



1911

THE CRY FOR LAW REFORM

ROBERT C. SMITH

Follow this and additional works at: <http://digitalcommons.law.yale.edu/ylj>

Recommended Citation

ROBERT C. SMITH, *THE CRY FOR LAW REFORM*, 20 *Yale L.J.* (1911).
Available at: <http://digitalcommons.law.yale.edu/ylj/vol20/iss4/3>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in *Yale Law Journal* by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

THE CRY FOR LAW REFORM

By Robert C. Smith.

Are we too much dominated by phrases? I am satisfied that both in argument and in judgment a very considerable amount of bad law goes unchallenged because it is couched in very presentable English. The influence of phrases in political campaigns is, of course, well known. Lord Beaconsfield carried an election by the words "peace with honor." Wonderful deeds of valor did the Highland clans perform when inspired by the "slogan" or rallying battle-cry! What two words could make a more captivating union than "law" and "reform," uniting the saving principle of civilization with the spirit of modern progress? Who could be opposed to it? Of course, we are all in favor of law reform. It must mean something very desirable. We shall not dream of saying of it as some of the old Tory peers did of the English Reform bill, that "it comes neither recommended by the weight of ancient authority, nor by the spirit of modern refinement." I hope I may not be classed as an opponent of law reform if I venture to ask for anything so matter of fact as a definition of its purview or purpose. Is it intended to reform the whole body of substantive law? Neither language nor law was a general preconcerted scheme to provide for future social needs. They both followed, not preceded, the social evolution. I have not heard it suggested that there shall now be undertaken a general revision of all branches of the law. Advanced socialism would probably be alone in advocating this. Individual ownership, rights of contract, the order of succession, freedom of willing and other fundamental portions of the law probably represent what the immense majority of our people believe to be right in principle. Law cannot be crystalized into any form that will forever meet all the requirements of progressive society. As necessities arise, they must be intelligently dealt with, and they will be much more effectually dealt with, as they are felt to exist, than theoretically as part of a general system of reformation.

As co-operation in the way of incorporation became so striking a feature of commercial and industrial activity, the great body of law specially applicable to joint stock companies gradually grew up with the development which made it necessary. When some

more convenient and efficacious way of doing things is discovered, it is first proved and then adopted; and so the Torrens and other systems of registration became law, superseding earlier and cruder systems. The desirability of uniformity, particularly in commercial law, is obvious, and the Commissioners on Uniform State Laws, by profound research and patient work, have accomplished and are accomplishing splendid results. So may we look for general advancement. But how many of those who join in the cry for "Law Reform" have any definite idea of what they are advocating? A living and active community will, of necessity, always need new laws and amendment of old ones, and it can scarcely be said that on this continent we are deficient in the necessary amount of variety of legislative authority for the purpose.

When the demand for law reform assumes a concrete shape at all, it is generally with regard to procedure, i.e., the machinery and methods of giving effect to the law, and the reforms principally called for relate to expedition and economy. Professor Goldwin Smith is credited with saying, "You might as well expect the tigers to clear the jungle of their hiding places, as expect law reform from the lawyers." This, no doubt, merits an angry growl, but the professor would probably not hear it. Unless it is proposed to discard all that the experience of ages has taught, and to begin experimenting over again, reform in procedure must necessarily come from the lawyers. We would not expect the land surveyors to define good practice in applied electricity, nor invite the clergy to revise the rules of the stock exchange. We are all agreed that it is most desirable that a cause should be decided as soon as possible after it is instituted. Tardy justice is, in many cases, no justice at all. But before suggesting reforms let us determine definitely the reason why there are such arrears in many courts. The ordinary delays in pleading and procedure are not a serious matter, but the business of the courts is frequently far in arrears. My belief is that one reason, if not the main reason, is of the simplest possible kind. The public expect the judges to do more than they reasonably can do. It is quite reasonable to lay down any rule as to the number of cases which ought to be heard and decided within any given time, nor can anyone but the judge himself determine how long he should deliberate upon any given case. If a judge be worthy to administer justice at all, may he not be trusted to devote his own time conscientiously to the public service, and to press forward the business of the court in which he presides, as rapidly as is consistent with safety? There

should be no cheese-paring in connection with the administration of justice. The courts should have enough divisions and enough judges to efficiently discharge the business coming before them, and until this, at least, is assured, there can be no satisfactory reform. It may be said that the judges are not complaining of overwork. But their position is naturally a delicate one, just as it is with regard to their salaries. Why does not some reformer investigate the subject of judicial salaries? He would find that they are fixed upon a hopelessly inadequate scale. In Canada, a few years ago, there was a general increase, but it was altogether insufficient. Judicial salaries were, in many cases, fixed long ago, when the cost of living was much less and the various governments in a much poorer condition to pay salaries. It is a very striking anomaly that those who are performing the highest and most important duties in the state, should, as a rule, be so miserably remunerated. That, of course, has no relation to the other question, whether enough judges have been supplied efficiently to discharge the business of the courts.

Another prolific cause of delays is the number of appellate courts, and the facility with which appeals are taken. The whole question of appeals is beset with difficulties. The appellate system naturally reposes on the postulate that the judgment of the court of final resort is always right. To the Supreme Court of the United States, and to the House of Lords in England, we must attribute infallibility. The whole fabric is founded on that idea. And the same is true of other courts whose jurisdiction is final. The right of appeal is a very important one and not lightly or hastily to be surrendered. The court of first instance is more careful because it exists. I am not familiar enough with the procedure in many of the states, as to appeals, to write on the subject generally, but I believe it worth inquiry whether some of the intermediate appeals might not with advantage be dispensed with, and the delay in the hearing, from whatever cause it arises, be materially shortened, even if Appellate Divisions have here and there to be duplicated to overtake the work. Reform in the matter of delay is a necessity, and will never be obtained without the earnest co-operation of Bench and Bar. It is, however, quite evident that it can be obtained.

Upon the other reform, viz., the making of resort to the courts less expensive, I do not feel so sure that it can be accomplished; at least, in the manner and to the extent that would place the rich

and poor on level terms in litigation. The duties and fees payable to Government ought to be reduced to a minimum. The administration of justice is not to be run as a commercial enterprise, with a view to making receipts and disbursements at least equal. But even when this has been done, we are not much advanced toward our reform. The Government's share of bills of costs is not a very large one. Counsel fees are by far the larger portion of every bill of costs. We are often told in our profession that we must not remove the ancient land-mark, that we must resist the innovations of commercialism; and that we must maintain and cherish the high ideals which originally established the honor of the Bar. Very true, and I range myself on the side of the conservative forces. I like to feel that counsel are officers of the court; that it is their duty to see that no injustice prevails, etc., etc. Nothing can ever be effectively done, however, without realizing and taking account of actually existing conditions. The brutal facts are that the profession of the law is carried on, among other things, for profit; that those who attain skill and distinction in it expect to be paid higher fees than those who do not; that it is a great advantage for a litigant to be represented by able counsel, and that the poor litigant is at a manifest disadvantage in this respect. In some of the older countries I understand that the legal profession is recruited from those who neither expect nor desire to make money in it. It is looked upon more as a vocation of honor than emolument. An experience I had a short time ago rather supports this. I required to obtain an opinion in Germany upon a matter involving over \$100,000. I received the opinion from a Doctor of Laws, of high standing, and a memorandum of charges composed of two items: "Conference with your agent" and "My opinion upon the question," the total charges being twenty-four marks, or in United States currency, \$6.00. I do not know why this simple little bill should have caused such an awakening of conscience, or why I should suddenly have felt such a weight of accumulated guilt. I could only obtain relief by thinking of all my very dear learned friends of New York. Even if true, as the Scripture saith: "Though hand join in hand, the wicked shall not go unpunished," I gathered a vast amount of illogical and unscriptural comfort from the reflection that my fees had been a not very dark grey—something between the angelic whiteness of German leniency and the "blackness and darkness and thick smoke" of the American metropolis.

There is unquestionably an advantage in being able to retain leading counsel. How this can be obviated, it is difficult to see. It would not be practicable to have a State advocate in every court to oversee trials and equalize the benefit of counsel, so to speak. The advantage which the affluent enjoy as regards counsel, though, is much more than offset by the slight *penchant* of the Bench and the all-devouring prejudices of the jury, against corporations, and the representatives of money influence generally.

Quite apart from the popular cry for law reform, which is neither prompted by definite knowledge nor controlled by appreciation of the difficulties in the way, there is the earnest desire in the profession itself that anomalies should be removed, and that the administration of justice should at least keep pace with the enlightenment and progress of the times. I believe the weight of opinion in the profession is that any systematic revision of the substantive law with a view to its reformation is undesirable and practically impossible, but that there is a wide field for reform in procedure, in the direction of simplicity and despatch and to some extent, economy. That procedure should be simplified requires no argument. The fullest powers of summary amendment should be vested in the courts, provided that no suitor should thereby be taken by surprise. That it should be possible for any cause to be disposed of upon technical grounds, without its merits having been determined, is a serious reflection upon our whole legal system. Delays must be shortened and costs reduced as far as possible. Let the subject, however, be approached with some sense of responsibility. One may not set any limit to discovery and invention in the natural sciences, but it is quite safe to predict that justice can never be administered by any penny-in-the-slot device. Neither in the wisdom of the ancients nor in all the ingenious novelties of to-day, do we find any substitute suggested for the exercise of judgment by skilled and disciplined intellects in order to define rights according to fixed rules of law.

Robert C. Smith.

THE PSEUDO-DOCTRINE OF THE EXCLUSIVE-
NESS OF THE POWER OF CONGRESS
TO REGULATE COMMERCE

By Frederick H. Cooke, of the New York Bar.

If there be any virtue in frequent reiteration of statement, there would seem to be, in the whole realm of our constitutional law, no more firmly established doctrine than that of the exclusiveness of the power of Congress to regulate commerce within the scope of the commerce clause of the Federal constitution. It was long ago declared by Mr. Justice Story to have been "settled, upon the most solemn deliberation, that the power is exclusive in the government of the United States."¹ A few of the more recent instances of its recognition by the Supreme Court will here suffice. "It has been too frequently decided by this court to require the restatement of the decisions, that the exclusive power to regulate interstate commerce is vested by the constitution in Congress."² "Any exercise of State authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause."³ "It has been frequently decided in this court that the right to regulate interstate commerce is, by virtue of the Federal constitution, exclusively vested in the Congress of the United States. . . . The exclusive power in Congress to regulate such commerce (has been) uniformly maintained."⁴

We are not here specially concerned with the important qualification of the doctrine, based on the alleged distinction between "matters national" and "matters of local interest,"⁵ it being seem-

¹ *Commentaries on the Constitution*, § 1067. But this statement was made on the supposed authority of *Gibbons v. Ogden*, 9 Wheat., 1, 209 (1824), where, however, the point, though incidentally touched upon, was not in reality involved.

² *New Mexico ex rel. McLean v. Denver & Rio Grande R. R. Co.*, 203 U. S., 38 (1906).

³ *Atlantic Coast Line v. Whaton*, 207 U. S., 328 (1907); *Adams Express Co. v. Kentucky*, 214 U. S., 218 (1909).

⁴ *Southern Ry. Co. v. King*, 217 U. S., 524 (1910).

⁵ This is the distinction first prominently asserted in *Cooley v. Port Wardens*, 12 How., 299, 319 (Dec. T., 1851).

ingly established that, as to the latter class of cases, the power of Congress is not exclusive, but concurrent with that of the States. We venture, however, to suggest, without elaborating the point, that the very existence of this qualification tends to cast suspicion upon the general doctrine, especially as "the court has never, in fact, formulated any general principles by which to determine what subjects are in a local and what in a national class."⁶

It may also serve to cast suspicion upon the doctrine, that it is confined in its scope to the exclusion of State legislation merely, the application of common law rules (whether in the Federal or in the State courts) not being precluded.⁷ This distinction seems very artificial and arbitrary, in some, at least, of its applications, as in case of rules regulating the liability of carriers. Take, for instance, a statute merely declaratory of the common law. Regarding the rule declared as merely statutory, it would seem inapplicable to commerce within the scope of the commerce clause; regarding it as a common law rule, it would be applicable.⁸ Yet in both instances the practical effect seems precisely the same.

But we are not here specially concerned with the question of the validity of the doctrine of the exclusiveness of the power of Congress, though, in passing, we submit that, from the standpoint of sound constitutional construction, the contrary view, that Congress and the States have general concurrent power in this respect, is the true one.⁹ What we do propose to show is that, even judged by the decisions of the Supreme Court itself, this supposed doctrine has, apart from anomalous cases that will be considered, nothing more than a nominal existence; that it is an empty form of words, a pseudo-doctrine, a myth, an illusion, an unreality, a superstition, if you please. We also propose to show that this is not a merely academic theoretical conclusion, but that mischievous consequences of great practical importance have resulted from the countenance given this pseudo-doctrine.

⁶ See article on *The Exclusiveness of the Power of Congress, &c.*, by J. S. Rogers, in 53 *Am. Law Reg.*, O. S., 529, 546 (1905).

⁷ The existence of this distinction seems to have been established in *Western Union Tel. Co. v. Call Publishing Co.*, 181 N. S., 92 (1901).

⁸ That it would be given the same effect, may be suggested by *Telegraph Co. v. Mellon*, 100 Tenn., 429 (1898).

⁹ See what seems to us to be the unanswerable reasoning of Taney, C. J., in the *License Cases*, 5 How., 504, 579 (Jan. T., 1847). There are other early decisions in which the point was much discussed. See arguments of counsel, and opinions, especially that of Woodbury, J., in the *Passenger Cases*, 7 How., 283 (Jan. T., 1849).

It is the commerce clause of the Federal constitution that confers upon Congress power to regulate commerce "with foreign nations, and among the several States." It is essential to clearness of thought on the subject, that we have a definite idea of just what is *commerce*, as the word is here used. For reasons that we shall not pause to elaborate, we submit that it essentially consists in *transportation*, that is, of persons or property, between points in different States, or to or from a point in a foreign country. Although the point is obscured in the confusing and unsatisfactory definition of commerce that has been sanctioned by the Supreme Court,¹⁰ it seems to have been apprehended by that court in at least one instance, it being said that "transportation . . . is commerce itself."¹¹

In determining the power of Congress and of the States respectively as to interstate and foreign commerce or transportation, we submit that it is very helpful to distinguish between what we venture to term *the subject of transportation*, that is, what is transported, be it a person or property, and what we term *the agency of transportation*, in particular, the *carrier*, usually a *common carrier*. The agency of transportation may be regarded as including, not merely the person engaged in transportation, but

¹⁰ "Commerce with foreign countries and among the States, strictly considered, consists in *intercourse and traffic*, including in these terms navigation and the transportation of persons and property, as well as the purchase, sale, and exchange of commodities." *County of Mobile v. Kimball*, 102 U. S., 691, 702 (Oct., 1880). This was approvingly quoted in *McCall v. California*, 136 U. S., 104 (1890); *Williams v. Fears*, 179 U. S., 270 (1900); *Champion v. Ames*, 188 U. S., 321, 351 (1903). See also statement in *Adair v. U. S.*, 208 U. S., 161, 176 (1908) which seems to indicate an increasing confusion of conception. But it is easily demonstrable that, in the opinion of the Supreme Court, at least, commerce but partially and imperfectly comprehends *intercourse*. It suffices to refer to decisions relating to insurance and other contracts. See *Paul v. Virginia*, 8 Wall., 168 (Dec., 1868); *Ware v. Mobile County*, 209 U. S., 405 (1908). And it scarcely seems to need pointing out that commerce does not comprehend mere *traffic* as such at all, or "the purchase, sale, and exchange of commodities," these being of themselves merely internal transactions, to which the power of Congress does not extend. See *Employers' Liability Cases*, 207 U. S., 463, 493 (1908). For instance, in *N. Y. ex rel. Hatch v. Reardon*, 204 U. S., 152 (1907), the commerce clause was held not to apply to a mere sale of stock. All then that really remains of the definition is that commerce consists in "the transportation of persons and property" (the words "and transit" being omitted as superfluous).

¹¹ *Railroad Co. v. Husen*, 95 U. S., 465, 470 (Oct., 1877).

the instrumentalities employed by him; thus, in case of transportation by railroad, cars, engines, track, stations, &c.

As this distinction seems to us so helpful, we shall endeavor to make it more clear by illustration. Suppose the entire interstate commerce of the country (excluding, for the sake of convenience, foreign commerce) to consist in transportation between Boston and Albany; that is, of clothing from Boston to Albany, and food from Albany to Boston. Now, it is obvious at the outset that there is no necessary connection whatever between mere interstate transportation of clothing or of food, and their transportation by a carrier, that is, a common carrier. The manufacturer of the clothing, or the manufacturer or producer of the food, might conceivably transport it from Boston to Albany, or *vice versa*, either on his own back, or the backs of animals owned and controlled by him, or by barrow, or by wagon. Indeed, such conditions of transportation have been and, in certain communities, continue to be widely prevalent. Even among us, local pedlers furnish illustrations.

The absence of any necessary connection between mere transportation, and transportation by a carrier, may, perhaps, be even more clearly understood, when it is realized that transportation, at any rate, change of location, of tangible objects, may happen without the interposition of any human agency, as if animals *ferae naturae* should pass from State to State, or if lumber should float down a navigable stream into another State.

Suppose, now, the State of Massachusetts, or of New York, or Congress, or other governmental authority, to interfere with transportation, under these conditions, of clothing or food between Boston and Albany, to what rule of law may the person transporting resort for protection? Does it make any essential difference that the transportation in question is between Massachusetts and New York, instead of being wholly within one or the other of these States? May he not appeal to a principle that antedates by centuries the commerce clause—indeed, the existence of our nation and its constitution? That he may, seems reasonably clear.

In *Hoxie v. N. Y., N. H. & H. R. Co.*,¹² it was said by Baldwin, C. J., in a well considered opinion: "The right to engage in commerce between the States is not a right created by or under the Constitution of the United States. It existed long before that

¹² 82 Conn., 352, 364 (1909).

Constitution was adopted. It was expressly guaranteed to the free inhabitants of each State, by the Articles of Confederation, and impliedly guaranteed by article 4, Sect. 2, Const. U. S., as a privilege inherent in American citizenship."

The point was not entirely overlooked in *Gibbons v. Ogden*,¹³ for it was here said by Marshall, C. J., "In pursuing this inquiry at the bar, it has been said, that the Constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The Constitution found it an existing right, and gave to Congress the power to regulate it." Indeed, seven centuries ago, the following provision appeared in Magna Charta: "All merchants shall have safe and secure conduct, to go out of, and to come into England, and to stay there, and to pass as well by land as by water, for buying and selling by the ancient and allowed customs, without any evil tolls."

Let us now consider what was the situation presented, and the action taken by the court, in *Gibbons v. Ogden*, that starting point of so much mischief and confusion. The case was not essentially different from the simple case already supposed, of transportation of clothing from Boston to Albany, or of food from Albany to Boston. That is to say, the transportation was of steamboats between a point in New Jersey and the City of New York and the relief sought and allowed was against legislation of the State of New York, that, if valid, would have had the effect to deprive of the right to so transport. Notwithstanding that the point involved was obscured by verbose discussion of irrelevant topics, it was, as we have just seen, not entirely overlooked, though given insufficient consideration.

Similarly, in *Robbins v. Shelby Taxing District*,¹⁴ what was sought to be transported was stationery, that is, from a point in Ohio to a point in Tennessee. The relief sought and obtained was against the action of the State of Tennessee in prohibiting such transportation, not, indeed, absolutely, but by way of requiring payment of a license tax as a condition of entering into a contract that involved such transportation.

¹³ 9 Wheat., 1, 211 (1824). The point was, we submit, given insufficient consideration, and has been strangely ignored in later decisions. It was referred to, though in dissenting opinions, in *Dooley v. U. S.*, 183 U. S., 151, 170 (1901); *Lottery Case*, 188 U. S., 321, 371 (1903).

¹⁴ 120 U. S., 489 (1887).

It suffices to refer to these two decisions as typical of a large number in which the Supreme Court has allowed relief against interference by a State with the liberty of transportation from State to State. It may then, we submit, be laid down as a general proposition, that one has the absolute right, as against any prohibitive or other restrictive legislation by the States, or, for that matter, by Congress, to engage in interstate commerce; that is, to transport persons or articles (including, to a certain extent, the right to transport or transmit the intangible, as in case of telegraphic messages) from State to State. Furthermore, the commerce clause has nothing to do with the matter; that is to say, such right exists independently of the commerce clause.^{14a} It scarcely needs adding that this view is radically at variance with repeated declarations of the Supreme Court.

We have said that, *as a general proposition*, one has the absolute right, as against any restrictive legislation by the States, to engage in interstate commerce. To avoid possible misapprehension, it may be well to briefly note the principal qualifications of this proposition; that is, note the conditions under which a State may interfere with such transportation.

To begin with, it may exercise its taxing power; thereby taxing property employed in such transportation. "This immunity does not prevent a State from imposing ordinary property taxes upon property having a situs within its territory and employed in interstate commerce."¹⁵ On the other hand, a State may not tax property beyond its jurisdiction, thus, if in course of transportation into or out of the State. Between these two classes of cases, there is a border territory in which much confusion prevails, involved in the application of the established, though, we submit, unsound doctrine, that a State may not tax the privilege of engaging in such transportation. "No State can compel a party, individual or corporation to pay for the privilege of engaging in interstate commerce."¹⁶

Furthermore, it is established that a State may so interfere by way of exercise of the powers reserved generally by the Tenth Amendment; or, as it is sometimes expressed, by way of exercise of its police powers. Perhaps quarantine laws furnish the best illustration of interference under this head. But with what, we

^{14a} If the ancient rule here discussed be insufficient as a basis of such right, then we submit that such basis is the Fourteenth Amendment.

¹⁵ *Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S., 160 (1903).

¹⁶ *Atlantic, etc., Tel. Co. v. Philadelphia, supra*.

submit, is glaring inconsistency, the Supreme Court has denied application of this qualification to legislation affecting intoxicating liquors.

It should also be noted that this fundamental right to engage in interstate commerce, though inhering in individuals generally, does not inhere in corporations; that is to say, there is no right to engage therein *as a corporation*. The reason is obvious: there is no right to exist as a corporation. "A corporation not being, like a natural person, one of the elements of society, of which government is formed, can only be considered as a creature of the law."¹⁷ This distinction has, however, been persistently overlooked or ignored by the Supreme Court, with resulting confusion. We are not here specially concerned to consider the source of authority to engage in such commerce as a corporation. Congress and the States seem to have concurrent power in this respect, thus to create a corporation to engage in transportation by railroad. We merely note in passing that this seems singularly inconsistent with the alleged doctrine of the exclusiveness of the power of Congress.

Thus far we have been considering interference with the *subject* of transportation, interference with the *agency* of transportation not being involved, at least not necessarily. Thus in *Robbins v. Shelby Taxing District*, for instance, it was interference with the transportation of *stationery*, the subject of transportation, that was under consideration. So far as concerned the action of the court, it seems to have been a matter of absolute indifference what was the *agency of transportation*. It might well have been the seller himself, employing his own conveyance, or a carrier by steamboat, or a carrier by railroad. Indeed, there is nothing in the report of the case to positively indicate what was the agency of transportation contemplated.

But we come now to deal with an essentially distinct class of cases, involving interference by a State or other governmental authority with *the agency of transportation*.

To revert to our illustration, we have, for the sake of simplicity, supposed the manufacturer of the clothing and the manufacturer or producer of food to themselves transport their products, without the intervention of a carrier. But now suppose the entire interstate commerce or transportation of the country to consist in transportation of such clothing and food between the points mentioned,

¹⁷ *McKim v. Odom*, 3 Bland Ch. (Md.), 407, 418 (1829).

by means of trains of freight cars. This involves the intervention of a carrier, in practice, always what is known as a *common carrier*. We now suppose action by a State that no longer has any necessary reference to the *subject* of transportation; that is, does not operate by way of interference with interstate transportation of any particular article. Such action now has particular reference to the *agency* of transportation, and has a wide range. It may, for instance, require the freight cars to be of a certain size and weight, those in management of the train to have certain qualifications, the train to be equipped with certain appliances, the rails to be of a certain weight, the track to be of a certain width, and so on. Although carriage for another is not necessarily by a common carrier, we may, for present purposes, ignore the negligible class of cases in which it is not, and proceed on the assumption that interstate transportation is conducted solely by common carriers, notably by railroad and vessel.

Broadly stated, then, the question is as to the power of a State to regulate the conduct and liability of common carriers. That such power of regulation resides in some governmental authority is settled beyond doubt, in the Supreme Court at any rate, since the decision in *Munn v. Illinois*,¹⁸ where it was declared that "when private property is devoted to a public use, it is subject to public regulation." More recently it has been stated as an "elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their operation are subject, as to their State business, to State regulation."¹⁹

In determining the power of Congress and of the States, respectively, in this regard, we submit that it is of prime importance to consider for the benefit of what persons the power of regulation is to be exercised. There seem to be three, and only three, such classes; that is to say, the classification is exhaustive.

First, there is the distinction between *those enjoying the benefit of transportation*, that is, travelers or shippers, and those that are, for the time being, not such. We express this distinction as between *the public*, which, for present purposes, may be regarded as those residing or sojourning within the territory affected, and *those enjoying the benefit of transportation*.

¹⁸ 94 U. S., 113, 130 (Oct., 1876).

¹⁹ *Atlantic Coast Line v. N. C. Comm.*, 206 U. S., 1, 19 (1907).

Now, it has never been seriously questioned that it is within the powers reserved to the States to regulate the conduct and liability of a carrier for the benefit of what we have called "the public," particularly as to matters involving health or safety. In every State there is a considerable mass of legislation of this character, of unquestionable validity. Good illustrations are requirements as to checking the speed of trains,²⁰ and that a whistle be blown before reaching a crossing. The list might be indefinitely extended. It may be regarded as settled law that the commerce clause furnishes no objection to such legislation.

Turning, now, however, to those enjoying the benefit of transportation, that is, travelers and shippers generally, we distinguish between those enjoying the benefit of transportation wholly within a State, and those enjoying the benefit of transportation within the scope of the commerce clause, a distinction that will, of course, be readily apprehended, being illustrated by one person traveling or shipping between Albany and Buffalo, and another traveling or shipping between Albany and Boston.

As with regulation for the benefit of the public, so it seems beyond question that it is within the power of a State to regulate the conduct and liability of a carrier for the benefit of intrastate travelers and shippers, a good illustration being the power to regulate rates for transportation. It remains to consider whether it is likewise within such power to legislate directly for the benefit of interstate travelers and shippers. Although there are at least two comparatively early decisions²¹ that seem to rest substantially on the proposition that this is beyond the power of a State, the course of later decisions suggests that the Supreme Court now recognizes no definite limitation upon the power of a State to regulate the conduct and liability of a carrier, even though such regulation be for the benefit of interstate travelers and shippers.

Perhaps the most conspicuous instance of this is *Lake Shore & Michigan Southern Ry. Co. v. Ohio*,²² where was sustained a statute requiring trains to stop at certain points, as applicable to transportation between points outside the State (Chicago and Buffalo), this being clearly regarded as a provision for the benefit

²⁰ See, for instance, *Erb v. Morasch*, 177 U. S., 584 (1900); *Southern Ry. Co. v. King*, 217 U. S., 524 (1910).

²¹ *Hall v. DeCuir*, 95 U. S., 485 (1877); *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U. S., 557 (1886).

²² 173 U. S., 285 (1899).

of interstate passengers. To like effect seems *Chicago, Milwaukee & St. Paul Ry. Co. v. Solan*,²³ sustaining a statute relating to exemption from liability; *Richmond & Alleghany R. R. Co. v. R. A. Petterson Co.*,²⁴ sustaining a provision as to the obligation assumed by a carrier accepting for transportation beyond his own line; *Missouri, Kansas & Texas Ry. Co. v. McCann*,²⁵ sustaining the imposition of liability for negligence of a connecting carrier. These instances are merely illustrative; others might be cited.

Turning now to a consideration of the power of Congress in this regard, it is unnecessary to consider what power it has, if any, to regulate the conduct and liability of a carrier for the benefit of "the public," or of those enjoying the benefit of transportation wholly within a State. Suffice it to say that such power is not exclusive. Although Congress unquestionably has power to regulate such conduct and liability for the benefit of those enjoying the benefit of transportation within the scope of the commerce clause, we have just seen that the States likewise have such power without definite limitation.

Hence, the conclusion seems justified that the power of Congress to regulate the conduct and liability of carriers is not exclusive; in other words, the States have concurrent power to regulate such conduct and liability.

Having, we submit, demonstrated the non-existence of the alleged doctrine of the exclusiveness of the power of Congress to regulate commerce, it remains to point out some of the practical mischief that has resulted from the supposed existence of this doctrine. Without attempting anything like an exhaustive analysis of the decisions applicable, we content ourselves with referring to *Bowman v. Chicago & Northwestern Ry. Co.*,²⁶ and *Leisy & Hardin*,²⁷ under the head of State action having reference to the *subject* of transportation, and to *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*,²⁸ under the head of such action having reference to the *agency* of transportation.

Now, in *Bowman v. Chicago & Northwestern Ry. Co.*, and in *Leisy & Hardin*, it was held beyond the power of a State to inter-

²³ 169 U. S., 133 (1898).

²⁴ 169 U. S., 311 (1898).

²⁵ 174 U. S., 580 (1899).

²⁶ 125 U. S., 465 (1888).

²⁷ 135 U. S., 100 (1890).

²⁸ 118 U. S., 557 (1886).

ferre with the transportation of intoxicating liquors between points in different States; this on the distinct ground that such action was repugnant to the commerce clause. But suppose that it had been understood by the court that the commerce clause had nothing to do with the matter; that the principle, if any, that was violated, antedated and was independent of the commerce clause. Would it not have been easy for the court to see that liberty of transportation between whatever points, whether or not both are within the State, does not include liberty to transport what, in the judgment of the legislature of the State, endangers the public morals and the public safety?

Turning now to the other class of cases, that of State action having reference to the agency of transportation, in *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, it was held beyond the power of a State to regulate charges for interstate transportation; here, again, on the ground that such action was repugnant to the commerce clause. This decision was of momentous practical importance, in furnishing excuse for the enactment of that mischievous piece of legislation, the Interstate Commerce Act of 1887. It has already been pointed out that this decision, as well as *Hall v. De Cuir*, which was here applied, is inconsistent with the course of later decisions of the Supreme Court, according to which there is no definite limitation upon the power of a State to regulate the conduct and liability of a carrier, even though such regulation be for the benefit of interstate travelers and shippers. But suppose that the court, in deciding *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, had apprehended what seems now to be the established doctrine, the Interstate Commerce Act perhaps would not have been enacted, and the matter of regulation of charges for interstate transportation would have been left where, we submit, it properly belongs, that is, with the States.

The following may be stated, by way of summary and conclusion:

There is a distinction between *the subject of transportation*, that is, what is transported, and *the agency of transportation*, in particular, a common carrier.

Interference by a State with *the subject of transportation*, that is to say, with transportation from State to State, is forbidden, not by the commerce clause, but either by a rule of law that antedates and is independent of the commerce clause, or by the Fourteenth Amendment, or by both, by which one has the right, as against

any restriction imposed by a State, to transport from State to State. The power of interference by a State with *the agency of transportation*, thus, by way of regulation of the conduct and liability of a common carrier, is concurrent with that of Congress, even as to regulation for the benefit of interstate travelers or shippers.

It follows that the supposed doctrine of the exclusiveness of the power of Congress to regulate commerce, has (apart from anomalous cases) nothing more than a nominal existence.

New York City.

Frederick H. Cooke.