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Regulation—A Threat or a Promise?

BY HENRY S. SHERMAN*

Let us go back a moment to the fourth year of the reign of King James the First of England. Colorado, among many other states in the Union, adopted as its fundamental law the common law of England existing at that time. Something to eat and drink and a place to sleep were then, as now, essentials of life. So the common law of England determined that these two essentials, being for the benefit of all, should be denied to none. They became, under the law, perhaps the first public utilities. An innkeeper had to furnish lodging and a tavern had to furnish food to everyone who applied. As you know, that is true in Colorado today and neither a hotel nor a restaurant has a right to deny food or lodging to anyone. As commerce grew and life became more complex, it became apparent that other services also were necessary to be maintained in the public interest, and that they, too, should be accessible to the public without discrimination as to manner or type of service or charge for performance. Thus came into being the theory of regulation. A public utility embraces every business which has been declared by the legislature "to be affected with the public interest." Such a definition, so far, has been limited to include chiefly the telephone and telegraph, corporations furnishing water, and all the forms of transportation of persons and property. However, it is within the power of the legislature to declare almost any and every business a public utility, and thus subject to regulation.

When we get down to fundamentals, is it not even more essential in the public interest that we have food available for our homes than it is to have it available in a hotel? Thus the grocer would become a public utility. Is it not as essential in the public interest that medical care and nursing be furnished to all? Thus the doctor and the nurse may become public utilities. And so with practically every business and profession. The convenience of yesterday becomes the necessity of today. Thirty years ago, the automobile, although highly convenient, could not be said to be a necessity. But today, in those lines of endeavor which call for speedy transportation in order to survive, the automobile becomes a necessity. And so tomorrow with the airplane and speedier rail transportation. There is scarcely any business which contributes to the necessities, the well-being and the improvement of the human race, which could not be said to be a public utility.

It would look as though, under this kind of a prognosis of future development, that we would not want regulation—that we should go back to the days when government left business strictly alone.

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In wartime, as we all know, the hand of regulation has reached heavily into every nook and crevice of the business structure. This has been grounded on military necessity and we all have borne it cheerfully. But the mushroom growth of boards and bureaus—even before the war—each reaching out seemingly for greater and greater power, and wriggling its tentacles into the very soul of business, seemed to be threatening to engulf us. We were irritated and alarmed before the war, but we took it in our stride as good soldiers during the war. What is our attitude going to be, now that the war is over?

This is the reason I want to discuss regulation and its trends, and let me say, its hopes—although my individual nature rebels, as I am sure yours must, against the bare word “regulation.”

The oldest federal regulatory body of consequence is the Interstate Commerce Commission. Most of the states of the Union have a state regulatory authority similar to our Public Utilities Commission. Generally speaking, they are old and seasoned bodies, and have survived the test of time. The Interstate Commerce Commission was set up to regulate the commerce between the states, the state commissions to regulate commerce within the confines of the various states. At first the railroads, steamship and barge companies were the chief subjects of regulation; then came motor transportation. At first some of these businesses resented and fought regulation. But the picture changed. Methods and practices of businesses, the establishment of fares and tariffs and charges became more uniform and more standardized—a pattern was formed for the conduct of these businesses—and not only the public benefited and knew what to expect, but the businesses themselves became more secure in the knowledge that they would not be subject to the unreasoning and momentary whims and caprices of incompetent officials as they sometimes had been in the past. They became public servants and were willing and glad for reasonable rules of regulation, reasonably applied. And what business or profession, if it is to succeed, is not a public servant, whether its rules of conduct be self-imposed or regulated by others who are charged with the dual responsibility of protecting the public and at the same time sponsoring the successful operation of the business? Our medical and legal associations were formed to raise the standards of their professions and to adopt codes and rules and regulations governing their members and increasing their services to the public. We have our realtors, our manufacturing and industrial associations and our traffic associations. There is scarcely a business that does not have an association with rules of conduct. Is there a one of them that would not be happy to have everyone engaged in that particular business required to comply with the rules and regulations that experience has determined are best suited for the conduct of that business? This is self-imposed regulation.

At the request of many of these associations themselves, the regulation is administered by a public body—witness the Real Estate Brokers Board, the Abstractors Board, the Board of Nursing Examiners, the Board of Barber Examiners, and a host of others. Regulation in itself is desirable and necessary—wrongfully administered, it can be harmful and oppressive.

The Interstate Commerce Commission, and in general the state commissions have come down through the years, mellowing as they have grown older, until now most of them, and the Interstate Commerce Commission notably among them, have reached the stage where the wisdom of their regulatory practices is seldom questioned and generally praised. I have heard it said many times by those familiar with the Interstate Commerce Commission that it is a body almost as deserving of respect and acclaim as are the supreme courts of our land.

I think when we condemn the regulation of business as such, we are in error. We should condemn—and many times during recent years we certainly have had the right to condemn—the type and manner of regulation we have had. But we should not condemn regulation in itself. After all, we do not condemn laws for the governing of men, for the punishment of crime, or for the preservation and improvement of the public health. Sometimes we condemn rightfully the manner of the enforcement of those laws. Regulations are but laws adopted by the regulatory bodies to whom has been delegated such authority by the legislative body of our government. These regulations must be reasonable and reasonably applied. They should not be burdensome, and they should be as simple as possible. Above all, they should be administered by those who know, or who are in a position to know, the facts. And here I think is the crux of the whole matter. Here is the cross roads at which regulation takes the road to oppression—or the road to greater freedom and greater security for the individual and for the public. Here is the point at which we can damn the boards and bureaus and say, "Let's abolish them,"—or we can say, "Let's trim them down, consolidate them, and make them the servants of business and the public generally." We broke away from England because she governed us from afar. We are tempted, lightly speaking, to break away from Washington because she governs us from afar.

Regulation by those who remain far away—by those who do not understand the problems they face—is bad regulation and bad government. Regulation among ourselves, by those who are on the ground and know the facts—the questions to be answered, and the difficulties to be solved—is good regulation, good government—and it is good business. This brings to the fore the question, "Shall we have federal regulation or state regulation?"—the age-old question of states' rights versus the

federal government. This is not a political speech. It seems to me that during the past few years, that very definite line of cleavage between the Republican and the Democratic parties—the Republicans originally favoring strong federal government—the Democrats originally favoring states' rights—has about disappeared. We now find a substantial segment of the Republican Party favoring states' rights, and a substantial segment of the Democratic Party favoring federal government. Many of our most stalwart Republicans and our most ardent Democrats have traded horses, and are now riding in the opposite direction. In my opinion, the true course to follow lies between the two extremes. "Render, therefore, to Caesar the things that are Caesar's, and to God the things that are God's." In matters of purely local concern, the regulation should be purely local. In matters involving a number of states or the country as a whole, the regulation should be federal. But that federal regulation definitely should be administered by those familiar with the territory to which it is to be applied. This lack has been perhaps the greatest weakness of federal regulation. And when this situation is corrected, many well-founded criticisms of federal regulation will cease.

Let me again refer to the Interstate Commerce Commission. When a matter arises involving just a few neighboring states, the Interstate Commerce Commission appoints a joint board, composed of one member of each state regulatory commission of each of the states involved. That joint board hears the evidence and makes its recommendations. Thus the Interstate Commerce Commission has the benefit of the knowledge and the experience of those who are on the ground and familiar with the problems to be solved. Then again, members of the state commissions sit as cooperators with some federal bodies in matters coming before them. If all federal agencies would depend to the same extent that some of these do upon local knowledge and local experience for the determination of their questions, federal supervision would not be so burdensome.

When I was a boy in Montrose, I got to Delta—twenty miles away—once before I graduated from high school. It took a day to reach Denver, and sometimes longer if the train was late. Now it takes less time to reach Washington from Denver by air than it takes to go to Montrose. As we all know, county lines are somewhat obsolete. With transportation becoming what it is today, and what it will be in the future, state lines will tend to become of less and less importance. Today many of new problems, admittedly are not to be approached as state problems, but as area, district or sectional problems, as in those cases where a number of states unite to oppose federal regulation, actual or proposed, in certain fields.

States can no longer live by themselves—just as it is yet only beginning to dawn upon our national consciousness that a nation cannot live by itself. We have repeated this to ourselves during these weary and terrible war years, but deep in our hearts we have hardly believed it. The light of the truth is just beginning to dawn upon us. Perhaps it took the terrible concussion of the atomic bomb to arouse us from our stupor—to make us realize that if all is not well in Tokyo this noon, the City of Pueblo may be obliterated tonight—but now we are beginning to see that we are of this world—a part and parcel of it—and what concerns every people on earth vitally concerns us.

Colorado, among other states of the Union, has, as you know, laws relating to the length and weight of trucks passing through Colorado. About two years ago, vital shipments of war materials, supplies for our soldiers, essential goods for the civilian machine of production were being held up at state borders while enroute from the industrial East to the Pacific Coast, because the trucks were over-weight and over-length. Perhaps a ship was waiting to sail for the South Pacific—perhaps airplanes were awaiting needed parts. Here in Colorado, as elsewhere, due to state laws, those shipments were stopped. Something had to be done. War goods had to move. The governor designated me to try to find an answer. The only answer I could find was that the governor issue an executive proclamation, which probably he had no legal right to do, suspending in effect the enforcement of those laws for the duration of the emergency. He did it, and the materials moved. Isn't it just as essential during peace-times—although in a much lesser degree, of course—that our commerce flow freely from state to state? Is it good business—is it good sense—that a truck originating at Detroit and destined for Denver has to stop at every state border and comply with a dozen or more technicalities of each and every state it passes through, when those requirements, protecting the substantial rights of each and every state, could just as well be comparatively uniform and uniformly administered? It is true that states try to pass uniform laws, but as I will give you an example in a moment, getting the legislature of 48 different states to adopt a uniform law is almost as futile as it would be to get a woman's club to adopt a unanimous resolution as to the hat it prefers. It might be accomplished over a long, long period of years, but how much more quickly and how much more successfully it could be accomplished by the federal government, if we just hold that federal government down. Perhaps it might be well to remember what Clark Gable said to Greta Garbo when he was selected to play opposite her, "All right, Garbo—before we get through, I will cut you down to my size." He recognized her possibilities, but she wasn't going to steal the show.

In the development of post-war aviation, in which we are all so intensely interested, we have a similar situation. The Public Utilities Commission has jurisdiction of the regulation of aviation in Colorado—the granting of certificates, the adoption of safety rules and regulations, and the fixing of fares and charges. But we realize that were we to attempt to regulate those who operate in other states than Colorado, we would be setting up one of 48 different barriers to the development of aviation. We do and must exercise regulatory authority within the state for the protection of the public—a considerable portion of the aviation industry wants us to—but we should not adopt such rules and regulations as will interfere with the free and speedy development of commercial aviation across the nation and over the world.

At a meeting of the National Association of Public Utilities Commissioners, representing the regulatory authorities of every state, about a year ago, that association adopted a resolution recommending a uniform aviation code for adoption by the legislatures of the various states. The code was good, but I said at that time, "You cannot gain uniformity in this matter by submission of a uniform code to 48 different states." To how many legislatures it was submitted I do not know. I do know that only five legislatures passed it—with amendments. And by the time they got through, it was about as uniform as a crazy quilt. Our legislature will meet soon to consider this, among other problems. We must remember that regulation of purely intrastate aviation in Colorado is necessary and vital, but I am hopeful that we also remember that we must not adopt such regulations as would impede in any way the full and free development of air commerce.

There are now bills pending in Congress vesting full sovereignty over the air in the federal government, and placing all regulatory authority in the Civil Aeronautics Board. I doubt the wisdom of the "full sovereignty" clause, for I believe that situations may arise where local regulation is necessary. The Interstate Commerce Commission, some time ago, granted a 10% increase in freight rates, but if a situation arose in a state whereby that increase would stifle an industry, the state itself could relieve that industry from the effects of the order, where such action would not place an undue burden on interstate commerce. The states followed generally the Interstate Commerce Commission, and the over-all picture was not blurred, but individual hardships could be avoided on local transportation. And so it should be in aviation. Local problems should be solved locally. But broadly speaking, I believe the proposed federal legislation is good and the states should not stand in the way of its general concept.

There are other bills pending in Congress which I think should vitally interest us. Those are bills providing for the consolidation of

boards and bureaus. We have now the Interstate Commerce Commission regulating railroad and motor transportation, the Civil Aeronautics Board regulating air transportation, the Federal Power Commission regulating interstate commerce in gas and electricity, the Federal Communications Commission regulating interstate communications by telephone, telegraph, television, and radio, the Securities and Exchange Commission regulating interstate commerce in securities, and various other commissions. It is proposed under the terms of these bills that some or all of these authorities should be consolidated under a single head. There are a hundred arguments as to why it should not be done. The aviation industry is especially fearful—on the ground that it will not advance as well in company with rail and motor transportation—that it must steer its course alone. There seems to me one logical persuasive reason why it should be done—get all federal regulations under one head, where a broad view can be taken of all transportation, and where there can be unified control and a consistent course of action. No one form of transportation need suffer in any degree.

I have tried to outline very generally a few of the broad problems connected with regulation—a few of the trends—and to give you a few thoughts on the basic problem—the conflict of federal and state jurisdiction.

It has been very hard for some, constituted as they are— it's been hard for me, right in the midst of it—to become reconciled to that vast growth of federal bureaucracy, which in many instances has seemed so very oppressive and stifling. I think its manner of enforcement in many cases, due to its phenomenal and abnormal over-night growth, has blinded us to the true solution. I believe when the smoke is cleared away and the federal government has settled down to normal peace-time development, we will find a disposition on the part of the federal boards and bureaus to cooperate with the states and in the administration of those activities, within their respective fields of regulation, to give consideration to local problems and situations. If they do, I am confident the states and state regulatory bodies will meet them more than half way. In time, each will realize that some things should be acted upon jointly, and that some things are peculiarly within the province of one, to the exclusion of the other. There has been bitterness and there has been feuding, but in the field of regulation, in my contacts with the bodies of other states and with the federal government, I find an increasing effort on the part of both to abandon unimportant claims to jurisdiction to the end that the common good may be best served.