State Regulation of Interstate Transmission of Natural Gas and Electricity

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time of the modified California decree, was the only one with power to affect the status of the children. 25

—G. E. O.

STATE REGULATION OF INTERSTATE TRANSMISSION OF NATURAL GAS AND ELECTRICITY.—Much confusion still exists in the cases as to what are the correct criteria of the extent of a state’s power to regulate interstate commerce. 1 Doubtless the problem is one which, because of the vast diversity of interests involved, may not be solved by fixed rules. 2 At any rate as the cases undoubtedly establish the fact that the states can, under some circumstances, directly regulate interstate commerce, 3 it seems certain that sooner or later the courts must discard the commonly-asserted “doctrine that the state cannot under any guise impose direct burdens upon interstate commerce.” 4 Of course, it is generally laid down along with the above-mentioned doctrine that

“As to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act.” 5

But considerable confusion has arisen in applying these criteria because, among other reasons, in working out the constitutionality or unconstitutionality of a given state regulation, it is common to start with the tacit assumption that the power of Congress to regulate interstate commerce is prima facie exclusive, thus rendering any state regulation of interstate commerce prima facie unconstitutional. Such a method of approaching the problem, however, seems misleading and conducive to erroneous conclusions. The states had power to regulate interstate commerce before Congress

25 The case is supported by Professor Beale on this ground. See Beale, “Progress of the Law: Conflict of Laws,” supra, 59.

1 U. S. Constitution, Art I, § 8: “The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.”

2 Cf. In re Pennsylvania Gas Co., 225 N. Y. 397, 122 N. E. 280 (1919): “No general formula can tell us in advance where the line is to be drawn.”

3 Some of the leading cases in point are discussed in this note and cited in footnotes 14, 16, 18 and 23, infra.

5 See e. g., The Minnesota Rate Cases, 230 U. S. 352, 400, 33 Sup. Ct. Rep. 729 (1913), per Mr. Justice Hughes.

5 Ibid., 399. This form of statement has been commonly followed since the leading case of Cooley v. Board of Wardens, 12 How. 299 (U. S. 1851). See one of the latest statements of these criteria in Pennsylvania Gas Co. v. Public Service Commission, U. S. Adv. Ops. 1919-20, 306.
was granted such power. Therefore, as a grant of power to Congress operates as a prohibition upon the states only to the extent that such prohibition appears by express words or by reasonable implication, the conclusion seems clear that we must start with the theory that there is no such presumption and that the states retain their sovereign powers, including their powers to regulate interstate commerce, except so far as the Federal Constitution limits those powers expressly or by reasonable implication.

What, then, are the correct criteria of the extent of a state's power to regulate interstate commerce? It is commonly said that state regulations affecting interstate commerce are constitutional if they only indirectly affect and do not directly regulate such commerce. But this is clearly inaccurate, for, as we shall see, the states may under some circumstances directly regulate interstate commerce. Besides, as "commerce among the states is not a technical legal conception but a practical one" it should be dealt with in a practical way. Hence, in determining the constitutionality, under the commerce clause, of a state regulation affecting interstate transportation the practical effect of the regulation should prevail over any refined distinction, however logical, between direct and indirect regulations.

A recent West Virginia decision and a similar New York decision illustrate the difficulty that attends any attempt to apply the commonly-accepted criteria under all circumstances. In the West Virginia case an electric plant generated electricity in Virginia and transmitted the electric current directly to consumers in West Virginia. The question was whether, in the absence of congressional action, an order of the West Virginia Public Service Commission regulating this service was an unconstitutional regulation of interstate commerce. The court held that there was nothing between production in Virginia and sale in West Virginia to break the continuity of the interstate transportation, but reasoned that "the vital distinction should be noted between regulation of rates of transportation and of the rates at which a commodity [while still being transported in interstate commerce]

8 See PRENTICE and EGAN, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION, 1, 10, 11 et seq.
10 Mid Creek Coal & Coke Co. v. Public Service Commission, 100 S. E. 557 (W. Va., 1919).
shall be sold” to the consumer. The same distinction was rather recently drawn by the Court of Appeals of New York in a case dealing with the constitutionality, under the commerce clause, of a state regulation of the rate at which natural gas, in the course of interstate transportation, may be sold directly to consumers. But is the alleged distinction a practical distinction? It is submitted that such a regulation of the so-called “rate of sale” is, in practical effect, just as much a burden upon the interstate transportation as if the regulation was by express words a regulation of the “rate of transportation”. To regulate the rate at which a thing so transported may be sold by the transporter while in the course of such transportation is, in practical effect, to regulate the rate of transportation, for such rate of transportation is necessarily included in the so-called “rate of sale.”

Thus the question raised by the two cases is whether such a state regulation, if a regulation of the rate for interstate transportation, is an unconstitutional regulation of interstate commerce. As has been intimated, it is not a sufficient answer to say that if the state regulation is a direct regulation of interstate transportation it is unconstitutional, for, notwithstanding the common statement to the contrary, many state regulations, though direct regulations of interstate transportation, are constitutional. Thus, in the absence of congressional action the United States Supreme Court has held that a state may under certain circumstances directly regulate the rate for interstate transportation. For example, a state may regulate the through rate to be charged for out-bound interstate transportation by ferry (when the ferry is not operated as a part of a railroad). Similarly, the Supreme Court has rather recently held that in the absence of congressional action a state may constitutionally regulate the rate to be charged for transportation by steamboat between termini within the state where a part of the route is outside the United States, viz., on the high seas. Likewise, a state may in the absence of congressional action make reasonable quarantine and pilotage regulations although they may

11 In re Pennsylvania Gas Co., supra.
12 Mill Creek Coal & Coke Co. v. Public Service Commission, supra, 562.
14 New York Central Ry. Co. v. Hudson County, 227 U. S. 248, 32 Sup. Ct. Rep. 269 (1913). The reasons why a state normally may not regulate interstate railroad rates apply with equal force to any attempt by a state to regulate interstate ferry rates when the ferry is operated as a part of a railroad: (1) Such interstate transportation is no longer local in nature. (2) Congress has regulated such commerce.
operate as "direct"17 regulations of interstate commerce. So, although it was until lately thought otherwise, it seems that in the absence of congressional action a state may regulate the rate of toll to be charged for crossing an interstate bridge from the state passing the regulation to another state but not the rate for returning from the other state18 (except possibly in case of round-trip tickets or perhaps passes issued in the state enacting the regulation but not required by such state to be so issued19). The famous Covington Bridge Case,20 which is generally supposed to be contra to the last-mentioned statement, has rather recently been explained by the United States Supreme Court21 on the ground that the state regulation of the interstate toll which was there held unconstitutional was an attempt by the state passing the regulation "to reach out and secure for itself a right to prescribe a rate of toll applicable not only to persons crossing from Kentucky to Ohio but from Ohio to Kentucky," a right which practically nullified the corresponding right of Ohio to fix tolls from her own state. And this (explained the court) was an adequate basis for the judgment.22

In the light of these cases and other analogous cases too numerous to mention,23 it is indisputable that the states may under some circumstances "directly" regulate interstate commerce and may directly regulate even to the extent of regulating the rate for interstate transportation. But when and to what extent? As was recently observed by the New York Court of Appeals:24

"No general formula can tell us in advance where the line is to

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17 That such regulations, though admittedly constitutional, may be "direct" regulations of interstate commerce. See Mr. Justice Hughes in Port Richmond & Bergen Point Ferry Co. v. Hudson County, supra, and authorities there cited.
19 See the first two cases mentioned in note 18. In the United States Supreme Court case, which the West Virginia case thought left the point undecided, the court said (at p. 333): "With respect to the rates for round trips we do not construe the ordinance [of New Jersey regulating rates] as requiring the company to issue round-trip tickets at its office in New Jersey . . . . Viewed as a limitation upon rates charged for such round-trip tickets, when sold by the company in New Jersey, we think that the ordinance is valid being one relating to the transactions of the company in New Jersey and the charges there enforced."
21 In Port Richmond & Bergen Point Ferry Co. v. Hudson County, supra.
22 Ibid., 328, 329.
23 E. g., Chosen Freeholders of Hudson County v. The State, 4 Zab. 718 (N. J. 1853); State v. Faudre, 54 W. Va. 122, 46 S. E. 269 (1903); Shrader v. Steubenville etc. Traction Co., 99 S. E. 207 (W. Va. 1919). The West Virginia Supreme Court of Appeals held in the case last cited that in the absence of congressional action a state may declare invalid the use of a pass over an interstate bridge, not only from the state enacting the regulation but also from the adjoining state.
24 In re Pennsylvania Gas Co., supra.
be drawn."” The unforeseen and unforeseeable growth of interstate commerce, more particularly in kind than in quantity, has emphasized the fact that the commerce clause, like the Constitution itself, is not a mere written instrument of authority or limitation of authority, but a living embodiment of governmental principles, and that these fundamental principles must be ever applicable to the changing conditions of commerce and society. Hence, the extent of the implied limitation upon the power of the states under the commerce clause cannot be determined by inelastic criteria. Each case, because of the ever-varying conditions and classes of commerce, must be decided largely on its own peculiar facts. Still there are some fundamental principles which must be applied, and the most appropriate method of approaching the problem and applying these principles seems to be as follows:

The continuous regulation of interstate commerce by "some" authority, state or national, is imperatively required. And in the absence of national action not only may the states regulate such commerce, subject of course to certain (hereinafter-mentioned) limitations, but there is no presumption that the power of Congress is exclusive. Some classes of interstate commerce, however, are of such a local nature and differ so materially in different localities that as a practical matter adequate regulations thereof can, as a rule, be made only by the local authorities. Hence, while Congress may regulate such commerce, if Congress does not do so, then, since interstate commerce must be dealt with in a practical way, it cannot be reasonably inferred that, in the absence of congressional action, the grant of power to Congress to regulate commerce was intended to operate as an implied prohibition upon the states to continue to regulate such commerce. But as to all other classes of commerce there is, because of the more-than-local nature of such commerce, an inherent need for such uniformity of regulation as can be adequately accomplished, as a practical matter, only by the action of a single regulatory power. Hence, as to these classes of commerce the reasonable inference is that, even in the absence of congressional action, the grant of power to Congress to regulate commerce was intended to operate as an implied prohibition upon the states to regulate such commerce at all. Consequently the ultimate question is this: In the absence of congressional action is the state regulation such that under all the circumstances of the given case it is, as a practical matter, the reasonable inference from the grant of power to.
Congress that a state was under such circumstances impliedly prohibited from regulating commerce as it did in the particular case? In answering that question it is necessary to bear in mind the underlying purpose of the commerce clause, viz., to prevent conflicting and discriminating state regulations of interstate commerce.\footnote{As to the purpose of the commerce clause see County of Mobile v. Kimball, 102 U. S. 691, 697, 28 L. Ed. 238, 239 (1889).} The test, then, of the extent of the power of a state to regulate interstate commerce when Congress has not acted seems to be whether, in view of the purpose of the commerce clause, the regulation, under all the circumstances of the particular case, is an \textit{unreasonable}\footnote{Cf. a very recent opinion of the United States Supreme Court in which it was said: \textquoteleft{It may be conceded that the local rates (fixed by the state) may affect the \textit{interstate} business of the company. But this fact does not prevent the state from making local regulations of a reasonable character.\textquoteright{ Pennsylvania Gas Co. \textit{v.} Public Service Commission, U. S. Adv. Ops. 1919-20, 306, 308. This case is an affirmance of \textit{In re} Pennsylvania Gas Co., \textit{supra}, in which the New York Court distinguished between state regulations of rates for \textit{interstate} transportation and state regulations of the rates at which the thing, while being transported in \textit{interstate} commerce, may be sold directly to the consumers. The United States Supreme Court, however, in affirming the actual conclusion, did not make the distinction drawn by the state court.} regulation of interstate commerce. And in deciding whether the regulation is reasonable or unreasonable in the above-mentioned sense the determining criterion seems to be whether the regulation in its practical operation involves a real danger of irreconcilable regulations of the same subjectmatter by the other interested state or states.

Accordingly, it would seem that in the absence of congressional action a state has power to regulate the rate for the transmission into the state of natural gas and electricity, at least under circumstances like those in the West Virginia and New York cases where the transmission is for a comparatively short distance.\footnote{This is apparently the view recently taken by the United States Supreme Court in Pennsylvania Gas Co. \textit{v.} Public Service Commission, \textit{supra}.} For, just as in the above-mentioned Ferry Rate Case\footnote{Port Richmond \& Bergen Point Ferry Co. \textit{v.} Hudson County, \textit{supra}.} and Toll Bridge Case,\footnote{Shrader \textit{v.} Steubenville \textit{etc.} Traction Co., \textit{supra}.} such interstate commerce differs so materially in different localities, both as to cost of transportation and otherwise, that there is no inherent need for such uniformity of regulation as may be secured only by the action of a single regulatory power. And, as the regulation of such rate of transportation cannot be an unreasonable regulation (for if unreasonable in the sense here used it would be void as a violation of the \textquoteleft{due process\textquoteright} clause), there is, therefore, no real danger of irreconcilable state regulations of such interstate transmission. Perhaps it should be pointed out parenthetically that a mere possibility of irreconcilable
regulations should not invalidate such a regulation, for, as already observed, interstate commerce, being a practical conception, should be dealt with in a practical way. Hence, the West Virginia case and the New York case, in holding constitutional such state regulation of the rate of sale, are clearly correct in conclusion. But, since such a regulation of the so-called "rate of sale" includes, in practical effect, a regulation of the rate of transportation, it would seem to follow that there is, in this respect, no practical distinction between two sorts of state regulations. Therefore, since a state can regulate such "rate of sale", a fortiori it would seem that a state can regulate such rate of transportation, for certainly under the implied prohibitions of the commerce clause a state cannot do by indirection what it cannot do directly.

—T. P. H.

**County in Which Process May Be Served Upon an Officer or Agent of a Corporation.**—Until some few years ago, it had been the uniform practice in West Virginia to serve process upon an officer or agent of a corporation in the county in which he resided. Prior to acts of 1903, it was understood to be erroneous in all instances if the return did not show that the officer or agent was served in the county in which he resided. This requirement grew out of a rather curious chain of statutory construction whereby chapter 50 of the Code is made to control the service of process in the circuit courts.

It will be noted that section 7 of chapter 124 of the Code designates the officers and agents of a corporation upon whom service may be had in the circuit courts, but fails to specify any place of service. The Supreme Court early felt that it was under the necessity of seeking elsewhere for some statute fixing the place of service. Section 6 of chapter 41 of the Code provides as follows:

"The service of process, when person or property is not to be taken into custody, or it is not otherwise specially provided,

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30 Pennsylvania Gas Co. v. Public Service Commission, supra, in which the United States Supreme Court affirmed the conclusion of the New York court.
31 For a collection of cases in point see 7 A. L. R. 1094, an annotation on the West Virginia case herein discussed.
33 It has always been very doubtful to the writer, for reasons that need not be stated here, whether it was ever intended that chapter 50 of the Code should control the service of process in the circuit courts.