

**THE REGULATION OF
INTER-STATE RAILROADS
BY THE NATIONAL
GOVERNMENT. AN ESSAY**

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The Regulation of Inter-state Railroads by the National Government. An Essay by Robert P. Harlow

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ROBERT P. HARLOW

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AN ESSAY.

*Awarded the Prize for 1880 by the New York State
Bar Association.*

BY ROBERT P. HARLOW.

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PRIZE ESSAY.

The Propriety of Regulating Commercial Intercourse (especially that relating to Railroads) between the States by National Legislation; or, What National Legislation (if any) should be had to regulate Commercial Intercourse between the States.

By ROBERT P. HARLOW, of New York City.

The State confers upon the railroads the right of eminent domain on the theory that their enterprises are of a public nature, and that they are not exclusively for the private benefit of the corporations, but for the interest of the whole people. It confers upon the railroads the right to make a use of their private property in a way which affects the public interests. This gives to them certain private and vested rights, and imposes upon them certain public duties and obligations. It is the duty of the State to protect the vested rights of the railroads, but at the same time to exact the observance of their public obligations and to guard other interests equally worthy of protection. When they pursue, with dangerous zeal, their private interests, and become wholly forgetful of their public obligations and the rights of others, the State has the right and is bound to restore the balance between interest and duty. In the recognition of these principles lies the solution of the question of transportation in the United States—a solution which shall protect the public interests, be just to the railroads, and accord with the genius of republican institutions. In the language of Chief Justice WAITE, “that government is the best which, while performing all its duties, interferes the least with the lawful pursuits of its people.” Without entering into a discussion as to the limits of the power and duty of the

Government, it may be asserted that the paramount duty of government is to protect rights and prevent abuses; and, as an indispensable condition to this end, to jealously guard and preserve its lawful powers against dangerous encroachments from whatever sources they may arise. Thus we have the principle and the limitation which should guide the Government in its action or omission to act upon the railroad problem. The result would be the largest liberty to the railroads consistent with the interests of commerce, the rights of the public, and the safety and freedom of the governing power. Commerce must not be subjected to the railroads; but the railroads must be allowed to pursue, without restriction, their own interests so long as they do not interfere with other and greater interests. And yet, in pursuing their legitimate interests they cannot always avoid conflict with and injury to other interests; but this conflict and injury should not, even in cases of necessity, be in the arbitrary discretion of the railroads, but should be regulated upon some stable principle, and by some wise, more powerful, impartial and independent influence, which can be none other than government itself. Conflicting human interests will not regulate themselves. If this were so, all government might be dispensed with. It is pleasant to cherish the hope of a coming perfection of character, and with it a perfection of human conduct; but as long as these remain only beautiful dreams we must despair of absolute freedom and submit to the inevitable necessity of governmental restraints. Hamilton truly says, "There are some who maintain that trade will regulate itself, and is not to be benefited by the encouragements or restraints of government. Such persons will imagine that there is no need of a common directing power. This is one of those wild speculative paradoxes, which have grown into credit among us, contrary to the uniform practice and sense of the most enlightened nations." This is as true of the railroad problem to-day as it was of general trade when the *Continentalist* was written. There should be interference to prevent the abuse of the power and privileges of railroad corporations, and the usurpation or exercise by them of the power

to regulate commerce. The *genius* of our institutions will not admit of more; the safety of government and the rights of the public demand no less. The policy of non-interference has two limitations: Government cannot remain inactive (1) while combinations are forming which threaten its supremacy and usurp its functions; (2) when the rights of those entitled to claim its protection are violated. The Government cannot make contracts between the railroads and the people, but it can and must see that the stronger takes no unfair advantage of the weaker. The doctrine of the freedom of contract does not apply to the railroad question. There is no such freedom on the part of shippers. They *must* accept the railroads' terms. It would be silly to say, in this age and at our stage of social development, that no one is compelled to enter into a contract with the railroads. Commercial and social conditions do *compel* men to use the railroads, and if they cannot do this on reasonable terms and conditions, they must accept those which are unreasonable. The regulation of intercourse by means of railroads is, therefore, a very proper function of government.

But we need not rest alone upon these general principles. The common law, so fruitful and elastic in its principles and so rich in its illustrations, is a never-failing guide. Lord Ch. J. HALE says, when private property is "affected with a public interest, it ceases to be *juris privati* only." The application of this principle is well illustrated in what are called the *Granger cases*, the *Chicago Elevator case* (decided by the Supreme Court of the United States), and in *People v. Boston and Albany R. R. Co.* (70 N. Y. R., 569). There are many other cases in point, but these will suffice for the present purpose. In *Munn v. Illinois* (4 Otto, 113), Chief Justice WARREN said: "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

This is a sufficient statement of the fundamental principles

on which legislative action should be based. The expediency of present action, the power which should act, whether State or National, the measures which should be adopted, and the means to be provided for their enforcement, will now be considered; and the first step is, to inquire what evils, if any, exist, and of their nature and extent.

There *is* a great evil, and, in a general form of statement, it is this: The illegitimate exercise, by railroad corporations, in their own interest, of extensive and important powers, vitally affecting the commerce and other industrial interests of the country. Whenever energy, mind and adequate means are concentrated in any enterprise, they are likely to affect the industries of the country; but it may be in a legitimate and beneficial manner, or in one that is illegitimate and highly injurious. The powers exercised by railroad corporations, in relation to freight tariffs, are virtually legislative powers. Exercised, as they are, in the interest of the legislators only, there is an absence of wisdom, justice and moderation, and an entire forgetfulness of the rights of the public. The power to regulate commerce is vested in Congress by the Constitution; and it was so vested, to prevent, among other things, unjust discriminations by one State against another in respect of commercial privileges and advantages. But now the railroads have quietly usurped this power, not to exercise it beneficently in the spirit of the Constitution, to curb injustice, but to create and intensify the evil of discrimination and inequality of privilege. And their action has created illegitimate, unregulated and ruinous competition, not only between the railroads themselves, but among communities and individuals. And thus, what was wisely denied to the States has been usurped by the railroads, and the consequences are, those very discriminations against one community or State or class, and in favor of another, to guard against which the power to regulate commerce was denied to the States. We have, then, commerce regulated by arbitrary rules made by self-interested corporations, which, unlike the legislators elected by and responsible to the people, are without that patriotism, desire of honorable fame and high

sense of honor and duty, which prompt to the conscientious discharge of the sacred obligations of public trust. And we shall see, further on, that these corporations are really and substantially without responsibility before the law for any reckless disturbance of industry and imposition of unequal burdens. A failure of the Government to control one of the most important of human interests, is a virtual *abdication* in favor of private corporations, and is, to this extent, a change in our institutions. But of some of the evils in detail.

And the one most onerous and odious is discrimination in rates. The cost of transportation is a decisive condition in commercial transactions. The power that controls this condition also controls production and exchange, and to a very great extent consumption itself. The cost of production of wheat in Minnesota, let us suppose, is thirty cents per bushel. Now let us suppose the cost is the same in Ohio. If the power that controls transportation to the markets of distribution and consumption, discriminates by granting lower rates to the producers in Minnesota, the producers in Ohio are driven from those markets and this industry in Ohio languishes. Again, a manufacturing industry in Ohio may be conducted as cheaply as in Missouri; but if the transportation of raw material or other needed means to Missouri is cheaper than to Ohio, the Missouri manufacturer has the advantage of his competitor in Ohio, and the one flourishes while the other fails. These are very simple illustrations, but in them may be seen the important powers of transportation companies, and how closely their operations are allied with the dearest rights and interests of the public. Of course, natural economic laws are constantly working similar results; but I am not now discussing that branch of the problem. It is the arbitrary action of the transportation companies for gain and self-interest to which I am directing attention. Again, a large dealer in Louisville obtains, by a secret or special arrangement with the transportation company, a rate much lower than numerous small dealers are compelled to pay. The small dealers are thus not only driven out of the wholesale markets of New York, Baltimore or New

Orleans, in the making of purchases, but their local trade with consumers is destroyed or greatly injured by this fatal competition. There is no end to these illustrations. They are familiar to business men and to intelligent observers. The air is filled with complaints and there is a loud and importunate demand for a fair chance. By the favor of the transportation companies, one State, class, community or individual is built up, while the rights and the hopes of another are dashed and trampled on. The companies thus exercise a power of burdening by taxation one State, city or class, and of exempting another. They tax some industries and foster others by exemption. They cause a fluctuation of values and demoralize commerce. Nor is this all; they demoralize and debauch the merchants and shippers and their own agents by inaugurating an illegitimate struggle or scramble for the advantage, which ends in the obliteration of all moral distinctions and in the forgetfulness of the commonest human obligations.

There are cases of discrimination which may not be evils in themselves, but which involve interests far too important to be left without legislative sanction and governmental regulation. One is the case of that class of freights called "*special*," now, I believe, included in "fourth class freights." The following is a good illustration: Twenty years ago sugar and molasses were largely imported at New Orleans, and shipped from there, by river, to the various river towns and cities, and thence distributed throughout the Western and North-Western States. The merchants of Chicago desired to compete with the merchants of New Orleans and the river towns, and, accordingly, the trunk lines, connecting the Atlantic seaports with Chicago, made a special rate for this class of goods, which was very much below the current rate for goods of equal value, in proportion to weight. (Report on Internal Commerce, 1879.) This rate was, in all probability, far below the actual cost of transportation. It stands to reason and common sense that other classes of freight and other enterprises were *taxed* to enable the trunk lines to foster this trade of Chicago merchants. The railroads, undoubtedly, made up their loss. A second