IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 161.

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, SOUTH CAROLINA PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

v.

BARNWELL BROTHERS, INC., POOLE TRANSPORTATION, INC., HORTON MOTOR LINES, INC., ET AL.,
Appellees.

MOTION OF THE STATE OF FLORIDA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

THE STATE OF FLORIDA, by the undersigned, its Attorney General, respectfully moves this Honorable Court for leave to file in this case, as *amicus curiae,* the accompanying brief in support of the decree of the District Court.

The grounds for this motion, fully discussed hereafter in the Preface to the brief, are:

First, *the academic interest* of the State of Florida in the affirmance of a decree which preserves those guarantees of the Commerce Clause of the Constitution of the United States which are essential to the welfare of each State and the Nation as a whole, and

Second, *the real and immediate interest* of the State of Florida in the affirmance of a decree which is now in fact protecting the public and private interests of her people from grave injury.

CARY D. LANDIS,
Attorney General of Florida.

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PREFACE TO THE BRIEF,

Statement of the Interest of the State of Florida in the Issues of This Case.

The interest of the State of Florida in the issues now drawn and soon to be orally debated at the bar of this Court, is not merely academic; does not spring alone from her desire that the precedents established and the opinions published by this Court continue to preserve to the States and their peoples the guarantees of the Commerce Clause of the Constitution of the United States. This State is also vitally and immediately concerned in the preservation and continuation of the protection now actually afforded by the District Court's decree to the public and private interests of her people.

The interests of the State of Florida are reflected in the findings and opinion of the District Court:

> "Within the past decade there has been a great development of interstate commerce by truck, and a corresponding change and development of industry in the Southeastern part of the United States based upon truck transportation. The market gardening industry, the textile industry, the fertilizer industry, and many others have changed in large part their method of doing business as a result of the facilities afforded them by the use of trucks in interstate commerce . . .
>
> ". . . A large part of this interstate traffic, with all that it means to the life of the people of the Southeastern part of the United States, will be virtually barred from the highways of South Carolina, and a barrier will be erected not merely against the commerce of the State but *also as against the commerce of sister States* (emphasis added), if these restrictions are enforced (Opinion, R. 65) . . . That the said standard paved roads form a well connected system of highways

> which have been improved with federal funds as a part of a national system; that they comprise the best system of highways in the Southeastern part of the United States, and are capable of carrying the commerce which has been developed by modern truck transportation; that federal highways numbered 1, 15-A, 17, 21, 25, 29 and 52 comprise the great arteries of interstate commerce through the State of South Carolina (Finding of Fact No. 18, R. 81) . . . the great arteries of interstate commerce above referred to carry the larger part of interstate traffic moving to and from the State, as well as such traffic *passing through the State to and from Georgia and Florida and the States to the North*" (Opinion, R. 64) (Emphasis added).

The evidence below was primarily directed to a showing of the burden which the enforcement of the South Carolina regulations would have upon the industry, commerce, and life of the people of South Carolina. This evidence was uncontradicted and the findings of the District Court were not excepted to by appellants. But the extent to which this enforcement will affect the industry, commerce, and life of the peoples of the surrounding States is well within the judicial knowledge of this Court.

The burden of the law will be so far reaching that it will affect all the States of the Union in varying degree; but a consideration of the geographical location of the State of Florida makes it manifest that the burden of the law will fall most heavily upon her people. The territorial expanse of South Carolina lies athwart the trunk arteries of interstate commerce which parallel the Atlantic Seaboard. There are no other land routes to carry the commerce between the State of Florida and its markets in the East and North. A narrow passage at the point where the States of Georgia and North Caro-

lina are contiguous is free from artificial barrier at the hands of men, but is blocked by the hand of nature. There is only one road through this gap, "a narrow road, full of short curves and mountain climbs which make it a very hazardous highway for trucks of any size to travel (R. 216)."

Some conception of the importance to the State of Florida of the motor transportation along the Atlantic Seaboard can be obtained from statistics of past years, although these do not reflect the advances in this commerce of recent years, especially that developed since the regulation and promotion of the motor carrier industry under the Motor Carrier Act. Thus it is disclosed by a census of motor trucking for hire, conducted by the Bureau of the Census for the year 1935,[1] that the 277 Florida concerns subjected to the census had a revenue for the year of $3,455,000. While only 23, or 8 per cent, of these concerns were primarily engaged in interstate commerce, their share of the annual revenue was $1,032,000, or 30 per cent of the total. However, it was recognized by this very study that private trucking constitutes the major part of all trucking operations in the United States (page 1), and it must be further observed that a great majority of the trucks operating into and out of the State of Florida are licensed in other States. Thus the Report of a Survey of Traffic in the State of Florida (for the year 1933-34) published by the United States Bureau of Public Roads and the State Road Department of Florida revealed (page 59) that Florida citrus fruit is carried principally by out-of-state registered vehicles. We quote from that report (p. 59):

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[1] Motor Trucking For Hire, Census of Business, 1935, Bureau of the Census, p. 40.

"More than 80 per cent of all trucks crossing the border and transporting citrus fruits are licensed in States other than Florida. This indicates the centers of ownership of the trucks are probably near the ultimate destination of the shipments, the trucks often being sent to Florida empty to obtain their loads and return. Likewise, garden produce is transported predominantly by out-of-State vehicles, to the extent of 71 per cent of all such trucks. Miscellaneous and empty outgoing trucks have nearly equal distribution of registrations between Florida and out-of-State licenses, while 41 per cent of all outgoing trucks are registered in Florida and 59 per cent are of foreign registry."

It was further found (Report, *supra,* pages 55-57) that:

"During the year survey, 215,599 trucks crossed the State line, outbound from Florida to adjoining or distant States. Of this volume 31,590 trucks, or 14.7 per cent of the total, were carriers of citrus fruit; 17,245 trucks, or 8 per cent, were carriers of truck garden produce; 86,039 miscellaneous trucks, representing 39.9 per cent; and 80,725 empty trucks, or 37.4 per cent of the total. . . . Other than to Atlanta, Georgia, shipments of truck garden produce were principally consigned to northern cities, with Washington, D. C., Baltimore, Maryland, and cities through Virginia, North Carolina, and Tennessee the principal destinations.

"On U. S. 41, there was recorded the greatest number of outgoing trucks, not only in carriers of citrus fruit but also of garden produce. This route joins the Florida producing areas with Atlanta, Georgia, Chattanooga, Tennessee, and the northern States west of the Appalachian Mountains and carries 32 per cent of the total 31,590 interstate citrus fruit trucks. Of nearly equal importance is U. S. 17, north from Jacksonville, over which there

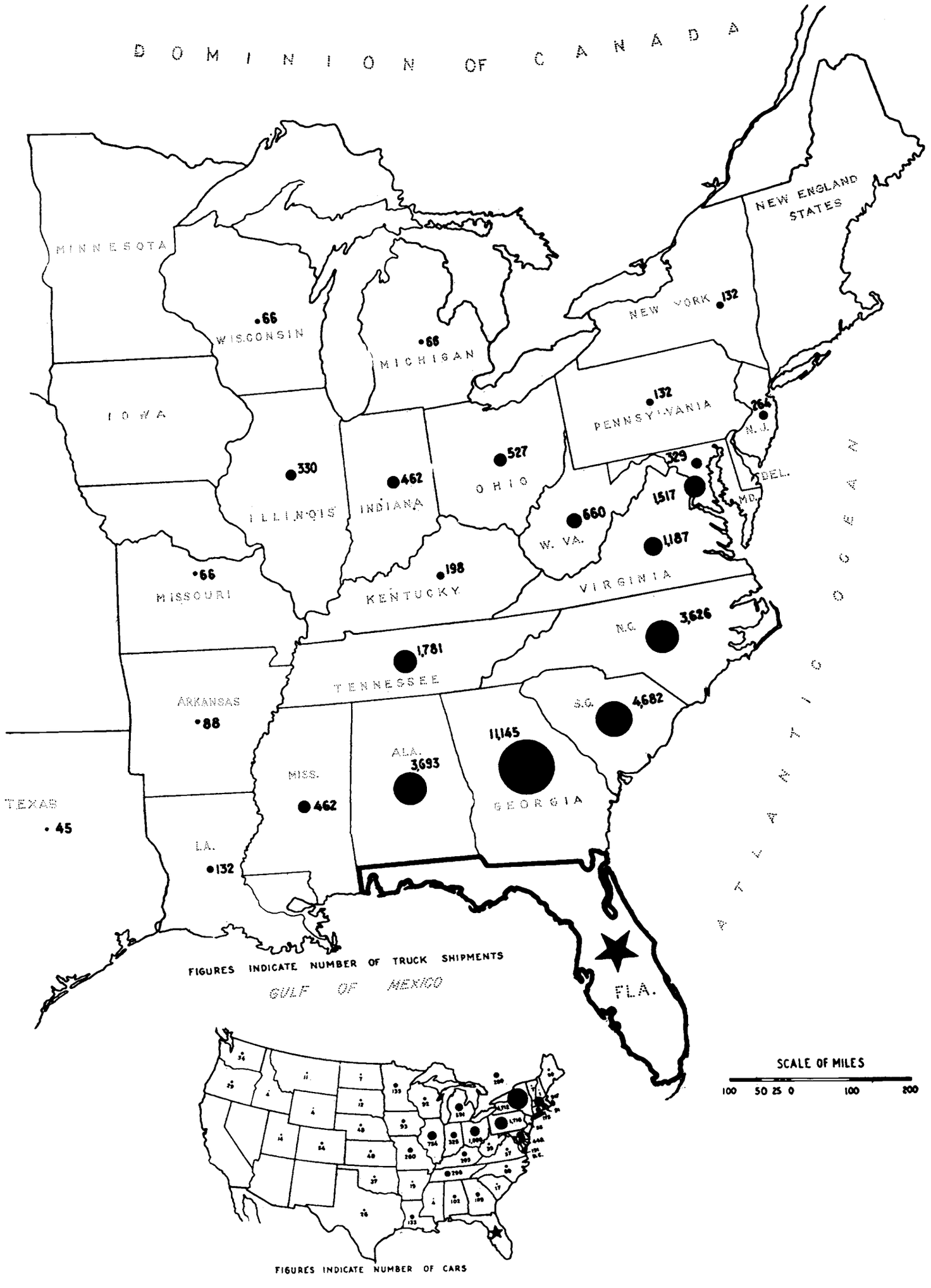

Figure 22.—Distribution of Florida citrus fruits by States; annual truck and rail and boat shipments

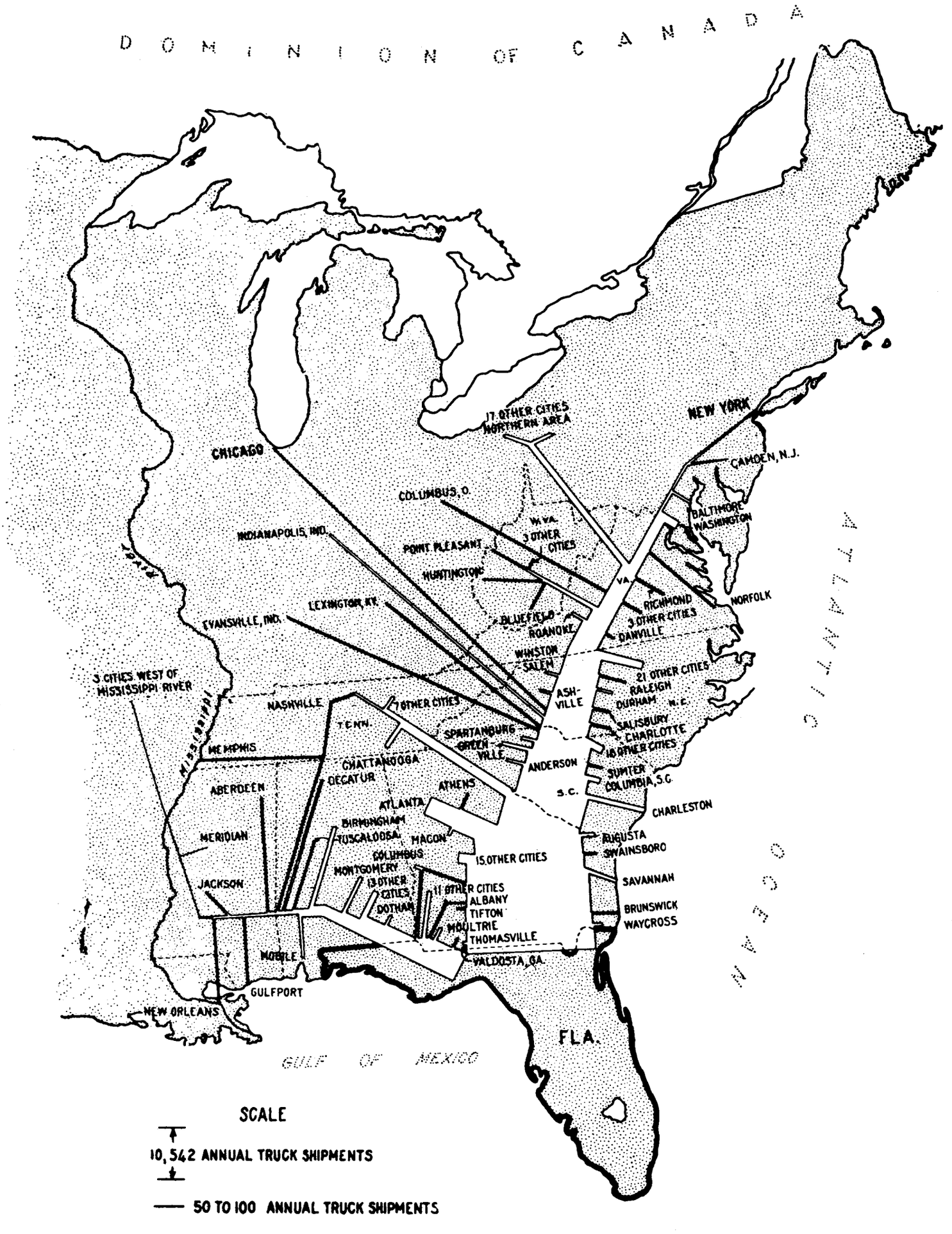

Figure 23.—Distribution of Florida citrus fruit by principal cities and areas.

moved 29 per cent of all interstate citrus fruit trucks. This road, and U. S. 1, also north from Jacksonville, are the channels for Florida's produce to reach the large northeastern markets and supply the communities along the Atlantic seaboard. U. S. 1 carried 20 per cent of the outgoing citrus fruit trucks.

"Of the 17,245 annual outgoing garden produce trucks, 37 per cent moved over U. S. 41; 32 per cent over U. S. 17; and 13 per cent over U. S. 1. The miscellaneous truck movement on these 3 routes in percentages of total outgoing miscellaneous trucks is: U. S. 41, 13 per cent; U. S. 17, 10 per cent; and U. S. 1, 20 per cent, respectively.

"In combination, the above 3 routes are Florida's commercial gateways of truck commerce, accounting for 81.8 per cent of all citrus fruit exports, by truck, and 82 per cent of the total garden produce. On these 3 routes, miscellaneous trucks amounted to 43.2 per cent and empty trucks, 38.8 per cent of the total of each carried on the 12 principal State roads crossing the Georgia and Alabama borders."

Figures 22 and 23 reproduced from this Report, illustrate the protection afforded but one important Florida industry by the decree of the District Court.

On page 59 of the Report it is found that much of the truck garden produce "is transported in modern refrigerator trucks carrying perishables with as high a degree of safety as that offered by railways." But the evidence below reveals, and the District Court found (Finding of Fact No. 10, R. 79), that if the South Carolina regulations be enforced, these refrigerated vehicles (tractor semi-trailers (R. 110)) will be driven from the highways. These refrigerated vehicles, moving along the Atlantic seaboard today, weigh empty 13,600 pounds and carry a pay load of 20,000 pounds, a gross weight of 33,600 pounds (R. 157). The enforcement of the

South Carolina regulations will reduce their pay loads 68 per cent, to 6,400 pounds, a pay load which could not be carried more than a few miles save at a loss.

The Interest of the State of Florida in the National System of Interstate Highways.

A comprehensive survey of the growth and purpose of the Federal Aid System of Highways is to be found on pages 19-40 of appellees' brief, and we deem it unnecessary to review that history here.

Suffice it to say that by the cooperative efforts of National and State governments this Nation is now possessed of "an adequate and connected system of highways interstate in character," in accordance with the mandate of Section 6 of the Federal Highway Act of 1921 (42 Stat. L. 212).

This system of highways has been constructed and maintained according to standards established by the United States Bureau of Public Roads, in the exercise of the power conferred upon the Secretary of Agriculture by Section 8 of the Federal Highway Act of 1921 "to approve the types and width of construction and reconstruction and the character of improvement, repairs, and maintenance" of these highways. It was early recognized that highways could not be "interstate in character" if the standards by which such highways were built in one State varied in large degree from those by which they were built in other States.

While complete uniformity was and always will be impossible, substantial uniformity in design and capacity has been achieved so that this Nation now possesses a national system of improved and interconnected interstate highways, which, from the standpoint of physical

characteristics, now permits the relatively unimpeded movement of interstate transportation.[2]

The general standard of weight capacity adopted by the Bureau was 16,000 pounds per axle for high-pressure, and 18,000 pounds per axle for low-pressure, pneumatic tires and it has been for these capacities that the Bureau has designed the main highways in the interconnected system.[3] Informed by its own knowledge of the designs and capacities of these interstate highways over the Nation, the Bureau of Public Roads, in 1934, under authority contained in the Federal Highway Act of 1921, published a "Uniform Act Regulating Traffic on Highways," as revised and approved by the Fourth National Conference on Street and Highway Safety, May 23, 25, 1934, which was recommended for adoption by all the States (R. 275). By Section 145 thereof (R. 277) wheel loads not in excess of 8,000 pounds and 9,000 pounds, and axle loads not in excess of 16,000 and 18,000 pounds are recommended, depending upon whether high-pressure or low-pressure pneumatic tires are used. All the States of the Union, save about five, now have tire, wheel, or axle limitations in substantial conformity with these recommendations.

Substantial uniformity in width has likewise been achieved in conformity with Section 9 of the Federal Highway Act of 1921, which provided:

> "That all highways constructed or reconstructed under the provisions of this Act shall be free from tolls of all kinds.

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[2] "Government Activities in the Field of Transportation", Report No. 12 of Select Committee to Investigate Executive Agencies of the Government pursuant to Senate Resolution No. 217 (74th Congress) 1937, p. 12.

[3] Testimony of Thomas H. McDonald, Chief, U. S. Bureau of Public Roads, before the Interstate Commerce Commission, Docket No. 23,400.

> "That all highways in the primary or interstate system constructed after the passage of this Act shall have a right of way of ample width and a wearing surface of an adequate width which shall not be less than eighteen feet, unless, in the opinion of the Secretary of Agriculture, it is rendered impracticable by physical conditions, excessive costs, probable traffic requirements, or legal obstacles."

As a result, a standard 96 inch width limitation for motor vehicles has long been recommended by the Bureau of Public Roads to all the States (R. 280) and has the support and recommendation of the American Association of State Highway Officials (R. 280). Forty-seven of the 48 States have given recognition to this uniformity of design in the interstate system and have prescribed the 96 inch limitation. The present inventory of interstate motor equipment has been designed to this capacity (Finding of Fact No. 24, R. 83).

In order to protect the national investment, assure the permanence of the Federal Aid system, and guard against its disruption by State abandonment or refusal to maintain the Federal Aid highways, it is provided by Section 14 of the Federal Highway Act of 1921:

> "That should any State fail to maintain any highway within its boundaries after construction or reconstruction under the provisions of this Act, the Secretary of Agriculture shall then serve notice upon the State highway department of that fact, and if within ninety days after receipt of such notice said highway has not been placed in proper condition of maintenance, the Secretary of Agriculture shall proceed immediately to have such highway placed in a proper condition of maintenance and charge the cost thereof against the Federal funds allotted to such State, and shall refuse to approve any other project in such State, except as hereinafter provided.

> "Upon the reimbursement by the State of the amount expended by the Federal Government for such maintenance, said amount shall be paid into the Federal highway fund for reapportionment among all the States for the construction of roads under this Act, and the Secretary of Agriculture shall then approve further projects submitted by the State as in this Act provided. . . ."

Between 1916 and October 31, 1936 the Federal Government had paid to the various States the sum of $2,197,634,970.13, and about $500,000,000 had been apportioned but not paid out (R. 137, 252) for the development of the designated Federal aid system. This expenditure has been the investment of all the people of the United States, the people of Florida as well as the people of South Carolina. The purpose and design has been national, not local. This Court in *Nashville, etc. R. Co.* v. *Walters,* 294 U. S. 405, 417, recognized the functional difference between these highways and the local highways of the States:

> "The state highways of Tennessee (as distinguished from county and city roads and turnpikes) have their origin in the Federal aid highway legislation. The aim of that legislation is 'a connected system of roads for the whole Nation'; 'to provide complete and economical highway transport throughout the Nation', to furnish 'a new means of transportation no less important to the country as a whole than that offered by the railroads'; to establish 'lines of motor traffic in interstate commerce.' "

While accurate statistics are unavailable, it cannot be doubted but that 90 per cent of interstate motor carrier traffic is carried over highways in the Federal aid system.[4]

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[4] Michigan Law Review, Vol. 33, No. 2, December 1934, p. 251-252.

All the States and their peoples rightly feel a deep concern in the proper functioning of the Federal aid system of highways. State legislation which needlessly disrupts that system affects the interests not of that State alone but the interests of all the States. While by the Federal aid undertaking the cost of maintenance and the responsibility of regulation is left with the States, certainly the Commerce Clause of the Constitution of the United States is guarantee against regulations which, exceeding their reasonable necessity, erect a barricade around the borders of a State and deny to interstate commerce a reasonable use of the Federal aid system within its borders. Thus this Court said in *Morris* v. *Duby,* 274 U. S. 135, 145:

> "Regulation as to the method of use . . . remains with the States . . . unless the regulation is so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contributions to bettering the highway systems of the Union . . ."

The Interest of the State of Florida and Its People in the Successful Administration of the Purposes and Policies of the Congress of the United States as Expressed and Embodied in Part II of the Inter-State Commerce Act (Motor Carrier Act, 1935).

The State of Florida, in common with all the States, is vitally concerned that the purposes and policies of Congress, as expressed and embodied in Part II of the Interstate Commerce Act (Motor Carrier Act, 1935), be effectively realized.

The 74th Congress of the United States in August, 1935, enacted Part II of the Interstate Commerce Act, otherwise designated as the "Motor Carrier Act, 1935." It was declared by Section 202(a) thereof to be the policy of Congress:

"to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest;

"to promote adequate, economic and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices;

"improve the relations between, and co-ordinate transportation by and regulation of motor carriers and other carriers;

"develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense;

"co-operate with the several states and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part."

This broad and comprehensive statute regulating and promoting the transportation of persons and commodities in interstate commerce over land highways was "not a wayward spark of the legislative fury, fanned by the resentment of motor competitors."[5] Within the ten year period prior to its passage at least thirty-five bills had been introduced relating to the subject. Hearings were held on some; reports made in others; and one[6] was even debated in and passed by the House. The first Act to be enacted, the one now in effect, came only after long and serious study.

Throughout this formative period the States were pressing strongly for comprehensive federal regulation.[7]

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[5] Georgetown Law Journal, Vol. 24, No. 2, p. 424, January, 1936.

[6] H. R. 10288, 71st Cong. 1st Sess. (1930).

[7] Report of the Federal Coordinator of Transportation, 1934, p. 123, 74th Cong. 1st Sess., House Document No. 89.

State efforts to regulate and promote commercial motor transport in the public interest had become increasingly ineffective due to the national nature of the problem and constitutional inhibitions inherent in the problem of interstate regulation. The situation was similar to that existing prior to the enactment in 1887 of the first Act to Regulate Commerce.

The first step taken by the States to meet the situation was the appointment in 1925 by the National Association of Railroad and Utilities Commissioners of a Special Committee to draft a bill proposing federal regulation of interstate common carriers of freight and passengers by motor vehicle. This bill (S. 1734) was introduced in the Senate in the First Session of the Sixty-first Congress. At the same session a bill (H. R. 8266) practically identical in substance was introduced in the House. Neither of these bills got beyond the committee stage, but since that time the States, through their State commissioners, consistently advocated federal regulation. The Rayburn Bill (H. R. 6836, 73rd Cong. 2nd Sess.) supported by the Federal Coordinator of Railroads, Hon. Joseph B. Eastman, was drawn by the Committee on Legislation of the National Association of State Railroad and Utilities Commissioners.[8] Reintroduced in the 74th Congress, it was enacted into law without substantial modification.

It was fitting and proper that all the States in the Union should have thus cooperated to the salutary end that the interstate transportation by motor carriers over their several highway systems should be so regulated by the national government as "to recognize and preserve the inherent advantages of" and to "foster sound economic conditions in, such transportation and

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[8] Regulation of Transportation Agencies, p. 25, 73d Cong. 2d. Sess., Senate Document No. 152.

among such carriers in the public interest," to "promote adequate, economic and efficient service by motor carriers," to "improve the relations between, and coordinate transportation by and regulation of motor carriers and other carriers," to "develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States."

If these purposes can be achieved and these policies administered, then the use of the States' highways by interstate traffic will be a use consistent with their proper purpose and function, and will in itself be an end justifying the great cooperative expenditures and effort of the States and National Government under the Federal Highway Acts, in the completion of a national system of highways interstate in character.

Any State law which tends to subvert and defeat these purposes and policies, not only impairs the investment which that State and all the States have made toward the creation of the national interstate highway system, but denies to its own highways that protection which can flow only from a system of interstate motor transportation regulated and promoted in the public interest.

The interest of all the States in the effective realization of the purposes and policies of the Motor Carrier Act is accentuated by the fact that this Act, like the Federal Highway Acts, contemplates and requires for its successful administration, the cooperation of the National and State governments.

Thus, it is expressly declared to be the policy of Congress "to cooperate with the several States and the duly authorized officials thereof . . . in the administration and enforcement" of the Act.[9]

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[9] Motor Carrier Act, Sec. 202(a).

The Act goes beyond mere declaration. Embodied in the Act as a fundamental feature is the plan for the utilization of State administrative machinery in effectuating federal regulatory power. This striking technique for effective Federal and State cooperative regulation was molded into the Motor Carrier Act at the instance of all the States, motivated by a desire to preserve the powers and capitalize upon the experience of the State commissions, to coordinate interstate and intrastate motor carrier policies, and to commit the solution of local interstate problems to State officials intimate with local conditions.

Section 205(b) of the Act requires that all controversies in which the interstate operations involve no more than three States shall be referred by the Commission to joint boards for hearing and recommendations of appropriate orders if any of the following matters are involved: applications for the issuance of certificates, permits, or licenses; the suspension, change, or revocation of such certificates, permits, or licenses; applications for the approval and authorization of consolidations, mergers, and acquisitions of control or operating contracts; complaints as to violations by carriers of the requirements established by the Commission with respect to continuous and adequate service, etc.; complaints as to the violations of the Commission's rules by brokers; and complaints as to rates, fares, and charges of motor carriers. The Commission in its discretion may also refer to joint boards any of the foregoing matters when more than three States are involved, and it may refer to said boards any investigation or other matter not specifically mentioned above.

These joint boards provided for by the Act are boards composed of one member from each State in which the

particular interstate carrier operation in controversy at the time is to be performed, nominated by the regulatory commission of the State from its own membership or otherwise, or by the Governor. Their duties, powers, and jurisdiction are the same as those of members and examiners of the Commission, and any order recommended by a joint board is subject to the same rules as an order recommended by a member or an examiner of the Commission. Thus Section 205(a) provides that if no exceptions are filed within the specified time, the recommended order shall become the order of the Commission unless stayed or postponed by the Commission within the specified period. If, however, exceptions are filed with the Commission, it is bound to consider the same and a review or further proceedings are authorized if sufficient reason appears therefor from the record. The Commission may also review decisions of joint boards on its own motion.

As of this writing, 257 Joint Boards have been created under the Act. The Interstate Commerce Commission properly accords great weight to the recommendations of these Boards, following them in approximately 85 per cent of the instances where their reports have been reviewed. This is almost the same percentage that obtains in the case of recommendations by the Bureau's own examiner.[10]

Thus it is that the State of Florida, in common with all the States of the Union, must observe with grave concern the enforcement of State regulation which will defeat and subvert the policies and purposes of Part II of the Interstate Commerce Act.

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[10] Report of Special Committee, American Bar Association, to Appraise Regulation of Motor Vehicles, August, 1937, page 13.

Undisputed and Unchallenged Findings of Fact by the District Court Make it Inevitable that the Enforcement of the South Carolina Regulations Will Defeat the Purposes and Subvert the Policies of the Motor Carrier Act as Administered in the Southeastern Section of the United States.

The drastic effect of the enforcement of the South Carolina regulations upon interstate commerce in the Southeastern section of the United States is concisely expressed in the District Court's Findings of Fact, Nos. 7 to 16, inclusive (R. 78-81), which were unexcepted to by appellants. These Findings are based upon extensive and detailed testimony of carriers, shippers and traffic experts, private and governmental, testimony unchallenged at the trial below and, indeed, confirmed by judicial knowledge.

These findings make it plain that the enforcement of the South Carolina regulations will defeat the purposes and subvert the policies of the Motor Carrier Act.

From 85 per cent to 90 per cent of the equipment used in interstate commerce is 96 inches wide and will be automatically barred at the borders of South Carolina by the 90 inch width limitation (Finding of Fact No. 24, R. 83). The motor equipment in 47 States must needs be junked and hereafter limited to the proposed South Carolina standard, or special equipment must be purchased in each State for use into, across or from South Carolina. The gross weight limitation will reduce the ordinary pay loads of interstate vehicles over 150 per cent (See Table II, Appellees' Brief, p. 72). From whatever State of origin, the interstate vehicle must either carry a pay load so small that it is unprofitable to operate, or must stop at the borders of South Carolina and reload into two smaller trucks, with all the

attendant cost, delay and impairment of service. (Finding of Fact No. 7, R. 78.)

How then may the common carrier comply with its statutory duty (Section 216(b)) "to provide safe and adequate service, equipment and facilities for the transportation of property in interstate commerce," or how may the Commission itself exercise its power (Section 204(a)) "to establish reasonable requirements with respect to continuous and adequate service"?

By Section 216(c) of the Act common carriers of property by motor vehicle "may establish reasonable through routes and joint rates . . . with other such carriers, or with common carriers by railroad, express, or water," but the District Court expressly found (Finding of Fact No. 8, R. 78) that "enforcement of the South Carolina law . . . would prevent the interchange of motor truck equipment and the establishment of through routes and joint rates on shipments moving into, out of and across South Carolina."

By Section 216(b) of the Act it is made the duty of common carriers by motor vehicles "to establish, observe, and enforce just and reasonable rates . . ." and by Section 216(d) it is declared unlawful for any common carrier by motor vehicle "to make, give or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, or description of traffic . . . or to subject any particular person, port, gateway, locality, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The disastrous effect of the enforcement of the South Carolina regulations upon the rates and rate returns of motor carriers is described in the testimony of Emory A. Boudreau, Assistant Chief of the Section of

Traffic, Bureau of Motor Carriers, Interstate Commerce Commission (R. 138-142).

Two vivid illustrations from his testimony are quoted in appellees' brief at page 61, and we respectfully refer the Court to that reference. But with especial regard to the rate situation for traffic originating in or destined to the States of Georgia and Florida and crossing the State of South Carolina, we quote further from his testimony (R. 141-142):

> "The increased rate would be the same on traffic passing through South Carolina, although the rate might be lowered by the carrier if he established transfer arrangements at state line points, say, like Rockingham, North Carolina, or Augusta, Georgia. Now the distance from Raleigh, North Carolina, and Macon, Georgia, is approximately 418 miles and if a carrier was restricted in his operation to 20,000 pounds gross weight, and he operated such equipment from terminal to terminal, he would require a rate of 99½ cents per one hundred pounds, whereas if he can operate 40,000 pounds from terminal to terminal the rate would be 50½ cents per one hundred pounds, or a difference of forty-nine cents.
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> "With reference to unloading at the border, if a carrier established transfer points at Rockingham, North Carolina and Augusta, Georgia, where he could transfer his loads from a 40,000 pounds gross weight vehicle to a 20,000 pound gross weight vehicle, in order to cross the state of South Carolina, he would still require an increase of 20.9 cents, or 21 cents per one hundred pounds over the rate required if he is permitted to operate the larger vehicle from terminal to terminal. In other words, he would require 72 cents for such transfer arrangement, as against 50½ cents if permitted to operate his 40,000 pound vehicle through.
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> "Of course in these transfer examples I have cited I have not taken into consideration the cost of

> transfer, the possible cost of equipment or terminals that might have to be purchased at the transfer points."

In making these rate comparisons the witness was considering only the effect of the enforcement of the weight restrictions, *and not the 90-inch width restriction which will bar from 85 to 90 per cent of all interstate vehicles from crossing the borders of South Carolina.* If this element be considered, of course these rate contrasts will be aggravated enormously.

The witness' rate comparisons, it is true, were based upon cost of operation and not competition, and if these regulations be enforced practical rates will vary downward from the witness' estimated rates, but how under these conditions will be promoted the policy of Congress to "foster sound economic conditions in such transportation and among such carriers in the public interest (Sec. 202(a))?"

It is provided by Section 216(i) of the Act:

> "In the exercise of its power to prescribe just and reasonable rates for the transportation of passengers or property by common carriers by motor vehicle the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by such carriers; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service."

It will be impossible for the Commission to reconcile the needs of the carriers and the needs of the public, as

here required, under the burden which will be inflicted by enforcement of the regulations and in face of the competition that will exist from other systems of transportation.

The District Court specifically found (Finding of Fact No. 15, R. 80-81) that "the enforcement of the South Carolina law would result in the diversion of large cargoes normally consigned to the port of Charleston, to other competing ports in other States along the Atlantic seaboard." Yet such a result is but illustrative of the many undue and unreasonable preferences which will be created, and discriminations and prejudices to which ports and localities, and the State of Florida itself, will be subjected, if these regulations be enforced.

How, under the embarrassment of these burdens will fare the policy of Congress to "recognize and preserve the inherent advantages of" transportation by motor vehicle (Sec. 202(a))? Speed, one of the principal "inherent advantages" will be done to nought, although:

> "The Commission has held in a number of decisions that speed of delivery is an inherent advantage of transportation by motor carriers over transportation by competing rail carriers which it is required by Section 202(a) of the Act to recognize as in conformity with the public interest, *even though rail carriers are rendering sufficient but slower service.*" *Hahn Truck Line, Contract Carrier Application,* 1 M. C. C. 479, decided February 15, 1937.

One of the "inherent advantages" of motor transportation which is of especial concern to the Southeastern section of the United States and to the State of Florida is the facilitated movement of fresh vegetables and fruits and other agricultural products from production

fields to the metropolitan areas of the North and East. This advantage will also be done to nought by the enforcement of the regulations (Finding of Fact No. 10, R. 79), not only because the time of delivery will be doubled by border interchange and increased handling —or as an alternative, the payload maintained below profit—but because the refrigerated vehicle vital to the industry, will be driven from interstate commerce along the Atlantic seaboard (Finding of Fact No. 10, R. 79). This follows from the fact that the modern refrigerated tractor semi-trailer in use today along the Atlantic seaboard weighs 13,600 pounds, empty. Loaded, it weighs 33,600 pounds with a ten ton pay load (R. 157). Thus loaded, it is moving the traffic today, and is threatened only by the South Carolina regulations which will reduce its pay load of 10 tons to only 3.2 tons, or 6400 pounds, *a reduction of 68 per cent.*

The State of Florida Foresees, in the Enforcement of the South Carolina Regulations, the Perpetuation of the Interterritorial Freight Rate Boundary Which Has for Many Years Constituted a Barrier Against the Free Flow of Commerce From the South.[11]

The burden upon the South inflicted by the interritorial freight rate barrier flung across its arteries of interstate commerce leading to the Nation's markets, has been increasingly recognized in recent years. That burden was well described by David E. Lillienthal, Direc-

[11]". . . An objectionable phase of the railroad situation for many years has been the maintenance of regional differences and distinctions, which are very imperfectly related to differences in costs and of territorial boundary lines ('Chinese walls') where rate systems and practices change. It has tended to provincialize the railroads and discourage national unity of action. It has

tor, Tennessee Valley Authority, before the Institute of Public Affairs of the University of Georgia, at Athens, Ga., October 29, 1936, when he said:

> "There are barriers to a sound industrial development in the South. Some of them are artificial —made by man and removable by man. For example, the South is surrounded by a Chinese wall of freight rates that place it at a disadvantage in the marketing of its industrial products. There is not time tonight to do more than mention this burden on Southern industry, but it furnishes one reason (some would even go so far as to say a justification) for the pressure on wage rates in Southern industry. And it has come to be recognized that low wages, which means low purchasing power, is one of the most serious forms of the draining of wealth and income."

The Southern States are now engaged in an effort to remove the artificial rate barriers against industrial progress in the South. On May 26, 1937, the Governors of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee filed an application with the Interstate Commerce Commission (I. C. C. Docket No. 27746) charging that "the acts, practices, rates, charges, rules and

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been a prolific source of complaints to the Commission. Regional competition in rates and services has been as keen as the direct competition of parallel lines, and has had equally undesirable and uneven results." First Report of Coordinator of Transportation, Senate Document No. 119, 73d Cong., 2d. Sess., 1934, p. 29.

For a fuller outline of the nature, extent, and seriousness of this problem reference may be made to a Survey entitled "The Interterritorial Freight Rate Problem of the United States", conducted by the Board of Directors of the Tennessee Valley Authority, transmitted by the President of the United States to the 75th Congress, 1st Session, and printed as House Document No. 264.

regulations of defendants (rail-carriers) is a denial of the national purpose of the Interstate Commerce Act and constitutes an arbitrary barrier against shippers shipping commodities from Southern territory." But the enforcement of the South Carolina regulations will perpetuate these barriers and render futile present efforts to find a permanent solution to the interterritorial freight rate problem. This result is reflected in the testimony of Thomas J. Burke, Commissioner of the Charleston County Traffic Bureau (R. 105):

> "The freight rates in the Southeastern part of the country are somewhat higher than those in the Middle West. If the truck competition with railroads was eliminated, the truck competitive rates now in effect would go out and you would go back to the normal level of rates, which is higher than these competitive rates. This would mean that commerce flowing into, out of and across South Carolina would be carried at higher rates to the public . . .
>
> "The situation as to the higher rates in the Southeastern part of the country has been a gradual process. In 1928 the rates were all revised in the southern part of the United States under what is known as the Southern Class Rate Investigation—that was class rates—but since that time we have revised the commodity rates. At the time the class rates were revised the level in the South was 25 per cent higher than the midwest section of the country. That level today has risen to about 40 per cent higher.
>
> "The truck competition with the railroads has tended to keep the levels of the rates down. If it were removed, this would be a detriment to the shippers and to the citizens of this State and section."

The District Court has Found Upon Adequate Evidence that the Burden Upon Interstate Commerce Resulting From the Enforcement of the South Carolina Regulation will be Arbitrarily and Needlessly Imposed.

That the District Court was justified in finding that the disastrous burden upon interstate commerce in the Southeastern section of the United States which will result from the enforcement of the South Carolina regulations will be needlessly and arbitrarily imposed, because these regulations exceed the reasonable necessity for their exercise, adequately appears from the lower Court's opinion and from the supporting discussion in appellees' brief, pages 63-100.

That the regulations exceed their reasonable necessities not only from the standpoint of the conservation of the highways but also from the standpoint of the safety of the highways is apparent from the findings of the lower Court (Finding of Fact No. 23 and 24) and its Opinion (R. 67, 73). The evidence disclosed that contrary to the supposed purposes of the Act, its enforcement will increase the hazard of the highways by increasing the number of vehicles on the highways, encouraging the use of light, over-loaded vehicles of flimsy construction, small tire surface and braking surface, discouraging the use of power brakes, proper tires and substantially built vehicles properly adapted to safe driving, and by encouraging poor distribution of loads over the axles.

The reasonable necessities of the states in limiting the size and weight of motor vehicles operating in interstate commerce for the purpose of safety should be con-

sidered in the light of the provisions of the Motor Carrier Act, 1935, which empowers the Interstate Commerce Commission (Sec. 204 (a) (1) (2)) to establish reasonable requirements for common and contract carriers with respect to qualifications and maximum hours of service of employees, and safety of operation and equipment; and (Sec. 204 (a) (3)) to establish for private carriers of property, if need therefor is found, reasonable requirements to promote safety of operation, and to that end to prescribe qualifications and maximum hours of service of employees and standards of equipment.

Pursuant to such power the Interstate Commerce Commission, on December 23, 1936, approved, adopted and prescribed comprehensive rules and regulations, to become effective July 1, 1937, concerning the matter of qualifications of employees and safety of operation and equipment of such common and contract carriers, designed to bring about greater safety on interstate highways in accordance with the declared policy of the Act. These prescribed regulations covered such matters as qualifications of drivers, reckless driving, speed, driving, stopping, lights, brakes, parts and accessories, loading and reporting of accidents.

These initial regulations did not include sizes and weights of motor vehicles in interstate commerce. Nevertheless, the Commission by its Report issued on July 1, 1936, included sizes and weights of motor vehicles as a part of its proposed long-term program for highway safety, and in its Report of December 23, 1936 (Ex Parte No. MC-4, 1 M. C. C. 1-36), accompanying its order of that date above referred to, expressly recognized a jurisdiction over sizes and weights for the pur-

pose of safety and deferred action thereon for the reason, among others, that "the art of motor vehicle construction and operation is one of constant change and improvement" and in order "to leave the way open for further technical advance," and to study and outline the elements of the problem.

IN THE

Supreme Court of the United States

OCTOBER TERM 1937

No. 161

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, SOUTH CAROLINA PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

v.

BARNWELL BROTHERS, INC., POOLE TRANSPORTATION, INC., HORTON MOTOR LINES, INC., ET AL.,
Appellees.

BRIEF FOR STATE OF FLORIDA AS AMICUS CURIAE.

ARGUMENT.

The District Court, Having Found That the South Carolina Regulations Will Impose a Drastic Burden on Interstate Commerce and That They Exceed the Reasonable Necessity for Their Exercise, Correctly Held That Their Enforcement Will Constitute a Regulation of Interstate Commerce in the Constitutional Sense and Thus Will Contravene Article I, Section 8, Clause 3 of the Constitution of the United States.

Appellants' briefs and supporting briefs contend that even though the District Court's findings of fact be admitted, there is escape from the District Court's con-

clusion of law that the regulations inflict an unconstitutional burden on interstate commerce; that even though these regulations exceed the reasonable necessity for their exercise and will inflict upon interstate commerce a disastrous burden, they are yet within the power of the State.

The argument of these briefs may be analyzed as follows:

(1) Since the District Court found that the regulations were consistent with the Due Process Clause of the Fourteenth Amendment, the Commerce Clause subjects them to no further test other than that they shall not discriminate against interstate commerce, which by their terms they do not do;

(2) The effect of the enforcement of the regulations upon the purposes and policies of Congress as expressed in the Federal Highway Acts and Part II of the Interstate Commerce Act (Motor Carrier Act, 1935) is of no significance in determining their validity under the Commerce Clause;

(3) That if it be conceded that State police power generally may not exceed its reasonable necessity as it affects interstate commerce, the Commerce Clause imposes no such restraint upon the regulation by the State of its own property; that in the regulation of its own highways State power is absolute, save only that it shall not discriminate against interstate commerce; and

(4) That by its decisions in *Morris* v. *Duby,* 274 U. S. 135, and *Sproles* v. *Binford,* 286 U. S. 374 this Court established these arguments as the law of the land.

We earnestly submit that these arguments, separately or collectively, find no support in the past decisions of

this Court, and are subversive of fundamental guarantees under the Commerce Clause of the Constitution of the United States.

The error inherent in all four of the arguments advanced by appellants springs from their failure to recognize that the test of the validity of State police regulation under the Commerce Clause is separate and distinct from the test under the Fourteenth Amendment.

Appellants assert that since the lower court found that the regulations (1) have not been superseded by Federal legislation, (2) deal with a subject which admits of diversity of treatment according to the special requirements of local conditions, (3) apply indiscriminately to intrastate and interstate commerce, and (4) are consistent with the Fourteenth Amendment, there is no other test to apply and the regulations are valid *regardless of the effect of their enforcement upon interstate commerce.*

This argument, however, ignores the fundamental principle that State police regulation substantially affecting (although not discriminating against) interstate commerce must not only be consistent with due process (that is, "shall not be unreasonable, arbitrary or capricious" and "the means selected shall have a real and substantial relation to the objects sought to be attained," *Nebbia* v. *New York,* 291 U. S. 502, 525), but must also *not exceed the reasonable necessity* for the exercise of the police power. There is a wide range of discretion for State police power under the Fourteenth Amendment; the State is not confined by the Due Process Clause to its reasonable necessities. As thus tested, even as appellants contend, the wisdom and the justice of the law is for the State legislature to determine. But no such range of discretion, no such ultimate power to judge the wisdom and justice of their police laws,

remains to the States when the effect of the enforcement of a law is to burden interstate commerce.

The Due Process Clause involves adjustments between the public, viewed as a State or a subdivision thereof, and an individual or individuals; the Commerce Clause involves adjustments between State and Federal power. Though every taking without due process of law is a burden on interstate commerce, if the subject dealt with is such commerce, it does not follow that the reverse is true.

The constitutional basis for the distinction is clear. The paramount authority of Congress over the regulation of interstate commerce has often been asserted by this Court and can no longer be doubted. *Minnesota Rate Cases,* 230 U. S. 352. Nevertheless, it has been recognized that there exists in the States a permissible exercise of authority which they may use until Congress has taken possession of the field of regulation. This Court has thus described this residual State power (*Minnesota Rate Cases,* 230 U. S. 352, 402):

> "Within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the Government because of the *necessity* that they should not remain unregulated and that their regulation should be adapted to varying local *exigencies;* . . . " (Emphasis added)

"By the Constitution, Art. I, Section 8, Cl. 3, the power to regulate interstate commerce is expressly committed to Congress and therefore impliedly forbidden to the States." *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 596.

The exertion of this residual State power does not impose *regulation* (in the constitutional sense) upon interstate commerce which might be affected—it merely imposes a *necessary condition,* no less necessary and no more a regulation than that imposed by mountain ranges or broad rivers flung by the hand of God across the paths of commerce. Alike they are *necessary conditions,* not regulations of interstate commerce.

But the converse of this principle is that State legislation which exceeds the reasonable necessity for its exercise is no longer a *condition* of interstate commerce; it is *regulation* and forbidden by the Commerce Clause.

This principle, dear to the States and Nation alike, is firmly rooted in the dicta and decisions of this Court, as demonstrated in appellees' brief at pages 104-115. We need not repeat the quotations here. This Court has said that the police power of a State cannot "obstruct foreign commerce or interstate commerce *beyond the necessity for its exercise.*" *Railroad* v. *Husen,* 95 U. S. 465, 474; or "*unnecessarily* hamper commerce between the States" *Cleveland, etc. Ry. Co.* v. *Illinois,* 177 U. S. 514, 516; or subject interstate commerce "to unreasonable demands", *South Covington, etc. Ry. Co.* v. *Kentucky,* 252 U. S. 399, 404; or "to requirements that are *unreasonable* or pass beyond the bounds of suitable local protection," *Minnesota Rate Cases,* 230 U. S. 351, 401; or "go beyond the *necessities* of the case" *Lake Shore & Mich. So. Ry. Co.* v. *Ohio,* 173 U. S. 285, 300.

Perfect illustration of the application of the principle is found in *Seaboard Air Line Ry.* v. *Blackwell,* 244 U. S. 310, discussed at pages 104 to 108 of appellees' brief. Recognition of the principle is to be found in the recent opinion of this Court in *Baldwin* v. *G. A. F. Seelig,* 294 U. S. 511, 522, 525:

> "Nice distinctions have been made at times between direct and indirect burdens . . . the line of division between direct and indirect restraints of commerce involves in its marking a reference to *considerations of degree.*"

Failure to give recognition to the fundamental distinctions between the test under the Commerce Clause and the test under the Fourteenth Amendment leads appellants into further error in their discussions of the presumptions of validity underlying the South Carolina regulations and the power of the Courts to examine into their reasonableness. Thus appellants say (Ky. Br. 24):

> "The case, however, is fully covered by the well established principle that granted the *power* of the legislative body, the *wisdom* or *propriety* or even *justice* of its act is not open to the courts. And in the case of a state's exercise of its police power to protect its own property and citizens, the right of the courts to interfere is still further restricted, the rule being that in such a case, if there is any basis for a difference of opinion as to the propriety of the statute, it comes within the scope of legislative discretion, and the judgment of the Legislature and not of the Court prevails.
>
> "The Court, in considering this identical question in connection with the Texas statute limiting the weight and size of trucks, thus stated the principle in *Sproles* v. *Binford, supra* (388):
>
> > " '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.*' (Citing authorities.)"

In the sentence of the Court's opinion immediately preceding the sentence quoted by appellants, it is expressly stated that the presumption under consideration was the presumption attaching to the validity of legislation under the Due Process Clause of the Fourteenth Amendment.

Where State laws are attacked under the Due Process Clause on the ground that they are arbitrary or oppressive, there is and should be a strong presumption in their favor. A State should be allowed a substantial opportunity to work out its own salvation so far as that State and its people are concerned. But the only presumption in favor of a State statute attacked under the Commerce Clause is the general presumption of constitutionality attaching to all legislation, federal, state, or municipal. The determination of the question of whether or not the practical effect of State regulations will burden interstate commerce, or whether or not these regulations exceed their reasonable necessities, are primary questions to be determined by the courts when such regulations are attacked under the Commerce Clause. These questions are not for the State legislature to judge, nor is the judgment of the State legislature binding merely because differences of opinion might exist. In such cases, it is a judicial determination not a legislative one.

> "One challenging the validity of a state enactment on the ground that it is repugnant to the commerce clause is not necessarily bound by the legislative declaration of purpose. It is open to

> him to show that in their practical operation its provisions directly burden or destroy interstate commerce." *Foster Packing Co.* v. *Haydel,* 278 U. S. 1, 10.
>
> "The reasonableness of the state's action is always subject to inquiry insofar as it affects interstate commerce . . . " *Hendrick* v. *Maryland,* 235 U. S. 610, 622.

It is apparent that there are two conditions precedent to the application of the principle above discussed: *First,* that a substantial burden on interstate commerce will be caused by the enforcement of State legislation, and *second,* that such legislation exceed the reasonable necessity for its exercise. The District Court has found that both of these conditions exist under the evidence in this case. In reaching this conclusion the lower Court gave consideration to the effect of the enforcement of the South Carolina regulations upon the purposes and policies of the Congress of the United States as expressed in the Federal Highway Acts and in Part II of the Interstate Commerce Act (Motor Carrier Act, 1935). The District Court said (Opinion, R. 74):

> "There is another angle from which the reasonableness of police regulations burdening interstate commerce in this way must be judged. Not only has Congress aided in the construction of the roads so that they may become highways of such commerce, but in the enactment of the motor carriers' act, it has recognized truck traffic as a legitimate part of that commerce essential to the welfare of the public and subject to regulation for that reason. As said of Federal aid legislation in *Bush Co.* v. *Maloy,* 267 U. S. 317, 324, this legislation regulating motor carriers is of significance because it makes clear the purpose of Congress that state highways shall be open to commerce of that character. Congress has not attempted to regulate size and weight

> and there are great practical difficulties in the way of such regulation by Congress. It is of great importance, therefore, that regulation of this matter by the states be held within reasonable bounds, and that they be not permitted, under guise of exercising the police power, to exclude from their highways by unreasonable regulations the interstate commerce which Congress is regulating in the public interest and for the carrying of which it has aided in the construction of roads that form parts of a great national system of highways."

Appellants challenge the relevancy of these considerations on the theory (S. C. Br. 109-114) that since the lower Court found that neither of these Federal Acts superseded the power of the state to regulate the size and weight of motor vehicles using the highways, the enactment of this legislation had no effect whatsoever upon the State power. It is they say a case of "all the one thing or all the other." (S. C. Br. 110).

Appellants here betray a fundamental misconception of the rationale of the District Court's consideration of these Federal Acts. That the enactment of these Federal acts did not supersede or otherwise limit the power of the States is not to say that the effect of the enforcement of the State regulations upon the purposes and policies of these acts is not a relevant factor in determining, *first* whether or not such enforcement imposes a *substantial* burden on interstate commerce, and *second* whether or not, in view of the nature and functions of the highways constructed under the Federal Highway Acts, and the nature and functions of the commerce regulated and promoted under Part II of the Interstate Commerce Act, the regulations exceed the reasonable necessity for their exercise.

It is also in the light of the necessity for the concurrence of these two conditions, that is that a substantial

burden on interstate commerce exist and that the regulations exceed the reasonable necessity for their exercise, that we must examine the two prior decisions of this Court involving State restrictions of the size and weight of motor vehicles, *Morris* v. *Duby,* 274 U. S. 135 and *Sproles* v. *Binford,* 286 U. S. 374.

Even if it were possible to find in the language used by this Court in those cases support for appellants' contention that the State power in issue is limited only by the Due Process Clause of the Fourteenth Amendment, it would still be necessary to analyze the actual decisions in those two cases in accordance with the traditional policy of this Court as expressed in *Euclid* v. *Ambler,* 272 U. S. 365, 397:

> "This is in accordance with the traditional policy of this Court. In the realm of constitutional law, especially, this Court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the constitution as applied to the exercise of flexible powers of police, with which we are here concerned".

And it was early said by Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheaton 264, 399:

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be

> respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

But there is in fact no support for appellants' theory either in the dicta or in the actual decisions of the Court in *Morris* v. *Duby* and *Sproles* v. *Binford.* In the former case it was said (at page 143) that regulations of the size and weight of motor vehicles must be "reasonable" and the same expression is found in *Sproles* v. *Binford* (at page 390), without further attempt to define the content of the word "reasonable". It is significant that this Court said in *Buck* v. *Kuykendall,* 267 U. S. 307, 315 that:

> "Appropriate state regulations, adopted primarily to promote safety upon the highways and conservation in their use, are not obnoxious to the commerce clause, *when the indirect burden imposed upon interstate commerce is not unreasonable."*

But it is obvious that in neither of these two cases did the facts disclose the existence, either separately or concurrently, of the two conditions which are necessary to invoke the protection of the Commerce Clause, and which are present in the instant case. In neither *Morris* v. *Duby* nor *Sproles* v. *Binford* did the facts show a substantial burden on or interference with interstate commerce. Thus one indispensable condition was absent, and its absence rendered it unnecessary for this Court to determine whether or not the state regulations

exceeded *the reasonable necessity* for their exercise, and confined the actual decision to the validity of the regulations under the Fourteenth Amendment. This is apparent in the very language of the opinion in *Sproles* v. *Binford* which appellants' briefs quote and requote with such fervor:

> "In exercising its authority over its highways the State is not limited to the raising of revenue for maintenance and reconstruction, or to regulations as to the manner in which vehicles shall be operated, but the State may also prevent the wear and hazards due to excessive weight of load. 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 14th amendment was intended to secure.*"

An examination of the Findings of Fact of the District Court which tried the case of *Sproles* v. *Binford*,[12] reveals that there was no proof or finding of a substantial burden on interstate commerce.

It was in accordance with the traditional policy of this Court, as expressed in *Cohens* v. *Virginia,* 6 Wheaton 264, 399 and *Euclid* v. *Ambler,* 272 U. S. 365, 397, that the lower Court in the instant case examined the cases of *Morris* v. *Duby* and *Sproles* v. *Binford* (Opinion R. 73):

> "We have given careful consideration to what was said in *Morris* v. *Duby* and *Sproles* v. *Binford, supra,* and were at first inclined to think that these decisions were conclusive of the case before us.

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[12] Transcript of Record, p. 126-140, Office Supreme Court of United States, Vol. 112, Case 826.

> Upon more mature consideration, we do not think this is correct. It is true that in *Morris* v. *Duby* a state statute prescribing a maximum load weight of 16,500 pounds was upheld, and in *Sproles* v. *Binford* one prescribing a net load of 7,000 pounds; but in neither of these cases was their any such showing of the unreasonableness of the limitation and of the direct burden upon interstate commerce when applied to a system of standard concrete roads as is contained in the record before us. The same is true of *State* v. *Nutt, supra.* In *Sproles* v. *Binford* the court commented on the fact (p. 385) that the roads capable of carrying a greater load than the maximum permitted by the statute did not form a regularly connected system and were scattered throughout the state and that the operations of complainant were conducted over all types of highways and bridges. Here we have a connected system of standard highways of the finest character; and there is no reasonable relation between the limitations complained of and the preservation of safety of such highways. In the light of experience and of scientific knowledge, there is no ground for reasonable difference of opinion as to the gross load limitation of 20,000 pounds not being necessary for the protection of such roads themselves, and there is even less justification for the requirement that the tractor-semi-trailer combination be counted one unit for the purpose of computing gross load."

The appellants contend that State regulations of the use of their highways cannot be subjected to the test of the Commerce Clause because the States own their highways. The term "ownership" is *nomen generalissimum,* and the rights and duties which are the attributes of ownership are as varied as the many characters which ownership may assume.

It is needless in this case to indulge in metaphysical exploration into the concept of ownership and it is need-

less also to engage in constitutional debate as to whether a State might, in the absence of the Federal Highway Acts, close its roads to all commercial transportation, or to the transportation of commodities, or deny the use of its roads entirely to transportation for hire. Out of wisdom born of a recognition by all the States that the Constitution "was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division,"[13] the several States and the National Government have by their several conventions pursuant to the Federal Highway Acts rendered it forever unnecessary to consider these questions, and have cooperated in building and maintaining a great system of improved highways, interstate in character, connecting the whole nation and dedicated to the needs of interstate commerce. *Nashville, etc.* v. *Walters,* 294 U. S. 405, 417. Under these acts, it is true, the States retain the ownership of the highways, the easements, and rights of way, and the duty to maintain, but this is not to exclude the equities of the nation in these highways and the protection of the Commerce Clause which attaches to that equity and conditions the rights of ownership to the extent that State regulation of the use of its highways will not unreasonably burden interstate commerce.

We repeat what was said in *Morris* v. *Duby,* 274 U. S. 125:

> "Regulation as to the method of use . . . remains with the States . . . unless the regulation is so *arbitrary and unreasonable as to defeat the useful purposes* for which Congress has made its large contributions to bettering the highway systems of the Union . . . " (emphasis added)

[13] *Baldwin* v. *G. A. F. Seelig,* 294 U. S. 511, 523.

And in *Bush* v. *Maloy,* 267 U. S. 317, it was said:

> "The Federal Aid legislation is of significance, not because of the aid given by the United States for the construction of particular highways, but because those Acts make clear the purpose of Congress that *State highways shall be open to interstate* commerce. (Emphasis added.)

In *Buck* v. *Kuykendall,* 267 U. S. 307, this Court considered a State attempt to deny an interstate operator the right to operate within the State on the ground that adequate highway transportation facilities already existed. The State's action was held invalid not only as a burden on interstate commerce and an invasion of federal power, but as the Court said (page 316) because "it also defeats the purpose of Congress expressed in the legislation giving federal aid for the construction of interstate highways."

The later decision of this Court in *Bradley* v. *Pub. Util. Commn.* 289 U. S. 92, upholding a State Commission order denying an interstate operator a certificate to operate over a particular highway because of congestion, does not detract from the fundamental principle that a State may not close its highways to interstate commerce. In that decision (page 94) it was said:

> "It is contended that the order of the Commission is void because it excludes Bradley from interstate commerce. The order does not in terms exclude him from operating interstate. The denial of the certificate excludes him merely from Route 20. In specifying the route, Bradley complied with the statutory requirement that an applicant for a certificate shall set forth 'the complete route' over which he desires to operate. Ohio General Code, §614-90(c). But the statute confers upon an applicant the right to amend his application before or after hearing or action by the Commission. §614-91. And it authorizes him, after the certificate is re-

> fused, to 'file a new application or supplement any former application, for the purpose of changing' the route. §614-93. No amendment of the application was made or new application filed. For aught that appears, some alternate or amended route was available on which there was no congestion."

The equity of the people of the United States in the Federal aid highways is indicated by the provisions of Section 14 of the Federal Highway Act of 1921, quoted above, which was designed to assure the permanency of the interstate highway system, by providing that in case any State failed to maintain any Federal aid highway within its boundaries, the Federal Government "shall proceed immediately to have such highway placed in a proper condition of maintenance." The cost of this Federal maintenance is charged against the Federal funds allotted to such State, and upon reimbursement by the State, the amount is to be paid into the Federal highway fund "*for reapportionment among all the States* for the construction of roads" under the Act.

It is tribute to the spirit in which all the States have cooperated under their several conventions with the Federal Government, and witness to the great value to all the States of the national interstate system of highways, that it has not yet been necessary in any State to enforce the drastic provisions of the Federal law.[14]

But of what avail is the protection of this provision of the Federal law, accepted and agreed to by all the States, and to what end the assurance that the physical capacity of the Federal aid highways be maintained, if, in the exercise of a power said by appellants to exist by

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[14] The Bureau of Public Roads and Its Work, Revised June 30, 1930, Thomas H. McDonald.

virtue of the States' "absolute ownership" of these roads, regulations may be enforced which will deny a reasonable use of the Federal aid system to interstate commerce and permit this system in large measure to waste in idleness?

Certainly by virtue of the great national investment in the Federal aid system and the conventions between all of the several States and the Nation, the people of the United States may assert such an equity in the interstate highways as will entitle them to the protection of the corollary of the Commerce Clause that interstate commerce shall not be burdened by State legislation exceeding its reasonable necessity. It cannot be doubted that this was the intent of this Court when it said in *Morris* v. *Duby,* 274 U. S. 135, 145:

> "Regulation as to the method of use, therefore, necessarily remains with the State and can not be interfered with unless the regulation is so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contribution to bettering the highway systems of the Union. . . ."

Nor do we believe that the national equity in the Federal aid system can be dissipated, nor the protection of the Commerce Clause denied, on appellants' theory (S. C. Brief 95-106) that the primary Federal aid system of highways within the boundaries of a State is an "innocent object", which can be dragged down to the level of its local and rural roads for the conveniences of administration and enforcement. Such a doctrine implies an utter negation of the entire Federal aid program and an unconscionable breach of the conventions pursuant to which this system of highways has been built up.

This attempt to excuse the defeat of the Federal-aid program deserves the same answer as that given by this Court to a similar "reasonable relationship" suggested by counsel in support of the New York Milk Control Act, as it affected interstate commerce:

> "Whatever relation there may be . . . is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between States." *Baldwin* v. *G. A. F. Seelig,* 294 U. S. 511, 524.

Even when determining the validity of State laws under the Fourteenth Amendment, this Court has said:

> "Constitutional guarantees cannot be made to yield to mere convenience." *Weaver* v. *Palmer Bros. Co.,* 270 U. S. 402, 415,
>
> "Rights guaranteed by the Federal Constitution are not to be so lightly treated, they are superior to this supposed necessity." *Schlesinger* v. *Wisconsin,* 270 U. S. 230.

CONCLUSION.

The record in this case presents for the first time a situation foreseen by this Court in *Morris* v. *Duby,* 274 U. S. 135, when it said that State regulation of the size and weight of motor vehicles in interstate commerce must not be "so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contributions to bettering the highway systems of the Union. . . ."

The stern language of the Supreme Court *In Re Debs,* 158 U. S. 564 (1894) points the true course (591):

> "Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Con-

gress and the cases in the courts have been principally concerned therewith. The fact that in recent years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.

"Constitutional provisions do not change, but their operation extends to new matters as the mode of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

When, finally, we come to weigh the National interests against the State interests as they are separately affected by the South Carolina Act, the conclusion is clearly right and necessary: *that under all the circumstances the South Carolina Act exceeds the scope of the State's police power, and goes far beyond the needs of the State to unduly burden the flow of interstate commerce, to defeat the purposes of Federal aid, and to subvert the purposes of the Motor Carrier Act. It therefore violates the Commerce Clause of the Constitution of the United States.*

Any other conclusion of law, based on the evidence in this case, would deny to the National interests the protection which the Commerce Clause was intended to afford.

> "By the Constitution, Art. I, §8, Cl. 3, the power to regulate interstate commerce is expressly committed to Congress and therefore impliedly forbidden to the States. The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile State laws and to insure uniformity in regulation. It means that in the matter of interstate commerce we are a single nation—one and the same people. All the States have assented to it, all are alike bound by it and all are equally protected by it." *Penna.* v. *West Virginia,* 262 U. S. 553, 596.
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> " . . . The United States form, for many, and for most important purposes, a single nation . . . In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people . . . America has chosen to be in many respects and to many purposes, a nation; and for all these purposes her government is complete; to all these objects it is competent." Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheaton, 264, 413.

Respectfully submitted,

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