate the business of private carriers, but only to regulate their operations upon the highways; and further, that it was not alleged that any unduly burdensome regulation had as yet been made.

to carriers for hire and exempt the privately operated vehicle, and still meet the requirements of the equal protection clause. The validity of a statute which contains a classification of persons or things for the purpose of the legislation depends upon whether the classification is reasonable and based upon real distinctions which bear some relation to the object sought to be accomplished. The reasonableness of the classification and justification for the distinction in motor vehicle legislation may be found in the fact that the use of the highways by the vehicles included in the statute is for the purpose of gain, while those exempted use the highways in the ordinary way, or in the facts that the movements of the former are more regular or frequent, or faster moving and attended with greater dangers, or more destructive to the highways, than the operations of those vehicles which are not included in the statute.

#### IV. REGULATION OF INTERSTATE MOTOR CARRIERS

Highway carriers engaged in interstate operations have not been subjected to federal regulation. Motor transportation was, of course, unknown when the first interstate commerce legislation, subjecting rail carriers to control, was enacted in 1887. But amendatory legislation enacted since the advent of the motor vehicle carriers has taken no cognizance of these carriers.<sup>134</sup> Even the Transportation Act of 1920 makes no mention of motor vehicle transportation. At that time, however, the operations of motor carriers had not reached very great proportions. By 1925 motor carriers had become a recognized factor in the transportation industry, but the problem of their regulation was still considered a local one. Mr. Justice McReynolds, in that year, expressed the situation thus:

"The problems arising out of the sudden increase of motor vehicles present extraordinary difficulties. As yet nobody definitely knows what should be done. Manifestly, the exigency cannot be met through uniform rules laid down by Congress.

"Interstate commerce has been greatly aided—amazingly facilitated, indeed—through legislation and expenditures by the states . . ."

"The Federal government has not and cannot undertake precise regulations. Control by the states must continue, otherwise chaotic conditions will quickly develop. The problems are essentially local, and should be left with the local authorities unless and until something is done which really tends to obstruct the free flow of commercial intercourse."<sup>135</sup>

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<sup>134</sup> Coordination of Motor Transportation (1932) 182 I. C. C. 263, 370; see *Cobb v. Department of Public Works of State of Washington* (W. D. Wash. 1932) 60 F. (2d) 631, at 640: ". . . Congress has gone no further in regulating interstate commerce by motor vehicles than the National Motor Vehicle Theft Act (Dyer Act), chap. 89, 41 Stat. 324 (title 18 USCA, sec. 408) and those acts which may be generally described as the Federal Highway Act (title 23, USCA, secs. 1 to 25)."

<sup>135</sup> Dissenting in *Buck v. Kuykendall* (1925) 267 U. S. 307, and *Bush & Sons Co. v. Maloy* (1925) 267 U. S. 317, 325.

Of late there has been much agitation for federal regulation of such carriers. The Interstate Commerce Commission has, on several occasions, recommended to Congress that such legislation be enacted.<sup>136</sup> Several bills have been proposed for the purpose.<sup>137</sup> The National Transportation Committee, in its recent report, recommended the extension of federal regulatory jurisdiction to this form of transportation.<sup>138</sup> But to regulate, or not to regulate, still is the question in Congress.

While Congress has not seen fit to exercise its power, under the commerce clause of the Constitution, to regulate the motor vehicle car-

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<sup>136</sup> See *Motor Bus and Motor Truck Operation* (1928) 140 I. C. C. 685, 742, 746, recommending legislation regulating interstate motor vehicle common carriers of persons operating over regular routes or between fixed termini; *Coordination of Motor Transportation* (1932) 182 I. C. C. 263, at 385 *et seq.*, recommending regulation of motor vehicle carriers of both persons and property in interstate commerce for hire, including some regulation of the contract carrier. The latest recommendation was made on Dec. 8, 1932, to the Congress which convened on Dec. 5, 1932; see 7 U. S. Daily, Dec. 9, 1932, 1797. The Commission asked for extension of regulatory powers to include busses and motor trucks. The Interstate Commerce Commission recommends that jurisdiction to regulate the motor carriers engaged in interstate commerce be vested in it with authority to delegate specific matters to joint boards composed of members of state regulatory bodies charged with the administration of state laws relating to transportation by motor vehicle. 182 I. C. C. at 385, 387. Some of the bills proposed in Congress for the regulation of motor vehicle carriers provided for jurisdiction by state boards with delegated powers from Congress, with appeal to the Interstate Commerce Commission. See Cummins-Parker Bill (1928) 140 I. C. C. 685, 733-734. The recommendation of the Commission itself in 1928 followed this plan. 140 I. C. C. at 746. Constitutionality of the delegation of jurisdiction over interstate commerce to state boards has been rested upon the rule of *Interstate Commerce Comm. v. Brimson* (1894) 154 U. S. 447, 471-474, which in substance is that Congress may select the means by which its power to regulate interstate commerce is to be carried into execution; and the rule of *Dallemagne v. Moisan* (1905) 197 U. S. 169, 174: "... power may be conferred upon a state officer, as such, to execute a duty imposed under an act of Congress, and the officer may execute the same, unless its execution is prohibited by the constitution or legislation of the State." See also 140 I. C. C. at 743, and Flynn Report, *supra* note 4, at 111. The Commission recommends that for the present federal legislation should not fix the requirements as to qualifications of drivers, hours of service of employees, the speed, size, length, or weight of load of motor vehicles operating for hire over the highways in interstate commerce. The view taken by the Commission is that, although it may eventually become necessary in order to secure uniformity in such regulations, the states, in the absence of federal legislation, clearly have the right to enforce such requirements, and that federal action in this field would immediately put at rest all state legislation on the subject so far as interstate commerce is concerned, and thus cast the duty and burden of enforcement upon the federal government. 182 I. C. C. 263, 387.

<sup>137</sup> For a review of bills which have been introduced in Congress and the present situation as to proposed legislation, see Stecher, *Proposed Federal Regulation of Interstate Carriers by Motor Vehicle* (1932) 17 MINN. L. REV. 1.

<sup>138</sup> 7 U. S. Daily, Feb. 16, 1933, at 2175, 2181; *ibid.* Feb. 17, 1933, at 2188; *ibid.* Feb. 20, 1933 at 2196.

riers engaged in interstate commerce, the courts have found the commerce clause effective as a curb to state regulation unduly affecting the operations of these carriers.

### *A. State Regulation and the Commerce Clause*

State legislation affecting interstate carriers rests upon the broad principle that the commerce clause does not entirely exclude the states from legislating in this field and, in the absence of congressional legislation with respect thereto, if the situation is a local one, protective measures in the interest of health, safety, morals and welfare of its people may be adopted by the state, although interstate commerce may be incidentally or indirectly involved.<sup>139</sup> Because of the large expenditures in constructing and maintaining the highways, and the great necessity that their use be regulated in the interests of the people of the state, it is highly desirable that the state be permitted considerable power to regulate highway use, particularly if that regulation may be in a manner as not to impose unreasonable burdens upon interstate commerce.

There being no congressional legislation on the subject, the states are free under the exercise of their police power, to enact and enforce reasonable regulations for highway protection and traffic safety, applicable alike to vehicles moving in interstate as well as intrastate commerce.<sup>140</sup> Thus the speed, the size of such vehicles and the weight of the load,<sup>141</sup> the length of the vehicle,<sup>142</sup> and the equipment,<sup>143</sup> may be subjected to regulation. A license for the vehicle may be required,<sup>144</sup> and regulations providing for registration of the vehicle, for competent licensed drivers<sup>145</sup> and fixing their hours of service may be imposed.<sup>146</sup> The state may impose a tax or charge upon the interstate carriers provided there is no discrimination against such com-

<sup>139</sup> *Missouri Pac. Ry. v. Larabee Flour Mills Co.* (1909) 211 U. S. 612; *Minnesota Rate Cases* (1913) 230 U. S. 352, 48 L. R. A. (N.S.) 1151; *Atlantic Coast Line R. R. v. Georgia* (1914) 234 U. S. 280; *Missouri, Kansas & Texas Ry. v. Harris* (1914) 234 U. S. 412; *Hendrick v. Maryland* (1915) 235 U. S. 610; *Kane v. New Jersey* (1916) 242 U. S. 160; *Chicago, Milwaukee & St. Paul Ry. v. State Public Utilities Comm.* (1917) 242 U. S. 333; *Pennsylvania Gas Co. v. Public Serv. Comm.* (1920) 252 U. S. 23; Note (1927) 11 *MINN. L. REV.* 157, 158.

<sup>140</sup> *Hendrick v. Maryland* (1915) 235 U. S. at 622; *Kane v. New Jersey* (1916) 242 U. S. 160; *Morris v. Doby* (1927) 274 U. S. 135.

<sup>141</sup> *Ibid.*, at 143-144; *Sproles v. Binford*, *supra* note 115, at 388-390.

<sup>142</sup> *Contract Cartage Co. v. Morris* (E. D. Ill. 1932) 59 F. (2d) 437, 445.

<sup>143</sup> *Sage v. Baldwin* (N. D. Tex. 1932) 55 F. (2d) 968, 971; *Nutley-Times Square Service, Inc. v. Board of Public Utility Com'rs* (N. J. 1932) 162 Atl. 124, 125-126.

<sup>144</sup> *Roadway Express, Inc. v. Murray* (W. D. Okla. 1932) 60 F. (2d) 293, 301.

<sup>145</sup> *Hendrick v. Maryland*, *supra* note 140; *Sage v. Baldwin*, *supra* note 143.

<sup>146</sup> *Ibid.*

merce, and the charge is only a fair contribution for the use of the state's highways.<sup>147</sup> If the tax imposed is in the nature of a privilege tax it must appear, affirmatively in some way, that it is levied only as compensation for use of the highways or to defray expenses of regulating traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use,<sup>148</sup> or by expressly allotting the proceeds to highway purposes.<sup>149</sup> While the state cannot impose a tax for the privilege of engaging in interstate commerce,<sup>150</sup> it may demand, from the interstate carrier, a fair compensation for what it gives.<sup>151</sup>

The state may require the interstate carrier to file a policy of liability insurance or in lieu thereof a bond for the protection of the people

<sup>147</sup> *Michigan Public Utilities Comm. v. Duke* (1925) 266 U. S. 570, 36 A. L. R. 1105; *Clark v. Poor* (1927) 274 U. S. 554; *Interstate Busses Corp. v. Blodgett* (1928) 276 U. S. 245; *Roadway Express Inc. v. Murray*, *supra* note 144; *Grolbert v. Board of R. R. Com'rs* (S. D. Iowa 1932) 60 F. (2d) 321. That it is not a regulation of, or burden upon, interstate commerce for a state to impose a lawful tax upon the subject or instrumentality of commerce, see *American Airways, Inc. v. Wallace* (M. D. Tenn. 1932) 57 F. (2d) 877, 880, *aff'd, per curiam* (1932) 287 U. S. 565; but that a tax cannot be exacted as the price of the privilege of using an instrumentality of interstate commerce, see *Helson & Randolph v. Kentucky* (1929) 279 U. S. 245, 252; *Varney Air Lines, Inc. v. Babcock* (D. Idaho 1933) 1 F. Supp. 687, 688-689; and see Hogue, *The Trend of Taxation of Motor Vehicles* (1932) 19 A. B. A. J. 272. See also Brown, *State Taxation of Interstate Commerce, and Federal and State Taxation in Intergovernmental Relations—1930-1932* (1933) 81 U. OF PA. L. REV. 247. On the right of the state to tax motor busses engaged exclusively in interstate commerce, see Notes (1930) 9 TENN. L. REV. 47, (1931) *ibid.* 245.

<sup>148</sup> *Interstate Busses Corp. v. Blodgett*, *supra* note 147; *State ex rel. Wisconsin Allied Truck Owners v. Public Serv. Comm. of Wisconsin* (1932) 207 Wis. 664, 242 N. W. 668. If the tax is based upon mileage it may be payable into the general fund. See *Johnson Transfer & Freight Lines v. Perry* (N. D. Ga. 1931) 47 F. (2d) 900, 903.

<sup>149</sup> See *Interstate Transit Inc. v. Lindsey* (1931) 283 U. S. 183, 186.

<sup>150</sup> *Adams Express Co. v. Ohio State Auditor* (1897) 166 U. S. 185, 218; *Helson & Randolph v. Kentucky* (1929) 279 U. S. 245, 249. A tax upon gross revenues of motor carriers engaged in interstate commerce, including the revenues from such commerce, is invalid, *Nutt v. Ellerbe* (E. D. S. C. 1932) 56 F. (2d) 1058, 1064; but if restricted to intrastate traffic, so that no burden is imposed upon interstate commerce, such a tax is not violative of the commerce clause, *Prouty v. Coyne* (D. S. D. 1932) 55 F. (2d) 289, 296. A 1931 statute imposing a tax based upon manufacturer's weight, without reference to the number of trips made, tonnage carried, or miles traveled, was, however, condemned in this case as bearing no reasonable relation to highway use and contrary to the commerce clause. On appeal to the United States Supreme Court, the decree was reversed and cause remanded with directions to dismiss the bill of complaint upon the ground that the cause was moot. *Coyne v. Prouty* (1933) 289 U. S. 704.

<sup>151</sup> *Continental Baking Co. v. Woodring* (1932) 286 U. S. 352, 365; (1933) 31 MICH. L. REV. 567; *Roadway Express, Inc. v. Murray*, *supra* note 144; *Grolbert v. Oklahoma Tax Comm.* (W. D. Okla. 1932) 60 F. (2d) 301. For a discussion of state taxation of motor vehicles engaged in interstate commerce, see Note (1933) 42 YALE L. J. 402.

of the state other than the carrier's passengers or shippers.<sup>152</sup> It has also been held that to require the interstate carriers to make a showing of financial responsibility is not unreasonable upon the theory that a want of financial stability might result in a failure to comply with regulations requiring safety devices, or an inability to pay license fees, taxes, and insurance for the protection of others employing the highways.<sup>153</sup>

Operators of motor vehicles in interstate commerce may be required to appoint a local agent upon whom process may be served in an action growing out of the operation of the vehicles within the state.<sup>154</sup> The appointment of such agent need not be formal but may be implied from the operation of the vehicles over the state's highways,<sup>155</sup> but such statutes must provide in terms for some adequate method of assuring the non-resident defendant of actual notice of the suit.<sup>156</sup>

In addition, the state may classify the highways as to their character and ability to withstand the use,<sup>157</sup> and, to prevent congestion, may deny the right to operate over a particular street or highway or from a certain terminal where the area involved is already overburdened with traffic.<sup>158</sup>

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<sup>152</sup> *Sprout v. City of South Bend* (1928) 277 U. S. 163, 171-172, 62 A. L. R. 45; *Continental Baking Co. v. Woodring*, *supra* note 151, at 365; *Alkazin v. Wells* (S. D. Fla. 1931) 47 F. (2d) 904; *Louis v. Boynton*, *supra* note 129.

<sup>153</sup> *Roadway Express Inc. v. Murray*, *supra* note 144, at 299; *cf. Hi-Ball Transit Co. v. Railroad Comm.* (N. D. Tex. 1928) 27 F. (2d) 425, 427.

<sup>154</sup> *Kane v. New Jersey*, *supra* note 140, at 167.

<sup>155</sup> *Hess v. Pawloski* (1927) 274 U. S. 352, 356-357. See *Meleski, The Case of Hess v. Pawloski* (1927) 7 B. U. L. REV. 243; and *Notes* (1927) 1 CIN. L. REV. 486; (1928) 28 COL. L. REV. 347; (1927) 41 HARV. L. REV. 94; (1927) 31 LAW NOTES 82; (1928) 12 MARQUETTE L. REV. 236; (1927) 26 MICH. L. REV. 212; (1927) 2 TEMP. L. Q. 61; (1927) 76 U. OF PA. L. REV. 93; (1927) 13 VA. L. REG. (N.S.) 374; (1928) 34 W. VA. L. Q. 283; (1927) 4 WIS. L. REV. 307.

<sup>156</sup> *Wuchter v. Pizzutti* (1928) 276 U. S. 13, 19; *Notes* (1928) 16 CALIF. L. REV. 428; (1929) 3 CIN. L. REV. 85; (1928) 28 COL. L. REV. 667; (1928) 13 CORN. L. Q. 606; (1928) 16 GEO. L. J. 491; (1928) 27 MICH. L. REV. 219; (1928) 12 MINN. L. REV. 753; (1928) 6 N. C. L. REV. 481; (1928) 3 NOTRE DAME LAW. 267; (1928) 3 ST. JOHNS L. REV. 155; (1928) 14 ST. LOUIS L. REV. 62; (1928) 2 TEMP. L. Q. 275; (1928) 76 U. OF PA. L. REV. 869; (1929) 63 U. S. L. REV. 445; (1928) 34 W. VA. L. Q. 283; (1928) 5 WIS. L. REV. 99. There is a note in (1930) 14 MINN. L. REV. 287 on a case involving an amendment to the New Jersey statute considered in *Wuchter v. Pizzutti*. This amendment provides for notice to the defendant and was given retroactive effect to validate the statute. See *Powell, The Supreme Court and State Police Power, 1922-1930* (1931) 17 VA. L. REV. 653, 667.

<sup>157</sup> *Sage v. Baldwin*, *supra* note 143, at 971.

<sup>158</sup> *Motor Transport & Truck Co. v. Public Utilities Comm. of Ohio* (1932) 125 Ohio St. 374, 181 N. E. 665; *Bradley v. Public Utilities Comm. of Ohio* (1932) 42 Ohio App. 75, 181 N. E. 668, *aff'd*, (April 10, 1933) 289 U. S. 92 (order of state commission denying interstate carrier's application to operate over a particular highway upheld); *Farnum v. Public Utilities Comm.* (R. I. 1932) 158 Atl. 713, *cert. den.*, (1932) 287 U. S. 603.

While the requirements just enumerated are considered as not unreasonably burdening interstate commerce, any regulation which does have the effect of placing an undue burden upon such commerce is, of course, beyond the power of the states, being repugnant to the commerce clause of the Constitution.<sup>159</sup> Objectionable on this ground are those regulations requiring the interstate carrier to furnish a bond or policy of insurance securing passengers or goods carried;<sup>160</sup> provisions in any wise seeking to affect the relationship between such carrier and shippers or passengers either within the state or without;<sup>161</sup> requirements imposing upon all persons engaged in transportation for hire by motor vehicle over the state's highways the burdens and duties of common carriers,<sup>162</sup> and any regulation of the rates of such carriers.<sup>163</sup>

For a time the idea prevailed that the states could refuse the interstate motor carrier for hire the use of their highways, where adequate transportation facilities were already available in the territory involved. Decisions supporting this view treated such action by the states as a valid exercise of police power.<sup>164</sup> But this was before

<sup>159</sup> *Adams Express Co. v. City of New York* (1914) 232 U. S. 14; *Buck v. Kuykendall* (1925) 267 U. S. 307, 38 A. L. R. 286; *Sage v. Baldwin*, *supra* note 143. Provisions and requirements of such a nature as to amount to direct regulation of the commerce as such, and which cannot be imposed upon interstate commerce, may, however, be imposed by the state upon the interstate carrier as to its intrastate operations, where such carrier is engaged in both interstate and intrastate commerce, providing it will not result in unduly burdening its interstate business. See *Interstate Busses Corp. v. Holyoke St. Ry.* (1927) 273 U. S. 45, 51; *Hi-Ball Transit Co. v. Railroad Comm.*, *supra* note 153, at 426; *Atlantic-Pacific Stages, Inc. v. Stahl* (W. D. Mo. 1929) 36 F. (2d) 260, 262; *Barrows v. Farnum's Stage Lines, Inc.* (1926) 254 Mass. 474, 150 N. E. 206; *Haselton v. Interstate Stage Lines, Inc.* (1926) 82 N. H. 327, 133 Atl. 451, Note (1927) 11 MINN. L. REV. 157.

<sup>160</sup> *Adams Express Co. v. City of New York*, *supra* note 159; *Michigan Public Utilities Comm. v. Duke*, *supra* note 147; *Red Ball Transit Co. v. Marshall* (S. D. Ohio 1925) 8 F. (2d) 635, appeal dismissed without opinion (1927) 273 U. S. 782; *Johnson Transfer & Freight Lines v. Perry*, *supra* note 148; *Cobb v. Department of Public Works* (W. D. Wash. 1932) 60 F. (2d) 631, (1933) 33 Col. L. REV. 154. (The Clerk of the U. S. Dist. Court for the Western District of Washington, Southern Division, in correspondence of Feb. 1, 1933, advises that a decree was filed in this case on Jan. 26, 1933, wherein the Department of Public Works of Washington is restrained from canceling plaintiffs' certificate of public convenience and necessity solely for lack of insurance covering interstate passengers.)

<sup>161</sup> *Sage v. Baldwin*, *supra* note 143, at 971.

<sup>162</sup> *Michigan Public Utilities Comm. v. Duke*, 266 U. S. at 577.

<sup>163</sup> *Sage v. Baldwin*, *supra* note 143. See on the general subject, *Asbill*, *loc. cit.* *supra* note 32.

<sup>164</sup> See *Buck v. Kuykendall* (W. D. Wash. 1924) 295 Fed. 197; *Bush & Sons Co. v. Maloy* (1923) 143 Md. 541, 123 Atl. 61; *Northern Pac. Ry. v. Schoenfeldt* (1923) 123 Wash. 579, 213 Pac. 26; *State ex rel. Schmidt v. Department of Public Works* (1923) 123 Wash. 705, 213 Pac. 31; *People v. Barbuas* (1923) 230 Ill. App. 560.

March 2, 1925. On that day the United States Supreme Court made some interstate motor vehicle transportation history by its decisions first, in the case of *Buck v. Kuykendall*<sup>165</sup> and then in the case of *Bush & Sons Co. v. Maloy*.<sup>166</sup>

In the *Buck* case, Mr. Buck, a citizen of Washington, wished to operate an auto stage over the Pacific Highway between Seattle, Washington and Portland, Oregon, as a common carrier exclusively for through interstate passengers and express. He secured the license from Oregon as prescribed by the laws of that state and then applied to the State of Washington for a certificate of public convenience and necessity as required by the laws of Washington, and construed by the highest court of that state as applying to common carriers engaged exclusively in interstate commerce.<sup>167</sup> The State of Washington, being of the opinion that transportation facilities already supplied by rail and road in that territory were adequate and sufficient, refused Mr. Buck a certificate. Its statute provided that the certificate might not be granted when the circumstances were such. The United States Supreme Court, reversing the United States District Court, held the statute, as applied to interstate carriers, was in violation of the commerce clause.

The Maryland statute, involved in the *Bush* case, differed in no material respect from the Washington statute condemned in the *Buck* case, the facts in the two cases were similar, and the Supreme Court, under the rule just announced, held this statute was also unconstitutional.

Mr. Justice McReynolds dissented in both cases, taking the view that the statutes should be upheld as falling within that class of powers which may be exercised by the states until Congress has seen fit to act upon the subject.

On January 12, 1925, just six weeks or so prior to the decisions in these two cases, the Supreme Court had decided the *Duke* case.<sup>168</sup> The Michigan statute involved required a permit of all those carrying for hire upon the state's highways, and the carrier there was an interstate carrier. But the statute also imposed other burdens which were objectionable.<sup>169</sup> So the question of whether an interstate carrier for

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<sup>165</sup> *Supra* note 159.

<sup>166</sup> (1925) 267 U. S. 317.

<sup>167</sup> *Supra* note 159, at 313.

<sup>168</sup> *Supra* note 58.

<sup>169</sup> *Supra* note 59. The statute provided that any and all persons engaged in the business of carrying for hire upon the state's highways should be common carriers and burdens appropriate to common carriers were imposed. The carrier involved although a carrier for hire was not a common carrier. The statute was condemned as repugnant to the due process clause as well as in violation of the commerce clause.

hire could be refused the use of the state's highways was clouded in that case.

As a result of these decisions we find the rule of *Packard v. Banton*,<sup>170</sup> to the effect that highway use for gain may generally be prohibited or conditioned as the legislature deems proper, which was qualified as to intrastate carriers in the *Frost case*,<sup>171</sup> is now further limited. It cannot, in its broad terms, be applied to interstate carriers.

The decisions in the *Buck* and *Bush* cases have not met with universal approval. There are those who contend that the state holds the highways in trust for the people of that state—not of every state, and that there is no more reason for compelling the state to devote its highways to interstate commerce by motor vehicles than to compel it to devote its highways to interstate commerce by steam or electric roads.<sup>172</sup> Reliance is placed upon the case of *St. Louis v. Western Union Tel. Co.*<sup>173</sup> in which the Supreme Court says that the streets and highways of the state are the public property of the state and can no more be appropriated without compensation than can the private property of an individual be so appropriated.<sup>174</sup> It is contended that the *St. Louis v. Western Union Tel. Co.* case is authority for the proposition that the state cannot be forced against its consent, to devote its public property to interstate commerce.<sup>175</sup> But the Supreme Court drew a distinction in this case between an exclusive and permanent appropriation of the state's property, such as that caused by telegraph poles, which was the matter involved in the case, and a temporary obstruction or appropriation such as that caused by travel. The latter use was referred to as a common use and one which cannot be denied by the state to the citizens of another state.<sup>176</sup>

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<sup>170</sup> *Supra* note 53.

<sup>171</sup> *Supra* note 63.

<sup>172</sup> See Gavit, *State Highways and Interstate Motor Transportation* (1927) 21 ILL. L. REV. 559. The contention seems logical.

<sup>173</sup> (1893) 148 U. S. 92.

<sup>174</sup> *Ibid.* at 101. On the right to compensation for the use of city streets for telegraph poles, see also *Western Union Tel. Co. v. City of Richmond* (1912) 224 U. S. 160.

<sup>175</sup> Gavit, *op. cit. supra* note 172, at 562, 564. The view is also taken that to license the use of the state's highways to interstate commerce is in no sense a regulation of such commerce, inasmuch as no such commerce has as yet been established where the carrier involved is merely proposing to operate and that Congress, although given authority by the commerce clause to regulate interstate commerce, has no authority to establish such commerce.

<sup>176</sup> *Supra* note 173, at 101. See also *West v. Kansas Natural Gas Co.* (1911) 221 U. S. 229, 260, where it was held that a state could not refuse interstate commerce the use of its highways while granting the use to intrastate commerce, the court saying: "At this late day it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of a state, and that it cannot be regulated or restrained by a state, or that a state cannot exclude from its limits a corporation engaged in such commerce."

The *Buck* and *Bush* cases having established the rule that the states cannot refuse the interstate motor carrier permission to use their highways, the notion prevailed for a time that these carriers could not be required to secure a permit.<sup>177</sup> Subsequent cases, however, have decided that the states may require such carriers to secure a permit, as a prerequisite to the use of their highways, if the permit is granted as a matter of course or upon payment of only a reasonable fee.<sup>178</sup> Inasmuch, then, as the interstate carrier may be required to secure a permit, it seems wise for the states to impose such a requirement. A record of interstate operations in the state is thus provided, and the exercise of police regulations facilitated.<sup>179</sup> In addition, there are some decisions to the effect that for violations of reasonable state regulations, further operations by the particular carrier may be prevented by a revocation of the permit.<sup>180</sup> The theory supporting this view is that the power of the state to impose reasonable regulations for the use of the highways includes the right to enforce them, and that penalties imposed for breach of the regulations may be other than fine or imprisonment.<sup>181</sup> While this makes it possible to restrict interstate carrier operations as an enforcement measure, although it is not possible under the rule of the *Buck* and *Bush* cases as affirmative action, the Supreme Court of Ohio, in *Detroit-Cincinnati Coach Line, Inc. v. Public Utilities Comm. of Ohio*<sup>182</sup> makes this observation:

"The only problem presented by this proceeding is whether the state authorities can enforce that obedience [to the valid laws of the state] by the extreme process of revocation of the interstate right altogether. The persons operating motor vehicles upon state highways as common carriers in interstate commerce are guaranteed against unreasonable interference and unreasonable burdens, but this immunity does not justify such persons in becoming outlaws or abusing franchises thus given to them."

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<sup>177</sup> See Rosenbaum and Lilienthal, *The Regulation of Motor Carriers in Pennsylvania* (1927) 75 U. OF PA. L. REV. 696, 709; and see the position taken by the carriers in *Clark v. Poor* (1927) 274 U. S. 554, 558.

<sup>178</sup> *Ibid.*; *Johnson Transfer & Freight Lines v. Perry*, *supra* note 148; *Alkazin v. Wells*, *supra* note 152; *Cannonball Trans. Co. v. American Stages, Inc.* (S. D. Ohio 1931) 53 F. (2d) 1051, 1053.

<sup>179</sup> See Rosenbaum and Lilienthal, *op. cit. supra* note 177, at 709-710.

<sup>180</sup> *Detroit-Cincinnati Coach Line, Inc. v. Public Utilities Comm. of Ohio* (1928) 119 Ohio St. 324, 164 N. E. 356 (carried passengers in intrastate commerce without certificate authorizing same and violated speed laws); *Wheeling Traction Co. v. Public Utilities Comm. of Ohio* (1928) 119 Ohio St. 481, 164 N. E. 523 (violated rules of state commission and conditions of certificate). *Cf. Atlantic-Pacific Stages v. Stahl*, *supra* note 159, holding a state may not decline to issue a certificate of convenience and necessity to a carrier engaged in interstate commerce on the ground that it has violated the law requiring it to obtain a certificate with respect to its intrastate business.

<sup>181</sup> See Rosenbaum, *Revocation of Interstate Motor Carrier Certificates* (1929) 3 CIN. L. REV. 354, 355-356.

<sup>182</sup> *Supra* note 180, at 331, 164 N. E. at 358.

Many of the highways used by both intrastate and interstate motor carriers were constructed or improved with federal aid. An investigation of the cases in which this point has been made will, however, disclose that as long as there is no attempt to charge tolls, the fact that the highway involved was so constructed or improved is of little importance so far as the right of the state to impose regulations as to its use is concerned.<sup>183</sup>

The preceding discussion on the power of the states to impose regulations upon the interstate motor carrier would clearly indicate

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<sup>183</sup> The Washington highway involved in the *Buck* case, *supra* note 159, was built with federal aid pursuant to the Act of July 11, 1916, (39 Stat. 355), as amended Feb. 28, 1919, (40 Stat. 1189, 1200), and the Federal Highway Act, Nov. 9, 1921, (42 Stat. 212). See 267 U. S. at 314. The Supreme Court took the view in that case that to refuse an interstate common carrier the use of the highway was not only a violation of the commerce clause, but would also defeat the purpose expressed in the legislation giving federal aid for the construction of interstate highways. See 267 U. S. at 316. In the *Bush* case, *supra* note 166, however, the highways in question were not federal aid highways, and in referring to this the Court said: "This difference does not prevent the application of the rule declared in the *Buck* Case. The federal-aid legislation is of significance, not because of the aid given by the United States for the construction of particular highways, but because those acts make clear the purpose of Congress that state highways shall be open to interstate commerce." 267 U. S. at 324.

In *Morris v. Duby*, *supra* note 140, a case where a federal aid road, the Columbia River Highway, was involved, decided two years after the *Buck* and *Bush* cases, Mr. Chief Justice Taft, speaking for the Court, said: "An examination of the acts of Congress [Federal Highway Acts] discloses no provision, express or implied, by which there is withheld from the State its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them." 274 U. S. at 143. An order of the Oregon Highway Commission reducing the maximum weight of motor vehicles and loads was upheld.

In *Interstate Busses Corp. v. Blodgett*, *supra* note 147, a Connecticut statute imposing a tax of one cent for each mile of highway traversed by any motor vehicle used in interstate commerce as an excise on the use of such highway, the proceeds of the tax to be applied to the maintenance of public highways of the state, was upheld by the Supreme Court, although a part of the cost of construction of the highways was received under federal aid legislation.

Section 9 of the Federal Highway Act, (42 Stat. (1921) 214, c. 119, 23 U. S. C. (1926) §9) provides: "All highways constructed or reconstructed under the provisions of this chapter shall be free from tolls of all kinds." But a state registration or license fee graduated according to weight or capacity of the vehicle is not a "toll" within the meaning of the act. *Carley & Hamilton, Inc. v. Snook* (1930) 281 U. S. 66, 73-74; *Sanger v. Lukens* (D. Idaho 1927) 24 F. (2d) 226, 229; *Liberty Highway Co. v. Michigan Public Utilities Comm.* (E. D. Mich. 1923) 294 Fed. 703, 708-709. Nor is a reasonable mileage tax a "toll" within the meaning of that act. *Johnson Transfer & Freight Lines v. Perry*, *supra* note 148, at 904; *Alkazin v. Wells*, *supra* note 152; *Intercity Coach Lines, Inc. v. Harrison* (1931) 172 Ga. 390, 398, 157 S. E. 673, 677. On the general subject of state and federal rights and obligations where federal aid to highways is involved, see George, *State Regulation of Interstate Motor Carriers* (1929) 14 St. Louis L. Rev. 136, at 153.

that the regulations must be limited to highway conservation or traffic safety. Regulation of this commerce as such or with a view to the protection of other transportation agencies serving the same territory must come from Congress.

The power of Congress to regulate the operations of interstate common carriers by motor vehicle would not be questioned. The rates and service of such carriers may be effectively regulated by federal legislation, if, and when, Congress sees fit to act. The source of this power is the commerce clause of the Federal Constitution. The power of Congress to regulate the contract carriers engaged in interstate commerce presents a more difficult problem. The Fifth Amendment of the Federal Constitution imposes a limitation upon federal legislation just as state legislation is limited by the Fourteenth Amendment.

### *B. Federal Regulation and the Fifth Amendment*

There being no federal legislation, subjecting interstate motor carriers to regulation, and consequently no decided cases on the point, any opinion on the power of Congress to regulate the contract carriers is necessarily conjectural. Had the Supreme Court upheld the Texas statute in *Stephenson v. Binford* on the ground that the business of these carriers is "affected," this question would have been put at rest and the power of the states and Congress to impose rate and permit regulations upon them established. But the Texas statute was upheld as a highway conservation measure. Except in a few isolated instances, the highways belong to the states and not the federal government,<sup>184</sup> and, if the constitutionality of contract carrier rate and permit regulation is to be predicated upon highway conservation, and that alone, it is difficult to find the power of Congress to subject these carriers to regulation of this kind.

The Supreme Court has recognized the power of the states to impose regulations upon carriers for the purpose of conserving the federal aid highways.<sup>185</sup> Because of its expenditures upon these highways the federal government may have concurrent jurisdiction to impose similar regulations. Under the rule of *Stephenson v. Binford*, minimum rate and permit regulations might then be imposed by Congress upon contract carriers engaged in interstate commerce over these highways as

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<sup>184</sup> Highways within the national parks, national forests, the Indian Reservations, Military and Naval Reservations, the District of Columbia, and a large part of the Mount Vernon Memorial Highway were constructed with federal funds on land owned by the federal government and therefore may be said to be the property of the federal government. (Information furnished by the Bureau of Public Roads, U. S. Dep't of Agric.).

<sup>185</sup> See *Morris v. Doby*, *supra* note 140.

highway conservation measures. But the highway involved may not be a federal aid highway. The question then arises as to whether Congress by virtue of its jurisdiction over interstate commerce, may, in the face of the Fifth Amendment, subject the interstate contract carriers to regulation. Certain regulations, such as those fixing physical standards for the vehicles, drivers' qualifications and the hours of service of employees, imposed for the safety and protection of passengers and property moving in interstate commerce, may be imposed without violating the guarantees of the Fifth Amendment.<sup>186</sup> But rate and permit requirements cannot properly be included within this category of permissible regulations.

Expressions may be found, in this connection, to the effect that the power to regulate interstate commerce, conferred upon Congress by the commerce clause, is without limitation.<sup>187</sup> But this is too broad an interpretation of the language of the commerce clause, and there is no warrant for it. Under the Federal Constitution the regulation of intrastate commerce is reserved to the states. Though they have jurisdiction to regulate such commerce, it has not been recognized that this jurisdiction gives the states power to impose rate and permit regulations upon intrastate private carriers. The fact that the power to regulate interstate commerce is vested in Congress by an express declaration would not give Congress any greater power over such commerce, in this respect, than the corresponding power of the states over intrastate commerce. The commerce clause merely effected a distribution of jurisdiction to regulate commerce. Under this clause the regulation of interstate commerce was assigned to Congress while the regulation of intrastate commerce was left with the states.

Some support for the power of the federal government to regulate the interstate contract carrier may be found in the decision in the *Shreveport Rate* case.<sup>188</sup> There, intrastate rates were made in a man-

<sup>186</sup> Regulations in the nature of police regulations may be imposed by Congress as an incident to its power to regulate interstate commerce. *Hoke v. United States* (1913) 227 U. S. 308, 43 L. R. A. (N.S.) 906. See Report of Hearings before Senate Committee on Interstate Commerce, Feb. 4, 1932, at 94.

<sup>187</sup> See Flynn Report, *op. cit. supra* note 4, at 108; Statement of Senator Barkley, Report of Hearings before Senate Committee on Interstate Commerce, Feb. 4, 1932, at 95: "I do not think there is a restriction on the power of Congress to regulate interstate commerce." But compare the cases cited in note 190, *infra*.

<sup>188</sup> *Houston, East & West Texas Ry. v. United States*, and *Texas & Pac. Ry. v. United States* (1914) 234 U. S. 342; discussed by Coleman, *The Evolution of Federal Regulation of Intrastate Rates: The Shreveport Rate Cases* (1914) 28 HARV. L. REV. 34. Accord: *Railroad Comm. of Wisconsin v. Chicago, B. & Q. R. R.* (1922) 257 U. S. 563, 22 A. L. R. 1086. Contra: *Abilene & Southern Ry. v. State* (Tex. Civ. App. 1918) 199 S. W. 878, but reversed by agreement (1924) 260 S. W. 1117.

ner as to discriminate against interstate commerce and it was held that, as a legitimate incident to the power to regulate interstate commerce, the federal government could enter upon the forbidden field of intrastate commerce and adjust rates where they operate to the injury of interstate commerce. By analogy, the position may be taken that the federal government, as a legitimate incident to its power to regulate interstate common carriers, can impose rate and permit regulations upon interstate private carriers where the operations of these carriers injuriously affect such commerce, as by the impairment or destruction of common carrier service.<sup>189</sup> What is now proposed would seem little greater than what has already been sanctioned. But the two problems are distinct. In the *Shreveport* case the power of the federal government was extended to permit the adjustment of the intrastate rates of a common carrier—an extension of jurisdiction and a limitation upon state's rights. Here the power of regulation is to be extended to cover the interstate operations of a private carrier—an extension of power over carriers within its jurisdiction and a limitation upon the rights of the individual. Whether the Supreme Court would be willing to sanction the limitation of private rights to this extent is subject to doubt.<sup>190</sup>

If the contract carriers engaged in interstate commerce are to be subjected to rate and permit regulations, the Supreme Court would appear to be presented with two alternatives. Either to sanction the

<sup>189</sup> Cf. *Ruppert v. Caffey* (1920) 251 U. S. 264.

<sup>190</sup> See *Monongahela Nav. Co. v. United States* (1893) 148 U. S. 312, 336: "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 . . ." And see *United States v. Chicago, Milwaukee, St. Paul & Pac. R. R.* (1931) 282 U. S. 311, 327: "The power to regulate commerce is not absolute, but is subject to the limitations and guarantees of the Constitution, among which are those providing that private property shall not be taken for public use without just compensation and that no person shall be deprived of life, liberty or property without due process of law." See also *Scranton v. Wheeler* (1900) 179 U. S. 141, 153; *Adair v. United States* (1908) 208 U. S. 161, 180; *Brown and Scott, op. cit. supra* note 32, at 566, n. 89: "That the exercise of the commerce power is limited by the Fifth Amendment is recognized in such cases as *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 437-39 (1930), where the validity of federal statutes regulating rates of persons engaged in interstate commerce is treated as dependent upon their being affected with a public interest, exactly as if a state statute were concerned." Cf. *Hamilton, op. cit. supra* note 98, at 1104: "In the constitution there is usually more than one sanction; it is, therefore, of note that regulation which stops little short of price-fixing has been upheld without formal affectation of business with a public interest . . . It may have been mere accident, it may have been cause; at least it has come about that it is for purposes of state, not of federal, legislation that industries are, or are not, to be affected with a public interest. The doctrine is plainly to be found within the Fourteenth Amendment; as yet it has not been discovered within the Fifth."

limitation of private rights, to this extent, in the interest of promoting a national system of transportation, or to declare the business of these carriers to be "affected with a public interest." While the end would seem to justify the adoption of either alternative, to declare the business "affected" would seem to be the logical choice. However desirable it may seem to limit the extension of the "affectation" doctrine, it seems inconsistent, if not an evasion of the prohibition of the Fifth Amendment, to treat the business of these carriers as a private undertaking, unimpressed with a public interest, and yet to sanction the imposition of regulations of this character as an incident to the power to regulate interstate common carriers.

#### V. CONCLUSION

It is clear that conditions prevailing along the highways indicate the need for police regulations promoting greater traffic safety and the better preservation of the roads. Most of the states have been much too lax in their regulation of highway use.<sup>191</sup> There is no constitutional obstacle to prevent the accomplishment of this end. The states under the exercise of their police power may subject all motor vehicles employing their highways, including those constructed with federal aid, to reasonable regulations of this character. Regulations falling within this category include those fixing physical standards of the vehicles used, providing for the registration of the vehicles, the licensing of drivers and their hours of service, insurance for the protection of others employing the highways, the appointment of agents upon whom process may be served in actions growing out of the operation of the vehicles in the state, and fees or charges for the use of the state's highways. The owner of the privately operated vehicle as well as the carrier for hire may be subjected to regulations of this kind. Until Congress acts upon this subject, regulations of this character may be imposed by the states upon the operators of vehicles moving in interstate commerce.

The prevailing opinion would clearly seem to be that motor transportation, as a business, should be subjected to regulation in the interest of the public. This public interest extends to the preservation of a dependable system of transportation, including both road and rail facilities. After an extensive investigation of the transportation problem of the country, the National Transportation Committee has declared:

"The railroad system must be continued and its efficiency preserved because of national necessity—economic, social and defensive . . . Gov-

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<sup>191</sup> See note 13, *supra*.

ernment has a positive duty to see to it that neither the railroads nor their competitors are either unduly handicapped or unduly advantaged . . . The studies of the committee clearly indicate the advisability of extension of regulatory jurisdiction to the whole transportation system."<sup>192</sup>

To accomplish this purpose all motor carriers for hire, both common and private, must be subjected to rate and permit control.

There is no constitutional difficulty in subjecting the common carriers to such regulation. These carriers engaged in intrastate commerce have in most states been subjected to regulation of this kind which is more or less effective and Congress can subject these carriers engaged in interstate operations to such control.

The contract carriers engaged in intrastate commerce may be subjected to minimum rate and permit regulations. These regulations were upheld by the Supreme Court in *Stephenson v. Binford*, however, not as valid regulations of the business of these carriers, but as permissible highway conservation measures. As a result of this decision there is doubt as to the legal possibility of effecting a complete regulatory system for transportation. Unless the business of the contract carriers is declared to be a business "affected with a public interest," the Fourteenth Amendment of the Constitution prevents the states from subjecting these carriers engaged in intrastate commerce to complete control. Maximum rate regulation could not be supported as a highway conservation measure. Nor is it clear that the contract carriers engaged in interstate commerce may be subjected to either maximum or minimum rate, or to permit regulation. The commerce clause prevents the states from imposing rate regulation, or the denial of permits to operate. Regulation imposed by Congress must meet the requirements of the Fifth Amendment. That the business of the contract carriers is "affected" has been decided in the affirmative by some of the state and lower federal courts, but the question has not been determined by the United States Supreme Court. In the light of the language used in *Smith v. Cahoon* and the fact that the Texas statute in *Stephenson v. Binford* was upheld on other grounds, the intimation is that the Supreme Court considers this business as not "affected." If this is the law, the intrastate contract carriers may be subjected to only limited control and one unit of our transport system—the interstate contract carriers—may be free from regulation designed to bring about a complete regulatory scheme for transportation. Had the Supreme Court, in affirming *Stephenson v. Binford* accepted the decision of Circuit Judge Hutcheson, this situation would have been corrected. Expediency dictated Judge Hutcheson's decision and it was sound

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<sup>192</sup> 7 U. S. Daily 2175, 2181, 2196 (Feb. 16, 20, 1933).

legally. It should have been adopted by the Supreme Court. It is to be hoped that when the opportunity is again afforded the Supreme Court, to pass upon this question, it will be decided that the contract carriers are engaged in a business "affected with a public interest." With such a decision from our highest tribunal, all constitutional obstacles would be removed and our general transportation system, including both road and rail facilities, could then be cöordinated, preserved and fostered to the fullest convenience and necessity of the public.

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