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INTRODUCTION

It is a matter of economic necessity, too obvious for elaborate discussion, that the transportation of freight and passengers between points in the same state and between points in different states must be accomplished to a very large extent by physical agencies and instrumentalities used in common for interstate and intrastate transportation, such as tracks, public highways, motive power, vehicles, stations and terminals. These agencies of transportation and their owners, in the pursuit of their public calling, must be subject to the exercise of governmental powers arising from some source, either state or federal. Some jurisdiction must determine the extent, if any, to which they shall be subject to taxation, their rates, fares, service and business practices shall be regulated, and the public safety, health and welfare shall be protected from impairment by their activities.

In the distribution of the exercise of power between the states and the nation there are three possible solutions from a purely academic standpoint :

1. Exclusive exercise of power over interstate carriers by the states.
2. Exclusive exercise of such power by the nation.
3. A division of its exercise between the states and the nation.

From the practical, as distinguished from the academic, standpoint, the first of these solutions must be summarily rejected. Not only is it contrary to the specific grant of power to regulate commerce conferred upon the federal gov-

ernment by the Constitution, but it is also in direct opposition to the universal recognition of the need of national solutions of national problems.

The second suggested solution, exclusive exercise of federal power, must also be rejected from the practical standpoint as impossible of present realization. While recent decisions of the United States Supreme Court support a very comprehensive exercise of federal power over interstate carriers, they nevertheless recognize that there are constitutional limits to congressional action. Furthermore, we are now experiencing a reaction from extreme centralization of power in the federal government, and the sentiment for state regulation of local affairs is so strong that it is entirely improbable that Congress would attempt to exercise exclusive jurisdiction even if it could constitutionally do so.

Thus, by a process of exclusion, it appears that for some time to come there must be a division of sovereignty in the various measures affecting interstate carriers. Owing to the inextricable interblending of local and national interests in the affairs of such carriers, it is utterly impossible to draw a clean-cut line between the proper fields of state and federal control. Attempts can be made to frame abstract formulæ for such purposes, but an abstract formula is at best a feeble attempt to give expression to ideas which cannot be defined with accuracy by the use of any language. Such formulæ are not only subject to the rule of reason and common sense, which frequently dictates that exceptions must be made to their terms, but they also give rise to disagreement as to their interpretation. It is, therefore, inevitable that, conceding the necessity for division of sovereignty, conflict must arise in determining the line of division.

The Supreme Court of the United States in interpreting the Constitution has divided the field of exercise of the powers of government into three zones:

1. The zone in which federal power is exclusive.
2. The zone in which federal and state powers are concurrent.¹
3. The zone in which state power is exclusive.

The determination of the boundaries of these zones is a judicial problem for the solution of which we must look to the Supreme Court of the United States as the ultimate arbiter of all such questions arising under the Constitution of the United States. In deciding whether a proposed exercise of power over interstate carriers should proceed from the federal government or the states, it must first be determined in which of these three zones the power will be exercised. If it relates to a subject which falls within either the first or third zone, there is no room for the exercise of legislative discretion in the division of sovereignty; if in the first zone, the federal government only can exercise power, and if in the third zone, the power must be exercised, if at all, by the states. When, however, the proposed exercise of power relates to a subject within the zone of concurrent jurisdiction, the division of sovereignty becomes a matter of legislative discretion. This discretion rests with Congress, because the Constitution established the supremacy of congressional action within the scope of congressional power. Within the limits of the second zone, Congress by its action may restrict the exercise of the sovereignty of the states. The courts, of course, will in particular cases determine the extent to which congressional action has so limited state power in this second zone, but such determination

¹ "Concurrent" is used throughout to denote the co-existence of paramount federal and subordinate state power, the sense in which it is customarily used in discussing the power to regulate commerce. The word "concurrent" did not appear in the United States Constitution until the adoption of the Eighteenth Amendment where it has been interpreted to indicate coordinate state and federal powers. See *United States v. Lanza* (1922), 260 U. S. 377.

merely seeks to interpret the will of Congress, which may be changed or differently defined by subsequent acts of Congress. The division of sovereignty within the zone of concurrent jurisdiction is, therefore, a legislative problem in which the role of the courts is confined to the interpretation of legislation.

Thus the conflict of state and federal sovereignty involves both judicial and legislative problems. The Supreme Court of the United States must determine the extent of the powers granted to the federal government and left with the states by the United States Constitution. In the zone in which state and federal powers, as so determined, overlap, Congress must decide as a matter of legislative policy the extent to which it will assert its constitutional supremacy over state action. It is significant that the final determination of the dividing line between state and federal action rests in all cases with some branch of the federal government; when this dividing line is drawn by constitutional interpretation, the ultimate authority is the Supreme Court of the United States; when it is drawn by the exercise of federal power, the ultimate authority is the Congress of the United States.

As the result of United States Supreme Court decisions and congressional legislation the sphere of federal regulation of interstate carriers has been gradually broadened and the authority of the states has been correspondingly narrowed. There is a widespread belief, particularly among state officials charged with the duty of regulating railroads, that this process has gone too far and, if unchecked, will result in a dangerous centralization of powers in the hands of federal authorities. This discussion will survey the various judicial decisions and acts of Congress whereby the line of separation between state and federal action has been drawn and, in conclusion, will outline the present situation, and the pending proposals for changes.

The judicial aspects of the problem will be considered first. The federal government being one of enumerated powers, it is necessary to know the extent of those powers and the extent to which their existence excludes the exercise of similar powers by the states. For this purpose attention must be given to the grant of federal powers made by the adoption of the United States Constitution, the circumstances surrounding that grant, and its interpretation by the Supreme Court of the United States. From these sources an attempt will be made to show the recognized limits of state and federal power over interstate carriers. As already indicated, it will be seen that the fields embraced within these limits overlap.

This leads to the consideration of the exercise of federal power within the field of concurrent state and federal jurisdiction. The various acts of Congress exercising federal authority will be examined with a view to showing the curtailment of state authority resulting therefrom. Various Supreme Court decisions interpreting the will of Congress as expressed in such acts will be reviewed at this point, as such decisions help to answer the legislative question "What has Congress done?" rather than the judicial question "What can Congress do?"

The survey of court decisions and congressional action will give the basis for an outline of the present status of the separation of state and federal powers with respect to interstate carriers in the light of the criticism now being offered. On the one hand, it is strongly urged that the interests of the nation demand the widest scope of federal authority; on the other hand, state authorities are making vigorous efforts to regain a greater measure of state autonomy. The arguments for and against pending proposals for change will be presented and considered. The writer's purpose is rather to promote a clear understanding of the issues involved, than

to advocate either side of the controversy. He will, however, make no attempt to conceal his belief that the problem of the regulation of carriers engaged in interstate transportation is national, not local, requiring in its more important aspects a uniform system of regulation controlled by a single authority, the federal government.

Repeated mention has already been made of the limits of state and federal powers imposed by the United States Constitution. The scope of this discussion is meant to include only limitations upon state and federal power arising from the division of powers between the states and the federal government. Both state and federal powers are also limited by safeguards to life, liberty and property imposed by amendments to the Constitution. Neither the states nor the federal government in the exercise of their powers may deprive any person of life, liberty or property without due process of law. The states may not abridge the privileges or immunities of citizens of the United States nor deny to any person within their respective jurisdictions the equal protection of the laws. In their practical application these provisions have resulted in a distinct curtailment of both state and federal authority in the regulation of interstate carriers, particularly in the regulation of rates and service. They do not, however, concern the division of state and federal authority and, therefore, are not relevant to the problems here presented.