LEGISLATION

REGULATION OF CONTRACT MOTOR CARRIERS [1]—Recent state legislative efforts [2] evince a renewed determination to devise a complete regulatory system for motor transportation that will meet the requirements of the United States Supreme Court.[3] Although this regulation is of busses as well as of trucks, interest lies chiefly in the latter for the reason that effective regulation of trucks is impossible if confined to common carrier operations [4] and it is only the regulation of private carrier operations that has met with constitutional objections.[5] These new efforts differ sufficiently from prior unsuccessful attempts to warrant a re-examination of the entire problem.[6]

The rise of the motor carrier from virtual insignificance to the position of a formidable and persistent competitor of the railroad has been astonishingly rapid.[7] Perhaps it is because of this phenomenal development that the initial state attempts at regulation proved legally and practically unsuccessful. They were made without a thorough examination into the nature of the instrumentality dealt with and in the main by the hasty expedient of an amendment to eisting general regulatory statutes.[8] It is this kind of statute only that has had judicial interpretation by the ultimate arbiter of constitutional disputes.[9]

One of the earliest attempts to regulate private carriers was made in Michigan.[10] All who carried for hire over regular routes were declared to be common carriers and required to obtain a certificate of convenience and necessity

---

[1] The words "contract" and "private", in this connection, are used interchangeably. "Private" is sometimes used to include the transportation of one's own person or property; strictly, when modifying "carriage", it means, as a *business* and distinguishes common carriage.

[2] Colo. Sess. Laws 1931, cc. 120, 121, 122; Fla. Gen. Laws 1931, c. 14764; Kan. Laws 1931, c. 236; Mich. Pub. Acts 1931, No. 212; Tex. Gen. Laws 1931, c. 277; Wyo. Sess. Laws 1931, c. 133.

[3] Michigan Public Utilities Comm. v. Duke, 266 U. S. 570, 45 Sup. Ct. 191 (1925), noted in (1925) 38 HARV. L. REV. 980; Frost v. Railroad Comm., 271 U. S. 583, 46 Sup. Ct. 605 (1926), noted in (1926) 40 HARV. L. REV. 131; Smith v. Cahoon, 283 U. S. 553, 51 Sup. Ct. 582 (1931), noted in (1931) 31 COL. L. REV. 1194, (1932) 30 MICH. L. REV. 629.

[4] "The point bears repeating that regulation which seriously burdens part of a group of competing carriers is *prima facie* bad. It provides a strong incentive to evasion, making the administrative function doubly difficult, and it discourages in an uneconomic way the performance of those transport functions which are thus burdened." Peterson, *Motor-Carrier Regulation and its Economic Bases* (1929) 43 Q. J. OF ECON. 604, 639; see also report of Attorney-Examiner Flynn, *Co-ordination of Railroad and Motor Transportation*, Interstate Commerce Commission, Docket No. 23400, sheet 109.

[5] *Ibid.* at sheet 117.

[6] Several exhaustive analyses of the earlier legislation have been made. Lilienthal and Rosenbaum, *Motor-Carrier Regulation: Federal, State, and Municipal* (1926) 26 COL. L. REV. 954; *Motor-Carrier Regulation by Certificates of Necessity and Convenience* (1926) 36 YALE L. J. 163; Brown and Scott, *Regulation of the Contract Motor-Carrier Under the Constitution* (1931) 44 HARV. L. REV. 530.

[7] In 1895 four passenger automobiles were produced in the United States; in 1904, 22,419 passenger cars and 411 motor trucks. In 1930, 26,523,779 passenger cars and 3,480,939 trucks were registered. *Facts and Figures of the Automobile Industry* (National Automobile Chamber of Commerce, 1931 ed.).

[8] See Brown and Scott, *op. cit. supra* note 6, at 538 *et seq.* In an appendix (568 *et seq.*), is contained a very helpful analysis of the statutes of the particular states with citations of cases construing them.

[9] See cases cited *supra* note 3. Inasmuch as the statutes in other states differ in no substantial particulars from those declared unconstitutional in the *Duke, Frost* and *Smith* cases, (Brown and Scott, *op. cit. supra* note 6, at 546), if effective permanent regulation is desired they must be changed.

[10] See Brown and Scott, appendix, *op. cit. supra* note 6.

and to submit to the ordinary public utility regulation.[11] The constitutionality of this enactment was challenged by a freight carrier operating under three contracts exclusively in interstate commerce. The Supreme Court decided[12] that the commerce clause was violated and then added words that have become a veritable epithet to be hurled almost indiscriminately at unpopular economic legislation,

> "Moreover, 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 for that would be taking private property for public use without just compensation which no state can do consistently with the due process clause of the Fourteenth Amendment." [13]

It is doubtful whether this means any more than that a state cannot arbitrarily and baldly declare a business to be subject to rate regulation, a point already well established.[14]

In the next case, *Frost v. Railroad Commission,*[15] the Court was confronted with a California statute[16] which differed from the Michigan enactment only in its lack of a declaration that all carriers for hire are common carriers; common and private carriers alike were subjected to identical regulation. The California Supreme Court upheld the constitutionality of this legislation on the ground that the use of the public highways as a place of business was a privilege that could be entirely withheld and therefore one which could be conditioned as the state saw fit.[17] Accepting that court's interpretation of the statute as requiring private carriers to become common carriers the Supreme Court reversed the decision on the ground that a state cannot do indirectly what it cannot do directly. This was an extension of the doctrine of unconstitutional conditions which the Court had worked out in connection with foreign corporations.[18]

In *Smith v. Cahoon*[19] an almost identical Florida statute[20] was declared unconstitutional, the Court reversing the decision of the state supreme court in which it had been held that the act did not require private carriers to become common carriers.[21] Chief Justice Hughes explained that the imposition of the same regulations on private as on common carriers was in effect to require them to become common carriers. This has been doubted inasmuch as the private carrier is not compelled to accept proffered business, one of the distinguishing marks of his common law status.[22] However, the statute was

[11] Mich. Pub. Acts 1923, No. 209, §§ 1-3.

[12] Michigan Public Utilities Comm. v. Duke, *supra* note 3.

[13] *Ibid.* at 193.

[14] It has been asserted, in connection with the state's exercise of the police power, that its declaration of public necessity is not decisive. Wolff Pkg. Co. v. Court of Industrial Relations, 262 U. S. 522, 43 Sup. Ct. 620 (1923); Burns Baking Co. v. Bryan, 264 U. S. 504, 44 Sup. Ct. 412 (1924); Foster-Fountain Pkg. Co. v. Haydel, 278 U. S. 1, 49 Sup. Ct. 1 (1928).

[15] *Supra* note 3.

[16] CAL. GEN. LAWS (Deering, 1923) Act 5129, § 1 (c) defines "transportation company" as one engaged "in the business of transportation of persons or property, or as a common carrier, for compensation."

[17] Frost v. Railroad Comm., 197 Cal. 230, 240 Pac. 26 (1925).

[18] The case is sharply criticized on this ground in Merril, *Unconstitutional Conditions* (1929) 77 U. OF PA. L. REV. 879. It has been argued that the theory of unconstitutional conditions, as applied to foreign corporations, reflects on the logical validity of the general theory of a foreign corporation's status. Note (1931) 79 U. OF PA. L. REV. 1119, 1128. Perhaps the same is true of the "special-privilege" theory of the use of public highways, *infra* note 29.

[19] *Supra* note 3.

[20] Fla. Gen. Laws 1929, c. 13700. As in the California statute "auto transportation" companies were defined as those engaged "in the business of transportation . . . for compensation or as a common carrier."

[21] Cahoon v. Smith, 99 Fla. 1174, 128 So. 632 (1930).

[22] (1931) 31 COL. L. REV. 1194.

fatally defective in other respects [23] and that of course detracts from the weight of an inference that a private carrier cannot constitutionally be regulated in substantially the same manner as is a common carrier if such regulation is reasonably necessary.[24] These three cases are chiefly significant in showing that the problem of regulation of private carriers cannot be approached categorically but must be viewed with a full realization of its economic potentialities and intelligently treated.

Recent legislation is of two kinds, both of which have been judicially approved in lower federal courts.[25] That in Michigan authorizes the commission "for the purpose of promoting safety upon the highways and the conservation of their use to supervise and reasonably regulate every private carrier . . . ; to prescribe reasonable rules and regulations for the operation of such private carriers; to provide for and require the safety of operations of such carriers; to prescribe reasonable rules and regulations providing for safety and order in respect to the use of the highways . . ." [26] It contains a further provision for the filing of reports and the furnishing of other data.[27] In *Ogden & Moffett Co. v. Michigan Public Utilities Commission* [28] the statute was sustained as a proper regulation of the use of highways in an extraordinary manner, that is, as a place of business. The Supreme Court in several cases has placed this type of regulation within the legitimate sphere of the state's so-called police power. Classification distinguishing vehicles used in the business of transportation from those otherwise used is not a violation of the equal protection clause of the Fourteenth Amendment because the former is an extraordinary use of the highways.[29]

The Texas statute is undeniably a regulation of the business of carriage.[30] It differs from most recent attempts in being limited to freight carriers. Following the mandate of the Supreme Court in the *Smith* case, in this respect like the other recent enactments, it treats the two types of carriers separately. Common carriers must obtain a certificate of convenience and necessity; contract

---

[23] See Howard, *The Supreme Court and State Action Challenged Under the Fourteenth Amendment, 1930-1931* (1932) 80 U. OF PA. L. REV. 483, 516 *et seq.*

[24] See Smith v. Cahoon, *supra* note 3, at 563, 51 Sup. Ct. at 585.

[25] Stephenson v. Binford, 53 F. (2d) 509 (S. D. Tex. 1931), noted (1932) 45 HARV. L. REV. 583; Ogden & Moffett Co. v. Michigan Public Utilities Comm., decided by the District Court for the Eastern District of Michigan, U. S. Daily Nov. 4, 1931, at 2014. These two cases are now pending in the Supreme Court.

[26] Mich. Pub. Acts 1931, No. 212, § 4. Section 5 requires the private carrier to obtain a "permit", but expressly for the purposes and is conditioned only by the regulations set forth in section four and the payment of certain fees.

[27] The Arkansas State Railway Commission now requires private carriers to file their contracts. This is justified as a reasonable means of determining which kind of carrier a particular operator is and of enforcing the regulation of the common carrier operations as required by statute. U. S. Daily, Dec. 30, 1931, at 2455. The Massachusetts Commission has proposed regulation that would insure the reliability and financial responsibility of truck operators. U. S. Daily, Jan. 4, 1932, at 2483.

[28] *Supra* note 25.

[29] "The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for purposes of gain is special and extraordinary and, generally, at least, may be prohibited or conditioned as the legislature deems proper." Packard v. Banton, 264 U. S. 140, 144, 44 Sup. Ct. 257 (1924) (act required indemnity against personal injury). See also The Hodge Drive-It-Yourself Co. v. Cincinnati, 52 Sup. Ct. 144 (1932) (act required indemnity against property and personal injury); *cf.* Hendrick v. Maryland, 235 U. S. 610, 35 Sup. Ct. 140 (1915); Kane v. New Jersey, 242 U. S. 160, 37 Sup. Ct. 30 (1916).

[30] *Supra* note 2. This act is more comprehensive than either the Kansas or the Florida acts, both *supra* note 2. The Florida act requires a certificate of convenience and necessity, in the granting of which the Commission is instructed to consider the effect on other transportation facilities (§ 4); but rates are not regulated. The Kansas act is unique in requiring a license of (§ 8) and providing regulation for (§ 4) not only contract carriers for hire but private carriers *of freight* not for hire. The vagueness of the language defies a precise determination of the extent of the regulation imposed.

carriers must receive a "permit" as a prerequisite to operation. The latter is not to be granted "if the Commission shall be of the opinion that the proposed operation of any such contract carrier will impair the efficient public service of any authorized common carrier . . . then adequately serving the same territory".[31] Further, the Commission must "prescribe rules and regulations covering the operation of contract carriers in competition with common carriers . . . and shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service".[32] The legislature expressly declares that "the business of operating as a motor carrier of property for hire along the highways of this State is . . . a business affected with the public interest" [33] and follows its declaration with an enumeration of reasons.

This legislation is the first regulation of the business of contract carriers ever to pass the close scrutiny of a federal court.[34] In sustaining it, Judge Hutcheson carefully distinguished the *Duke, Frost* and *Smith* cases.

> "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 a 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." [35]

Throughout the decision is evident the belief that a *carrier's* use of the pubic highways is a privilege.[36]

This kind of regulation raises two nice questions: has the state power, within the limits imposed by the Fourteenth Amendment, (1) to exclude private carrier interference with its common carrier system of transportation, rail and highway; (2) to assume control over private carrier operations to the extent of prescribing minimum rates that are not lower than those charged by common carriers? The other provisions are of a kind that either may be subsumed under the general heads of the above two questions or that come within the recognized scope of the state's police powers.[37] These two questions may be discussed separately; the powers are conferred in separate sections and the statute expressly provides for the enforcement of any section apart from the validity of any other section.[38]

---

[31] Tex. Gen. Laws 1931, c. 277, § 6 (c).

[32] *Ibid.* at § 6aa.

[33] Declaration of Policy, *ibid.* at § 22b. This section continues, "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 shoud 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."

[34] Stephenson v. Binford, *supra* note 25; *cf.* Johnson v. Perry, 47 F. (2d) 900 (N. D. Ga. 1931).

[35] Stephenson v. Binford, *supra* note 34, at 514.

[36] "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 characterizing him at common law, his privilege flowers under the Fourteenth Amendment into a right which the State may not impair." *Ibid.* at 515.

[37] See cases cited *supra* note 29.

[38] *Supra* note 2, at § 23.

It is apparent that calling the license a "permit" instead of a "certificate of convenience and necessity" avoids the unsavory implications that the latter name calls forth. A certificate of convenience and necessity is meaningless unless the public has a right to demand the carrier's service and it was this factor essentially that marked the difference between the private and the common carrier at common law. If the mandate against converting a private carrier into a public or common carrier means any more than that a state cannot arbitrarily and without a show of reason assume regulatory control over the private carrier,[39] it means only that a state cannot compel a private carrier to serve the public by accepting proffered business to the extent of his facilities.[40] This is the essence of the existing objection to certification of private carriers.[41] The Court, in the *Frost* case, quite plainly left the door open to certification of some kind, Justice Holmes in his dissenting opinion, expressly approving it;[42] but the tenor of the majority opinion justifies the inference that the Court had in mind a *highway* rather than a *business* regulation, that is, exclusion based on the congestion of the highways and the physical danger to the general public rather than on the destructive competition and inferior service caused by the operations of innumerable unregulated carriers.[43] However, it must be noticed that the certification referred to was that of the motor business as such and without reference to other forms of transportation by recognized

[39] For an interesting discussion of the history and purpose of certificates of convenience and necessity, see Note (1920) 33 HARV. L. REV. 576.

[40] It is of somewhat more than academic interest that not a few writers have concluded that at early common law it was required of those who engaged in an enterprise for business purposes as distinguished from private purposes to serve one and all, and that the later common law development which differentiated public and private *businesses,* is historically incorrect as well as economically unsound. Adler, *Business Jurisprudence* (1914) 28 HARV. L. REV. 135, 160: "The right to refuse to have business relations is one thing; the right to continue in business and have business relations with some and not with others in equal circumstances is a wholly different thing." *Cf.* similar language in Brass v. North Dakota, 153 U. S. 391, 404, 14 Sup. Ct. 857, 862 (1894). And see Cheadle, *Government Control of Business* (1920) 20 COL. L. REV. 550, 564 *et seq.;* Robinson, *The Public Utility Concept in American Law* (1928) 41 HARV. L. REV. 277, 293-303; *cf.* Aterburn, *The Origin and First Test of Public Callings* (1927) 75 U. OF PA. L. REV. 411, 421 *et seq.* The most frequently cited definition of a common carrier is, "any man undertaking, for hire, to carry the goods of all persons indifferently", Gisbourn v. Hurst, 1 Salk. 249 (1711). Yet many definitions mingle with this or add to it, a differentiation between carriage *pro hac vice* and carriage as a business. Claypool v. Lightning Delivery Co., 299 Pac. 126, 127 (Ariz. 1931); Cushing v. White, 101 Wash. 172, 181, 172 Pac. 229 (1918). REDFIELD, CARRIERS & OTHER BAILEES (1869) § 19; STORY, BAILMENTS (9th ed. 1878) § 495; 1 HUTCHINSON, CARRIERS (3d ed. 1906) § 35: That the "holding out" test is today artificial and unrealistic in view of the fact that so-called contract carriers are actually active competitors of common carriers is shown strikingly in not a few state court decisions where this fact is relied on in whole or in part to sustain public utility regulation of contract carriers. Rutledge Co-Op. Ass'n v. Baughman, 153 Md. 297, 138 Atl. 29 (1927); Michigan Pub. Utilities Comm. v. Krol, 245 Mich. 297, 222 N. W. 718 (1929); Barbour v. Walker, 126 Okla. 227, 259 Pac. 552 (1927); in Stephenson v. Binford, *supra* note 25, also, this fact was prominent. *Contra:* State v. Smith, 31 Ariz. 297, 252 Pac. 1011 (1927); Jones v. Ferguson, 181 Ark. 522, 27 S. W. (2d) 96 (1930); Stoner v. Underseth, 85 Mont. 11, 277 Pac. 437 (1929); Weaver v. P. U. C., 40 Wyo. 462, 278 Pac. 542 (1929). The later cases adhere to the classical definition and require that an intentional "masking" behind contracts be shown, a test that is artificial, flimsy and virtually prohibitive of any successful practical regulation of common carriers. Brown and Scott, *op. cit. supra* note 6, at 537; Peterson, *op. cit. supra* note 4, at 635 *et seq.* In despair arbitrary measures have been taken in some jurisdictions. *Re* Auto Transportation Co., P. U. R. 1930 C 54 (Wis.); see also Note P. U. R. 1931 B 562.

[41] See Frost v. Railroad Comm., *supra* note 3, at 592, 46 Sup. Ct. at 606; Brown and Scott, *op. cit. supra* note 6, at 543 *et seq.;* Report of Attorney-Examiner Flynn, *supra* note 4, at sheet 128.

[42] See Frost v. Railroad Comm., *supra* note 3, at 601, 46 Sup. Ct. at 610.

[43] *Ibid.* at 591, 592, 46 Sup. Ct. at 606; see also Buck v. Kuykendall, 267 U. S. 307, 45 Sup. Ct. 324 (1925), discussed in Note (1929) 77 U. OF PA. L. REV. 904.

public utilities. As has been already observed, that kind of certification obviously is meaningless apart from a public right to demand services.[44]

A strong argument is possible in favor of the public right to demand the services of those who undertake to carry as a business in contradistinction to those who carry for their own purposes.[45] This would involve merely the modification of the classic definition of a common carrier to conform to present economic conditions; it is admitted that there is no vested right in the common law.[46] At the same time the established conceptual categories,"public" and "private", would be preserved intact. A practical weakness in this argument is that it does not reckon with the "rigid conservatism" [47] periodically manifested by the Supreme Court, a philosophy which is prone to regard historical facts as present realities and which only reluctantly admits that circumstances can and do alter the economic and social significance of a particular business.[48] But it is believed that the validity of the Texas "permit" can be sustained without the necessity of hurdling this towering barrier.

Mention already has been made of the fact that the police regulation of private carriers is sustained on the ground of the "extraordinary" use of the public highways; [49] to some extent this is true in the *Stephenson* case. The historical and economic soundness of this foundation is questionable.[50] It is true that at common law the unreasonable use of the highways by a single individual for his private business purposes was held to be a nuisance.[51] But this would seem to be because the use interfered with the use of the roadways for transportation purposes.[52] Certainly there is no substantial difference between the *use* of the highways as such by one who carries for himself and one who carries for others.[53] Both use them as a source of profit; the only difference is that the one use is an indirect source of profit whereas the other is direct. As regards the *use* of the highways the reduction of the number of companies is futile. If the business is there a single company will increase its facilities; if it is not the unnecessary ones will be starved out of existence. Regulation of the *use* of highways for safety purposes is accomplished logically only by regulation of the kind of facilities and manner of their use not by regulation of their number.[54]

---

[44] Brown and Scott, *op. cit. supra* note 6, 543 *et seq.;* see FREUND, POLICE POWER (1904) § 398. Certification of irregular carriers as such, without reference to some regular route, as sometimes attempted is "outside the accepted scope of public-utility control. Between that and fixing the number of grocery stores which a community may have, there is no very formidable gulf." Peterson, *op. cit. supra* note 4, at 616.

[45] This cannot accurately be called "carriage", *supra* note 1; see, also, discussion and cases *supra* note 40.

[46] Munn v. Illinois, 94 U. S. 113 (1876).

[47] *E. g.* Tyson v. Banton, 273 U. S. 418, 47 Sup. Ct. 426 (1927), noted (1927) 75 U. OF PA. L. REV. 778; Ribnik v. McBride. 277 U. S. 350, 48 Sup. Ct. 545 (1928). These cases and the Court's attitudes are thoroughly discussed in Finklestein, *From Munn v. Illinois to Tyson v. Banton* (1927) 27 COL. L. REV. 769; McAllister, *Lord Hale and Business Affected with a Public Interest* (1930) 43 HARV. L. REV. 759; see, also, Robinson, *supra* note 40; Cheadle, *supra* note 40, at 438, 550; Rottschaeffer, *The Field of Governmental Price Control* (1926) 35 YALE L. J. 438; Keezer, *Some Questions Involved in the Application of the "Public Interest" Doctrine* (1927) 25 MICH. L. REV. 596; Merrill, *The New Judicial Approach to Due Process and Price Fixing* (1929) 18 KY. L. REV. 3.

[48] *Cf.* Block v. Hirsh, 256 U. S. 135, 41 Sup. Ct. 458 (1921); Howard, *supra* note 23; CARDOZO, THE PARADOXES OF LEGAL SCIENCE (1928) 122, 123.

[49] *Supra* note 29. See, also, Carson v. Woodram, 95 W. Va. 197, 120 S. E. 512 (1923).

[50] *Cf.* Note (1931) 40 YALE L. J. 469.

[51] 2 ELLIOTT, ROADS AND STREETS (4th ed. 1926) § 831.

[52] *Ibid.* at §§ 831, 832, and cases cited therein.

[53] Peterson, *op. cit. supra* note 4, at 639 *et seq.;* but see Johnson v. Perry, *supra* note 34, at 902.

[54] *Ibid.* This writer gives an intelligent exposition of the economic justification for regulation of contract carriers, in which he ridicules the "extraordinary use" idea, concluding: "The sole use of the special privilege idea would seem to be in getting legislation past the gauntlet of the courts, when legal obstacles appear in the way of measures desirable on other grounds" (at 646).

The Texas "permit" should be upheld only in the face of the recognition that it is a business regulation; viewed as anything else it is a futile provision. That it is designed to operate negatively, to prevent the deleterious effect of countless catch-as-catch-can carriers on recognized public utilities,[55] to co-ordinate the various transportation agencies and to mould an effective state-wide system, presents a strong argument for its constitutionality.[56] So viewed, the difficulty of affecting with a public interest the business of contract carriage *as such* is avoided. If it is in the public interest to have a system of common carriage available for its use, equally in the public interest would seem to be the preservation of the system's efficiency. That the public is not clamoring *en masse* for regulation should not militate against this argument.[57] The state legislatures are the spokesmen of the public and facts are numerous to support the reasonableness of their recommendations.[58] Although not a precise analogy, the action of Congress in wielding the commerce power [59] gives additional meaning to this system of negative certification.[60]

Rate regulation of contract carriers encounters a more formidable barrier,[61] although it has been said that certification requires a greater degree of "publicness",[62] because the "special privilege" theory cannot be used as a justification. This is implicit in the Frost decision.[63] Disapproval of this flimsy justification for any kind of business regulation has been expressed in connection with certification. Consequently, that most vague, most elusive test,[64] "affected with a publick interest",[65] unhappily extracted from Lord Hale's *De Portibus Maris,* where it had reposed undisturbed for nearly a century, by Chief Justice Waite in *Munn v. Illinois,*[66] must be satisfied. Its content has varied with the changing complexion of the Supreme Court, but the words, the bare skeleton, have remained as the ultimate test of the constitutionality of price regulation.[67]

---

[55] Section 6 (c), *supra* note 2, is not limited, expressly at any rate, to rail carriers, but then, the constitutionality of public utility regulation of motor common carriers seems to be admitted. See cases *supra* note 3.

[56] See declaration of policy *supra* note 33; *cf.* Attorney-Examiner Flynn's Report, *supra* note 4.

[57] *Ibid.* at sheet 109.

[58] *Ibid.* at sheets 45-89. The National Association of Railroads and Utilities Commissioners has recently gone on record as favoring complete Congressional regulation of motor carriers, freight and passenger. Stenographic Report, U. S. Daily Supplement, Nov. 23, 1931, at 26; see also testimony of A. R. McDonald before Interstate Commerce Commission, U. S. Daily, Mar. 4, 1932, at 1.

[59] *E. g.* Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 20 Sup. Ct. 96 (1899); Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276 (1905); Board of Trade v. Olsen, 262 U. S. 1, 43 Sup. Ct. 470 (1923); Tagg Bros. v. United States, 280 U. S. 420, 50 Sup. Ct. 220 (1930).

[60] The commerce power is used to buttress the argument for regulation of contract carriers by Attorney-Examiner Flynn, *supra* note 4 at sheets 119-121. The automobile interests strenuously oppose truck regulation of any kind (*ibid.* at sheet 108); see also Hearings of Senate Interstate Commerce Commission, U. S. Daily, Feb. 6-8, 1932.

[61] It is somewhat surprising that Attorney-Examiner Flynn recommends fixing a price minimum, but would require as prerequisite to the issuance of a permit nothing more definite than what is "appropriate for the regulation of contract carriers". Report, *supra* note 4, sheet 128.

[62] Southwest Utility Ice Co. v. Liebmann, 52 F. (2d) 349, 354 (C. C. A. 10th, 1932); *cf.* dissenting opinion of Justice Holmes in Frost v. Railroad Comm., *supra* note 3, at 601, 46 Sup. Ct. at 609; see also Adams v. Tanner, 244 U. S. 590, 34 Sup. Ct. 662 (1917).

[63] Frost v. Railroad Comm., *supra* note 3, at 591, 46 Sup. Ct. 606.

[64] McAllister, *op. cit. supra* note 47; Cardozo, *op. cit. supra* note 48, at 130.

[65] HARGRAVE, LAW TRACTS (1787) 77-78.

[66] 94 U. S. 113 (1876).

[67] *Cf.* German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612 (1914); O'Gorman & Young v. Hartford Fire Ins. Co., 282 U. S. 251, 51 Sup. Ct. 130 (1931), noted in (1931) 79 U. OF PA. L. REV. 806; with Tyson v. Banton; Ribnick v. McBride, both *supra* note 47.

The attitude of the Court in *Munn v. Illinois* seemed to fulfill the hopes of those who regard a legislative democracy as the embodiment of the American Ideal. That decision narrowed the scope of judicial review. Since then the pendulum has swung gradually to the opposite extreme.[68] Not only has the scope of judicial review been expanded but the Court at times has evidenced an uncritical propensity for an evanescent political philosophy. Nothing less than a preponderance of Spencerean sentiment would have divorced the states' powers to regulate prices,[69] when necessary to correct social evils, from their ordinary police powers and attached as a condition precedent to the former a cloudy, meaningless test, used, in the main, as a foil to rigid historical conservatism. It may be that the words of the Fourteenth Amendment are form only, that a judicial tribunal must give them substance; at any rate, Judicial Review is an established American institution.[70] This only makes more necessary the candid recognition that in a dynamic society the substance of such general constitutional principles ineluctably must change [71] unless the institution is to stagnate.

Here is not the place for an extensive review of the cases on price regulation. The literature in this field is abundant, the product of eminent authorities. They are virtually unanimous in deprecating the Supreme Court's approach to the problem.[72] In several well-known cases the majority of the Court has invalidated necessary and publicly-demanded regulation.[73] Yet, conspicuously lacking is a test to determine the extent of legislative powers. Taken as an entirety the decisions are difficult to reconcile one with another. Virtual monopoly has been an important factor in many,[74] but it is neither an exclusive test [75] nor sufficient in itself.[76] The mere fact that the business was large has not been a reason for regulation,[77] but then the comparative smallness of a business has

[68] Reagan v. Farmer's Loan and Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047 (1894); Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418 (1898).

[69] Tyson v. Banton; Ribnik v. McBride, both *supra* note 47. The same attitude is evident in Williams v. Standard Oil Co., 278 U. S. 235, 49 Sup. Ct. 115 (1929); *cf.* also cases like Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273 (1887); Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383 (1898); Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 47 Sup. Ct. 114 (1926) where purposes of safety, health, or moral interests may be found, with cases like Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394 (1924); Adams v. Tanner, *supra* note 63; and *cf.* further, Stone v. Mississippi, 101 U. S. 815 (1879), with Home Telephone Co. v. Los Angeles, 211 U. S. 265, 29 Sup. Ct. 50 (1908). In this connection, it is well to point out the anomalous distinction made by the Court in determining the state's power to tax for purposes of engaging in business, Jones v. City of Portland, 245 U. S. 217, 38 Sup. Ct. 112 (1917); Green v. Frazer, 253 U. S. 233, 40 Sup. Ct. 499 (1920); Standard Oil Co. v. City of Lincoln, 275 U. S. 504, 48 Sup. Ct. 155 (1927) (memorandum decision); see also, Wolff Pkg. Co. v. Court of Industrial Relations, *supra* note 14, at 537, 43 Sup. Ct. at 633.

[70] Rottschaeffer, *op. cit. supra* note 47, at 458; see also, Corwin, *Social Planning Under the Constitution—A Study in Perspectives* (1932) 26 AM. POL. SCI. REV. 1; *cf.* Finklestein, *loc. cit. supra* note 47; Cheadle, *op. cit. supra* note 40.

[71] History shows that conceptions of property and liberty are growths, ever changing with man's social and economic development. SELIGMAN, PRINCIPLES OF ECONOMICS (4th ed. 1909) c. IX, X, XI.

[72] See articles cited *supra* notes 40 and 47.

[73] Tyson v. Banton; Ribnik v. McBride, both *supra* note 47. See also Adkins v. Children's Hospital, *supra* note 69; and Adams v. Tanner, *supra* note 63.

[74] See WYMAN, PUBLIC SERVICE CORPORATIONS (1911) cc. III, IV; Wyman, *The Law of Public Callings as a Solution to the Trust Problem* (1904) 17 HARV. L. REV. 156, 217; *State Control of Public Utilities* (1911) 24 HARV. L. REV. 624.

[75] Brass v. North Dakota, *supra* note 40; German Alliance Ins. Co. v. Lewis; O'Gorman and Young v. Hartford Fire Ins. Co., both *supra* note 67.

[76] Tyson v. Banton, *supra* note 47.

[77] Expressly stated by Justice Sutherland in Williams v. Standard Oil Co., *supra* note 69, at 240, 49 Sup. Ct. at 116.

not been prohibitive.[78] It seems that the business must be a social necessity.[79] One writer has concluded that nothing more definite than the existence of social evils will reconcile all of the decisions.[80] Obviously, questions of social necessity and social evils involve questions of values. The issue then, is squarely raised: Are these questions to be determined by five justices of the Supreme Court or by the various legislative bodies honestly reflecting the prevailing public sentiment? If the latter, the institution of Judicial Review is not necessarily abandoned because exercised less frequently to invalidate legislation. Nor is it less valuable. It merely becomes objective instead of subjective, the real nature of the judicial function.[81] Justice Holmes has enlisted his vast energies in the support of this view and so have other prominent thinkers in increasing numbers.

Brief attention should be paid to the generally assumed constitutionality of regulation of motor common carriers. The approach has been categorical rather than realistic, conceptual rather than empirical, by means of hasty and inaccurate analogy. Regulation of rail carriers, as that of other public utilities, is generally justified on the ground of virtual monopoly.[82] Nothing could be much further from the character of motor carriers. Perhaps few contemporary businesses can be entered into with a smaller financial outlay. Competition may be keen to the point of economic wastefulness, but this spells at least present benefit to the public. It also negatives the possibility of inequality of bargaining power. Economists and those who urge regulation of motor freight carriers are at one in insisting on the futility of any attempt to control common carriers while leaving their active competitors free.[83] This suggests a method. Instead of assuming without thought the constitutionality of the one type of carrier and centering the struggle around the other, each separately viewed, they should be treated as they are, integral parts of a system of highway transportation which, in turn, is but one of several interlocking systems that together form a country-wide transportation network, the importance of which to an industrial civilization can scarcely be minimized.

So viewed the case for regulation is on solid ground; it is in touch with realities. If the independent, inharmonious functioning of any one of the parts throws the whole system out of gear, reverberations are likely to be heard in widely-scattered corners.[84] Once a legislative body has decided that these are true facts and that regulation of motor carriers is necessary as a corrective and preventative measure, the Court's function should be to ascertain the truth of the facts and the reasonableness of the inferences, as before observed an essentially objective approach. Once again, the earlier and the later cases are in striking contrast.[85] In the latter what objectivity was manifested was focused principally on the particular business, regarded *in vacuo*. In the former, where legislation was sustained, the view taken was broader; the importance of the industry in relation to society was prominent. This was true of the warehouse and the insurance company cases.[86] One difference must be noted between them

[78] See cases cited *supra* note 74; see also Central Lumber Co. v. South Dakota, 226 U. S. 157, 33 Sup. Ct. 156 (1912); Yeiser v. Dysart, 267 U. S. 540, 45 Sup. Ct. 399 (1925).

[79] In Tyson v. Banton, *supra* note 47, the Court missed the real problem presented (see Powell, *State Utilities and the Supreme Court, 1922-1930* (1931) 29 MICH. L. REV. 811, 822). However, the regulation involved was designed to benefit theatre-goers, whether regarded as a regulation of theatres or of scalpers.

[80] Rottschaeffer, *op. cit. supra* note 47, at 456.

[81] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) 91, 92, 105.

[82] See WYMAN, *loc. cit. supra* note 73.

[83] Peterson; Flynn, both *op. cit. supra* note 4.

[84] A recent literature has appeared on the subject of "co-ordination" of transportation facilities. This is admirably discussed in Peterson, *Transport Co-ordination: Meaning and Purpose* (1930) 38 J. POL. ECON. 660, especially at 670 *et seq.* See also Cummings, *The Need For Co-ordination of Our Transportation System* (1927) 35 J. POL. ECON. 852.

[85] See cases *supra* note 67; see also Brass v. North Dakota, *supra* note 40.

[86] *Ibid.*

and the business of motor carriage. Regulation of the former was designed to correct harmful effects of one business on other and different businesses; regulation of the latter is designed to prevent competing types of businesses from destroying the effectiveness of each. Although present evils are intended to be corrected, in one sense the purpose is positive and preventative rather than negative and corrective. The aim is to direct economic energies into their most fruitful channels. Perhaps this involves a broader conception of the function of government than even the liberal are willing to admit.[87]

Commentators [88] on the most recent decisions of the Supreme Court have professed to see in the last few changes [89] in membership a significant transformation in philosophical outlook. The tendency is seen to be toward a more liberal tolerance for the social and economic experiments of legislative bodies. Until very recently no critical question had been presented to show convincingly whether or not this tendency is real. But in the most recent case, *New State Ice Co. v. Liebmann,*[90] six of eight active [91] justices decided that Oklahoma's attempt to correct widespread grievances growing out of conditions in the ice manufacturing business, by requiring of participants therein certificates of convenience and necessity, fell within the prohibitions of the Fourteenth Amendment. As in *O'Gorman & Young v. Hartford Fire Insurance Co.,*[92] where rate regulation of fire insurance agents was sustained, the votes of Chief Justice Hughes and Justice Roberts turned the scale; they, alone, voted differently in the two cases. Evidently those justices will not be disposed to acquiesce completely in a policy of judicial sanction to reasonable legislative experimentation. On the other hand it is equally clear that they will not be impervious to such experiments simply because they assume the form of public utility regulation.

Because of the division in these two cases the Texas enactment, soon to be decided, is of crucial importance. It presents a problem mid-way between both. Unlike the *O'Gorman* case it does not concern an adjunct to a business already regulated, but one in competition therewith. Unlike the *Liebmann* case it relates to an entire economic function of vital national importance; it treats a problem to which not one but many states and the federal government are awaiting an authoritative guide.[93] Justice Sutherland's majority opinion in the *Liebmann* case reflects new influences not present in his other opinions on the same subject; there are indications that a positive test is being formulated. It may be that Chief Justice Hughes and Justice Roberts will mediate between the two opposing groups of justices and that the Supreme Court will establish ascertainable limits to public utility regulation. Where the line is drawn should soon become clear.

D. J. S.

---

[87] *Cf.* Rottschaeffer, *op. cit. supra* note 47, 458 *et seq.*

[88] Corwin, *op. cit. supra* note 70, at 25; Howard, *op. cit. supra* note 23, at 519; Mason, *Mr. Justice Brandeis and the Constitution* (1932) 80 U. OF PA. L. REV. 799, 832; Powell, *op. cit. supra* note 79, at 838.

[89] Justice Holmes' recent resignation and the substitution of Justice Cardozo would seem to make no change in the present division of the Court if the latter's writings are a reliable basis for prediction.

[90] 52 Sup. Ct. 371 (1932), *aff'g* Southwest Utility Ice Co. v. Liebmann, *supra* note 62.

[91] Justice Cardozo took no part in the argument. Justice Brandeis, writing the dissenting opinion in which Justice Stone concurred (*ibid.* at 375) loosed a veritable torrent of facts in support of the particular legislation and also compensated for Justice Holmes' absence with a masterful argument for unhampered legislative experimentation. See Mason, *op. cit. supra* note 88, at 832 *et seq.*

[92] *Supra* note 67.

[93] See Report of Interstate Commerce Commission on Docket No. 23,400, U. S. Daily, April 19, 1932, at 319. Federal legislation had been made necessary by the decision in Buck v. Kuykendall, *supra* note 43. For a history of proposed legislation, see *Motor Bus and Motor Truck Operation,* 140 I. C. C. 685, 733 (1928); Report of Att'y Gen'l Flynn, *supra* note 4, at sheet 114. The most recent proposal, the Couzens Bill, S. 2793, is still in committee.