Michigan Law Review

Volume 33 | Issue 2

1934

FEDERAL REGULATION OF MOTOR CARRIERS

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FEDERAL REGULATION OF MOTOR CARRIERS

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The first installment of this article appeared in November. The author considered:

I Need of Federal Regulation.
II The Rayburn Bill.
III Codes under the NIRA.
IV Constitutional Limitations on the Federal Power to Regulate.
1. Limitations on Power of Federal Government to Impose Economic Regulations upon Motor Carriers.

2. *Limitations on Power of Federal Government to Impose Safety Regulations upon Interstate Motor Carriers*

REGULATIONS pertaining to public safety include such matters as requirements concerning drivers' licenses, safety equipment, clearance lights, maximum speed limits, and others of a similar nature. It has already been pointed out that the states in the absence of federal regulation can enforce safety regulations of this kind against interstate motor carriers. It has also been shown that federal regulation in this field is desired in order to relieve interstate motor carriers from diverse and conflicting state laws.[126] The only limitation upon the right of the federal government to impose such regulations upon interstate motor carriers is the general requirement that the regulations shall not be so unreasonable as to amount to a taking of property without due process of law. No difficult problems of constitutional power are presented. Congress has long had a free hand in regulating railroads with respect to safety equipment, safety of operation, and employees' hours of service, and its power to do so has never been seriously questioned.[127] That

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This study is part of a survey of the economic position and legal status of the motor carrier, undertaken under the direction of Professor E. Blythe Stason. The article appearing at this time supplements the earlier articles, "State Regulation of Interstate Motor Carriers," 31 MICH. L. REV. 920, 1097 (1933), and "State Taxation of Interstate Motor Carriers," 32 MICH. L. REV. 1, 171, 351 (1933). From time to time as the project is carried forward additional studies will be published.—*Ed.*

[126] See note 34, supra.

[127] In Baltimore & Ohio R. R. v. Interstate Commerce Commission, 221 U. S. 612 at 618, 31 Sup. Ct. 621 at 625 (1911), where the Court held that the Federal Hours of Service Act (34 Stat. 1415), was a valid exercise of the power to regulate

it possesses the power to prescribe uniform regulations of a similar kind for interstate motor carriers cannot be doubted.

The codes of fair competition for the various branches of the motor carrier industry make no provision at all for uniform safety regulations. But the Rayburn bill, although it contains no specific safety provisions, does authorize the federal regulatory commission to establish "reasonable requirements" with respect to "safety of operation and equipment." [128] This grant of power to the commission would appear to authorize it to establish uniform rules for interstate motor carriers respecting clearance lights and other safety equipment. The Rayburn bill also authorizes the commission to establish reasonable requirements with respect to "qualifications and maximum hours of service

interstate commerce, it said: "By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce and of those who are employed in transporting them."

[128] H. R. 6836, sec. 2 (a) (1) (2), 73rd Cong., 2nd Sess. The phrase "reasonable requirements" is qualified by the phrase, "not inconsistent with the police powers of the States." It is difficult to understand the meaning of this qualifying phrase. How can a regulation of interstate motor carriers that is enacted in the exercise by Congress of the power expressly delegated to it to regulate interstate commerce be inconsistent with the reserved police power of the states? If the attempted federal regulation is of such a kind that it does not properly come within the scope of the power to regulate interstate commerce, it is *per se* invalid as an encroachment upon the police power of the states. But certainly it is superfluous for Congress to tell a federal regulatory commission charged with the regulation of interstate motor carriers that it can prescribe no regulations that are not regulations of interstate commerce. This qualifying provision of the Rayburn bill is unnecessary and results in obscurity and confusion. It is not found in the corresponding sections of the Dill bill, S. 3171, sec. 304a (1) (2), 73rd Cong., 2nd Sess.

Earlier bills contained no provisions authorizing the federal regulatory commission to prescribe regulations governing safety of operation and equipment. H. R. 10202 and H. R. 10288, sec. 2 (a) (1) (2), bills introduced in the 2nd Sess. of the 71st Cong., were the first to contain such a provision. S. 2793, sec. 2 (a) (1) (2), 72nd Cong., 1st Sess., authorized the regulatory commission to prescribe reasonable requirements with respect to "safety of operation and equipment (including the weight, length, width, and height of motor vehicles used by such carriers)." The parenthetical inclusion of the power to prescribe size and weight limitations as part of the power to prescribe regulations concerning safety of operation and equipment was an interesting development. See note 132, infra. The bill is unique in this respect. Thereafter in H. R. 7239, sec. 2 (a) (1), 72nd Cong., 1st Sess.; H. R. 12229, sec. 2 (a) (1), 72nd Cong., 1st Sess., and H. R. 4104, sec. 2 (a) (1), 73rd Cong., 1st Sess., the federal regulatory commission was authorized to prescribe regulations governing "safety of operation and equipment" without any parenthetical provision interpreting this grant of authority to include the power to prescribe size and weight limitations. And in H. R. 12739, 72nd Cong., 1st Sess., and H. R. 3756, 73rd Cong., 1st Sess. (bills introduced by Rep. Rayburn) there was not even a provision authorizing the commission to prescribe rules governing "safety of operation and equipment."

of employees."[129] Under this grant of authority the commission would have power to set up standards of physical and mental fitness for drivers and require them to secure licenses; likewise to prescribe maximum hours of service so as to protect the public against the highway dangers that result from the operation of buses and trucks by overtired drivers.[130] These broad grants of administrative power would make possible the achievement of uniform safety regulations for interstate motor carriers. With the establishment of such regulations, state laws and regulations would be rendered inoperative so far as interstate carriers are concerned, and the inconveniences and hardships resulting from conflicting and diverse state regulations would be eliminated.

3. Limitations on Power of Federal Government to Impose Regulations Affecting Use and Conservation of Highways

Regulations of this kind, which will be hereinafter called *highway use regulations*, may be divided into two classes: (1) regulations designed to preserve the usefulness of the highways to the general public

[129] H. R. 6836, sec. 2 (a) (1) (2). The Dill bill, S. 3171, 73rd Cong., 2nd Sess., does not contain a similar provision in the corresponding section [sec. 304 (a) (1) (2)], but sec. 325 authorizes the commission "to investigate and report on the need for Federal regulation . . . of the qualifications and maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle. . . ."

Earlier bills, which, as pointed out in note 128, supra, contained no provisions authorizing the commission to prescribe regulations governing safety of operation and equipment, likewise made no provision with respect to qualifications and maximum hours of service of employees. A provision of this kind was first introduced in H. R. 10202 and H. R. 10288, sec. 2 (a) (1) (2), 71st Cong., 2nd Sess. A like provision was contained in H. R. 7239, sec. 2 (a) (1), 72nd Cong., 1st Sess.; H. R. 4104, sec. 2 (a) (1), 73rd Cong., 1st Sess., and H. R. 12229, sec. 2 (a) (1), 72nd Cong., 1st Sess. S. 2793, sec. 2 (a) (1, 2, 3), 72nd Cong., 1st Sess., contained a like provision, but the commission's power was expressly subjected to the limitation, sec. 2 (b) (1), that no operator of a motor vehicle employed by a motor carrier should be permitted to be on duty more than eight consecutive hours and should have at least eight consecutive hours off duty after having been on duty the maximum number of consecutive hours. H. R. 12739, sec. 2 (b), 72nd Cong., 1st Sess., and H. R. 3756, sec. 2 (b), 73rd Cong., 1st Sess., gave the commission no authority to prescribe regulations governing qualifications and maximum hours of service of employees, but did expressly provide that operators of motor vehicles used as common carriers should be subject to the eight-consecutive-hour rule which was evidently borrowed from S. 2793, supra.

[130] The significance and validity of maximum hour provisions under the codes as means of economic regulation of motor carriers have already been discussed. The maximum hour provisions contained in bills proposing federal regulation of interstate motor carriers have their inception in considerations relating to public safety. Needless to say, a drastic maximum hour limitation that might be deemed reasonably necessary in order to effectuate the economic policy underlying the National Industrial Recovery Act

for normal highway purposes, as distinguished from use by carriers for hire; (2) regulations designed to preserve the road-beds from destructive use.

It was earlier pointed out that, in the absence of federal regulation, states can impose on interstate motor carriers highway use regulations of the two types above enumerated. For example, they can deny an interstate motor carrier the privilege of using a highway already badly congested, and they may subject him to size and weight limitations. It was also pointed out that there has arisen a demand for uniform federal regulation concerning these matters, particularly with respect to size and weight limitations, and that this demand has arisen from the inconveniences and hardships suffered by interstate motor carriers who are now subjected to a diversity of regulations imposed by the different states.[131]

The codes for the two branches of the motor carrier industry do not deal with these matters. Nor would passage of the Rayburn bill remedy the situation. On the contrary, the bill specifically provides for the maintenance of the present control of the states over the matters mentioned:

> "The laws enacted in any State and regulations thereunder that relate to the maintenance, protection, safety, or use of the highways therein, which do not discriminate against motor vehicles used in interstate commerce, shall not be deemed to be a burden or an obstruction or impediment to interstate commerce, and the power to enact such laws and promulgate such regulations thereunder is hereby expressly recognized and confirmed to the respective States." [132]

would not necessarily be the same maximum hour limitation that might be deemed reasonably necessary in order to protect the public against the risks of accident and injury arising from the operation of buses and trucks by weary and tired drivers.

[131] See note 35, supra.

[132] H. R. 6836, sec. 19 (a), 73rd Cong., 2nd Sess. The Dill bill, S. 3171, 73rd Cong., 2nd Sess., contains no such provision; on the contrary it envisages the possibility of federal highway regulations, as is indicated by the following provision in sec. 325: "The Commission is hereby authorized to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles. . . ."

In the earliest bills there were no provisions of any kind relating to size and weight limitations; they neither conferred authority upon the federal commission to authorize uniform limitations for interstate motor carriers, nor subjected interstate motor carriers to state laws with respect to limitations of this kind. But beginning with the 2nd Session of the 70th Congress, bills were introduced which contained provisions subjecting interstate motor carriers to state laws in these matters. These provisions are of three types. The first type merely provides that interstate carriers are to be subject to the proper exercise by the state of its police powers. It is found in the following

But even if these matters are left, for the present, as they are, it is probable that the agitation for federal legislation to deal with them will continue and become even more intense. Such legislation will raise many interesting and difficult questions. At this point we propose to anticipate the most important of these questions and attempt to answer them. In particular we shall direct our attention to the two questions which are most likely to cause difficulty: (1) May the federal government in the exercise of its power over interstate commerce authorize an interstate motor carrier to use a highway which a state has denied him permission to use on the ground of highway congestion? (2) May it prescribe uniform size and weight limitations for interstate motor carriers that will supersede state limitations? [133]

bills: S. 5085, sec. 14, 70th Cong., 2nd Sess.; S. 1351, sec. 14, 71st Cong., 1st Sess.; H. R. 3822, sec. 14, 71st Cong., 1st Sess.; H. R. 7954, sec. 14, 71st Cong., 2nd Sess.; H. R. 7239, sec. 9 (a), 72nd Cong., 1st Sess.; H. R. 12229, sec. 15 (a), 72nd Cong., 1st Sess.; H. R. 4104, sec. 9 (a), 73rd Cong., 1st Sess. The second type, which is represented by the provision in the Rayburn bill as quoted in the text, is found in the following earlier bills: S. 2793, sec. 14 (a), 72nd Cong., 1st Sess.; H. R. 12739, sec. 16 (a), 72nd Cong., 1st Sess.; H. R. 3756, sec. 16 (a), 73rd Cong., 1st Sess. The third type is represented by a bill which was introduced in three different sessions by Rep. McClintic (H. R. 13555, 71st Cong., 3rd Sess.; H. R. 221, 72nd Cong., 1st Sess.; H. R. 4119, 73rd Cong., 1st Sess.) and which contained the following provision only: "That the legislature of each State shall have the right to regulate the size, speed, and license fee of all intrastate and interstate busses or trucks engaged in public business with its citizens."

A problem presented by the second type of provision, i.e., the type found in the Rayburn bill, as quoted in the text, results from the use of the word "safety." According to this provision state laws relating to the "safety of the highways" shall not be deemed a burden on interstate commerce, and the power to enact such laws is expressly confirmed to the several states. How can this be reconciled with sec. 2 (a) (1, 2) of the Rayburn bill which gives the federal commission power to establish reasonable requirements respecting "safety of operation and equipment"? See note 128, supra. "Safety of the highways" is dependent at least in part on "safety of operation and equipment," although it is also dependent in part upon such factors as size of the vehicles that use the highways. But the bill attempts first to give the federal commission power to establish regulations governing "safety of operation and equipment," and then it proceeds to confirm in the states the power to prescribe highway safety regulations. Confusion could be avoided by leaving the word "safety" out of sec. 19 (a), which without this word would still accomplish its purpose of subjecting interstate motor carriers to state size and weight limitations.

[133] The problems here raised have assumed an added importance and interest in light of the attention bestowed upon them in the Report of the Special Committee on Contract Carrier Regulation in Program and Committee Reports of the Section of Public Utility Law of the American Bar Association at its 1933 session, 80 at 91, 100-112. The Committee reached the conclusion (pp. 91, 100) that although Congress can lawfully impose upon interstate carriers "regulations for safety and order in the transportation of interstate commerce," it "may not interfere with the authority of the states to impose regulations for the physical protection and conservation of the highways themselves."

Of course, the general power of the federal government to issue certificates to interstate carriers allowing them to operate over all of the highways of the country is not questioned. It has already been discussed at length in the preceding installment of this article. However, the extent of the federal power in regard to the specific subject matter of the above-stated questions is not nearly so clear. The same broad considerations of due process as were met in discussing economic regulations and safety regulations are applicable, and the carriers themselves may object to the imposition of regulations so unreasonable in character as to deprive them of property in violation of the Fifth Amendment. But in addition to this limitation there are limitations arising from the fact that in this case the state also becomes an interested party since regulations of the kind now under consideration affect the *use* and *preservation* of the highways much more directly than do either of the other types. The states, and not the federal government, are the owners of the highways,[134] and as such owners they have an interest in regulations affecting the use and preservation of the highways quite different both in nature and in degree from their interest in the regulation of the business of privately owned carriers operating in interstate commerce within their borders. As owners the states may interpose objections to federal certification of interstate carriers provided such certification unconstitutionally invades state rights. It is desirable to examine this constitutional limitation in some detail.

Highways as State Property and State Instrumentalities

State ownership of the highways imposes a limitation upon federal powers for two reasons. In the first place, the highways are state instrumentalities and as such are subject to the protection thrown around them for the preservation of state sovereignty. The highways are built by the state for the purpose of advancing its social and economic policies. According to a doctrine implicit in the very nature of the federal Constitution the national government cannot nullify a function carried on legitimately by a state within the sphere of its reserved powers, by interfering with or placing a burden upon the state instrumentality in which this function finds expression.[135]

[134] "It is well established law that the highways of the state are public property. . . ." Justice Sutherland in Stephenson v. Binford, 287 U. S. 251 at 264, 53 Sup. Ct. 181 at 184 (1932).

[135] Collector v. Day, 78 U. S. (11 Wall.) 113, 20 L. ed. 122 (1871); Indian Motocycle Co. v. United States, 283 U. S. 570, 51 Sup. Ct. 601 (1931). The doctrine that the federal government cannot interfere with the normal functions of the

In the second place, state highways are state property, and, like privately owned property, enjoy protection under the Fifth Amendment. The federal government presumably cannot deprive a state of its property without due process of law,[186] nor can it take a state's property without making compensation therefor.[187] In regulating interstate motor carriers, therefore, Congress must observe the property rights the states enjoy in their highways.

Of course it does not follow, because state highways are state instrumentalities and because they are state property protected by the Fifth Amendment, that they are not subject to federal control under the commerce clause, or that Congress has no power to regulate interstate motor carriers who operate over state highways. When the Supreme Court held in the case of *Buck v. Kuykendall*[188] that a state could not require an interstate motor carrier to show that public convenience and necessity required its operation, the Court necessarily took the position that a state's proprietary interests in its highways did not justify certain kinds of regulation which it sought to impose on interstate motor carriers who used its highways.[189] Also implicit in that

states is but the converse of the doctrine elaborated by Chief Justice Marshall in McCulloch v. Maryland, 17 U. S. (4 Wheat.) 316, 4 L. ed. 579 (1819), that the states cannot interfere with the functions of the federal government.

[186] In New York v. United States, 257 U. S. 591 at 601, 42 Sup. Ct. 239 at 240 (1922), where it was held that the Interstate Commerce Commission under the National Transportation Act of 1920 could prescribe intrastate rates in excess of the rates fixed by the original charter granted to the railroad by the state, the Court assumed that the due process clause of the Fifth Amendment protected a state's property rights from unreasonable federal regulation, but it was unnecessary for the Court actually to decide this question. There are no holdings directly in point on this question, but the fact that the Supreme Court has clearly indicated that state property cannot be taken by the federal government unless compensation is made therefor, as pointed out in note 137, infra, warrants the conclusion that the Supreme Court will take the view that state property like private property is protected under the due process clause of the Fifth Amendment.

[187] In St. Louis v. Western Union Tel. Co., 148 U. S. 92 at 100-101, 13 Sup. Ct. 485 at 488 (1893), where the Supreme Court held that a municipality could exact a compensatory fee in the nature of a rental for the special use of the highways from a telegraph company licensed by Congress to construct and maintain telegraph lines over federal post-roads, Mr. Justice Brewer declared that the federal government could not authorize an appropriation of state property for purposes of interstate commerce unless compensation was made therefor. See the Report of the Special Committee on Contract Carrier Regulation in Program and Committee Reports of the Section of Public Utility Law of the American Bar Association at its 1933 session, 80 at 106-107.

[188] 267 U. S. 307, 45 Sup. Ct. 324 (1925).

[189] If it be assumed that the use of state highways by motor carriers for hire is an extraordinary or special use and that the legislature may deny to carriers for hire the privilege of making such use of state property, then the Buck case means that a state in granting the privilege of making a special use of its highways for interstate purposes

decision is the conclusion that even if state highways are state instrumentalities and state property, Congress in the exercise of its powers derived from the commerce clause can regulate at least for certain purposes the interstate motor carriers who use these highways. In other words, the mere fact that a state instrumentality is involved does not serve to exclude the paramount power of Congress to regulate interstate commerce.[140] Likewise the mere fact that state property is

cannot attach as a condition thereto the observance of economic regulations which the state cannot properly impose upon those engaged in interstate business. See the writer's article, "State Regulation of Interstate Motor Carriers," 31 MICH. L. REV. 920 at 923-925 (1932).

[140] It seems fair to say that where a situation arises presenting a conflict between the doctrine that a state instrumentality is immune from federal interference and the doctrine that Congress is supreme within the sphere of its power to regulate interstate commerce, the conflict must be resolved in favor of the power of Congress. In Board of Trustees of University of Illinois v. United States, 289 U. S. 48 at 57, 53 Sup. Ct. 509 at 510 (1933), where it was held that Congress in the exercise of its power to regulate foreign commerce could impose a protective tariff on scientific instruments imported into the country for use by a state educational institution, the Court answered the argument that the tariff imposed a burden on a state instrumentality by saying, "The principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce." This case shows that the doctrine of a state instrumentality's immunity from federal interference or regulation is only a relative one and is subordinate to the paramount power of Congress when it acts within the sphere of its delegated powers. It lends support to the proposition that the fact that highways are state instrumentalities does not nullify the power of Congress to regulate interstate motor carriers who use these highways. The question presented by the highway situation is in fact not a novel one. It must be remembered that railroad companies incorporated by the states are also state instrumentalities. The states have given the railroad companies corporate powers and special franchises and privileges because the railroads were intended to serve as quasi-public agencies for the advancement of the states' economic and social interests. Yet the fact that railroad lines were in truth state instrumentalities did not militate against the assertion of the national government's power to regulate interstate railroads in the Interstate Commerce Act of 1887. In exercising its power the Interstate Commerce Commission has asserted jurisdiction over railroads actually owned by the states. The Supreme Court of Georgia upheld the authority of the Commission in regulating the rates of Georgia's own railroad line. State v. Western & Atlantic Ry., 138 Ga. 835, 76 S. E. 577 (1912). Furthermore, the provisions of the Federal Employer's Liability Act have been held applicable to a terminal railroad operated by a municipality [Mathewes v. Port Utilities Commission (D. C. S. C. 1929) 32 F. (2d) 913], and the provisions of the Federal Safety Appliance Act have been held applicable to a terminal railroad operated by a state [McCallum v. United States, (C. C. A. 9th, 1924) 298 Fed. 373, certiorari denied, 266 U. S. 606, 45 Sup. Ct. 92 (1924)]. The same situation exists with respect to water transportation. The power of Congress to regulate navigation is not impaired by the fact that states own the beds of navigable streams or that states have facilitated navigation by building dams, locks, canals, and wharves. Analogous to the supremacy of the federal power to regulate commerce even where state instrumentalities are concerned is the supremacy of the federal admiralty power over artificial waterways constructed, owned, and maintained by states. Ex parte Boyer, 109 U. S. 629, 3 Sup. Ct. 434 (1884)

concerned does not prevent Congress in the exercise of its control over interstate commerce from enacting legislation affecting the use of that property. When the state relies upon the due process clause for the protection of its property it is placing itself substantially in the position of any private owner of property, and in that position it is subject to a reasonable exercise of federal powers.[141]

(Illinois and Michigan Canal); The Robert W. Parsons, 191 U. S. 17, 24 Sup. Ct. 8 (1903) (Erie Canal). See note in 37 AM. L. REV. 911 (1903).

The foregoing discussion seems to make clear that the federal power to regulate interstate commerce is not nullified or vitiated by the fact that the particular type of interstate commerce in question involves the use of state property or state instrumentalities.

[141] It is proper at this point to consider two arguments that are often made in support of the proposition that a state in regulating the use made of its own property is not subject to the limitations imposed by the commerce clause, where an interstate transaction is involved.

The first argument is that such a regulation is a regulation of property and not of interstate commerce. The Supreme Court in some early cases seemed to adopt this view. Thus in Geer v. Connecticut, 161 U. S. 519, 16 Sup. Ct. 600 (1896), it held that a state could discriminate against interstate commerce by forbidding the transportation to points outside of the state of game birds killed within the state. Likewise in Hudson County Water Co. v. McCarter, 209 U. S. 349, 28 Sup. Ct. 529 (1908), it held that a state could prohibit the transportation of water from a river within the state to any other state. In these two cases the emphasis was upon the argument that the state was regulating the use of its own property; consequently it could not be invalid as a regulation of interstate commerce. But this argument has been repudiated by later decisions which held that a state could not regulate the use of its own property or natural resources in such a manner as to discriminate against interstate commerce. Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229, 31 Sup. Ct. 564 (1911); Pennsylvania v. West Virginia, 262 U. S. 553, 43 Sup. Ct. 658 (1923); Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1, 49 Sup. Ct. 1 (1928). For a discussion of these cases, see GAVIT, THE COMMERCE CLAUSE, secs. 37-39, 153-158 (1932). The Kansas Natural Gas Co. case, cited supra, is directly in point on the matter of highway regulation, since it was held in the case that a state could not discriminate against interstate commerce in withholding the privilege of using its highways for special purposes. Furthermore, in Buck v. Kuykendall, 267 U. S. 307, 45 Sup. Ct. 324 (1925), the Court held that a state could not require an interstate motor carrier to secure a certificate of convenience and necessity even though the carrier operated over a highway that was state property. Clearly the Supreme Court has repudiated the argument that a state in regulating the use of its own property is not regulating interstate commerce where an interstate transaction is involved. From a realistic viewpoint the argument is an indefensible one. As pointed out by Professor Gavit, "Even in the use of its own property the state is in fact regulating the conduct and interests of persons who are in law entitled to the protection of both the Fourteenth Amendment and the Commerce Clause." THE COMMERCE CLAUSE, sec. 38 at p. 62 (1932). See also sec. 53.

A second argument is that a state in regulating the use made of its own property may properly impose any conditions it sees fit regardless of whether these conditions result in a discrimination against or unreasonable burden upon interstate commerce. But this argument is refuted by the Supreme Court decisions which have established the doctrine of unconstitutional conditions. According to this doctrine "a con-

We commence, then, with the proposition that state highways are not withdrawn as such from the operation of the commerce clause. However, state ownership is doubtless a fact to be considered in determining how far the federal government may go in regulating the use made of the highways by interstate motor carriers. The state instrumentality doctrine operates as a limitation on federal power by preventing Congress from asserting its power so as to interfere *unreasonably* with the state's policy and purpose in maintaining its state highway system.[142] Likewise, the due process clause operates as a limitation

stitutional power cannot be used by way of condition to attain an unconstitutional result." This doctrine received its first clear expression in Western Union Tel. Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190 (1910). The subsequent history and development of the doctrine is traced by Mr. Justice Sutherland in Frost & Frost Trucking Co. v. R. R. Comm., 271 U. S. 583, 46 Sup. Ct. 605 (1926). See also ELSBREE, INTERSTATE TRANSMISSION OF ELECTRIC POWER 23-56 (1931); Merrill, "Unconstitutional Conditions," 77 UNIV. PA. L. REV. 879 (1928); Howard, "Gas and Electricity in Interstate Commerce," 18 MINN. L. REV. 611 at 649-659 (1934). The doctrine of unconstitutional conditions has a direct application to the highway problem. Though a state is under no necessity to grant special highway privileges, it cannot capitalize upon its power to withhold such special privileges in order to effectuate a policy of discriminating against interstate commerce [Oklahoma v. Kansas Natural Gas Co., cited supra], or to impose a type of regulation which the state is ordinarily powerless to impose upon those engaged in interstate commerce [Western Union Tel. Co. v. Foster, 247 U. S. 105, 33 Sup. Ct. 438 (1918)], or to impose a type of regulation which violates the due process clause [Frost & Frost Trucking Co. v. R. R. Comm., 271 U. S. 583, 47 Sup. Ct. 605 (1926)]. Furthermore, if the privilege of using highways for purposes of gain is a special privilege which a state may withhold from carriers for hire, it cannot, in light of the decision in Buck v. Kuykendall, 267 U. S. 307, 45 Sup. Ct. 324 (1925), grant the privilege to an interstate carrier subject to a condition which imposes an unlawful burden upon interstate commerce. See note 139, supra.

[142] It is true that in Board of Trustees of University of Illinois v. United States, 289 U. S. 48, 53 Sup. Ct. 509 (1933), referred to in note 141, supra, the Court said that the principle of duality in our system of government does not touch the authority of Congress in the regulation of foreign commerce. From this statement it might be inferred that the Court would say that with respect to the power of Congress to regulate interstate motor carriers, the state instrumentality argument derived from the fact of state ownership of the highways was wholly irrelevant. But it is doubtful whether the Court would take such an extreme position. The Court has indicated that the power of Congress to regulate foreign commerce is not restricted by constitutional limitations to the same extent as is its power to regulate interstate commerce. See 2 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES, sec. 417 (1929). It is easily possible, then, for the Court to say that the state instrumentality doctrine does not touch the authority of Congress in the regulation of foreign commerce but it does impose a relative although not an absolute limitation on the power of Congress to regulate interstate commerce. Surely between the one extreme position that the state's ownership of its highways and its use of them as a state instrumentality completely nullifies the power of Congress to regulate interstate motor carriers that use state highways — a position wholly untenable — and the other extreme position that the state instrumentality doctrine is of no significance whatever as a limitation on the power of Congress to regulate

and prevents Congress from so regulating the use made of highways by interstate motor carriers as to impair *unreasonably* the state's property interests in the road-beds it has built and maintains.[143] Since the state instrumentality doctrine and the due process clause both serve to enjoin reasonableness upon the federal government in its regulation of the highway operations of interstate motor carriers, the situation may be summed up by saying that the fact of state ownership of highways requires that federal regulation be reasonable in the light of the state's proprietary interests in its highways and the social and economic purposes they were meant to serve.[144]

interstate motor carriers who use state highways — a position which may work an injustice to the states — is the middle-ground doctrine that Congress in regulating interstate motor carriers that use state highways must not *unreasonably* interfere with the state's control of its own highways. As a general proposition it seems desirable to state the instrumentalities doctrine in terms of reasonableness instead of couching it in the language of absolutism. The Supreme Court's application of the instrumentalities doctrine as though it were an absolute rule and not a rule of reasonableness has in some extreme cases yielded results that have been the object of much criticism. See Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 48 Sup. Ct. 451 (1927), and Indian Motocycle Co. v. United States, 283 U. S. 570, 51 Sup. Ct. 601 (1931), and the criticisms of the cases in 77 UNIV. PA. L. REV. 115 (1928); 42 HARV. L. REV. 128 (1928); 27 MICH. L. REV. 225 (1928); 23 ILL. L. REV. 707 (1929); 13 MINN. L. REV. 361 (1929); 15 VA. L. REV. 484 (1929); 10 N. C. L. REV. 106 (1931); 38 W. VA. L. Q. 59 (1931); 17 IOWA L. REV. 271 (1932). As pointed out by Mr. Justice Holmes in his dissenting opinion in the Panhandle Oil case, cited supra, it is not necessary to apply the instrumentality argument as an absolute rule in order to achieve the desired result of preserving intact our dual scheme of government.

[143] "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." Mr. Justice Roberts in Nebbia v. New York, 291 U. S. 502 at 525, 54 Sup. Ct. 505 at 510-511 (1934).

[144] The conclusion here reached is at variance with the conclusion reached in the Report of the Special Committee on Contract Carrier Regulation in Program and Committee Reports of the Section of Public Utility Law of the American Bar Association at its 1933 meeting, 80 at 91, 100-112. The Committee expressed the opinion (p. 100) that Congress "may not interfere with the authority of the states to impose regulations for the physical protection and conservation of the highways themselves." More explicitly, the Committee was of the opinion that Congress could not prescribe uniform weight and size limitations for interstate motor carriers more liberal than the limitations prescribed by the various states. According to the Committee's report, the matter of reasonableness does not enter into the picture. In other words, regardless of whether the limitations prescribed by the state are unreasonably drastic and of whether federal maximum limitations are unreasonably liberal, federal regulations authorizing the use in interstate commerce of state highways by vehicles with physical dimensions in excess of the maximum limitations permitted by the states is *per se* unconstitutional. The

Effect of Federal Aid

The foregoing discussion has proceeded on the assumption that the highways over which interstate motor carriers operate are the sole and exclusive property of the states. The significance of federal contributions — federal aid — to the building of state highways has been neg-

Committee's arguments in support of this contention are not convincing. Its first argument is that federal regulations prescribing weight and size limitations for interstate motor carriers would not be a regulation of interstate commerce but a regulation of the states with respect to the kind of road that they should supply. It is true that the enactment of federal regulations prescribing maximum size and weight limitations for interstate motor carriers would rest on the assumption that state highways over which the interstate carriers operated were so constructed and maintained as to be able to withstand use by vehicles measuring up to the maximum federal limitations. But that does not mean that such regulation would be any less a regulation of interstate commerce. In its statement that such regulation by Congress would not be a bona fide regulation of interstate commerce, the Committee hardly does justice to the situation that is creating a demand for uniform federal highway regulations. At the present time interstate motor carriers are suffering inconveniences and hardships due to the diversity of state regulations with respect to size and weight limitations. It was for the very purpose of insuring freedom of interstate commerce from onerous state exactions and regulations that the power was given to Congress to regulate interstate commerce. To say that federal regulations designed to carry out this purpose are not bona fide regulations of interstate commerce but instead are unlawful regulations of state property is to ignore the actualities of the vexing interstate problem and likewise to ignore the possibility that federal regulation may be a bona fide regulation of interstate commerce and at the same time also be a regulation of the use of state property. It was pointed out in note 141, supra, that the argument that a state in regulating the use of its own property in interstate transactions can disregard the commerce clause on the theory that it is regulating the use of its own property and that it is not regulating interstate commerce has been repudiated by the Supreme Court. Furthermore, in Morris v. Duby, 274 U. S. 135, 47 Sup. Ct. 548 (1927), and Sproles v. Binford, 286 U. S. 374, 52 Sup. Ct. 581 (1932), where weight limitations imposed by states were held valid as to interstate motor carriers, the Court said that, in the absence of federal legislation, the states could impose weight and size limitations which would not be held invalid as to interstate motor carriers unless they were discriminatory or unreasonable. Two assumptions were implicit in the Court's statement. In the first place, the Court assumed that if state weight limitations were discriminatory or unreasonable, they would be invalid as to interstate motor carriers; in other words, even though they were regulations governing the use of state property, they would still be invalid as regulations of interstate commerce. In the second place, the Court assumed that Congress could prescribe limitations of this kind for interstate motor carriers; evidently the Court thought this would be a valid regulation of interstate commerce even though it affected the use of state property. It is true, as the Committee points out at pp. 102-104, that the statements in these two cases are dicta, but as dicta they are not without significance.

The Committee's second argument is that enactment of federal weight and size limitations would be the exercise by Congress of authority over a purely local matter of which the state has exclusive jurisdiction. Again it is true that limitations of this kind bear a pertinent relation to questions of highway construction and maintenance, and it is true that the states have built and maintained the highways over which interstate carriers operate. But does this mean that the matter of limitations is purely a state prob-

lected. As was pointed out at the beginning of this article, federal aid highways carry a heavy share of motor vehicle traffic even though they constitute but a small fraction of the nation's total highway mileage.

Some have supposed that the federal government because of its financial contribution to the construction of these arteries of traffic has an absolute power to regulate the use made of these highways.[145] Even assuming this position to be correct, it is questionable whether its practical implications in respect to the power of Congress to relieve interstate motor carriers from onerous and diverse highway regulations are as important as they may first seem. Several factors must be considered. In the first place, not all interstate motor carriers operate over federal aid highways. For the purpose of this discussion we may assume that all interstate motor carrier traffic moves over primary or trunk highways. We may further assume that about 90 per cent of all interstate motor carrier traffic moving over primary or trunk highways is carried over highways in the federal aid system.[146] But this would

lem? Enough has already been said to show that a genuine interstate problem results from the conflict and diversity in the limitations prescribed by the several states.

A third argument in support of the Committee's conclusion is that the construction and maintenance of highways is a state function which cannot be controlled by Congress. But as pointed out in note 140, supra, the instrumentality argument does not prevent Congress from asserting its paramount power to regulate interstate commerce, even though this means regulating the use of state instrumentalities, whether they be railroads, canals, or highways.

The assumption that underlies all of the Committee's arguments is that if it is within the power of Congress to prescribe size and weight limitations for interstate motor carriers, then the state must either build highways adequate to support vehicles measuring up to the maximum federal limitations or else it must stand by and witness the destruction of its road-bed. It is submitted that this dilemma does not exist. It may be conceded that Congress in the exercise of its power to regulate interstate commerce can prescribe size and weight limitations for interstate motor carriers, but it cannot authorize such a use of state highways as will result in the destruction of the road-bed or unreasonably interfere with the public purpose intended to be served by these highways. This is the position taken by the writer.

[145] See the reference in RAILWAY AGE (Sept. 16, 1933), p. 393, to the appeal made by the Federated Motor Truck Association to the Secretary of Agriculture, asking him to urge the President of the United States to call upon the governors and the legislatures of Texas, Louisiana, Kentucky, and Tennessee to repeal as far as federal aid roads are concerned their statutes limiting the loads of vehicles on their highways.

[146] The expenditure of federal funds for highway purposes is limited to the improvement of a designated 7 per cent of each state's rural highway mileage. 42 Stat. 213; U. S. C. tit. 23, sec. 6 (1921). State highway systems which include the federal aid mileage aggregate about 10 per cent of the total rural highway mileage. (In 1930 local roads coming within the jurisdiction of counties and townships totaled 2,684,570 miles, whereas for 1932 state highways coming under the jurisdiction of state highway departments aggregated 328,942 miles, a figure which we may assume was about the same for the year 1930. See figures furnished by United States Bureau

not justify control over the remaining 10 per cent, and interstate motor carriers hauling passengers and goods in interstate commerce over state trunk highways would not be subject to any special jurisdiction vested in the federal government because of its contribution to federal aid highways.

In the second place, many interstate motor carriers that operate over federal aid trunk highways operate in part also over state highways that serve either to feed the federal aid trunk highways or to complement them in some other way.

In the third place, federal aid highways are rural highways only. The federal aid system does not include "any highway or street in a municipality having a population of two thousand five hundred or more as shown by the last available census, except that portion of any such highway or street along which within a distance of one mile the houses average more than two hundred feet apart." [147] A motor carrier operating between two cities may operate over a federal aid trunk highway connecting the two cities, but when he is within the city limits of either of the terminal cities, he is no longer operating over a federal aid highway.[148] It is possible of course that an interstate motor carrier

of Public Roads.) Federal aid mileage therefore constitutes about seven-tenths of the state highway mileage. Federal aid highways are divided into two classes: three-sevenths of the mileage consists of interstate or primary highways, four-sevenths consists of inter-county or secondary highways. 42 Stat. 213; U. S. C. tit. 23, sec. 6 (1921). Since the total federal aid mileage equals about seven-tenths of the total state highway mileage, therefore federal aid primary and secondary highways constitute about three-tenths and four-tenths, respectively, of the state highway systems. The remaining three-tenths of the state highway mileage not included in the federal aid system presumably consists of primary highways. If our original assumption is correct that all interstate motor carriers move over primary highways, then this traffic moves over the three-tenths in the state highway system that comprises the federal aid interstate system and over the other three-tenths in the state highway systems that is not included in the federal aid system. But it is probably true that the proportion of interstate traffic moving over the three-tenths of federal aid primary highways is much greater than the proportion of interstate traffic moving over the three-tenths of primary highways in the state highway systems exclusive of the federal aid system. It has been stated by Thomas H. MacDonald, Chief of the United States Bureau of Public Roads, that the "principal interstate traffic movements are carried over the highways of the federal-aid system." Hearings on S. 2793, p. 208, 72nd Cong., 1st Sess. We may estimate, therefore, that the federal aid highways carry about 90 per cent of all the interstate motor carrier traffic.

[147] 42 Stat. 212 (1921); U. S. C. tit. 23, sec. 2 (1921).

[148] In State v. Oligney, 162 Minn. 302 at 308, 202 N. W. 893 at 896 (1925), where the court held that a Minnesota registration tax was valid as to an interstate motor carrier operating between points in Wisconsin and Minnesota, it said in answer to the argument that the tax was invalid since the carrier operated over a federal aid highway:

"But even though it should be conceded that defendant need not comply with the act in order to use Federal-aid highways, he must comply with it before he

in service between terminal cities in two states may operate over a federal aid highway that traverses a third state in a single unbroken stretch without any intervening municipalities. This would be a perfect example of an interstate motor carrier operating solely on a federal aid highway in a single state. But cases of this kind are probably comparatively rare. In the great majority of cases the interstate motor carrier does not operate continuously over federal aid highways.

Accordingly, even if the federal government has an absolute power to determine what use shall be made of federal aid highways, the exercise of this power would not in itself be sufficient to free interstate motor carriers as a whole from state highway regulations — unless, indeed, the courts should decide that the federal aid system comprehends not only the specific highways into which federal funds have gone, but also all other streets and highways essential to the reasonable use of the federal aid system.

But the foregoing difficulties really need not concern us seriously for the reason that the federal aid legislation cannot properly be deemed to give the federal government plenary power over federal aid roads. Early proposals for federal aid to the states for highway purposes were linked with proposals for uniform regulations governing the use to be made of these highways.[149] These early bills contemplated a co-operative effort on the part of the federal and state governments in the construction of good roads and in the formulation of uniform regulations respecting their use, so that motor vehicle operators would not be inconvenienced by conflicting state laws with respect to such matters as lights and size and weight limitations.

However, the first Federal Aid Road Act,[150] passed in 1916, made

may lawfully use the streets of St. Paul and Minneapolis, which do not receive Federal aid, and the information alleges that he uses the streets on his trips in this state."

[149] S. 2846, 62nd Cong., 1st Sess. (1911) was entitled, "A bill for experimental improvement of rural delivery roads by the Secretary of Agriculture in cooperation with the Postmaster General, for investigating the subject of Federal registration and license of automobiles used in interstate travel, and to bring about as near as possible such cooperation among the various States as will insure uniform and equitable interstate highway regulations." 47 Cong. Rec. 2469-2470.

H. R. 13709, 62nd Cong., 1st Sess. (1911), was entitled, "A bill to establish a Federal highways commission, whose duties it shall be to urge the cooperation and joint action of the several States with the Federal Government in the construction, improvement, and maintenance of permanent and durable highways throughout the United States; prescribe such rules of agreement in connection with their use as will insure uniform and equitable highway regulations; and issue Federal licenses governing interstate automobile travel or commerce." 47 Cong. Rec. 4045.

[150] 39 Stat. 355.

no provision for uniform regulations governing the use of federal aid highways. But the Federal Highway Act [151] of 1921, which amended the 1916 legislation, contained some significant provisions that implied a reservation of control over federal aid highways by Congress and the possibility of uniform highway regulations. The act provided that only such durable types of surface and kinds of material should be adopted for the construction and reconstruction of federal aid highways as would adequately meet the existing and probable future traffic needs and conditions thereon; [152] that the Secretary of Agriculture should approve the types and width for highway construction and reconstruction, and the character of improvements, repairs and maintenance for each case, consideration being given to the type and character which would be best suited for each locality, and to the probable character and extent of the future traffic; [153] that all highways should have a right of way of ample width and a wearing surface of an adequate width of not less than eighteen feet unless that was rendered impractical by certain considerations.[154] The act further provided: "The Secretary of Agriculture shall prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this chapter, including such recommendations to the Congress and the State highway departments as he may deem necessary for preserving and protecting the highways and insuring the safety of traffic thereon." [155]

The foregoing provisions warrant the following conclusions:

1. That federal aid highways should measure up to certain national standards of construction determined on the basis of potential highway use.

2. That federal aid highways should be open to that kind of motor vehicle traffic and type of use which they were built to accommodate.

3. That the Secretary of Agriculture should recommend to Congress and state highway officials such regulations governing the use of the highways as should be advisable in light of the type of highway construction and the nature and extent of motor vehicle traffic which the federal aid road-beds were built to accommodate.

The act, it should be noted, did not authorize the Secretary of Agriculture to make rules and regulations respecting the use of federal aid highways, but merely authorized him to act in an advisory capacity

[151] 42 Stat. 212; U. S. C. tit. 23, c. 1 (1921).
[152] 42 Stat. 212 at 214, sec. 8; U. S. C. tit. 23, sec. 8 (1921).
[153] 42 Stat. 212 at 214, sec. 8; U. S. C. tit. 23, sec. 8 (1921).
[154] 42 Stat. 212 at 214, sec. 9; U. S. C. tit. 23, sec. 10 (1921).
[155] 42 Stat. 212 at 216, sec. 18; U. S. C. tit. 23, sec. 19 (1921).

and to make recommendations to Congress with respect to these matters.[156] Apparently Congress in enacting the federal aid legislation of 1921 meant to reserve a power to prescribe regulations governing the use of federal aid highways in accordance with the Secretary of Agriculture's recommendations.

However, even this federal aid legislation does not warrant the conclusion that Congress has actually retained an interest in federal aid highways which would completely eclipse the state's interest therein. Federal aid highways represent a co-operative undertaking on the part of the federal and state governments. Had the federal government seen fit to do so, it could have constructed and maintained exclusively federal highways in the interests of interstate commerce.[157] In that

[156] The Secretary of Agriculture (who acts in these matters through the United States Bureau of Public Roads) has never exercised the power conferred on him by section 18 of the Federal Highway Act to recommend to Congress and the state highway departments such measures as he may deem necessary for preserving and protecting the highways and insuring the safety of traffic thereon. It has been said that the department "has looked upon this function as exclusively an engineering problem, to be met by cooperation with the state highway officials in the matter of adopting proper plans and requiring standard construction." See Tooke, "The Centralization of Control of Highway Traffic," 60 AM. L. REV. 741 at 751 (1926).

[157] The question whether Congress has the affirmative power to foster and promote commerce by authorizing the construction or improvement of inland transportation facilities was one of the classic constitutional problems of the first half of the nineteenth century. In the course of the historic struggle over the Cumberland Road project and the general question of "internal improvements," many leading statesmen of the day expressed the view that Congress had no such power. For the Congressional discussions on the constitutionality of the Cumberland Road project, see YOUNG, POLITICAL AND CONSTITUTIONAL STUDY OF THE CUMBERLAND ROAD 37-77 (1902). The same author gives a summary of the discussions in Congress on Calhoun's elaborate internal improvements bill of 1816. For a discussion of the internal improvements issue during the administrations of Presidents Monroe and Jackson, see BABCOCK, RISE OF AMERICAN NATIONALITY 246-256 (1906); TURNER, RISE OF THE NEW WEST, 1819-1829, pp. 228-235 (1906); MACDONALD, JACKSONIAN DEMOCRACY, 1829-1837, c. 8 (1906). The arguments against the power of Congress to assume jurisdiction over inland transportation were summed up by President Monroe in his elaborate paper on internal improvements which he submitted to Congress in 1822. 2 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 170 (1903). An excellent discussion of the constitutional questions involved in the internal improvements question is found in 1 VON HOLST, CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES 388-396 (1877).

But during and after the Civil War the idea that Congress had no affirmative power to foster interstate commerce by authorizing the construction of inland transportation facilities was effectively dispelled. From 1862 to 1872 four transcontinental railroads were incorporated by the federal government. [Union Pacific, 12 Stat. 489 (1862); Northern Pacific, 13 Stat. 365 (1864); Atlantic & Pacific, 14 Stat. 292 (1866); Texas & Pacific, 17 Stat. 59 (1872).] In order "not to offend the susceptibilities" of the states by asserting a paramount control within their respective jurisdictions, Congress required the first two railroads chartered by it to secure the consent of

case it could have regulated the use made of such highways without raising difficult questions respecting state instrumentalities and state property. But Congress chose instead to co-operate with the states,[158] so that federal aid highways are instrumentalities of both the federal and state governments.

The states have legal title to the federal aid highways. All expenses of securing the necessary rights of way and public easements for federal aid highways are paid by the states.[159] Once the improved roadbed is constructed the state has the burden of maintaining it.[160] In view

the states through which they passed. See Wickersham, "Federal Control of Interstate Commerce," 23 HARV. L. REV. 241 at 245 (1910). But in chartering the Atlantic & Pacific and the Texas & Pacific companies, Congress did not stipulate that the consent of the states should be secured, and it authorized these companies to exercise the power of eminent domain. *Ibid.*, 241 at 245. In California v. Central Pacific R. R., 127 U. S. 1 at 39, 8 Sup. Ct. 1073 at 1080 (1888), the Supreme Court upheld the power of Congress to incorporate interstate railroad companies. Mr. Justice Bradley said:

> "The power to construct or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. . . . This power in former times was exerted to a very limited extent, the Cumberland or National Road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject."

Referring to this decision Warren says: "Thus was settled the great question of Internal Improvements which, since the early years of the Nation, had been a topic of such sharp political division." 3 SUPREME COURT IN UNITED STATES HISTORY 359 (1922).

[158] This co-operative feature characterizes what is known as the Federal Aid Plan, whereby Congress appropriates money to be allocated to the states for certain purposes provided the states match the federal appropriation with an equal appropriation and in the expenditure of the moneys thus appropriated observe standards prescribed by the federal government. See MACDONALD, FEDERAL AID (1928). The power of the federal government to appropriate money is apparently unlimited. By means of the federal aid device it may therefore subsidize the states for the purpose of inducing them to adopt federal standards with respect to matters that fall within the reserved powers of the states and over which Congress could exert no direct legislative control. See Burdick, "Federal Aid Legislation," 8 CORN. L. Q. 324 (1923); Corwin, "The Spending Power of Congress — Apropos the Maternity Act," 36 HARV. L. REV. 548 (1923).

[159] Rules and Regulations of the Secretary of Agriculture for Carrying Out the Federal Highway Act (July 22, 1922), Regulation 6, sec. 7.

[160] 42 Stat. 212 at 215, sec. 14; U. S. C. tit. 23, sec. 15 (1921). In Morris v. Duby, 274 U. S. 135 at 144-145, 47 Sup. Ct. 548 at 550 (1927), where the Court held that weight limitations imposed by a state were valid as to an interstate motor carrier operating over a federal aid highway. Mr. Chief Justice Taft said:

> "Conserving limitation is something that must rest with the road supervising authorities of the State, not only on the general constitutional distinction beween

of these facts it seems fair to conclude that the states did not intend to relinquish to Congress an absolute and unlimited power of determining what use should be made of these highways. In fact, it is at least doubtful whether the states could, if they so intended, contract away their sovereign power and duty to regulate the highways for the general public good.

What then is the proper construction of the federal aid legislation in this respect? Has Congress a greater power to determine what use shall be made of these highways than it has in the case of highways constructed out of state funds exclusively? It seems reasonable to conclude that when the states agreed to the terms of the federal aid legislation and entered upon this undertaking to build good roads in cooperation with the federal government, it was contemplated both by the states and the federal government that these roads should serve the same economic and social purposes that all of the other highways of the country are intended to serve; that the general public's enjoyment of these highway facilities should be paramount over the special privilege of motor carriers for hire to operate over these highways; and that trucks and buses making destructive use of the roadbeds should be prohibited from operating over them. In short, the federal aid legislation does not alter in any measure whatsoever the situation with respect to federal power to promulgate highway use regulations, and accordingly, although the federal government may grant permits to interstate motor carriers authorizing them to use all state highways, this power is subject to the limitation that it shall not be used in such a way as to interfere in an unreasonable manner with the state's property interests in such highways, and with the social and economic purposes the highways are meant to serve.[161]

national and state powers, but also for the additional reason, having regard to the argument based on a contract, that under the convention between the United States and the State, in respect of these jointly aided roads, the maintenance after construction is primarily imposed on the state."

[161] Of course there is still the possibility of amending the federal aid legislation. It may be assumed that Congress could not amend the federal aid legislation and give it a retroactive effect so as to compel the states to submit to greater federal control over their highways without their consent. The states' rights in highways built up to this time under the Federal Highway Act of 1921 must be deemed to be vested rights which Congress cannot impair by giving retroactive effect to the act as subsequently amended. But there should be no difficulty in allowing Congress to establish new conditions precedent to future grants, and provide that states thereafter accepting federal aid funds for highway purposes would be deemed to consent to the exercise by the federal government of an absolute and unrestricted power to prescribe highway regulations for interstate motor carriers operating not only over federal aid highways but over state highways and city streets as well. See Senator Brookhart's proposal to condition

Conflicts in Exercise of Federal and State Power

The question now shifts from one of constitutional powers to one of practical application of the above-stated broad principle. The most serious problem of application arises from the fact that there are two or more sovereign powers involved — the federal government and the several states. While, for the most part, it may be assumed that the sovereigns involved in each case will work together harmoniously in reaching proper solutions, yet it is inevitable that, from time to time, there will be conflicting decisions in particular cases. In such cases interesting and unique questions of administrative law will be presented. They may best be examined in relation to the two concrete problems raised at the outset of this discussion, namely, (a) what will be the result if the federal government attempts to authorize an interstate motor carrier to use a highway which a state has denied him permission to use on the ground of highway congestion, and (b) what will be the result if the federal government attempts to prescribe uniform size and weight limitations for interstate motor carriers that would conflict with state limiations.

Authorization by Federal Government Purporting to Permit Interstate Motor Carrier to Use Highway which State Forbids Him to Use on Ground of Highway Congestion

We may assume the case of a highway route lying between two populous centers of adjoining states. Each state within its respective territorial jurisdiction has provided a high-type surface highway of a sufficient width to accommodate large vehicles. Much traffic moves over the highways. On Sundays and holidays in particular, traffic is

federal aid grants on acceptance by the state of uniform federal highway regulations in Hearings on S. 2793, 72nd Cong., 1st Sess. 230, 457 (1932). In accepting the federal aid funds on these terms the state in effect would be waiving its right to object to federal highway regulations on the ground either that they unreasonably impaired its proprietary interests in its highways or that they unreasonably interfered with the functioning of the highways as state instrumentalities. It is doubtful, however, whether this proposal would be of any practical value. Would the states be disposed to accept federal aid on these terms? From 1921 to 1929 the states spent $6,000,000,000 for state highways; of this sum $728,000,000, or about 12 per cent, represented federal aid grants. See statement before Senate Committee in Hearings on S. 2793, 72nd Cong., 1st Sess., of Thomas MacDonald, Chief of United States Bureau of Public Roads, at pp. 211, 218. A state might well take the position that giving its consent to the federal government's assumption of a plenary jurisdiction over its highways for the purpose of prescribing highway regulations for interstate motor carriers would be too dear a price to pay for the continuance of federal aid subsidies that represent only a small fraction of the total amount spent by the state on highway construction and maintenance.

unduly heavy and congested and vehicles move along at a relatively slow pace. A number of buses and trucks are operated for hire between these two points and contribute their share to the congested traffic conditions. The highway authorities of the two adjoining states, acting under due authorization, issue an order prohibiting any additional use of the highways by carriers for hire, on the ground that such additional use would threaten the destruction of the road-bed and interfere with the general public's enjoyment of the facilities of highway travel.

In the absence of federal regulation a state can undoubtedly issue such an order on the ground that traffic on the highway is already badly congested and that increased use of the highways by motor carriers will result in destruction of the road-bed.[162]

But now let us assume that the federal government has undertaken to regulate interstate motor carriers and has provided for the issuance of certificates of public convenience and necessity to such carriers which will authorize them to operate over certain specified routes in interstate commerce. An interstate carrier proposes to operate between the two centers in these two adjoining states in the case stated. He applies to the federal administrative body for a certificate of public convenience and necessity to operate over the particular route which the state authorities have declared shall be closed to any additional motor carrier traffic. He is granted the certificate. The carrier now starts to operate over this particular route. The proper state authorities attempt to secure an injunction to prevent the operation in violation of the state order forbidding additional use of the congested highway by carriers for hire. The carrier contends that since he is authorized to operate by the federal government the state is powerless to deny him the privilege of using its highways.

In such case we have a conflict between the exercise of the power of the federal government to regulate interstate commerce and the exercise of the power of the states to protect their own property and control the use of their own instrumentalities. Which shall prevail?

In the disposition of this hypothetical controversy the courts will encounter two troublesome problems: (1) what weight shall be given the respective determinations of the federal and the state tribunals on the facts in issue, and (2) on whom shall the burden of proof rest? The solution of either or both of these problems may be aided by the

[162] Bradley v. Public Utilities Comm., 289 U. S. 92, 53 Sup. Ct. 577 (1933); Wald Storage & Transfer Co. v. Smith, 290 U. S. 596, 602, 54 Sup. Ct. 129, 227, aff'g by *per curiam* decision the three-judge court's decision in (D. C. Tex. 1933) 4 F. Supp. 61).

federal statutes, or on the other hand, they may have to be worked out by judicial decision.

As to the question of the weight to be accorded the findings of the state tribunals, the courts, in the absence of legislative mandate governing their course, may attempt to turn to the precedents laid down in cases arising under the Interstate Commerce Act, in which orders of the Interstate Commerce Commission have come into conflict with orders of state tribunals (or perhaps with state legislative action) concerning matters lying along the borderlines between state and federal jurisdiction. Some of these Interstate Commerce Commission cases involve the validity of the orders of state authorities as to rates to be charged on intrastate rail traffic, the circumstances being such that interstate commerce is likely to be affected indirectly because of the non-compensatory level of charges fixed for intrastate hauls. Others are cases in which the Interstate Commerce Commission has passed upon whether or not an intrastate rail carrier shall be permitted to construct a new line or an extension of an old one, under such conditions as to affect interstate commerce. In all of these cases the paramount nature of the federal power is clearly recogized. The Interstate Commerce Commission's decisions are upheld if reasonable, and little if any attention is paid to the fact that conflicting state orders or determinations have been overruled.[163]

It does not necessarily follow, however, that the same treatment will be accorded the interstate motor carrier questions now under consideration. In fact there are differences between the two situations which will in all probability compel a different treatment. In the first place, in the Interstate Commerce Commission cases the question is one of regulation of privately owned rail carriers, and the state interest is confined to its police power to regulate such private business for the general good. On the other hand, in the interstate motor carrier cases the state has a substantial additional interest due to the fact that it is actually the owner of the highways involved, and due to the further fact that these highways are instrumentalities used by it as a sovereign to perform an essential public function. In the second place, in the railroad cases the nationwide question of what is essential for the building of an adequate national transportation system is involved. On the other hand, in the interstate motor carrier cases, the questions

[163] See R. R. Comm. of Wisconsin v. C. B. & Q. R. R., 257 U. S. 563, 42 Sup. Ct. 232 (1922); Colorado v. United States, 271 U. S. 153, 46 Sup. Ct. 452 (1925); Nashville C. & St. L. Ry. v. Tennessee, 262 U. S. 318, 43 Sup. Ct. 583 (1922).

become much more localized, since they involve local traffic conditions, local road specifications, etc.[164]

Any attempt to predict what the course of judicial decision is likely to be in regard to the weight to be given state commission orders closing roads to additional motor carrier burdens is bound to be pure speculation, but it is probably safe enough to say that both the state ownership of the highways and the localized nature of the issues will loom large in the determination of the question. The pressure from these causes will have a strong tendency to induce the courts to attach substantial, though probably not conclusive, weight to state orders.

Probably the question of the weight to be attached to state orders will also be affected by the care and ability which state tribunals show in working out the technique on which they base their decisions. The facts involved in the cases are incapable of precise and definite proof. The conclusion to be reached must depend upon expert opinion. The question of threatened destruction of the road-bed must be answered by engineers. The question as to undue traffic congestion resulting in impairment of the common enjoyment of the public ways must be answered on the basis of field studies as to the flow and density of traffic, the average speed per vehicle, the frequency of accidents, etc. These are fact questions calling for determination by expert and skilled administrative authorities, and the extent to which state authorities have demonstrated such skill will be highly important.

As hitherto suggested, the matter of determination of the weight to be given the respective federal and state commission decisions may be affected by the provisions of the federal statutes enacted for the regulation of interstate motor carriers. As has already been pointed out, the courts have held that, in the absence of federal regulation, a state commission may deny the use of a particular highway to an interstate motor carrier on the grounds of highway congestion or threatened destruction of the road-bed. In these cases the courts have accepted state administrative determinations based on rather scanty evidence.[165]

[164] *Cf.* Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159, 49 Sup. Ct. 282 (1929), in which the Court held that complex questions of state statutory construction should, if possible, be left for local determination.

[165] In Bradley v. Public Utilities Comm. of Ohio, 289 U. S. 92 at 96, 53 Sup. Ct. 577 at 579 (1933), where the Court upheld the action of the Ohio commission in refusing an interstate motor carrier permission to operate over State Route No. 20, extending from Cleveland, Ohio, to the Ohio-Michigan line, on the ground that this highway was already badly congested, the contention was made that the commission's finding was unsupported by evidence, since the only evidence introduced consisted of

Let us now assume that federal legislation is enacted which provides, as does the Rayburn bill, that the

> "laws enacted in any State and regulations thereunder that relate to the maintenance, protection, safety or use of the highways therein, which do not discriminate against motor vehicles used in interstate commerce, shall not be deemed to be a burden or an obstruction or impediment to interstate commerce, and the power to enact such laws and promulgate such regulations thereunder is hereby expressly recognized and confirmed to the respective States."

Such a clause is open to several interpretations. It might be construed to mean that it subjects interstate motor carriers to *all* state regulations pertaining to the protection and use of the highways and that any

two traffic counts, both in the single city of Fremont. It was argued that this evidence was insufficient because Route 20 extended for only 2.2 miles through Fremont, whereas the total length of the portion which would have been traversed was about 100 miles. But the Court without further discussion said, "The evidence was adequate to support the finding." The Ohio Supreme Court which had previously upheld the Commission's action in Motor Transport & Truck Co. v. Public Utilities Comm. of Ohio, 125 Ohio St. 374 at 380, 181 N. E. 665 at 667 (1932), said:

> "It is contended further that the facts disclosed by the record do not warrant the conclusion of the commission that State route No. 2 is so badly congested as to endanger public safety and the conservation of that highway. The record contains ample evidence covering the traffic condition upon the highway in question to fully warrant the conclusion that additional motor-truck service would create and maintain an excessive and undue hazard to the safety and security of the traveling public and to the property upon such highways."

In Wald Storage & Transfer Co. v. Smith, (D. C. Tex. 1933) 4 F. Supp. 61, affirmed by *per curiam* decision in 290 U. S. 596, 602, 54 Sup. Ct. 129, 227 (1933), where a three-judge court upheld the action of the Texas Railroad Commission in denying to interstate contract carriers permission to operate over Texas highways on the ground that the proposed operations would unreasonably interfere with the use of the highways by the general public, the same contention was made that the commission's action was arbitrary and unsupported by the evidence. The original application for permission to operate had attached to it the highway map of Texas, and the applicant proposed to operate between "practically every city and town in the state and over practically every highway." The court held that the record as to the number of weak bridges and bad roads in the state "overwhelmingly" supported the commission's order in refusing permits for such indiscriminate operation. Upon failure to secure such a blanket permit covering the whole Texas highway system, the plaintiff amended his application so as to secure permission to operate over "principally Highway 75, Houston to Dallas, Highways 3 and 3(a), from Houston to San Antonio, Highway 6, from Houston to Waco, and Highways 6 and 2 from Dallas to San Antonio, via Waco and Austin." The court in upholding the commission's action in refusing to grant a permit over these highways said there was "ample testimony to support the commission's findings that they are far too heavily congested." What evidence was included in the record before the court in support of the commission's findings does not appear in the report.

state regulation purporting to conserve the highways would be valid as to interstate motor carriers regardless of whether or not such a regulation was supported by evidence. If this were the interpretation adopted, then, in the hypothetical case, the interstate motor carrier by express provision of federal law would be bound by the state regulation regardless of whether the fact determination on which it rested was supported by any evidence.

But a more reasonable interpretation of such a clause in proposed federal legislation is that it evinces an intention on the part of Congress that interstate motor carriers shall be subject to state regulation of this kind the same as if there were no federal legislation with respect to motor carrier regulation. If this be the proper construction, then such federal legislation is of no assistance in determining the weight to be given state determinations.

Now suppose that federal legislation is enacted containing no such reservation of the police power to the states.[166] The statute is simply silent on the point. In that case two interpretations are possible. It might be argued that since Congress has not authorized the federal authorities to pass on the question whether the proposed interstate operation would be consistent with the state's interest in keeping its highways free from undue traffic congestion and preserving the roadbed from destructive use, and since it has not attempted to negative the power of the states in this matter, therefore the proposed legislation would leave to the states the same powers they exercised in these matters before any federal legislation was enacted. This would appear to be the sound interpretation, and, in case it should prevail, the present situation would be unchanged and the finding of the state administrative authority would be supported even though the evidence in support thereof was rather meager.

But if such legislation should be interpreted to mean that all state laws, regulations and orders respecting use and preservation of the highways are abrogated so far as interstate motor carriers are concerned, that the issues are left with the federal administrative tribunal for conclusive determination, subject to the usual rules as to judicial review, and that no weight should be given state determinations on these matters, an interesting question of conflict of powers would be presented. What should the answer be? Should it be that all constitutional requirements are satisfied by providing the federal administrative tribunal as the trier of issues, with the federal courts to review

[166] This is true of the Dill bill, S. 3171, 73rd Cong., 2nd Sess.

the determination? Or do doctrines of state sovereignty demand greater respect for state administrative determinations? Common sense in the administration of the affairs of government would seem to dictate an affirmative answer to the first question, but until the Supreme Court has spoken we shall not know definitely what to expect. The same uncertainty would also exist, of course, with regard to legislation specifically providing conclusiveness for the decisions of the federal tribunal.

There is also another element which may be material in determining the relative weights to be accorded the federal and state determinations of our hypothetical question. The point has already been made that the United States Bureau of Public Roads is a federal research and administrative agency that is the nation's most expert authority on highway problems. As part of its research program it engages in traffic studies for the purpose of collecting data on problems of highway congestion and destructive use of the highways by heavy motor vehicles. Now suppose the Bureau of Public Roads has made a survey of traffic on this particular highway and has come to the conclusion that traffic thereon has not yet reached the point where the additional use of the road-bed by motor carriers would unduly impair the general public's enjoyment of the highway easement or result in premature wearing-out of the road-bed. Here, then, we have a case of two conflicting administrative determinations of a difficult fact question. The state administrative agency has made a finding which is directly opposed to the finding of the highly expert federal administrative agency. What effect shall the latter finding have upon the determination of the results?

If the federal legislation should provide that no certificate to operate over a federal aid highway should be granted an interstate motor carrier unless and until the Bureau of Public Roads had certified to the federal regulatory commission on the basis of traffic studies conducted by it that such additional use of the highways would not result in undue traffic congestion or premature destruction of the road-bed, and the interstate motor carrier had been granted a certificate after such a finding by the Bureau of Public Roads, the finding of the Bureau as an administrative agency of the federal government occupying an official status should, because of its expert character, be given substantial weight in reaching the decision in our hypothetical case, and probably it should be given even greater weight than that of the state administrative tribunal.

It is probably not too much to say that promise of a satisfactory

solution of this difficult problem can best be found in federal legislation providing for such a preliminary finding by the Bureau of Public Roads before the issuance of a certificate. Among other advantages, this procedure would have a tendency to forestall state determinations of an adverse nature unless there were a genuine need of state action in the specific instances. Furthermore, it would lead to the accumulation of valuable data by the Bureau of Public Roads, so that that body eventually would have a most valuable fund of information regarding traffic conditions on highways throughout the country.

There is still to be considered the second question which will arise in our hypothetical case, i.e., the question of burden of proof. In the injunction proceedings would the carrier have the burden of showing that the proposed use of the state highway would neither subject the road-bed to excessive use nor unduly hamper the general public's enjoyment of the highway facility? Or would the state have the burden of proving that in these respects the proposed use of its highway would be an unreasonable impairment of its interest in the highway? As before stated, the facts at issue in such a controversy are not readily capable of proof. Careful study and investigation are required. Consequently, the question of burden of proof becomes an important question.

The question should be fairly easy to answer. By hypothesis the state is the moving party and as such, according to conventional notions of procedure, it should assume the burden of proof. Furthermore, since the power of Congress to regulate interstate commerce is paramount, it seems proper to say that if a state contends that federal regulation of interstate commerce is an unreasonable interference with its proprietary interests, the burden is on the state to prove unreasonableness.[167] In other words, the state must adduce evidence showing that in fact the road-bed would be threatened with destruction and the general public's enjoyment of the highway facility would be unduly impaired if additional carrier-for-hire traffic were permitted over this highway.

Power of Federal Government to Prescribe Uniform Size and Weight Limitations

It may be conceded at the outset that the federal government has power to prescribe uniform size and weight limitations for interstate

[167] On the presumptive validity of legislation, see O'Gorman and Young v. Hartford Fire Ins. Co., 282 U. S. 251, 51 Sup. Ct. 130 (1931). See also 1 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 371 *et seq.* (1927).

motor carriers provided the maximum limitations prescribed do not exceed the maximum limitations allowed by state law. Difficulty arises over the question whether the federal government can prescribe maximum limitations exceeding state maximum limitations and superseding them so far as interstate motor carriers are concerned. The question can be more readily discussed if the size and weight factors are separately considered.

Maximum size limitations are not related to the question of protection of the road-beds themselves. Weight and not size is the vital factor with respect to the destruction of the road-bed. Size limitations are really pertinent to two matters other than road destruction. First, they concern safety of highway travel. Vehicles operated by carriers for hire generally are appreciably larger than ordinary vehicles. They render highway travel more hazardous because their greater height impairs forward vision and because vehicles attempting to pass them must travel for a longer distance on the left lane of travel before returning to the right hand lane. This is particularly true of trucks with a train of trailers loaded high. Furthermore, the tendency for trailers to weave to and fro so that the margin of passing room is rendered uncertain increases the difficulty of passing a train of this kind. Where semi-trailers are employed it is necessary in swinging the train around a curve to cut off temporarily the left lane of travel. In light of these considerations it is easy to see why size limitations can be classified as highway safety regulations.

But size limitations can also be classified as regulations to conserve the general public's right of passage over the highway. The operation of a long train of vehicles at a slow rate of speed tends to create highway congestion and slow up highway traffic, so that the usefulness of the highways to the citizens of the state is thereby impaired. For that reason size limitations bear a pertinent relation to the power of the state to prescribe regulations governing the use of its own instrumentalities so as to serve the widest and most beneficial public purpose.

Let us suppose that a state by statute or duly authorized administrative order limits the use of its highways to vehicles not exceeding in size the following limitations: width, 96 inches; height, 12 feet; length per single unit, 35 feet; over-all length of combination of tractor and semi-trailer, 45 feet; over-all length of combined truck and trailer, 65 feet. Suppose that Congress in turn by statute or through its duly authorized administrative agency should prescribe the following uniform maximum size limitations for interstate motor carriers: width, 106 inches; height, 14 feet; length per single unit, 40 feet; over-all

length of combined tractor and semi-trailer, 65 feet; over-all length of combined truck and trailer, 85 feet. Here, then, Congress would be prescribing more liberal size limitations than those of the state. Could the state enjoin an interstate motor carrier that measured up to the federal maximum size limitations from operating over its highways, on the ground that the federal government in authorizing the use over its highways of vehicles exceeding the state's size limitations was unreasonably interfering with the state's authority to regulate the use of its highways as a state instrumentality?

The state's argument would be that observance of the maximum size limitations it had prescribed was essential in order to preserve for the public the greatest enjoyment and use of the state's highway facilities and that the more liberal federal limitations permitted the use of vehicles which impeded traffic and impaired the enjoyment of highway facilities.

Again, maximum weight limitations as distinguished from maximum size limitations serve primarily, if not altogether, the purpose of protecting the road-bed from destructive use. If motor vehicles of a given design and weight are permitted to operate over a highway that is not designed and constructed to withstand the impact and stress resulting from the operation of such vehicles, the road-bed will be ruined and the state's investment destroyed. Weight limitations, then, are vital to the state's conservation of its road-beds. If a state limits the use of its trunk highways to motor vehicles with a maximum axle load distribution not in excess of eight tons, and the use of its secondary highways to vehicles with a maximum axle load distribution not in excess of six tons, and if the federal government were to prescribe for interstate motor carriers maximum weight limitations of ten tons and eight tons per axle-load, for trunk and secondary highways respectively, could the state enjoin an interstate motor carrier that measured up to the maximum federal weight limitations from operating over its highways? If the state could show that its trunk and secondary highways were of such thickness and built of such materials that they could not bear up under axle load distributions exceeding eight and six tons, respectively, and that therefore the use of its highways measuring up to the maximum federal limitations would result in destruction of the road-bed, it would make a strong case to the effect that the federal government was authorizing interstate carriers to make a ruinous use of state property.

Certain fact conclusions bearing on these questions can be regarded as fairly well agreed upon by those familiar with the subject. If the

highway over which the interstate motor carrier in question is operating is 16 feet wide, there is no doubt that a federal limitation allowing an interstate motor carrier to operate a vehicle with a width of 106 inches would be deemed unreasonable, since it would authorize a motor vehicle operator to occupy more than half of the highway. Again, there would probably not be much controversy as to whether a maximum height limitation was unreasonable. It is generally agreed that 12 or 12½ feet is a fair and reasonable height limitation.[168] A maximum federal limitation in excess of this would probably be considered unreasonable. At least the state in making the argument that it was unreasonable would be supported by the expert opinion of highway engineers. Again, with respect to length limitations, there is almost unanimous agreement that 35 feet is the proper maximum limitation on length of a single unit.[169]

But as far as length of combinations is concerned, i.e., combined length of tractor and semi-trailer or of truck and four-wheel trailers, there is no such unanimity.[170] The maximum length limitations for combinations prescribed by various highway codes prepared by expert organizations vary from 35 feet to 85 feet. The question of what is a proper length limitation for combinations is largely a matter of expert opinion only. Any scientific conclusions on this matter would have to rest on careful studies of curvature and grade density of traffic, flow of traffic per minute, number of accidents that can be attributed to the operation of combinations on the highways, etc. At the present time no great amount of data on these questions is available.

Likewise with respect to maximum weight limitations, there is diversity of opinion. Here again, as in the case of length limitations, the problem is one calling for study by expert engineers. Any attempt

[168] See the chart in STATE GOVERNMENT (Oct. 1933), p. 15, giving in parallel columns the weight and size limitations suggested in the highway codes proposed by the United States Bureau of Public Roads, American Association of State Highway Officials, National Conference on Street & Highway Safety, and Society of Automotive Engineers, respectively.

[169] See the chart in STATE GOVERNMENT (Oct. 1933), p. 15, giving in parallel columns the weight and size limitations suggested in the four major proposed highway codes, referred to in note 168, supra.

[170] The greatest difference is to be found between the limitations contained in the code proposed by the American Association of State Highway Officials and those contained in the code proposed by the National Conference on Street & Highway Safety. See the chart in STATE GOVERNMENT (Oct. 1933), p. 15. Under the first-named code the maximum length for a single unit or for a tractor and semi-trailer would be 35 feet, and the maximum length for a combination would be 45 feet. Under the second-named code, the maximum length for a single unit would be 33 feet, and the maximum length for either tractor and semi-trailer or combination would be 85 feet.

to answer the question as to the proper weight limitation on vehicles operating over a particular highway requires an investigation into such matters as structural design of the road-bed, the thickness of the pavement, the composition of the pavement, the present age of the road and its present condition, etc. Furthermore, it requires research with respect to the relation between weight, impact, and stress, and the choice of a standard that properly reflects that relation. It is true that more recently, as a result of careful experimental study regarding weight limitations, some conclusions have been reached upon which unanimity of expert opinion may be expected. For instance, highway engineers quite generally agree at the present time that it is not a vehicle's gross weight but rather its distributed load per axle that really determines whether the vehicle is subjecting the road-bed to a stress which it is not able to withstand.[171] But there is still enough controversy among experts on the general question of weight limitations so that the burden of proving the reasonableness or unreasonableness of weight limitations remains an important factor to be considered.

In connection with these questions concerning which technical investigations are necessary to guide the decisions, many of the same conclusions as to procedure should be reached as in connection with the attempt by a state to keep an interstate motor carrier off a particular highway on the ground of highway congestion. In the absence of any federal regulation on the subject, a state may properly prescribe size limitations for interstate motor carriers provided they are reasonable.[172] And the Supreme Court will regard as presumptively reasonable and hence valid the determination of a state legislature or state administrative agency that certain size and weight limitations are required in order to avoid highway congestion, preserve the public easement for the common good, and preserve the road-beds from destructive use.[173] Furthermore, the Supreme Court will not inquire too

[171] See Charles F. Marvin, Jr., "A Technical Basis for Apportioning Motor Vehicle Taxes," 11 PUBLIC ROADS 41 at 42 (1930); TAXATION OF MOTOR VEHICLE TRANSPORTATION (Nat. Ind. Conf. Bd.) 12-16 (1932); BLAKEY, TAXATION IN MINNESOTA 390-395 (1932). The four major proposed highway codes digested in the chart in STATE GOVERNMENT (Oct. 1933), p. 15, prescribe weight limitations in terms of weight per axle.

[172] Morris v. Duby, 274 U. S. 135, 47 Sup. Ct. 548 (1927); Sproles v. Binford, 286 U. S. 374, 52 Sup. Ct. 581 (1932).

[173] In Morris v. Duby, 274 U. S. 135 at 144, 47 Sup. Ct. 548 at 550 (1927), where the Court held that a gross weight limitation of16,500 pounds was valid as to an interstate motor carrier, Mr. Chief Justice Taft said: "In the absence of any averment of specific facts to show fraud or abuse of discretion, we must accept the judgment of the

closely into the question whether the weight standard chosen by a state reflects accurately the relation between highway impact and stress.[174]

If federal legislation for the regulation of interstate motor carriers were enacted containing a provision like that in the Rayburn bill, expressly subjecting interstate motor carriers to state highway regulations, the situation would probably remain unchanged; the reasonable interpretation of such a provision would be that state size and weight limitations would continue to govern interstate motor carriers as long as they were reasonable. But if Congress were to provide in express language that interstate motor carriers would be permitted to operate vehicles not to exceed certain size and weight limitations, prescribed either by Congress or by the Bureau of Public Roads, in this case also we would be confronted with conflicting determinations of federal and state authorities and the question would again arise as to the weight to be accorded state determinations. The same considerations are involved as those discussed in connection with state orders refusing to certify additional carriers because of highway congestion.

In light of the foregoing discussion the most effective approach to the problem of size and weight limitations seems reasonably clear. With respect to limitations on height, width, and length of single units there would be no great objection if Congress itself prescribed specific limitations, since there is virtual agreement among highway engineers on such limitations.[175] Thus Congress might say that motor carriers

Highway Commission upon this question, which is committed to their decision, as against merely general averments denying their official finding."

[174] Morris v. Duby, 274 U. S. 135, 47 Sup. Ct. 548 (1927), a gross weight limitation of 16,500 pounds was held valid as to an interstate motor carrier. In Sproles v. Binford, 286 U. S. 374, 52 Sup. Ct. 581 (1932), a net load limitation of 7000 pounds was held valid as to such a carrier. The objection was made that a weight limitation based on the net load factor did not take into account the really vital factors pertinent to the problem of vehicle impact and highway stress, and that a scientific weight limitation would be based on the maximum axle-load distribution of gross weight. But Mr. Chief Justice Hughes said (286 U. S. 374 at 388-389, 52 Sup. Ct. 581 at 585):

> "Limitations of size and weight are manifestly subjects within the broad range of legislative discretion. To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure. . . . When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome."

[175] See the chart in STATE GOVERNMENT (Oct. 1933), p. 15, giving in parallel columns the size and weight limitations contained in the four major proposed highway codes.

would be permitted to engage in interstate operations provided the vehicles employed did not exceed the following limitations: height, 12 feet; width, 96 inches; length per unit, 35 feet. But a proviso should be included prohibiting an interstate motor carrier from operating a vehicle over a given highway if the width of the vehicle, even though it was no greater than 96 inches, was in excess of one-half of the road-bed. With respect to limitations on lengths of combinations and weight limitations, it would seem best for Congress to authorize the Bureau of Public Roads to establish limitations for interstate motor carriers. In conferring this authority on the Bureau, Congress should provide that the Bureau before establishing limitations for particular highways should take cognizance of traffic conditions over these highways and the condition and structural design of the road-bed, and yet at the same time attempt to achieve uniformity in limitations as far as possible.

It has been assumed up to this point that uniform size and weight limitations for interstate motor carriers can be easily achieved. Such is not the case. Complete uniformity cannot be expected for the reason that there is no uniformity in highway construction and traffic conditions throughout the United States.[176] But much of the present lack of uniformity between the states can be eliminated, and some of the gross disparities in limitations can be reduced. This result could be achieved by giving the United States Bureau of Public Roads the administrative authority to prescribe limitations in the manner suggested.

Federal legislation granting to the Bureau of Public Roads the power to prescribe size and weight limitations for interstate motor carriers, as well as the power to determine whether traffic conditions warrant further motor carrier operations over a particular highway, as earlier suggested, should authorize the Bureau to act in co-operation with state highway officials in these matters. Through co-operation with state highway officials the Bureau would benefit by their experience and knowledge. The co-operative procedure would also have the advantage of tending to minimize differences between federal and state officials and would probably be effective in preventing a feeling

[176] In administering the federal aid highway legislation the United States Bureau of Public Roads has not insisted upon a uniformity in highway construction and design throughout the United States; instead it has established for each state "standards compatible with the highway needs and available resources of the state." See the Bureau's publication, UNITED STATES BUREAU OF PUBLIC ROADS AND ITS WORK (Rev. May 1, 1932), p. 27.

of antagonism toward the Bureau on the part of state highway officials. Furthermore, the requirement that the Bureau co-operate with state *highway* officials and not state *regulatory* commissions having jurisdiction over motor carrier operations would encourage the states to place highway problems in the hands of highway officials where they properly belong. When state commissions charged with the economic regulation of motor carriers are authorized to prescribe rules governing the use of the highways for the purpose of conserving them for the benefit of the general public and preserving the road-bed from destructive use, there is the possibility that the commission will exercise its power in these matters in order to achieve certain economic policies with respect to motor carrier regulation. It is preferable to give a public utility commission the power to regulate motor carriers for economic purposes and to give the state highway commission power to prescribe rules for the conservation of the highways.

It should not be supposed that the procedure here suggested would mark any radical extension of the activities of the Bureau of Public Roads. At the present time this Bureau is conducting research studies and field investigations on highway problems of the kind we have been discussing. It has been co-operating with state highway officials for a number of years, and it maintains agents in the field for the purpose of advising and co-operating with state highway officials on highway problems.[177] The Bureau's experience and its competent personnel well fit it to administer the duties here proposed.

From the foregoing discussion it becomes apparent that highway use regulations promulgated by the federal government in connection with the operation of interstate motor carriers will present some unique and difficult problems occasioned by the conflict between federal and state powers. It will be interesting to observe the functioning of the United States Bureau of Public Roads in connection with the solution of these problems.

[177] See the Bureau's publication, UNITED STATES BUREAU OF PUBLIC ROADS AND ITS WORK (Rev. May 1, 1932), pp. 21-24.