

REGULATION OF THE  
CONTRACT MOTOR CARRIER  
UNDER THE CONSTITUTION

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THE history of civilization is in large measure a story of the development of transportation. So far as land communication is concerned, the fundamental agency, throughout this story, has been the public highway. For a period, brief as history goes, it declined into merely local importance. The stage coach and the public carter gave place almost completely to the steam railroad. But during the past twenty years, the motor vehicle has brought back these carriers and has so expanded and intensified highway transportation as to make it, at least in certain fields, a formidable and often successful rival of the railway train.<sup>1</sup> What another twenty years may bring in the development of the airways one dare not predict. But it seems safe to guess that the public highway will remain a prime necessity to a world increasingly dependent upon quick and economical transportation.

Whatever may lie ahead, the present is very much with us. Great mechanical and engineering progress inevitably brings new problems, and courts and lawyers do not escape them. The amazing increase in the use of motor vehicles, the resulting demand for improved highways, the corresponding need for additional revenue, the increasing necessity for closer control of highway traffic for the sake of public safety, these and a dozen other by-products of the motor age have had results in legislation, have produced a flood of litigation, and have made necessary, in some instances, the devising of special administrative and judicial machinery.<sup>2</sup>

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<sup>1</sup> This is strikingly illustrated by the testimony of railroad men themselves, describing recent losses of traffic by the railroads and attributing them to motor vehicle competition. See testimony by railroad officials at I. C. C. Hearings, Docket 23,400, a general investigation into the relations between railroads and motor vehicle carriers now in progress, instituted by the Commission on its own motion.

<sup>2</sup> For example, the accentuation of the problem of the runaway defendant in cases arising out of motor vehicle operation has led to the widespread adoption of the device of substituted service on a state officer. *Hess v. Pawloski*, 274 U. S. 352 (1927); see Legislation Note (1930) 43 HARV. L. REV. 949.

Perhaps the most complex of the puzzles presented to legislatures by the motor vehicle are those which arise less from the physical operation of the vehicle itself than from the economic effect of its operation — both as to those whom it serves and as to the competing forms of transportation which it displaces. The problem of the commercial motor vehicle is new, however, only in its economic and legal complications. Generations of our forefathers knew and depended upon the carriers who, to use a current phrase of depreciation, used the public highway as their place of business. The law of carriers grew out of the public dependence upon their operations. The legal and constitutional principles and distinctions so developed must be the guides to a proper solution of our contemporary legal difficulties.

In commercial as in other highway transportation, the magnitude and economic complexity of the situation has of late years become very great. Only about one eighth of all the motor vehicles registered in the United States in 1929 were commercial vehicles. But there were 3,379,854 such vehicles registered.<sup>3</sup> Much traffic formerly moving by railroad now goes by truck or bus. Shipments of merchandise in many cases now move by truck with a speed, simplicity of handling, and flexibility of service which the rail carrier can not match. Often the rates are less than those applying to rail movement. Since 1920, there has been an increasing tendency on the part of merchants and small industries toward the maintenance of small inventories and the practice of "hand to mouth" buying. Certain manufacturing enterprises therefore have come to depend upon quick, and in many cases over-night, delivery from the manufacturing town to the great distributing centers. Such a service only the motor truck satisfactorily provides.<sup>4</sup>

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<sup>3</sup> Total motor vehicle registration, 26,501,443. Total commercial motor bus registration, 44,600. The figure given in the text is that for trucks of all sizes and descriptions, which of course includes privately owned trucks, light delivery wagons, and the like, as well as carriers for hire. The overwhelming majority of motor vehicles registered, 23,076,989, are in the private passenger class. *FACTS AND FIGURES OF THE AUTOMOBILE INDUSTRY* (National Automobile Chamber of Commerce, 1930).

<sup>4</sup> See, *e.g.*, testimony at Boston session of I. C. C. Hearings, Docket 23,400, Dec. 15-16, 1930, with reference to overnight delivery from New England manufacturing centers to New York. Indeed, railroad men for a long period insisted that less-than-carload traffic, in which motor vehicle competition is most keen,

On the other hand, the railroad remains supreme in the field of long-distance bulk transportation. No one will quarrel with the proposition now much insisted upon in public statements by railroad spokesmen that the continued existence of our railroads must be insured and the immense investment of our people in their properties not unduly imperiled. The question of economics which is posed is how to work out the relationship of these — and other — competing forms of transportation so as to provide the maximum of public service at the least cost to shipper and consumer and with fair compensation to the labor and capital employed. This extremely difficult problem is beyond the scope of this article except insofar as its solution has been sought by the enactment of legislation designed to regulate motor transportation in somewhat the same way that transportation by rail is regulated by the Interstate Commerce Act<sup>5</sup> and cognate state statutes.<sup>6</sup>

## I

The first object of such regulatory activity was the common carrier. As a matter of legal theory it was simple and logical to class the common carrier by motor with his predecessors, the steam and electric railways, and with his ancestors, the stage coach and public carter. Almost universally, therefore, the highway common carrier of passengers was made the subject of regulatory legislation. The constitutional validity of such regulation is beyond question,<sup>7</sup> and the operation of such statutes has been ably discussed.<sup>8</sup>

The motor bus, moreover, presents a field in which regulation

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was a type of freight which the railroads did not desire, and which they could not profitably handle. See *Seeking Lost Rail Traffic*, Boston Transcript, Jan. 5, 1931, at 14.

<sup>5</sup> 49 U. S. C. (1926) §§ 1-70.

<sup>6</sup> Several states have effected motor vehicle regulation by simply expanding existing public utility regulations covering rail carriers to include motor carriers. See, e.g., Illinois, New York, and Pennsylvania statutes cited in Appendix, *infra* pp. 568-71.

<sup>7</sup> See note 43, *infra*. For constitutional problems concerning state regulation of common carriers in interstate commerce, see notes 80-83, *infra*.

<sup>8</sup> Rosenbaum and Lilienthal, *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.

is, at least in theory, easy to apply. The carriage of passengers involves as a business proposition regular schedules, fixed termini, and tariffs which at least at any given time are the same for all who apply. It is essentially a common-carrier operation like that of other regulated public utilities, and except in sporadic instances can not be otherwise conducted. While such regulation has not been wholly successful in accomplishing any of the ends sought by its proponents, its results have been sufficient to encourage the passage of such statutes in all the states except Delaware.<sup>9</sup> The troubled history of these laws since 1925 illustrates the great practical difficulties, economic and administrative, which are inherent in regulation even in this relatively favorable field.

Regulation of the common-carrier truck is likewise free of constitutional difficulty, and the majority of the states have enacted such legislation. There are, however, some noteworthy exceptions.<sup>10</sup>

It is helpful at this point to notice the source of the demand for regulation of this character and the ends sought to be achieved. In general the demand has not come from the business world which uses the service.<sup>11</sup> Rail carriers have asked for it, and some existing motor carriers, for very different reasons, have seconded the demand. The aim of regulation was in some manner to protect railroad revenues without depriving the public of any motor service which it desired or found convenient, and without raising the cost of such service. By the assignment of routes to certificated operators and the elimination of irresponsible or incompetent truckmen, the cutting of rates to non-compensatory levels was to be stopped and the business "stabilized." The public was to have more regular and responsible service, and the use to capacity by certificated operators of their trucks, under

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<sup>9</sup> See Appendix, *infra* pp. 568-71.

<sup>10</sup> See note 20, *infra*.

<sup>11</sup> In I. C. C. Hearings, Docket 23,400, such shipper testimony as has been advanced has been opposed to regulation. See particularly testimony of representatives of the Boston Chamber of Commerce, Boston, Dec. 15-16, 1930, and of the Merchants' Association of New York and others, New York, Dec. 18-20, 1930. That the demand comes almost exclusively from the railroads is apparent from the most cursory examination of the testimony thus far presented in this nationwide investigation.

conditions of limited competition if not of monopoly, was to reduce the congestion upon the highways.

That these and other promised advantages are not in all respects consistent with each other is apparent. That in great measure they have not been realized is made plain when the practical working of regulation is examined. The complaints of the rail carriers in Pennsylvania, which has truck regulation, are as earnest as those from New Jersey, where there is none. In many states truck regulation is found on the books but not on the highway. In others constant amendments are sought in the hope of making the law effective.

There are many reasons for the imperfect operation of truck regulation. A very simple one is the ease with which a shipper who wants unregulated transportation can procure his own truck and operate it for himself. Another is the presence in large numbers of the private or contract carrier.<sup>12</sup>

While the transportation of passengers on any substantial scale must be a business of common carriage, such is far from true with respect to the carriage of goods. The great contribution of the motor truck to modern transportation is its ability to perform the particular service required, at the particular time, in the particular way, and with the particular details of service demanded by the individual shipper. The business is one which lends itself to the making of individual bargains for specialized service and which often must be so conducted if its economic possibilities are to be realized. This is true both of the small user and of the large corporation. The latter, though well able to operate its own trucks, often has found it more convenient and profitable to contract for this service than to complicate a merchandising organization with the machinery of distribution. In consequence, while the vast majority of trucks still are owned by shippers, the proportion operated by contract carriers is very much larger than that operated by common carriers.<sup>13</sup> As long

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<sup>12</sup> The term "private carrier" is herein used in its technical sense, in which it is synonymous with "contract carrier." See *Michigan Public Utilities Comm. v. Duke*, 266 U. S. 570, 576 (1925). "Private carrier" does not here refer to the shipper operating his own truck, though in popular usage the phrase is sometimes made to include him. He is not a "carrier" since he does not operate for hire.

<sup>13</sup> The only available statistics were compiled in the form of traffic surveys by the United States Bureau of Public Roads. These show that 82 per cent of the

as this tremendous traffic is unregulated it is plain that regulation of common-carrier trucks has a very doubtful future. Recognition of this fact has given rise to broadening demands for regulatory legislation which will embrace private carriers, and has resulted in the passage by some legislatures of statutes in which they are included.

At the outset of the consideration of these legislative proposals must be noticed the great practical difficulty involved in framing a definition of contract carrier which can be used with any confidence to determine with precision whether a given operator — or a given operation — is within or without the class. It is easy to state the broad line of differentiation. The essential factor characterizing common carriage has always been that the carrier holds himself out to serve the public indiscriminately in whatever field of transportation he affords.<sup>14</sup> A private or contract carrier does not so hold himself out to the public, but transports only for those whom he chooses, making contracts, as in any other business, for an individual transaction or group of transactions.<sup>15</sup>

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trucks in operation are owned outright by shippers, 11 per cent by contract carriers, and 7 per cent by common carriers. Of this latter class, only about one third are engaged in regular route operation. The futility of regulation of common carriers only to reestablish that dominance which the railroads seek can not be better shown than by these figures. As yet not even the most advanced legislatures have seriously considered the regulation of the shipper-owned truck.

<sup>14</sup> See DOBIE, BAILMENTS AND CARRIERS (1914) § 107 (common carriage of goods); *id.* § 164 (common carriage of passengers); *Gisbourn v. Hurst*, 1 Salk. 249 (1711), defining a common carrier of goods as "any man undertaking, for hire, to carry the goods of all persons indifferently." A number of well-defined types of service by motor vehicle have consistently been held to constitute common carriage. *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252 (1916) (general taxi service); *Austin Bros. Transfer Co. v. Bloom*, 316 Ill. 435, 147 N. E. 387 (1925) (same); *Re Yellow Cab & Baggage Co.*, P. U. R. 1923A 146 (Neb.) (same); *Huston v. Des Moines*, 176 Iowa 455, 156 N. W. 883 (1916) (jitney); *Cross v. Chicago, R. I. & P. Ry.*, 120 Kan. 58, 242 Pac. 469 (1926) (same); *United States Exp. Co. v. Backman*, 28 Ohio St. 144 (1875) (express company); *Jones v. Voorhees*, 10 Ohio 145 (1840) (stage coach).

<sup>15</sup> "The criterion is, whether he carries for particular persons only, or whether he carries for everyone. If a man hold himself out to do it for everyone who asks him, he is a common carrier; but if he does not do it for everyone, but carries for you and me only, that is a matter of special contract." *Ingate v. Christie*, 3 Car. & K. 61 (1850). A few typical cases in which motor carriers were held to be operating as contract carriers only are *Bell v. Harlan*, 20 F.(2d) 271 (App. D. C. 1927); *Sanger v. Lukens*, 26 F.(2d) 855 (C. C. A. 9th, 1928); *Re Lampson*, P. U. R. 1929A 125 (Cal.); *Re Hanes*, P. U. R. 1930B 289 (Colo.); *Griffon v. Villa*, P. U. R.

That it may be exceedingly difficult, however, in any given instance, to decide into which classification a carrier may fall, is apparent from the cases in which this issue has arisen for decision. One who in fact holds himself out to serve the public in general can not escape the consequences of his status as a common carrier by purporting to make a separate contract with each of his customers.<sup>16</sup> On the other hand, it is plain that a truckman may make more than one contract without abandoning his private status. How many customers he may have under separate and *bona fide* private contracts before he will be held to be serving the public is not easy to determine.<sup>17</sup> The question just put, and

1928A 652 (La.); *Towers v. Wildason*, 135 Md. 677, 109 Atl. 471 (1920); *Smith v. Public Serv. Comm.*, 73 Pa. Super. Ct. 209 (1919); *Big Bend Auto Freight v. Ogers*, 148 Wash. 521, 269 Pac. 802 (1928); *State v. Vaughan*, 97 W. Va. 563, 125 S. E. 583 (1924).

<sup>16</sup> *E.g.*, *Haynes v. McFarlane*, 207 Cal. 529, 279 Pac. 436 (1929); *Public Serv. Comm. v. Johnson Motor Freight Lines*, P. U. R. 1929C 122 (La.); *Restivo v. Public Serv. Comm.*, 149 Md. 30, 129 Atl. 884 (1925); *Craig v. Public Util. Comm.*, 115 Ohio St. 512, 154 N. E. 795 (1926); *Breuer v. Public Util. Comm.*, 118 Ohio St. 95, 160 N. E. 623 (1928). The language of such opinions frequently obscures the issue by speaking of such contracts as "subterfuges." An objective test as to whether or not the carrier in fact holds himself out to serve the public would seem distinctly preferable.

<sup>17</sup> Numerous decisions maintain that the fact of operation under several contracts with different customers does not destroy the carrier's private status. *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252 (1916); *Film Trans. Co. v. Michigan Pub. Util. Comm.*, 17 F.(2d) 857 (E. D. Mich. 1927); *Board of County Comm'rs v. Clayburg*, P. U. R. 1928B 780 (Colo.); *Re Didriksen*, P. U. R. 1928E 376 (Mont.); *Sammes v. Stewart*, 20 Ohio 70 (1851); *Re Jones*, P. U. R. 1924A 540 (Pa.); *Weaver v. Public Serv. Comm.*, 40 Wyo. 462, 278 Pac. 642 (1929). Yet in several cases the existence of a large number of contracts is the basis for a holding that common carriage is being carried on. *Michigan Pub. Util. Comm. v. Krol*, 245 Mich. 297, 222 N. W. 718 (1929); *Re Thome*, P. U. R. 1927A 860 (S. D.); *Re Gueguen*, P. U. R. 1925D 531 (Wash.). In Wisconsin, the commission has laid down a rule that anyone with more than three contracts is presumptively a common carrier. *Re Auto Trans. Co.*, P. U. R. 1930C 54. And in several instances, persons apparently operating under a single contract only have been held common carriers. *Doskovitch v. Public Util. Comm'rs*, 103 N. J. L. 570, 138 Atl. 110 (1927); *New York Cent. R. R. v. Public Util. Comm.*, 121 Ohio St. 588, 170 N. E. 574 (1930); *Harlacker v. Adams Transit Co.*, P. U. R. 1928A 12 (Pa.). A similar situation frequently arises where the carrier contracts with an association to carry for its members. Such an operator was held to be a contract carrier in *Hissem v. Guran*, 112 Ohio St. 59, 146 N. E. 808 (1925). In the following cases, however, the carrier was held to be a common carrier in such a situation, the court treating the association as a mere subterfuge to conceal service to the public. *Davis v. People ex rel. Pub. Util. Comm.*, 79 Colo. 642, 247 Pac. 801 (1926); *Re Elliott*, P. U. R. 1929D 485 (Colo.); *Jacksonville-*

similar issues,<sup>18</sup> whose decision must depend largely upon the facts surrounding a given form of operation, have received contradictory answers from different courts. This illustrates one of the complications attending motor-carrier regulation. Nevertheless the frequent difficulty of determining whether a given operator is or is not a private or contract carrier does not change the fact that a considerable majority of the trucks actually in service for hire are operated by those who are, and must be held to be, *bona fide* contract carriers. The attempt to include such carriers within the scope of regulation presents, therefore, economic as well as legal questions of the first importance.

The means thus far tried for subjecting the private carrier to control have been simple. The standard form of common-carrier regulation, both of passenger- and freight-carrying vehicles, is a statute requiring, as a prerequisite to operation, the issue to the carrier by the state public utility commission of a certificate "of public convenience and necessity." To this requirement is added the vesting of broad regulatory power in the commissions, including the power to fix rates, fares, and schedules, which must be published and complied with, to require reports, to prescribe

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Springfield Trans. Co. v. Beeley, P. U. R. 1926E 742 (Ill.); Fort Lee Trans. Co. v. Edgewater, 99 N. J. Eq. 850, 133 Atl. 424 (1926); Henneous v. Flaugh, P. U. R. 1927A 649 (Pa.). The use of the term "subterfuge" is open here to the criticism made in note 16, *supra*.

<sup>18</sup> A serious problem which seems destined to increasing importance is the status of a specialized carrier, equipped to carry only one type of merchandise and refusing to carry any other. An irregular route furniture carrier was declared to be a common carrier in *Re Vaughn*, P. U. R. 1929B 510 (Colo.). A similar decision with respect to one distributing photographic films to theatres is *Re Exhibitors Film Delivery and Serv. Co.*, P. U. R. 1928E 623 (Colo.). But the latter type of carrier has also been held to be a contract carrier. *Film Trans. Co. v. Michigan Pub. Util. Comm.*, 17 F.(2d) 857 (E. D. Mich. 1927).

Another delicate question is created by the fact that a common carrier, even a steam railroad, may under certain circumstances properly perform contract carriage. *Santa Fe, P. & P. Ry. v. Grant Bros. Const. Co.*, 228 U. S. 177 (1913). In such a situation, it seems proper to treat separately the two types of operation. *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252 (1916). Yet tribunals dealing with motor carriers frequently lose sight of this fact. It has been held that a motor carrier may not engage in contract carriage with the same name, the same facilities, and in the same territory. *York Motor Exp. v. Public Serv. Comm.*, 96 Pa. Super. Ct. 174 (1929); *cf. Re Schauer's Fast Freight*, P. U. R. 1928E 252 (Wis.) (common carrier rates fixed by commission may not be deviated from by private contract).

accounting methods, and in general to exercise the powers familiar in the case of other public utilities.<sup>19</sup> Every state but one has a statute of this general nature, some applying to all common carriers, some only to carriers of passengers, and many only to common carriers who operate between fixed termini or over regular routes.<sup>20</sup>

Regulation of the private carrier, where attempted, has not been sought by passing a separate statute designed to cope with the problems of contract carriage as such. What has been done is so to frame a general regulatory statute, or to amend an existing statute, as to include within the definition of the regulated

See also the following cases, where the entire operation was held to be common carriage. *Bartels v. Hessler Bros.*, P. U. R. 1922B 584 (Ill.) (contracts with some customers); *Re Kuchan*, P. U. R. 1925B 541 (Mont.).

Numerous other difficulties can merely be suggested. The fact that it did not actually own any vehicles has been held to preclude a forwarding company from being a common carrier. *Motor Freight, Inc. v. Public Util. Comm.*, 120 Ohio St. 1, 165 N. E. 355 (1929). *Contra*: *United Parcel Serv. v. Inter-City Parcel Serv.*, P. U. R. 1927E 111 (Cal.). In *Wayne Trans. Co. v. Leopold*, P. U. R. 1924C 382 (Pa.), a carrier operating under contract was held to be a common carrier because he competed with a common carrier. In *Northampton Transit Co. v. Sandt*, P. U. R. 1926E 799 (Pa.), a corporation admitted to be engaged only in contract carriage was required to obtain a certificate under a statute regulating common carriers only, because private carriage was not permitted by its articles of incorporation.

<sup>19</sup> The usual common-carrier statute is discussed in detail in the two articles by Rosenbaum and Lilienthal, *supra* note 8. Citations to the statutes at present in force are to be found in the Appendix, *infra* pp. 568-71. The commission is usually given the discretion to refuse certificates, grant them in whole or in part, or "on such terms and conditions as in its judgment the public convenience and necessity may require." Certificates are unassignable without the commission's consent, and in some states they are not transferable under any circumstances. Commissions have power to revoke certificates once granted, for causes set forth with varying completeness in the statutes. A bond or liability insurance is required. In most jurisdictions, a "grandfather clause" requires the issuance of a certificate to persons operating in good faith at the date of the passage of the statute, or at least raises a presumption of public convenience and necessity in their favor.

<sup>20</sup> Forty-eight jurisdictions have common-carrier regulatory statutes, the District of Columbia and every state except Delaware. Of these, thirty-seven regulate carriers of persons or property, and eleven regulate carriers of persons only (the Nevada statute covers persons and baggage). Of the former group, twenty-five include carriers over regular or irregular routes, eleven those over regular routes only, and Iowa regulates carriers of persons over regular routes only, but property carriers over both regular and irregular routes. Of the statutes governing carriers of passengers only, eight cover regular routes only, and three include regular or irregular routes. See Appendix, *infra* pp. 568-71.

unit not only the common carrier but the contract carrier as well.<sup>21</sup> Upon the unit so defined, usually called a "motor carrier" or described by some similar generic term, the regulatory provisions are imposed. In broadening the statutory definition to include the contract carrier these effective provisions are left unchanged. The contract carrier is thus projected bodily into a system of regulation which hitherto has never been applied to any but a public utility.

The constitutional validity of such a device has not yet been passed upon by the Supreme Court of the United States. It has been sustained in certain state decisions<sup>22</sup> and declared invalid in others.<sup>23</sup> Since it seems probable that, if constitutional, this

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<sup>21</sup> Careless and contradictory draftsmanship appears in many of the acts. But twenty-two of the forty-eight statutes seem to extend their regulations beyond common carriage so as to embrace, in whole or in part, the field of contract carriage. Of these, eighteen include carriers of persons or property, fourteen of them covering regular or irregular routes, and four regular routes only. Four statutes cover only the much smaller class of contract carriers of persons, one including regular or irregular routes, and three regular routes only. The practical importance of the extension of regulation to contract carriers of persons is perhaps not great, though there are numerous types of contract passenger carriers. See many of the cases cited in notes 14-18, *supra*. But the potential significance of even these statutes, in extending regulation to property carriers by a simple amendment, can not be ignored. For a more detailed discussion of the scope of the statutes, see Appendix, *infra* pp. 568-71.

<sup>22</sup> *Cahoon v. Smith*, 128 So. 632 (Fla. 1930), probable jurisdiction noted on appeal, 51 Sup. Ct. 89 (U. S. 1930); *Georgia Pub. Serv. Comm. v. Saye & Davis Transfer Co.*, 170 Ga. 873, 154 S. E. 439 (1930); *Rutledge Coöperative Ass'n v. Baughman*, 153 Md. 297, 138 Atl. 29 (1927); *Barbour v. Walker*, 126 Okla. 227, 259 Pac. 552 (1927). These four cases, though unsatisfactory as to opinions, sustain the regulations as applied to contract carriers, after some discussion of the constitutional questions involved. *Cf.* *Public Serv. Comm. v. Fox*, 96 Misc. 283, 160 N. Y. Supp. 59 (1916); *State v. Price*, 122 Wash. 421, 210 Pac. 787 (1922); *Davis & Banker v. Nickell*, 126 Wash. 421, 218 Pac. 198 (1923), where the statutes in question were declared applicable to contract carriers, but without constitutional discussion. See also *Smith v. State*, 218 Ala. 669, 120 So. 471 (1928); *Haddad v. State*, 23 Ariz. 105, 201 Pac. 847 (1921).

<sup>23</sup> *State v. Smith*, 31 Ariz. 297, 252 Pac. 1011 (1927); *Jones v. Ferguson*, 181 Ark. 522, 27 S. W.(2d) 96 (1930); *Stoner v. Underseeth*, 85 Mont. 11, 277 Pac. 437 (1929); *Hissem v. Guran*, 112 Ohio St. 59, 146 N. E. 808 (1925); *Purple Truck Garage Co. v. Campbell*, 119 Ore. 484, 250 Pac. 213 (1926); *State ex rel. Pub. Util. Comm. v. Nelson*, 65 Utah 457, 238 Pac. 237 (1925); *Weaver v. Public Serv. Comm.*, 40 Wyo. 462, 278 Pac. 542 (1929). Some of these cases purport to reach their result by construing the statute in question as inapplicable to contract carriers, but all do so for constitutional reasons. *Cf.* *Davis & Banker v. Metcalf*, 131 Wash. 141, 229 Pac. 2 (1924).

form of regulation will spread throughout the country, as have the common-carrier regulations which it supplements, the question whether what is thus attempted can in fact be done obviously merits careful attention.

## II

The decisions of the Supreme Court of the United States with respect to motor-carrier regulation are necessarily few, since the subject matter itself is of comparatively recent origin. There is only one limitation upon state power which can be set down with complete certainty. It has twice been adjudicated that a state may not, by legislative fiat, require a private carrier to become a common carrier against his will. The first of these decisions, *Michigan Public Utilities Comm. v. Duke*,<sup>24</sup> arose under a statute<sup>25</sup> which expressly declared all carriers within the regulated unit to be common carriers. The unit was broad enough to include contract carriers.<sup>26</sup> It was held that this statute as applied to a contract carrier was repugnant to the due process clause of the Federal Constitution, since it expressly required a person to devote his property to public use without his consent and without compensation. Despite this decision there are several statutes still in force which follow closely upon this discredited model.<sup>27</sup>

The exact scope of the second decision, *Frost v. Railroad Comm.*,<sup>28</sup> is less easy to determine. The California statute in question,<sup>29</sup> while including contract carriers within its scope, and imposing on common and contract carriers identical regulations

<sup>24</sup> 266 U. S. 570 (1925).

<sup>25</sup> Mich. Acts 1923, No. 209.

<sup>26</sup> The regulated unit was defined, in a manner typical of existing acts, as any persons who should "engage in the business of transporting persons or property, by motor vehicle, for hire upon or over the public highways of this state, over fixed routes or between fixed termini, or hold themselves out to the public as being engaged in such business."

<sup>27</sup> The statutes of Alabama, Kansas, Missouri, Ohio, Texas, and Virginia, all of which cover contract carriers, contain an express declaration that the regulated unit is a common carrier or a public utility. This declaration is found in each case in the act cited in the Appendix, *infra* pp. 568-71, except for Ohio, where the declaration is found in GEN. CODE (Page, 1926) § 614-2a, which is not materially amended by the 1929 statute.

<sup>28</sup> 271 U. S. 583 (1926).

<sup>29</sup> CAL. GEN. LAWS (Deering, 1923) act 5129.

of the customary type,<sup>30</sup> contained no express declaration that private carriers might not retain their private status. But in holding that a certificate of convenience and necessity could properly be required of such carriers, the California court, interpreting the act as a whole, decided that even without an express declaration it in effect required a private carrier to assume the duties and obligations of public service.<sup>31</sup> It nevertheless sustained the act. The Supreme Court of the United States, accepting the interpretation of the statute by the state court as binding, reversed the decision on the authority of the *Duke* case.

Though complicated by the acceptance of the interpretation of the state court, the *Frost* case at least shows, as is logically obvious, that a statute may in actual effect require a contract carrier to become a common carrier by the imposition on him of the duties of common carriage, even though there is no express statement of such an intention. In the light of the decision in that case, an examination of the validity of the existing statutes which regulate the private carrier must begin with the determination of what regulations are imposed, and of their necessary effect upon the carrier's private status.

As has been said, the requirement which is universally exacted from all regulated operators, whatever their status, is that a certificate of public convenience and necessity must be obtained from the commission as a condition precedent to operation. A more unfortunate or ambiguous phrase than "public convenience and necessity" has seldom been invented. It might well mean anything which a public utility commission desired it to mean; and in fact, as a result either of explicit legislative definition or of interpretation by courts and commissions, a very considerable variety of meaning is in practice disclosed. With surprising unanimity, however, courts and commissions have agreed that the primary test of the public convenience and necessity of a proposed service is the adequacy or inadequacy of existing service on the route or in the territory which the applicant seeks to serve.

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<sup>30</sup> The initial section, copied verbatim in several other acts, defined "transportation company" as any person operating "any automobile . . . used in the business of transportation of persons or property, or as a common carrier, for compensation . . . between fixed termini or over a regular route."

<sup>31</sup> *Frost v. Railroad Comm.*, 197 Cal. 230, 240 Pac. 26 (1925).

Uniformity does not result, however, since wide variations exist as to the tests by which the adequacy of the existing service is to be determined. The requirement that the effect of certification upon existing modes of transportation be considered by the commission is frequently placed, in varying terms, in the statute itself.<sup>32</sup> In some statutes, however, it is specifically provided that the existence of other transportation facilities shall not of itself be cause for refusal to grant a certificate, although it may be cause for limiting the extent of the proposed new service.<sup>33</sup> In still other states it is provided that no certificate is to be deemed to establish a monopoly,<sup>34</sup> and in some states a qualified applicant must be certificated without regard to the existence of other service.<sup>35</sup>

The latter situation is exceptional, however, and as a general proposition it can safely be said that either by statutory requirement or by commission interpretation it is settled law with respect to the certification of common carriers that the test of public convenience and necessity is to be found in the adequacy or inadequacy of existing service, however that adequacy or inadequacy may be measured.<sup>36</sup>

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<sup>32</sup> Numerous statutes in general terms require the commission to consider the service being rendered by existing carriers. Indiana, Kentucky, Minnesota, Mississippi, Missouri, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Wisconsin. Several go further and state that a certificate may not be granted unless existing service is inadequate. Florida, Montana, Virginia, Washington, West Virginia. A few refer to the adequacy of the service offered by the applicant as a factor. Idaho, Oregon, Tennessee; *cf.* Louisiana (inadequacy a ground for revocation of certificate once granted). For citations, see Appendix, *infra* pp. 568-71.

<sup>33</sup> South Carolina, Texas, West Virginia. These statutes do not, however, purport to abolish the test of adequacy of existing service. They merely condition its application.

<sup>34</sup> *E.g.*, Wyoming.

<sup>35</sup> This is the case by express statutory provision in the Iowa irregular-route-truck statute and the Wyoming law. The same result has been reached by interpretation in Nebraska. See Appendix, *infra* pp. 568-71.

<sup>36</sup> *Courts: Certificate granted for inadequacy of existing service: Bartonville Bus Line v. Eagle Motor Coach Line*, 326 Ill. 200, 157 N. E. 175 (1927); *Appeal of Beasley Bros.*, 206 Iowa 229, 220 N. W. 306 (1928); *Yazoo & M. V. R. R. v. Public Serv. Comm.*, 170 La. 441, 128 So. 39 (1930); *Rapid Ry. v. Public Util. Comm.*, 225 Mich. 425, 196 N. W. 518 (1923); *West Jersey & Seashore R. R. v. Public Util. Comm.*, 149 Atl. 269 (N. J. 1930); *Warren-Salem Coach Line Co. v. Public Util. Comm.*, 116 Ohio St. 383, 156 N. E. 453 (1927); *Chicago, R. I. & P. Ry. v. State*, 126 Okla. 48, 258 Pac. 875 (1927); *Petersburg, H. & C. P. Ry. v.*

What is the situation of the private carrier when he becomes a part of such a system? A person desiring to operate under a single contract to haul goods for a corporation or an association still is proposing to transport property for hire. He must, under the ordinary statute, apply for a certificate of convenience and necessity. The test for the grant or refusal of such a certificate is the adequacy of existing service to meet the public demand. If the applicant is to remain a private carrier, though subject to the act, this test is manifestly so inapplicable as to be absurd.

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State Corp. Comm., 152 Va. 193, 146 S. E. 292 (1929); Northern Pac. Ry. v. D. P. W., 144 Wash. 47, 256 Pac. 333 (1927); Quesenberry v. State Road Comm., 103 W. Va. 714, 138 S. E. 362 (1927). *Certificate denied for adequacy of existing service*: West Suburban Trans. Co. v. Chicago & W. T. Ry., 309 Ill. 87, 140 N. E. 56 (1923); Superior Motor Bus Co. v. Community Motor Bus Co., 320 Ill. 175, 150 N. E. 668 (1926); Cooper v. McWilliams & Robinson, 221 Ky. 320, 298 S. W. 861 (1927); *Re Samoset Co.*, 125 Me. 141, 131 Atl. 692 (1926); *State ex rel. Lovantos v. Terte*, 23 S. W.(2d) 120 (Mo. 1929); Fornarotto v. Public Util. Comm., 105 N. J. L. 28, 143 Atl. 450 (1928); McLain v. Public Util. Comm., 110 Ohio St. 1, 143 N. E. 381 (1924); Chicago, R. I. & P. Ry. v. State, 123 Okla. 190, 252 Pac. 849 (1927); Abbott v. Public Util. Comm., 48 R. I. 196, 136 Atl. 490 (1927); Trescot Transfer Co. v. Sawyer, 138 S. C. 337, 136 S. E. 481 (1926); *Re James*, 99 Vt. 265, 132 Atl. 40 (1926); Yelton & McLaughlin v. D. P. W., 136 Wash. 445, 240 Pac. 679 (1925); Monongahela W. Pa. Pub. Serv. Co. v. State Road Comm., 104 W. Va. 183, 139 S. E. 744 (1927).

*Commissions: Certificate granted for inadequacy of existing service*: *Re Central of Ga. Motor Transport Co.*, P. U. R. 1928E 535 (Ala.); *Re Arizona Trans. Co.*, P. U. R. 1929C 341 (Ariz.); *Re Phoenix Motor Coach*, P. U. R. 1925E 340 (Ariz.); *Re California Transit Co.*, P. U. R. 1927E 650 (Cal.); *Re Carver*, P. U. R. 1923B 242 (Colo.); *Re Arnett*, P. U. R. 1925A 832 (Colo.); *Re Gold Star Line*, P. U. R. 1927C 531 (Ill.); *Re Egyptian Trans. Co.*, P. U. R. 1929E 199 (Ill.); *Re Meadors & Allen*, P. U. R. 1929B 513 (Ind.); *Ex parte Vincent*, P. U. R. 1928C 178 (La.); *Re Maine Motor Coaches, Inc.*, P. U. R. 1926B 545 (Me.); *Re New York, N. H. & H. R. R.*, P. U. R. 1926D 157 (Mass.); *Re Murphy Transfer & Storage Co.*, P. U. R. 1927C 806 (Minn.); *Re McCartney*, P. U. R. 1929C 512 (Mo.); *Re Howe & Holt Transfer Co.*, P. U. R. 1928A 860 (Mont.); *Re Boyce*, P. U. R. 1923A 153 (Nev.); *Re Gillingham*, P. U. R. 1923D 540 (N. H.); *Re Boston & Maine Trans. Co.*, P. U. R. 1927A 98 (N. H.); *Re Choate & Tumulty*, P. U. R. 1928A 98 (N. J.); *Re Bee Line*, P. U. R. 1926D 67 (N. Y.); *Re Tri-City Motor Trans. Co.*, P. U. R. 1930B 417 (N. D.); *Re Sholl Trans. Co.*, P. U. R. 1930B 302 (N. D.); *Re National Freight & Delivery Co.*, P. U. R. 1927C 728 (Pa.); *Re DeMaris*, P. U. R. 1929A 133 (R. I.); *Re Munk*, P. U. R. 1926C 417 (S. D.); *Re Phelps*, P. U. R. 1928B 677 (S. D.); *Re Utah Cent. Truck Line*, P. U. R. 1927C 397 (Utah); *Re Jewett*, P. U. R. 1928B 225 (Vt.); *Re Wright*, P. U. R. 1925B 141 (Va.); *Re Middaugh*, P. U. R. 1927E 207 (Wash.); *Re Inter-County Motor Coach Line*, P. U. R. 1928B 680 (Wis.); *Re Scott*, P. U. R. 1927C 626 (Wyo.); *cf. Re S. Y. A. Bus Line*, P. U. R. 1928E 98 (Neb.) (statute held to give

The public in general makes no demand for this applicant's service. Such a demand, if made, would be useless unless the applicant ceases to be a private carrier, since by hypothesis he does not hold himself out to serve, and can not be made to serve, any but the party to his single contract. His service will not, if he remains a private carrier, be offered to the public at large. The grant of the certificate, if made, will produce no additional service to the public in general, nor does the present existence of common-carrier service meet the demand which the applicant's customers, for reasons of their own, have manifested for his service.

In short, the principle which underlies the existing forms of regulation is wholly inapplicable to the private carrier. It was not formulated for the purpose of controlling individual contracts to serve individual customers. It was designed to equalize, over a period of time, the need of an entire community for a given type of service and the supply of such service. A contract carrier who can not be forced, even though certificated, to respond to a given public demand has no place in such a system. The demand for service to which he responds is not a public one, statistically calculable. It is a single private demand or series of private de-

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commission no authority to refuse a certificate to an applicant). *Certificate denied for adequacy of existing service: Re Steele's Trans. Co.*, P. U. R. 1923E 246 (Ariz.); *Re Ayres-Whiteside Trans. Co.*, P. U. R. 1928A 108 (Cal.); *Re Giacomelli Bros.*, P. U. R. 1928A 425 (Colo.); *Re City Cab Serv.*, P. U. R. 1930A 113 (Conn.); *Re Packard DeLuxe Lines*, P. U. R. 1924A 458 (Ill.); *Re Reeder*, P. U. R. 1928E 136 (Ind.); *Re Spurgin*, P. U. R. 1925D 219 (Iowa); *Ex parte Vincent*, P. U. R. 1928C 178 (La.); *Re Portland Taxicab Co.*, P. U. R. 1923E 772 (Me.); *Re Detroit-Chicago Motor Bus Co.*, P. U. R. 1928C 102 (Mo.); *Re Butte-Dillon Freight Serv.*, P. U. R. 1930B 302 (Mont.); *Re Nevada-California Stage Co.*, P. U. R. 1924A 460 (Nev.); *Re Pickwick Stages*, P. U. R. 1929D 645 (Nev.); *Re Gold Star Line*, P. U. R. 1927A 164 (N. H.); *Public Serv. Ry. v. Mayr*, P. U. R. 1926E 352 (N. J.); *Re Northport Trans. Co.*, P. U. R. 1927C 605 (N. Y.); *Re Fargo-Moorehead Trucking Co.*, P. U. R. 1927A 350 (N. D.); *Re Salisbury Trans. Co.*, P. U. R. 1927C 611 (Ohio); *Re Chester Auto Bus Line*, P. U. R. 1923E 384 (Pa.); *Re Hossie*, P. U. R. 1927C 270 (R. I.); *Re Jensen*, P. U. R. 1927C 623 (S. D.); *Re Devers*, P. U. R. 1929A 131 (S. D.); *Re O'Driscoll*, P. U. R. 1927A 100 (Utah); *Re James*, P. U. R. 1923E 857 (Vt.); *Re Olympia-Tacoma Auto Freight Co.*, P. U. R. 1928C 113 (Wash.); *Re Cannonball Express Co.*, P. U. R. 1929A 131 (Wis.); *Re Wyoming Trans. Co.*, P. U. R. 1925E 861 (Wyo.); *cf. Vernonia Stage Line v. Spokane, P. & S. Trans. Co.*, P. U. R. 1929A 124 (Ore.) (certificate granted in spite of adequacy, with a declaration that the policy of the act is to promote competition).

mands, the recurrence of which can not be predicted and response to which can not be compelled.

The manifest incongruity between the legal and practical status of the private carrier and the theory and application of the regulatory statutes shows what, as a matter of interpretation, the legislatures must be held to have intended. While the legislative history of the successive enactments varies in different states,<sup>37</sup> there is always a background of common-carrier regulation. An attempt to project against this background a type of carrier so completely out of harmony with it produces a result so meaningless that the legislatures can not be presumed to have intended it. The conclusion must be either that the legislatures intended the commissions to set up standards for certification of the private carrier wholly different from those applied to common carriers, or that it was intended to require all regulated carriers to become common carriers. Every indication points to the latter conclusion. In no case has a separate system of control been set up for the private carrier. Ordinarily the principal features of the act are exactly the same as if common carriers alone were included. Regulatory provisions which destroy the very essence of the private carrier's status are made applicable to him as to common carriers. As has been said, generally all that is done is to broaden the definition of the regulated unit so as to include him within it, and all the machinery devised for and appropriate to the regulation of common carriers only is left applicable to the private carrier.<sup>38</sup>

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<sup>37</sup> For example, in Ohio an act which for four years was applied only to common carriers was amended in 1929 to include the private carrier, no other alteration of substance being made. In Georgia the present statute, which includes all carriers for hire within the regulated unit, is the first regulation of either contract or common carriers by that state. The form of standardized act was so closely followed in the latter act and similar ones, however, as to render insignificant this difference in chronological sequence.

<sup>38</sup> Consideration of the practical difficulties resulting from the application of regulation indiscriminately to private and to common carriers reinforces the argument drawn from the inapplicability to the former of the principle underlying common-carrier regulation. If the existing service is adequate, a new certificate will not, under the prevailing practice, be granted. So no private carrier could properly be given a certificate where existing common carriers could handle the traffic. The familiar "grandfather clause" granting certificates as of right to carriers operating at the passage of the statute would not save the situation, as the protection of these clauses does not extend to new conditions which involve changes in routes or service, and such changes are, of course, very frequent

Aside from the question whether the Supreme Court was compelled to adopt the construction of the California statute made by the California courts, there is, therefore, little question that that interpretation was correct. The regulation to which the legislature subjected the private carrier showed as clearly as could an express declaration that it was intended that the contract carrier should for all legal and practical purposes become a common carrier. What was true of the California statute is equally true of every statute in which the device has been followed.<sup>39</sup> For the reasons given by the Supreme Court in the *Frost* case all are unconstitutional.

There are certain decisions of state courts subsequent to the *Frost* case which seek to avoid its result by differently "interpreting" statutes which in every substantial detail are like the California statute there disapproved. Such interpretation frequently

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with contract carriers. Moreover, many common carriers operate over broadly stated "irregular routes." Such carriers ordinarily would be able to extend their operations, so far as the actual physical carriage went, to meet the new demand, and it might well be that the private carrier would never be able to get a permit. On the other hand, the existence of a contract carrier would not bar the application of a proposed common carrier. The contract carrier, if he remained such, could not contend that he proposed to give the general public such service as it might need.

But if it be assumed that the private carrier could obtain a certificate, without defeating the whole purpose of certification, and having obtained it would remain, in some restricted legal sense, a private carrier, it is plain that he could no longer conduct his business in the manner characteristic of it. In theory a private operator doing business like other merchants under a system of free contract, in practice he would find himself controlled in detail as to the most important features of his contracts. Public regulation of a private motor carrier is a contradiction in terms.

How a schedule of rates can be made in advance to govern the indefinite and unlimited variation of service which is the reason for existence of the private motor carrier is difficult to see. The service grew up under a system of individual bargaining and is fitted for no other. For these additional reasons, "regulation" of the private carrier means, in practice, forcing him to become a common carrier.

<sup>39</sup> By this is meant, of course, statutes where the requirement of obtaining true "certificates of convenience and necessity" is exacted of contract carriers. Such is not the case where certificates are granted them as a matter of right, without discretion in the commission to withhold them. *Cf. Clark v. Poor*, 274 U. S. 554 (1927). Of the statutes which apply to contract carriers, however, only that in Wyoming clearly is of this type. Several statutes are obscure on the point, in that they set up different classes of carriers, the extent of which, and the requirements for the certification of which, are ambiguously set forth. See, *e.g.*, North Dakota, Oklahoma, South Carolina, South Dakota, Virginia.

consists of a bald assertion that the statute does not require a private carrier to become a common carrier.<sup>40</sup> It is submitted that this is not such an interpretation of the *meaning* of the statute as to be binding upon the Supreme Court under the familiar rule, but is merely a pronouncement as to its legal *effect*, which the Supreme Court may properly review. Nevertheless, since the language of the majority opinion in the *Frost* case does not necessarily exclude the possibility of acceptance of such a statement of the effect of a regulatory statute by the state court, it is proper to inquire further into the constitutionality of these regulations of the private carrier as such, assuming, *arguendo*, that they permit him to remain a private carrier.

### III

Perhaps the best approach to an analysis of the power of the state to regulate the private carrier, in that capacity, is again found in the *Frost* case. Without resorting to the somewhat vague term "police power," it is clear that there are two distinct types of power which the state may attempt to assert. These are, first, the power arising from the public control of the highways to enact measures in the interest of preserving their condition and the safety of the traveling public; and second, the power to regulate the business of the carrier by reason of the nature of that business.

Much can be and has been accomplished in the solution of the problems created by automotive transportation through the exercise of the state's control of its highways. Speed, height, and weight limitations, licensing and registration provisions, requirement of indemnity bonds or insurance protection to the public,

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<sup>40</sup> See, *e.g.*, *Georgia Pub. Serv. Comm. v. Saye & Davis Transfer Co.*; *Rutledge Coöperative Ass'n v. Baughman*; *Barbour v. Walker*, all *supra* note 22. A significant interpretation to the contrary was made by the Ohio commission under the 1929 statute, however, in *Re Railway Express Agency, Inc.*, U. S. Daily, March 18, 1930, at 163. Moreover, the 1929 Georgia act has, within the past month, received the interpretation here contended for, by a federal three-judge court in the Northern District of Georgia. *Johnson Transfer & Freight Lines v. Perry*, Equity No. 598, Jan. 24, 1931. Despite the absence of an express declaration in the act, it was held that to subject a contract carrier to its regulations was to require him to become a common carrier, and that it was therefore unconstitutional.

special tax exactions for the use of the highways, insistence upon proper qualifications of those who drive motor vehicles, all these may be imposed upon all who own or operate motor vehicles, in the interest of public safety and the like. The imposition is, however, upon the general public as such. The type of business or other purpose for which the vehicle is employed has nothing to do with the regulation enforced. The validity of such measures is unassailable.<sup>41</sup>

Regulation imposed upon a particular business or occupation for economic reasons stands obviously upon a very different footing.<sup>42</sup> There may well be constitutional sanction for such regulation, and that applied to public utilities is an obvious example. The source of this power has, through a long series of decisions, come to be expressed by the elastic formula that the business in question is "affected with a public interest." It is on this basis that the Supreme Court has sustained state determination of the rates of common carriers, gas and electric companies, insurance companies, grain elevators, and the like.<sup>43</sup>

The *Frost* case is direct authority for the proposition, logically quite obvious, that the two sources of power referred to are entirely separate and distinct. If a statute is genuinely a highway

<sup>41</sup> See, e.g., *Christy v. Elliott*, 216 Ill. 31, 74 N. E. 1035 (1905) (speed); *State v. Mayo*, 106 Me. 62, 75 Atl. 295 (1909) (prohibition against use of certain streets); *Commonwealth v. Boyd*, 188 Mass. 79, 74 N. E. 255 (1905) (registration); *In re Opinion of the Justices*, 251 Mass. 569, 147 N. E. 681 (1925) (compulsory insurance); *In re Opinion of the Justices*, 81 N. H. 566, 129 Atl. 117 (1925) (same); *Ogilvie v. Hailey*, 141 Tenn. 392, 210 S. W. 645 (1918) (license tax).

<sup>42</sup> FREUND, *POLICE POWER* (1904) §§ 372, 373 *et seq.* For necessary purposes of presentation, and for want of a less ambiguous phrase, the term "business regulation" is used in this article in contradistinction to "highway regulation." There are, of course, many measures passed in the interest of "peace, safety, health and morals" which affect the conduct of business, and could be called business regulations, and yet may be imposed on business enterprises in general, or even on a single enterprise (e.g., licensing provisions) not affected with a public interest. The term as herein employed, however, refers to those drastic regulations of the conduct of a particular industry, because of its nature, for reasons involving the economic security of the community, the standard example of which is rate fixing. With rate fixing, Freund classes the requirement of equal service, requirements in the interest of public convenience, and requirements and restraints in the interest of financial security. *Ibid.*

<sup>43</sup> See, e.g., *Munn v. Illinois*, 94 U. S. 113 (1876); *Peik v. Chicago & N. W. Ry.*, 94 U. S. 164 (1876); *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389 (1914); *Union Dry Goods Co. v. Georgia Public Serv. Corp.*, 248 U. S. 372 (1919).

protection measure such as a weight limitation, it will be sustained as such. If a business is of the type which is said to be clothed with a public interest, its rates and other incidents may be regulated. But an effort to regulate a business which is not of a type susceptible of regulation is not helped as to its validity by attaching such a regulation as a condition precedent to the use of the highways. Thus, in the *Frost* case, the court declared unconstitutional a business regulation requiring private carriers to become common carriers, against the contention that the power of the state to exclude vehicles for hire from its roads was sufficiently broad to allow the imposition of this requirement as a condition of operation thereon, saying:

“ There is involved in the inquiry not a single power, but two distinct powers. One of these — the power to prohibit the use of the public highways in proper cases — the state possesses; and the other — the power to compel a private carrier to assume against his will the duties and burdens of a common carrier — the state does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? . . . It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.”<sup>44</sup>

This rule that the state may not impose a condition, involving the surrender of constitutional rights, upon a privilege which it has otherwise complete power to grant or withhold, has been laid down in many cases.<sup>45</sup>

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<sup>44</sup> 271 U. S. 583, 593-94 (1926).

<sup>45</sup> *Pullman Co. v. Kansas*, 216 U. S. 56 (1910); *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914); *Western Union Tel. Co. v. Foster*, 247 U. S. 105 (1918); *Terral v. Burke Const. Co.*, 257 U. S. 529 (1922).

In short, a business is or is not susceptible of regulation according to its character. With this distinction in mind, an analysis may be made of the regulations imposed on the contract carrier by the ordinary statute. In classifying them as highway regulations on the one hand, or regulations of the business of carriage on the other, no assistance is ordinarily rendered by the statutes themselves, which usually group together without distinction all their provisions concerning motor carriers.

#### IV

It seems wisest, therefore, to discuss first that regulation which is most typically a regulation of the business itself and not a highway measure, namely, the regulation of rates.<sup>46</sup> In the long line of cases dealing with governmental price fixing, the standard justification of legislative action has been the determination that

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<sup>46</sup> Nearly all the motor-carrier statutes give the power of rate regulation over the regulated unit, some mandatorily imposing the duty to fix the rates of all carriers subject to the act, some merely giving the commission power to fix or approve the rates charged. In some jurisdictions where the power has been conferred, it has not yet been exercised—Ohio and Georgia, for instance. The widespread use of the power is evidenced, however, by the following sample cases in which it was exercised. *Re Rates and Fares Charged by Motor Vehicles*, P. U. R. 1922E 444 (Ariz.); *Re Monroe*, P. U. R. 1926E 684 (Cal.); *Re Buster*, P. U. R. 1928E 199 (Colo.); *Re Jitneys of New Britain*, P. U. R. 1926C 650 (Conn.); *Re Washington-Interurban R. R.*, P. U. R. 1928E 712 (D. C.); *Schaub v. People's Motor Coach Co.*, P. U. R. 1928D 693 (Ind.); *Matter of Funk v. Bader*, June 30, 1930 (Iowa R. R. Comm.); *Wichita v. Hussey*, 126 Kan. 677, 271 Pac. 403 (1928); *Re Rates for Motor Carriers of Freight*, P. U. R. 1930E 488 (La.); *Re Rates of Motor Vehicle Operators Transporting Milk*, P. U. R. 1930E 249 (Md.); *Re Duluth, S. S. & A. R. R.*, P. U. R. 1928B 659 (Mich.); *Re Purple Swan Safety Coach Lines*, P. U. R. 1928A 193 (Mo.); *Re Howe & Holt Transfer Co.*, P. U. R. 1928A 860 (Mont.); *Roselle Park v. Public Util. Comm.*, 144 Atl. 623 (N. J. 1929); *Re Schenectady Rapid Transit*, P. U. R. 1930E 32 (N. Y.); *Interstate Trans. Co. v. Minneapolis, St. P. & S. Ste. M. R. R.*, P. U. R. 1930C 68 (N. D.); *Re Motor Vehicle Freight Classification*, P. U. R. 1928A 90 (Ore.); *Re Rates and Practices of Com'l Truck Haulers*, P. U. R. 1925D 524 (Ore.); *Re General Rules and Regulations for Motor Carriers*, P. U. R. 1930C 245 (Okla.); *Schaeffer v. Citizens Transit Co.*, P. U. R. 1925E 737 (Pa.); *Re Russell*, P. U. R. 1928E 199 (Utah); *Re Auto Trans. Co.*, P. U. R. 1930C 54 (Wis.). The practical difficulties of applying such regulation to irregular route and contract carriers are, of course, tremendous. See *Re Anywhere-for-hire Carriers*, P. U. R. 1928D 427 (Ore.) (impracticability of rate regulation of furniture haulers admitted); *Re Yellow Taxi Line*, P. U. R. 1926E 804 (S. D.) (judicial notice taken of the universal practice of undercutting published rates).

the enterprise in question was of a type "clothed with a public interest." It was never intimated that common carriers' charges might be fixed because such control in some way guarded the life and limb of the traveler or preserved the surface of the highway. No more plausibly can such an argument be advanced in the case of the private carrier.<sup>47</sup> The question is squarely presented, therefore, whether private or contract motor carriage, as distinguished from common carriage by motor, is a business so clothed with a public interest as to be subject to state regulation of rates. It is submitted that this question admits only of a negative answer.

The reason immemorially given for the state's ability to exercise drastic supervision and regulation over the common carrier class has been that this class was affected with a public interest.<sup>48</sup> Indeed, in the cases involving carriage from the earliest common law down to the latest adjudications of the Supreme Court of the United States, the terms "common carrier" and "clothed with a public interest" have been synonymously and interchangeably used. If rate regulation of private carriers is to be sustained, the above authorities must be said not to establish synonymy between "common carriage" and "public interest," but merely to demonstrate that the common carrier is "affected with a public interest," leaving it open to assertion that the private carrier is likewise so affected.

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<sup>47</sup> Another drastic type of regulation exercised over motor carriers in several jurisdictions, worthy of being noted here, is supervision over all security issues made by them. See *Re Gray Line Motor Tours*, P. U. R. 1929E 87 (Cal.); *Re Atlantic Motor Exp.*, P. U. R. 1930C 223 (Me.); *Re Southern Mich. Trans. Co.*, P. U. R. 1930B 168 (Mich.); *Re Pioneer Bus Lines*, P. U. R. 1929C 466 (Neb.); *cf. Re Indianapolis Street Ry.*, P. U. R. 1928A 670 (Ind.) (stock sale disapproved).

<sup>48</sup> "From the same source comes the power to regulate the charges of common carriers, which was done in England as long ago as the third year of the reign of William and Mary. . . . Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. . . . Their business is, therefore, 'affected with a public interest,' within the meaning of the doctrine which Lord Hale has so forcibly stated." *Munn v. Illinois*, 94 U. S. 113, 129 (1877). See also *Chicago, B. & Q. R. R. v. Iowa*, 94 U. S. 155 (1876); *Peik v. Chicago & N. W. R. R.*, 94 U. S. 164 (1876); *Ruggles v. Illinois*, 108 U. S. 526 (1883); *Illinois Cent. R. R. v. Illinois*, 108 U. S. 541 (1883); and the list of common law authorities on rights and duties of carriers in *McCurdy, The Power of a Public Utility to Fix its Rates and Charges in the Absence of Regulatory Legislation* (1924) 38 HARV. L. REV. 202, 207, n.12.

But the entire language and intendment of the opinions would indicate that the sole inference from the clothing of common carriers with a public interest is that other kinds of carriers are not so clothed. If such were not the case, there would result an unprecedented anomaly in the law. Operating side by side would be two types of carriers, both affected with a public interest, both subject to identical drastic regulation, yet one allowed to pick and choose his customers, while the other was obliged to provide transportation for any member of the public who so desired it. Such a result is inconsistent with the whole spirit and application of the phrase "clothed with a public interest." Moreover, it runs counter to a fundamental principle of the law of regulation of business by public authority, as hitherto understood. A long line of decisions shows that, in the case of the enterprises which have hitherto been subjected to rate regulation as being affected with a public interest, the privileges conferred by the state upon the business have carried with them the correlative duty to serve all the public, as well as to supply the service at a reasonable figure.<sup>49</sup>

In these cases, it is true, the existence of the duty to serve the public has been declared to result more from the grant of a total or partial monopoly, such as that conferred by a certificate of public convenience and necessity, than from the imposition of rate regulation. And it would be possible to regulate rates without more than nominal certification,<sup>50</sup> or without any at all. It is nevertheless significant that in those businesses whose rates have been fixed by the state, an accompanying duty to serve the public has been implied, as part and parcel of the rights and duties involved in a business clothed with a public interest.<sup>51</sup> This duty to

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<sup>49</sup> *Allnutt v. Inglis*, 12 East 527 (1810); *Weymouth v. Penobscot Log Driving Co.*, 71 Me. 29 (1880); *State ex rel. Gwynn v. Citizens' Tel. Co.*, 61 S. C. 83, 39 S. E. 257 (1901); *Shepard v. Milwaukee Gas Light Co.*, 6 Wis. 539 (1858); see *Chicago & N. W. Ry. v. People*, 56 Ill. 365, 378 (1870); *Louisville, E. & St. L. R. R. v. Wilson*, 119 Ind. 352, 358, 21 N. E. 341, 343 (1889); *Chaplin, Limitations Upon the Right of Withdrawal from Public Employment* (1903) 16 HARV. L. REV. 555 *et seq.*; *Wyman, The Law of the Public Callings as a Solution of the Trust Problem* (1904) 17 HARV. L. REV. 156 *et seq.*; 2 KENT, COMM. §§ 598, 599.

<sup>50</sup> See note 39, *supra*.

<sup>51</sup> It has been suggested that insurance presents an example of a business so far affected with a public interest as to permit legislative regulation of its rates although the public has no legal right to demand and receive service. The sug-

serve all has been scrupulously exacted from the motor common carrier, who has been found to be clothed with a public interest. The present effort to regulate private-carrier rates implies that the private carrier as well is clothed with a public interest. But to regulate private and common carriers identically, and as an exercise of the identical power over business charged with a public interest, and yet to argue that one must serve all comers and the other need not, is to attempt a distinction which is unsupported by logic or authority.

It follows that cases like *Michigan Public Utilities Comm. v. Duke*<sup>52</sup> and *Frost v. Railroad Comm.*,<sup>53</sup> holding that a private carrier may not be converted by legislative fiat into a common carrier, and *Terminal Taxicab Co. v. Kutz*,<sup>54</sup> holding that a taxicab company, insofar as it rents out automobiles on private contract, is not a public utility, are authority for the proposition that the private carrier is not affected with a public interest. Consequently, he is not subject to governmental rate-fixing, though this specific question has yet to be passed upon.

It is not only by making this comparison with the common carrier that it becomes apparent that the private carrier can not be subjected to legislative rate determination. An examination of the decisions since *Munn v. Illinois*<sup>55</sup> which have pricked out the

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gestion is predicated upon certain supposed intimations in the decision in *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389 (1914). The opinion does not, however, lay down the proposition that an insurance company can not constitutionally be required by statute to serve all proper persons who apply. It was enough to decide that it was so far clothed with a public interest that its rates could be regulated.

The next step has since been taken. By Acts 1925, c. 346, § 113d, the legislature of Massachusetts provided administrative and judicial machinery under which an applicant for insurance may compel the issue to him of a policy. This was held constitutional in *In re Opinion of the Justices*, 251 Mass. 567, 613, 147 N. E. 681, 700 (1925).

But in the *Frost* case the Supreme Court specifically held that the business of private carriage by motor could not be transmuted by legislative fiat into a public calling, by necessary implication excluding the power exercised over insurance companies as above set forth. Moreover, in the motor-carrier statutes, rate regulation does not stand alone, but is accompanied by certification, a partial grant of monopoly of just the type discussed in cases cited in note 49, *supra*.

<sup>52</sup> 266 U. S. 570 (1925).

<sup>53</sup> 271 U. S. 583 (1927).

<sup>54</sup> 241 U. S. 252 (1916).

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

line between those enterprises whose prices may be fixed by law and those whose prices may not be so fixed, discloses that in no way does the business of private or contract carriage fall within any of the criteria which determine that a business is clothed with a public interest.

This is most obviously true of the test of "devotion" to a public use. Though the employment of this phrase as a touchstone has been much criticized, it was used by the ultimate arbiter, the Supreme Court of the United States, in one of its most recent pronouncements on the subject. In *Tyson v. Banton*, Mr. Justice Sutherland, for the majority, in holding that the business of theatre-ticket brokerage was not affected with a public interest, used the following language:

"The significant requirement is that the property shall be devoted to a use in which the public has an interest, which simply means, . . . that it shall be devoted to 'a public use.' Stated in another form, a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby, in effect, *granted* to the public."<sup>66</sup>

It is quite clear, from the very definition of private carrier as distinguished from common carrier, that this is exactly the test to which the private carrier does not answer. If any further substantiation is required, it is furnished by the Supreme Court itself. In *Michigan Public Utilities Comm. v. Duke*, Mr. Justice Butler, speaking for a unanimous Court, said: "Plaintiff is a private carrier. . . . He does not undertake to carry for the public and does not devote his property to any public use. He has done nothing to give rise to a duty to carry for others."<sup>67</sup> In short, a dilemma is created by the contention, which we have accepted for the sake of argument, that the statutes do not require the private carrier to serve the public. In thus seeking to escape the horn of the *Frost* case, the statutes are impaled upon that of the test of devotion to a public use.

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<sup>66</sup> 273 U. S. 418, 433-34 (1927). For similar language, see *Munn v. Illinois*, 94 U. S. 113, 138 (1876). For a discussion of this test, see Robinson, *The Public Utility Concept in American Law* (1928) 41 HARV. L. REV. 277, 293 *et seq.*

<sup>67</sup> 266 U. S. 570, 576 (1925).

A second test which finds considerable support in the cases is that of virtual monopoly. It is not contended that no business is clothed with a public interest unless it is a virtual monopoly; that would ignore *Brass v. Stoesser*.<sup>58</sup> And the soundness of this test, like the first, has been gravely questioned. Nevertheless, it recurs in the opinions frequently enough<sup>59</sup> to have been considered occasionally the exclusive test of the public calling.<sup>60</sup> Here again it is plain that the test is not met by the private carrier. His position is not like that of the only railroad between two points, whether for lack of trade to support two, or by reason of a grant of eminent domain to it alone. Nor is he comparable to the Illinois warehouseman who "stood in the gateway of commerce" because all the grain passing through the Chicago "bottleneck" had to make use of his facilities.<sup>61</sup> Here, on the contrary, is a business of the most highly competitive type. Private contract carriage, as a class, covers every conceivable phase of transportation service and covers it competitively, by contract. Virtual monopoly in a business is a question of fact, and the facts lend no support to the contention that it exists in the industry in question.

A third test, whose approach is more persuasive, is one which, though variously stated, may be summed up as an inequality of bargaining power between the business and the public, not because of a monopoly in an individual sense, but because of the inadequacy of competition to protect the public. As Mr. Justice Stone stated in his dissent in *Tyson v. Banton*:

"An examination of the decisions of this Court in which price regulation has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or

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<sup>58</sup> 153 U. S. 391 (1894).

<sup>59</sup> See the following cases, among them one decided only last year. *Munn v. Illinois*, 94 U. S. 113 (1876); *Budd v. New York*, 143 U. S. 517 (1892); *Tagg Bros. & Moorehead v. United States*, 280 U. S. 420 (1930).

<sup>60</sup> See Wyman, *loc. cit. supra* note 49; Wyman, *State Control of Public Utilities* (1911) 24 HARV. L. REV. 624. For discussions of the monopoly test, see Rottschaefer, *The Field of Governmental Price Control* (1926) 35 YALE L. J. 438, 451; McAllister, *Lord Hale and Business Affected with a Public Interest* (1930) 43 HARV L. REV. 759, 770 *et seq.*

<sup>61</sup> See *Munn v. Illinois*, 94 U. S. 113, 132 (1876).

sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community."<sup>62</sup>

Such a situation was held to exist in the insurance business by *German Alliance Ins. Co. v. Lewis*,<sup>63</sup> and was thought by the dissenters, and many commentators, to exist in the business of theatre-ticket and employment brokerage, in *Tyson v. Banton* and *Ribnik v. McBride*.<sup>64</sup> Yet the majority held in the latter cases that conditions did not warrant regulation. In the face of these decisions, it is inconceivable that a situation of this type should be held to exist in the business of private carriage by motor vehicle. The private carrier has in no way a position of dominance over a public, the larger part of whose need for such transportation is served by individually owned vehicles; nor can the demand for contract carriage be thought so to exceed its supply that the interest of the public served requires regulation of its rates to prevent extortion. Here again the ease of acquiring and operating the privately owned truck is a controlling factor. Finally, the marked absence of demand for regulation from the public served, in whose interest alone price regulation may, under the precedents, properly be imposed, seems decisive.<sup>65</sup>

Thus the business under consideration seems to answer none of the tests of "publicness" to be found in the rate-fixing decisions. Many able commentators upon this line of cases insist, however, that regardless of the language of the opinions, each case is, after all, decided by the court not by any rule-of-thumb

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<sup>62</sup> 273 U. S. 418, 451-52 (1927); see also Rottschaefer, *supra* note 60, at 453: "There are, however, situations in which, although there exists bona fide competition among those who supply the commodity or service, that group as a whole has an advantage over the consuming group as a whole."

<sup>63</sup> 233 U. S. 389 (1914). Very recently the Supreme Court has sustained a state statute regulating the size of commissions earned by insurance agents. *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, decided Jan. 5, 1931.

<sup>64</sup> 277 U. S. 350 (1928); see McAllister, *supra* note 60, at 775 *et seq.*

<sup>65</sup> This element provides a basic distinction even from the statutes involved in the *Tyson* and *Ribnik* cases. The demand for regulation of the brokers there concerned came from the public with which they dealt, and over which they occupied a position of dominance. The demand for motor-carrier regulation comes from a very different source, the competing carriers, and a contrary decision in the *Tyson* and *Ribnik* cases would not weaken the argument here advanced.

test but rather by a detailed study of the conditions which in fact exist in the industry in question and the effect upon those conditions of the proposed regulation. It has even been argued with earnestness that the courts have so used the flexible weapon of the due process clause as to make of it the means of judicial legislation to the point of usurping the legislative function.<sup>66</sup> The modern method of approach by the courts to such questions has been summarized as follows:

“ Mr. Justice Stone asks two questions, (1) is the business of sufficient importance to the community as a whole to be a matter of public concern; and (2) are the conditions in the business such that the state has a substantial basis for concluding that the regulation of price is the only effective remedy to protect the interest of the community as a whole? ”<sup>67</sup>

It is apparent that so to approach a question of constitutional law at once takes the discussion completely out of the field of legal reasoning and makes it a matter purely of economic theory, in which the element of predictability so much esteemed by legal philosophers becomes highly attenuated. Nevertheless the absence of any marked demand from shipping interests for regulation of the private motor carrier<sup>68</sup> is highly persuasive that however important his business may be to the community, no evil attends it, at least from the point of view of the user, which calls for the remedy of regulation. If, considering the high degree of competition existing in the business, there can be said to be any evil, it is primarily to be found in its effect upon other carriers and especially upon the railroads. This situation has had repeated precedent in the history of transportation, without being considered of itself a ground for governmental interference. In the absence of abuses from which the public as a whole demands redress, it would seem that there is little in the argument based upon the partial displacement of the rail carrier from its former position of practical monopoly. Indeed, if the argument were

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<sup>66</sup> See Finkelstein, *From Munn v. Illinois to Tyson v. Banton. A Study in the Judicial Process* (1927) 27 COL. L. REV. 769, especially at 782, 783.

<sup>67</sup> McAllister, *supra* note 60, at 784, referring to dissent by Stone, J., in Ribnik v. McBride, 277 U. S. 350, 359 *et seq.* (1928).

<sup>68</sup> See note 11, *supra*.

sound a necessary step would be the regulation of the privately owned truck employed wholly in its owner's business, and, more than that, of the private automobile, which has been the chief factor in the sharp falling off of passenger revenues of the railroads.<sup>69</sup> The difficulties of the situation must, it would seem, be left to the solution which will be worked out by the laws of economics.

## V

The standard form of motor-vehicle regulation asserts the power of the state in two principal respects. The first of these is the power to control rates, and incidentally practices, of the regulated carriers. The second is the power to admit one applicant and to exclude another from entering the business at all. The latter power is worked out through the granting or refusal of the certificates of convenience and necessity whose issue is made a prerequisite to operation.

The question of the applicability to the private carrier of this power to exclude presents the same fundamental problem as that involved in rate regulation. If the exclusion is a *bona fide* measure for the protection of the highways from undue congestion, improper wear and tear, dangerous use, and the like, it is highly probable that its validity will be sustained. The power of the state to make reasonable regulation of the use of its highways, with particular reference to the use of motor vehicles for hire, has frequently been sustained,<sup>70</sup> and such regulation is not necessarily objectionable because it is not imposed in the same manner on pleasure vehicles. Thus in *Packard v. Banton*<sup>71</sup> a requirement that a motor carrier give security against injury resulting from its operation was sustained although the statute did not impose the same requirement, as constitutionally it might have done,<sup>72</sup> upon the drivers of private motor cars.

If, however, the power of exclusion is imposed not as a measure of highway safety or protection but as a regulation of the business

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<sup>69</sup> See notes 3, 13, *supra*.

<sup>70</sup> See note 41, *supra*.

<sup>71</sup> 264 U. S. 140 (1924); see also *Hazelton v. Atlanta*, 144 Ga. 775, 87 S. E. 1043 (1916).

<sup>72</sup> *In re* Opinion of the Justices, two cases, both *supra* note 41.

of carriage, it is neither more nor less valid than a regulation of rates. Given a business affected with a public interest, such as an ordinary public utility, the state may impose such regulation as will remedy the existing evils. For an economic inequality of bargaining between utility and consumer, the proper measure may be rate regulation. For cut-throat competition between common carriers resulting in inadequate service to the public and in economic instability, a valid and perhaps an appropriate remedy is to exclude some and admit others to the business, bringing about a system of regulated monopoly. But the power to impose either of these remedies rests primarily upon the fact that the enterprise is affected with a public interest. It may be added that ultimate authority for this proposition can not be cited because the effort actually to apply such exclusion to other than public utilities has not yet reached the Supreme Court of the United States.<sup>73</sup> Its soundness is clear, however, from the decisions in the rate cases to the effect that regulation of a particular enterprise as such for reasons involving only the economic interests of the community may be imposed only upon an occupation clothed with a public interest. A sharp distinction, made with great clarity in the majority opinion in the *Frost* case,<sup>74</sup> has been preserved between these cases and those involving regulations promoting health, morals, and safety, the latter having the same justification that supports true highway regulations.

The problem thus presented reduces itself into a determination of whether the certification requirement is a regulation of the business or of the use of the highway. If the former, it is, as applied to the private or contract carrier, invalid, since the business is not of a type susceptible to such regulation; if the latter,

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<sup>73</sup> See, however, FREUND, POLICE POWER § 398. Moreover, the *Frost* case, though it does not adjudicate this particular issue, shows that rate regulation is not the only measure which can not be imposed upon an industry which is not a public utility. It at least can not be made to become a public utility against its will and without compensation. For a close parallel to the relation between rate regulation and exclusion from engaging in the business by means of certificates, compare *Ribnik v. McBride*, 277 U. S. 350 (1928), with *Adams v. Tanner*, 244 U. S. 590 (1917).

<sup>74</sup> 271 U. S. 583, at 592, 593. See also Stone, J., dissenting, in *Ribnik v. McBride*, 277 U. S. 350, 373-74 (1928); Cobb, *Reasonableness of Maximum Rates as a Constitutional Limitation upon Rate Regulation* (1908) 21 HARV. L. REV. 175; FREUND, POLICE POWER §§ 372, 373, 398.

it is valid if it is reasonable and non-discriminatory. It is immaterial that a regulation of the highway is bound to affect the business, or *vice versa*. The essential question is not the effect of the statute but the source of the power which the state seeks to exercise.<sup>75</sup>

But the fact that the regulation in its result may affect in very direct fashion both the use of the highways and the business of the user frequently renders difficult the determination of what type the regulation really is. An example of the confusion existing upon the subject is found in a much cited article. The authors say:

"It is submitted that within the bounds of the practical capacity of the commissions to act, private carriers, equally with public ones, should be required to obtain certificates of convenience and necessity. Regulation by means of such certificates is reasonably devised to protect the public from the abusive use of the roads, *from the evils incident to unregulated competition*, and from the physical dangers involved in motor carrier operation."<sup>76</sup>

Without stopping to quarrel with some of the practical assumptions implicit in this language, its use suggests insufficient analysis of the economic and constitutional situation dealt with. Regulation designed to protect the public from the evils of unregulated competition is not regulation of the use of the highways at all. It is simply regulation of the business of carriage which can not be imposed either directly or indirectly upon a business not affected with a public interest. A legislature might feel that unregulated competition in the grocery business was an evil. But it could not be dealt with by requiring grocers to apply for certificates of convenience and necessity before their privately owned trucks could use the highways, thus coping with the assumed evil by granting certificates to only that number of grocers which a commission might conclude was enough to satisfy the demands of the community.

An examination of the decisions and dicta sustaining the requirement that private carriers obtain certificates indicates that the supporters of such measures regard them as justifiable highway

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<sup>75</sup> See *Frost v. Railroad Comm.*, 271 U. S. 583, 592-93 (1926).

<sup>76</sup> Rosenbaum and Lilienthal, *supra* note 8, 26 *COL. L. REV.* at 963. (Italics inserted.)

regulations. The passage most frequently relied upon is the dissent of Mr. Justice Holmes in the *Frost* case:

"If a state speaking through its legislature should think that, in order to make its highways most useful, the business traffic upon them must be controlled, I suppose that no one would doubt that it constitutionally could, as, I presume, most states or cities do, exercise some such control. The only question is how far it can go. I see nothing to prevent its going to the point of requiring a license and bringing the whole business under the control of a railroad commission so far as to determine the number, character and conduct of transportation companies and so to prevent the streets from being made useless and dangerous by the number and lawlessness of those who seek to use them."<sup>77</sup>

If a system of requiring certificates is in fact set up for the plain purpose of preventing the streets from being made useless and dangerous, it may well be that Mr. Justice Holmes' statement will be accepted by the entire Court. There are similar indications in the majority opinion in the same case. It is largely upon this asserted basis that four state courts have sustained similar regulations.<sup>78</sup>

Analysis of the statutes involved in these decisions will show; however, that, as in the ordinary case, the purpose of certification is quite different from that suggested by Mr. Justice Holmes. Obviously if on a given route four carriers were operating with insufficient business to keep all fully employed, the refusal of a certificate to a fifth applicant would prevent a temporary increase in the number of carriers and might prevent a temporary increase in the number of trucks on the road. But the law of supply and demand would in normal course correct such a condition without any action by the state. If, on the other hand, there were sufficient business to warrant an increase in service, either the application would be granted or, if refused, the existing carriers would put on additional trucks to make the service adequate. In either instance nothing has been accomplished by the certification provisions to relieve highway conditions. Thus in its major function, which is to provide for increased traffic without introducing additional competition, certification does not even incidentally

<sup>77</sup> 271 U. S. at 601.

<sup>78</sup> See cases cited in note 22, *supra*.

serve as a highway measure. It is true that in cases of improvident applications like that first referred to, refusal of certificates will diminish congestion, but such situations are not sufficiently dominant to warrant the assertion that, judged by its results, certification is to be supported as a highway measure.

What is thus plain as a matter of reason is confirmed by authority. In *Buck v. Kuykendall*, the Supreme Court, speaking by Mr. Justice Brandeis, said that the primary purpose of requiring certificates

“ . . . is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. . . . [It] is designed primarily to promote good service by excluding unnecessary competing carriers.”<sup>79</sup>

Accordingly it was held that a state had no power to demand a certificate of convenience and necessity from a carrier engaged exclusively in interstate commerce.<sup>80</sup>

<sup>79</sup> 267 U. S. 307, 315 (1925).

<sup>80</sup> *Accord*: Michigan Pub. Util. Comm. v. Duke, 266 U. S. 570 (1925); Bush & Sons Co. v. Maloy, 267 U. S. 317 (1925); Hi-Ball Transit Co. v. Railroad Comm., 27 F.(2d) 425 (N. D. Tex. 1928); Atlantic-Pacific Stages v. Stahl, 36 F.(2d) 260 (W. D. Mo. 1929); People v. Yahne, 195 Cal. 683, 235 Pac. 50 (1925); Woollet v. Compania de Transportes, P. U. R. 1927D 526 (Cal.) (foreign commerce); Western Trans. Co. v. People, 82 Colo. 456, 261 Pac. 1 (1927); *Re* Indianapolis-Cincinnati Bus Co., P. U. R. 1926D 362 (Ind.); State v. Martin, 230 N. W. 540 (Iowa 1930); *Re* Maine Motor Coaches, Inc., P. U. R. 1926B 545 (Me.); State v. LeFebvre, 174 Minn. 248, 219 N. W. 167 (1928); *Re* Cooke City Serv., P. U. R. 1925E 399 (Mont.); West Jersey & Seashore R. R. v. Public Util. Comm., 149 Atl. 269 (N. J. 1930); Pine Hill-Kingston Bus Corp. v. Davis, 225 App. Div. 182, 232 N. Y. Supp. 536 (1929); Pennsylvania R. R. v. East Coast Coach Co., P. U. R. 1927C 603 (Pa.); Newport Elec. Corp. v. Oakley, 47 R. I. 19, 129 Atl. 613 (1925); *Re* Crittenden, P. U. R. 1927D 733 (S. D.); *Re* Terminal Motor Bus Co., P. U. R. 1929C 504 (Wis.). *Contra*: Bartels v. Hessler, P. U. R. 1922D 193 (Ill.); East St. Louis, C. & W. Ry. v. Dingerson, P. U. R. 1924C 127 (Ill.); Crigger & Stepp v. Allen, 219 Ky. 254, 292 S. W. 811 (1927) *semble*; *Re* Interstate Transit, P. U. R. 1930A 457 (Tenn.); *cf. Re* La Fors, P. U. R. 1926B 615 (Wash.).

In practice, however, the rule has been much weakened by cases requiring certificates of operators interstate in fact, on the ground that their interstate operation was a mere subterfuge, Pennsylvania R. R. v. Colonial Stages, P. U. R. 1930B 244 (Pa.); Delaware, L. & W. R. R. v. Martz Bus Co., P. U. R. 1929D 253 (Pa.); *Re* Cowell, P. U. R. 1927B 612 (R. I.); or even because the operation was predominantly intrastate, New York Cent. R. R. v. Conlin Buss Lines,

The decision that the requirement of certification is a regulation of the business and not a highway regulation like those referred to by Mr. Justice Holmes, was absolutely essential to the decision in the cases just referred to. For it is well settled, to quote again from *Buck v. Kuykendall*, that

“appropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the Commerce Clause, where the indirect burden imposed upon interstate commerce is not unreasonable.”<sup>81</sup>

Thus genuine highway measures, taxes for road maintenance, weight limitations, insurance requirements, and the like, may be exacted from interstate carriers by the states.<sup>82</sup> It follows that *Buck v. Kuykendall* and its companion cases, although arising under the commerce clause, squarely hold that the requirement of certification is not a highway regulation.<sup>83</sup>

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258 Mass. 498, 155 N. E. 601 (1927); *Public Serv. Comm. v. Highway Motor Coach Co.*, P. U. R. 1927D 309 (Pa.); *Re Inter-City Coach Co.*, P. U. R. 1927E 421 (R. I.). These decisions, particularly the latter, seem extremely questionable.

<sup>81</sup> 267 U. S. at 315.

<sup>82</sup> *Hendrick v. Maryland*, 235 U. S. 610 (1915); *Kane v. New Jersey*, 242 U. S. 160 (1916); *Morris v. Doby*, 274 U. S. 135 (1927); *Clark v. Poor*, 274 U. S. 554 (1927); *Sprout v. South Bend*, 277 U. S. 163 (1928); *Re Insurance Regulation for Motor Trans. Cos.*, P. U. R. 1928D 396 (Neb.); *cf. Newport Elec. Corp. v. Oakley*, 47 R. I. 19, 129 Atl. 613 (1925); *Re Hamilton*, P. U. R. 1930C 141 (S. D.). And a permit which is not a true certificate of convenience and necessity, but issues as a matter of right upon compliance with such valid provisions as these, may be required even of an exclusively interstate carrier. *Clark v. Poor*, 274 U. S. 554 (1927). The state likewise may require true certificates for that portion of a carrier's operation which is purely intrastate, though he is also engaged in interstate commerce with the same facilities. *Re Townsend*, P. U. R. 1928A 175 (Colo.); *Re Moore*, P. U. R. 1930C 526 (Ind.); *Re Maine Motor Coaches, Inc.*, P. U. R. 1926B 545 (Me.); *Re Red Star Line*, P. U. R. 1927B 145 (Md.); *State v. Le Febvre*, 174 Minn. 248, 219 N. W. 167 (1928); *Re Pickwick Stages System*, P. U. R. 1928B 1 (Mo.); *Re Bennett*, P. U. R. 1927C 595 (Mont.); *Re Pickwick Stages*, P. U. R. 1929D 645 (Nev.); *Haselton v. Interstate Stage Lines*, 82 N. H. 327, 133 Atl. 451 (1926); *Re Brewster-Danbury Motor Bus, Inc.*, P. U. R. 1925D 307 (N. Y.); *Re Scott Trans. Co.*, P. U. R. 1925D 529 (Pa.); *Re Sioux Falls Traction System*, 228 N. W. 179 (S. D. 1929); *Re Columbia Gorge Motor Coach System*, P. U. R. 1928A 119 (Wash.); *Re Terminal Motor Bus Co.*, P. U. R. 1929C 504 (Wis.).

<sup>83</sup> A contrary decision on this question would have reversed the decision on the principal point at issue. The cases did not go at all upon the basis that the requirement, though a highway measure, was so heavy as to be an improper

When the actual practice of state commissions in the matter of granting and refusing certificates is considered, this conclusion becomes irresistible. As has already been remarked, the adequacy or inadequacy of the existing service is the primary test.<sup>84</sup> In many cases a secondary inquiry is whether, assuming the existing service not to be adequate, the existing carrier can or will make it so.<sup>85</sup> If the service is, or will be made, adequate, the certificate is refused. If not, it is granted. Another common ground for refusing a certificate is that, if granted, the investment in existing rail carriers might be impaired.<sup>86</sup> In almost no case

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burden upon interstate commerce; the burdensome character of the regulation was not even mentioned.

The fact that these cases arose under the commerce clause, whereas the objection to state certification of contract carriers is based on the due process clause, seems a distinction without a difference. The point at issue was whether certification was or was not a highway regulation, and it was adjudicated that it was not. Whatever provision of the Constitution is in issue, the nature of this identical measure can not change in this respect.

<sup>84</sup> See note 36, *supra*.

<sup>85</sup> Certificates were denied for failure to give existing operators a chance to improve their service in *Re Wade*, P. U. R. 1926E 312 (Cal.); *Re Colorado Cab Co.*, P. U. R. 1929A 123 (Colo.); *Egyptian Trans. System v. Louisville & N. R. R.*, 321 Ill. 580, 152 N. E. 510 (1926); *Re Spencer-Martinsville Motor Line*, P. U. R. 1927D 67 (Ind.); *Re Kansas City, I. & F. Park Stage Line Co.*, P. U. R. 1929A 129 (Mo.); *Re Butte Bus Lines*, P. U. R. 1927E 856 (Mont.); *Re Cassidy & Word*, P. U. R. 1926A 295 (Nev.); *Re Cavaretta*, P. U. R. 1927A 164 (N. H.); *Columbus, D. & M. Elec. Co. v. Public Util. Comm.*, 116 Ohio St. 92, 155 N. E. 646 (1927); *Re Powell*, P. U. R. 1928A 475 (S. D.); *Re Tyrell & Barney*, P. U. R. 1927B 726 (Utah); *Re Krakenberger & Rinne*, P. U. R. 1926D 386 (Wash.); *cf. Re Lageman*, P. U. R. 1922D 705 (Pa.); *Re Appleyard*, P. U. R. 1926D 196 (Vt.).

<sup>86</sup> *Re Hamilton*, P. U. R. 1927B 207 (Ariz.); *Re Morgan*, P. U. R. 1922B 768 (Cal.); *Re Fort Morgan-Brush Trans. Co.*, P. U. R. 1928B 676 (Colo.); *Re Bridgeport*, P. U. R. 1922B 193 (Conn.); *Re Clark Truck Co.*, P. U. R. 1923A 325 (Ill.); *Re Fort Dodge, DeM. & S. Trans. Co.*, P. U. R. 1926C 19 (Iowa); *Re Weiner*, P. U. R. 1925B 357 (Me.); *Re Red Star Line*, P. U. R. 1927B 145 (Md.); *Re Alton Trans. Co.*, P. U. R. 1928D 585 (Mo.); *Re Broadhead*, P. U. R. 1924E 222 (Mont.); *Re Simms-Great Falls Freight Serv.*, P. U. R. 1926C 818 (Mont.); *Re Virginia & Truckee Ry.*, P. U. R. 1928C 203 (Nev.); *Re Bell*, P. U. R. 1923E 319 (N. H.); *Public Serv. Ry. v. Mayr*, P. U. R. 1926E 352 (N. J.); *Re Merchants Community Bus Transit*, P. U. R. 1927E 854 (N. Y.); *Stark Elec. Ry. v. Public Util. Comm.*, 118 Ohio St. 405, 161 N. E. 208 (1928); *Re Oklahoma Ry.*, P. U. R. 1929D 603 (Okla.); *Re Bingamon Co.*, P. U. R. 1924C 389 (Pa.); *Re Newport Elec. Corp.*, P. U. R. 1925E 309 (R. I.); *Re Stephens*, P. U. R. 1926B 208 (S. D.); *Re King*, P. U. R. 1927C 463 (Utah); *Re Booth*, P. U. R. 1924C 393 (Va.); *Re Jossy*, P. U. R. 1924B 420 (Wash.); *Re Wyoming Trans. Co.*, P. U. R. 1925E 861 (Wyo.); *cf. St. Johnsbury & L. C. R. R. v. Central Vt. Ry.*, P. U. R. 1926E 701 (Vt.).

is the decision affected by questions as to whether the highways concerned are crowded or deserted. Occasionally other factors are taken into consideration,<sup>87</sup> but highway conditions are almost never discussed. Even when discussed they are usually declared to be irrelevant.<sup>88</sup>

Considered individually, therefore, the provisions both for the regulation of rates and practices and for the requirement of certification are regulations of the business, and, in application to contract carriers, invalid, since the business of those carriers is not

<sup>87</sup> In a few cases, certificates have been granted because the applicant offered lower rates than existing carriers. *Re Hatchell*, P. U. R. 1923D 543 (Ariz.); *Re Cheyenne Mt. Co.*, P. U. R. 1929A 126 (Colo.); *Re Raymond*, P. U. R. 1928B 658 (Minn.). *Contra: Re Joaquin*, P. U. R. 1923B 47 (Cal.); *Re Greeley Trans. Co.*, P. U. R. 1929C 106 (Colo.); *Fornarotto v. Public Util. Comm.*, 105 N. J. L. 28, 143 Atl. 45 (1928); *Re Cannonball Exp. Co.*, P. U. R. 1929A 131 (Wis.).

In the following typical cases, railroads were allowed to substitute motor vehicles for trains. *Re Central of Ga. R. R.*, P. U. R. 1930C 309 (Ala.); *Re Southern Pac. Motor Transport Co.*, P. U. R. 1929A 193 (Cal.); *Re Western Slope Motorway*, P. U. R. 1928A 32 (Colo.); *Re Connecticut Co.*, P. U. R. 1927C 135 (Conn.); *Re Virginia & Truckee R. R.*, P. U. R. 1928C 203 (Nev.); *Re Central R. R.*, P. U. R. 1928B 686 (N. J.); *Re New York State Rys.*, P. U. R. 1930D 121 (N. Y.); *Re United R. R.*, P. U. R. 1926D 422 (R. I.); *cf. Re Towns*, P. U. R. 1925B 379 (Va.).

<sup>88</sup> The statutes of Minnesota, Mississippi, North Carolina, North Dakota, Tennessee, Texas, and Utah include among the factors to be considered by the commission in granting certificates the effect of certification on highway conditions and costs on the route applied for. In spite of these provisions, very few cases have been found where any reference whatever to highway conditions was made. In the following instances, extreme highway conditions, such as impassibility for several months in the year, were given as one of several reasons for denial of a certificate. *Re New York, N. H. & H. R. R.*, P. U. R. 1928A 106 (Conn.); *Re Kipp's Exp. Van Co.*, P. U. R. 1923E 249 (Ill.); *Re Yoder*, P. U. R. 1927A 163 (Ind.); *Re Boston & Maine Trans. Co.*, P. U. R. 1928D 242 (N. H.); *Re Sturn*, P. U. R. 1927D 332 (Utah); *Re Stedman*, P. U. R. 1925D 812 (Wash.); *cf. Re Schwartz & Smith*, P. U. R. 1924E 359 (Wash.). In an equal number of cases, however, highway conditions were expressly declared irrelevant and not proper matters for consideration with respect to certification. *Re Phoenix Motor Coach*, P. U. R. 1925E 340 (Ariz.); *Re Southern Pac. Motor Transport Co.*, P. U. R. 1929A 193 (Cal.); *Re Cheyenne Mt. Co.*, P. U. R. 1929B 506 (Colo.); *Re New York, N. H. & H. R. R.*, P. U. R. 1926D 157 (Mass.); *Re Aldrich*, P. U. R. 1923A 385 (N. Y.); *cf. Re Tri-City Motor Trans. Co.*, P. U. R. 1930B 417 (N. D.); *Re Knilians*, P. U. R. 1927A, 792 (Wis.). Nor is any attention given in the decisions to that standard cry of proponents of regulatory legislation, the wearing out of the highways by carriers who do not pay for their use. For an authoritative answer to this contention, see MacDonald, *Commercial Vehicles on Free Highways* (1925) 1 J. LAND & PUB. UTIL. ECON. 385; WALKER, *HIGHWAY TAX COSTS* (National Automobile Chamber of Commerce, 1931).

affected with a public interest. In practice, however, they are not to be regarded individually, but as complementary and essential components of a unified regulatory system. A statute providing for certification intended to result in a limitation of competition, tending toward monopoly, plainly must embrace rate regulation as a protection to the public. If it be assumed, *arguendo*, that a constitutional method of exclusion of some of those seeking to engage in the business of contract carriage could be devised, it is a necessary corollary that regulation of rates and practices must accompany it. Otherwise the exclusion of free competition, if effective, would be mischievous. One consequence is that in the case of a statute embracing both rate regulation and certification, the failure on constitutional grounds of the provisions regarding rates and practices must, as a matter of necessary interpretation, carry down with it the certification provisions.

## VI

To sum up, then, regulation in the sense of control of contracts, rates, and practices, and of the right to engage in the business, can not be imposed upon the contract motor carrier without violating the due process clause.<sup>89</sup>

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<sup>89</sup> Although the problem of regulation of the contract carrier in intrastate commerce by state legislation is an existing one which will undoubtedly soon claim the attention of the Supreme Court, it is only a step ahead of the analogous issue of regulation by the Federal Government of the contract carrier in interstate commerce. The demands of the railroads in the present investigation under I. C. C. Docket 23,400, if satisfied, must ultimately lead, by a similar progression to that of the state statutes, through regulation of the common carrier to that of the private one. The considerations herein discussed, however, warrant the conclusion that such regulation, if undertaken on the model of existing state statutes, embodying rate fixing and certification, would be open to the same constitutional objection. The power over interstate commerce is not complete and free from the other constitutional limitations on governmental action, in spite of broad language in such cases as *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, 227 *et seq.* (1899). That the exercise of the commerce power is limited by the Fifth Amendment is recognized in such cases as *Tagg Bros. & Moorehead 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. To the same effect are *Monongahela Nav. Co. v. United States*, 148 U. S. 312 (1893); *Adair v. United States*, 208 U. S. 161 (1908); see *Wilson v. New*, 243 U. S. 332, 347, 366 (1917). Federal legislators as well as state legislators

This may well be a desirable result, even from the point of view of those who now demand such regulation. That the competition of the motor vehicle, whether common carrier, contract carrier, or privately owned, has created a serious problem for the owners of older agencies of transportation is beyond question. Whether, in the end, it will prove as serious as recent cries of alarm would suggest, is less certain. The existence of the problem results from the fact that the motor vehicle has served a public demand which has been increased by the efficiency of its response. An attempt to limit by legislative interference the effect upon other transportation agencies of the powerful economic forces thus set in motion is, at best, doubtful economics. If, for constitutional reasons, this illusory expedient must be abandoned with respect to the contract carrier, it is reasonable to hope that the intelligence of the business world will, by using the facilities at hand, work out a complete mechanism in which the railroad, the steamship, the pipe line, the airplane, and the motor vehicle will each be assigned the part in which it can contribute most to the cheap and efficient transportation upon which the public welfare depends.<sup>90</sup>

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must, therefore, devise a different regulatory system in order constitutionally to reach the contract carrier.

<sup>90</sup> For a relevant suggestion as to the desirability of use of the motor truck by the railroads in their own service, see testimony of Interstate Commerce Commissioner Eastman before the Senate Committee on Interstate Commerce, Dec. 18, 1930. Hearing on H. R. 10288, at 27.

## APPENDIX

Citations are to statutes at present in force. Earlier acts now superseded, though often of interest, are omitted for purposes of brevity. Ambiguity in the statute and occasional adjudications of the invalidity of the statute have made it necessary in some instances to resort to case material in order to determine whether the act includes private carriers within its scope. Where the motor carrier regulation is in a single continuous act, the initial citation only is given.

*Alabama.* CODE (Michie, 1928) § 6270(1). Regular route carriers of persons or property. Though the regulated unit includes common carriers only, it is provided that any regular route vehicle operated in competition with a certificated vehicle may be subjected to the same regulation. This provision clearly includes contract carriers. *Cf. Smith v. State*, 218 Ala. 669, 120 So. 471 (1928).

*Arizona.* CODE (Struckmeyer, 1928) §§ 736-41. Carriers of persons or property over regular or irregular routes. Like the Alabama act, it purports to cover common carriers only, but there is a provision regulating competitors of certificate holders over regular routes, broad enough to include contract carriers. But under an earlier act, it was held that regulation could constitutionally be imposed on common carriers only. *State v. Smith*, 31 Ariz. 297, 252 Pac. 1011 (1927). But *cf. Haddad v. State*, 23 Ariz. 105, 201 Pac. 847 (1921).

*Arkansas.* DIG. STAT. (Crawford & Moses, Supp. 1927) § 7440a, amended by Acts 1929, no. 62. Carriers of persons or property over regular or irregular routes. Before the amendment, the act was held applicable to common carriers only. *State v. Haynes*, 175 Ark. 645, 300 S. W. 380 (1927). The amendment seems intended to cover contract carriers, but this was held not to be the case in *Jones v. Ferguson*, 181 Ark. 522, 27 S. W.(2d) 96 (1930).

*California.* CODES AND GEN. LAWS (Deering, Supp. 1925-27) act 6386, § 24. Regular route carriers of persons. Common carriers only. *Id.* (Supp. 1929) act 5129. Regular route carriers of property. Common carriers only. *Frost v. Railroad Comm.*, 271 U. S. 583 (1926).

*Colorado.* LAWS 1927, c. 134. Carriers of persons or property over regular or irregular routes. Common carriers only.

*Connecticut.* GEN. STAT. (1930) c. 203. Regular route carriers of persons. Common carriers only.

*District of Columbia.* CODE (1930) tit. 26, § 11. Carriers of persons or property over regular or irregular routes. Common carriers only. The jurisdiction over property carriers has not been exercised. *Re Rules and Regulations for Motor Bus Transportation*, P. U. R. 1930C 158 (1929).

*Florida.* Acts 1929, c. 13700. Regular route carriers of persons or property. Covers contract carriers, to an extent as yet judicially undetermined, but including certification. *Cahoon v. Smith*, 128 So. 632 (Fla. 1930).

*Georgia.* LAWS 1929, c. 293. Carriers of persons or property over regular or irregular routes. Covers contract carriers. *Georgia Pub. Serv. Comm. v. Saye & Davis Transfer Co.*, 170 Ga. 873, 154 S. E. 439 (1930).

*Idaho.* LAWS 1929, c. 237. Regular route carriers of persons or property. Though ambiguous, the language appears broad enough to cover contract carriers. But see, under a previous act, *Smallwood v. Jeter*, 42 Idaho 169, 244 Pac. 149 (1926); *Sanger v. Lukens*, 26 F.(2d) 855 (C. C. A. 9th, 1928).

*Illinois.* STAT. ANN. (Callaghan, 1924) c. 111a, §§ 24, 71, 72. Carriers of persons or property over regular or irregular routes. Common carriers only.

*Indiana.* ANN. STAT. (Burns, 1926) § 10164. Carriers of persons or property, over regular or irregular routes. Contract carriers are specifically exempted from regulation, but a subsequent provision declares to be common carriers all motor vehicles transporting persons or property for a railroad, thus seeming to cover contract carriers to a limited extent.

*Iowa.* CODE (1927) § 5105-a1. Regular route carriers of persons or property. Common carriers only. Laws 1929, c. 129. Irregular route carriers of property. Common carriers only and permit issues as of right.

*Kansas.* Laws 1925, c. 206, amended by Laws 1929, c. 222. Regular route carriers of persons or property. An unconstrued provision excepts from regulation vehicles "operated exclusively by an agent or employee while transporting the property of his principal or employer." This suggests regulation of certain types of contract carriers.

*Kentucky.* STAT. (Carroll, 1930) § 2739j-1. Carriers of persons over regular or irregular routes. Language broad enough to cover contract carriers.

*Louisiana.* Acts 1926, no. 292. Carriers of persons or property over regular or irregular routes. Common carriers only.

*Maine.* REV. STAT. (1930) c. 66. Regular route carriers of persons. Language broad enough to cover contract carriers.

*Maryland.* ANN. CODE (Bagby, Supp. 1929) art. 56, § 251. Carriers of persons over regular or irregular routes. The language is somewhat ambiguous but seems to cover common carriers only. *Id.* § 258. Carriers of property over regular or irregular routes. A similar ambiguity appears, but the statute has been construed as applying to contract carriers of at least one type. *Rutledge Coöperative Ass'n v. Baughman*, 153 Md. 297, 138 Atl. 29 (1927).

*Massachusetts.* Acts 1925, c. 280, amended by *id.* 1926, cc. 163, 392; *id.* 1927, c. 276. Regular route carriers of persons. Common carriers only.

*Michigan.* Acts 1923, no. 209. Regular route carriers of persons or property. The language of the act covers contract carriers, but was declared unconstitutional to that extent in *Michigan Pub. Util. Comm. v. Duke*, 266 U. S. 570 (1925).

*Minnesota.* STAT. (Mason, 1927) § 5015-1. Regular route carriers of persons or property. Common carriers only.

*Mississippi.* CODE ANN. (1930) § 7115. Carriers of persons or property, apparently over either regular or irregular routes. Common carriers only.

*Missouri.* Laws 1927, c. 402. Regular route carriers of persons. Language broad enough to cover contract carriers. House Bill No. 7, now pending, extends full regulation to carriers of persons or property over regular or irregular routes, and covers contract carriers.

*Montana.* REV. CODE (Choate, Supp. 1927) § 3858-1. Regular route carriers of persons or property. Though identical in language to the California act in question in *Frost v. Railroad Comm.*, 271 U. S. 583 (1926), the Montana court, for constitutional reasons, has interpreted the statute as applicable to common carriers only. *Stoner v. Underseth*, 85 Mont. 11, 277 Pac. 437 (1929).

*Nebraska.* Laws 1927, c. 150. Regular route carriers of persons and baggage. The language covers contract carriers, but the power of rate regulation is not conferred, and the commission has construed the statute as giving it no power to deny a certificate. *Re S. Y. A. Bus Line*, P. U. R. 1928E 98 (1928). A bill is to be proposed in the present legislative session, however, regulating property carriers, conferring full powers on the commission, and apparently including some contract carriage operations.

*Nevada.* Laws 1925, c. 161. Carriers of persons over regular or irregular routes. Common carriers only.

*New Hampshire.* PUB. LAWS (1926) c. 258. Regular route carriers of persons. Common carriers only.

*New Jersey.* COMP. STAT. (Supp. 1924) § \*167-14 *et seq.* Also *id.* § \*136-400, amended by Laws 1926, c. 144. Regular route carriers of persons. The language applies to common carriers only, but see *Doskovitch v. Public Util. Comm.*, 103 N. J. L. 570, 138 Atl. 110 (1927).

*New Mexico.* STAT. ANN. (Courtright, 1929) § 11-1001. Regular route carriers of persons or property. Common carriers only.

*New York.* CONS. LAWS (Cahill, 1930) c. 64, §§ 1, 2, 60-69d. See also *id.* c. 49, § 2a. The language is jumbled, but appears to regulate carriers of persons or property over regular or irregular routes. Common carriers only.

*North Carolina.* Laws 1927, c. 136, amended by Laws 1929, cc. 193, 216. Carriers of persons or property over regular or irregular routes. There are contradictory provisions, but the excepted class of operators "making casual trips on call" is so narrow that it seems proper to conclude that contract carriers are regulated, particularly in view of Laws 1929, c. 193, which deletes the words "under contract or" from that exception.

*North Dakota.* COMP. LAWS ANN. (Supp. 1925) § 2976v, amended and re-enacted by Laws 1927, c. 90. Carriers of persons or property over regular or irregular routes. Contract carriers are regulated, the only exception to the operation of the statute being "an occasional accommodative transportation service by a person not in the transportation business."

*Ohio.* Laws 1929, c. 482. Carriers of persons or property over regular or irregular routes. The phrase "for the public in general" is retained from a previous act, GEN. CODE (Page, 1926) § 614-2, but in view of the insertion of the phrase "whether by private contract or otherwise" and of the complete deletion of the distinction between common and contract carriers, the act seems clearly intended to regulate the latter.

*Oklahoma.* COMP. STAT. ANN. (Supp. Thornton, 1926), § 10221-28, amended by Laws 1929, c. 253. Carriers of persons or property over regular or irregular routes. A peculiar classification of types of carriers is set up, but contract carriers of many types are clearly subject to full regulation. See *Barbour v. Walker*, 126 Okla. 227, 259 Pac. 552 (1927), decided prior to the 1929 amendment.

*Oregon.* LAWS ANN. (Supp. Clark, 1927) § 1317, amended by Laws 1929, c. 394, LAWS ANN. (Supp. Clark, 1929) § 2370. Carriers of persons or property over regular or irregular routes. The amendment excepts from regulation "contract haulers" and "commercial haulers," which together seem to cover contract carriers, presumably as a result of *Purple Truck Garage Co. v. Campbell*, 119 Ore. 484, 250 Pac. 213 (1927).

*Pennsylvania.* STAT. (West, 1920) §§ 18057, 18088, 18149 *et seq.* Carriers of persons or property over regular or irregular routes. Common carriers only.

*Rhode Island.* GEN. LAWS (1923) c. 254. Regular route carriers of persons. Common carriers only.

*South Carolina.* Acts 1925, no. 170. Carriers of persons or property over regular or irregular routes. Covers contract carriers.

*South Dakota.* COMP. LAWS (1929) § 9744-A. Carriers of persons or property over regular or irregular routes. A complex classification is made of types of carriers and of certificates, but the result seems to regulate the contract carrier.

*Tennessee.* Pub. Acts 1929 (Reg. Sess.), c. 58. Carriers of persons or property over regular or irregular routes. Exceptions to the regulations of the act cover the contract carrier of persons, but leave contract carriers of property subject to the statute. Senate Bill No. 225, now pending, extends

All regulation to carriers of persons or property over regular or irregular routes, and covers contract carriers.

*Texas.* Laws 1927 (Gen. Sess.), c. 270, amended by Laws 1929 (1st Sess.), c. 78. Carriers of persons over regular or irregular routes. Language broad enough to cover contract carriers. Laws 1929 (Gen. Sess.), c. 314. Carriers of property over regular or irregular routes. The language covers all carriers, with a peculiar classification, and all are declared to be common carriers. Yet in the class in which the majority of contract carriers must fall, neither rate regulation nor the requirement of a certificate is imposed.

*Utah.* COMP. LAWS (1917) §§ 4782, 4818; Laws 1927, c. 42, amended by Laws 1929, c. 94. Carriers of persons or property over regular or irregular routes. The last amendment, specifying that the 1927 act shall not apply to common carriers holding certificates (presumably under the act first cited) apparently confines the application of the 1927 act to contract carriers alone. This seems inconsistent, however, with State *ex rel.* Pub. Util. Comm. v. Nelson, 65 Utah 457, 238 Pac. 237 (1925).

*Vermont.* Laws 1923, no. 91; *id.* 1925, nos. 74, 86. Regular route carriers of persons or property. Common carriers only.

*Virginia.* CODE ANN. (Michie, 1930) § 4097m. Carriers of persons or property over regular or irregular routes. Extremely confusing draftsmanship obscures the intent of the legislature, but the object appears to be either regulation of contract carriage or its prohibition.

*Washington.* COMP. STAT. (Remington, 1922) § 6387, amended by Laws 1927, 179, COMP. STAT. (Remington, Supp. 1927) § 6390. Regular route carriers of persons or property. The amendment, though a trifle ambiguous in terms when read into the original act, is held to limit the operation of that act to common carriers. *Big Bend Auto Freight v. Ogers*, 148 Wash. 521, 269 Pac. 802 (1928).

*West Virginia.* CODE (1931) p. 402. Carriers of persons or property over regular or irregular routes. Covers contract carriers.

*Wisconsin.* STAT. (1927) § 194.01. Carriers of persons or property over regular routes. Common carriers only.

*Wyoming.* Laws 1927, c. 98, amended by Laws 1929, c. 123. Carriers of persons or property, with a contradiction in terms as to whether carriage over irregular routes is included. Certificates must be granted as of right, as a result of the decision in *Weaver v. Public Serv. Comm.*, 40 Wyo. 463, 278 Pac. 542 (1929), that the 1927 act could not constitutionally be applied to contract carriers.