Newcomb, Harry Turner
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PROPOSED SOLUTIONS

OF THE

RAILWAY RATE PROBLEM

A Paper Presented at the Fifty-ninth Annual Meeting of the American Association for the Advancement of Science, before the Section on Social and Economic Science, at New Orleans, Louisiana, on December 30, 1905.

By H. T. NEWCOMB

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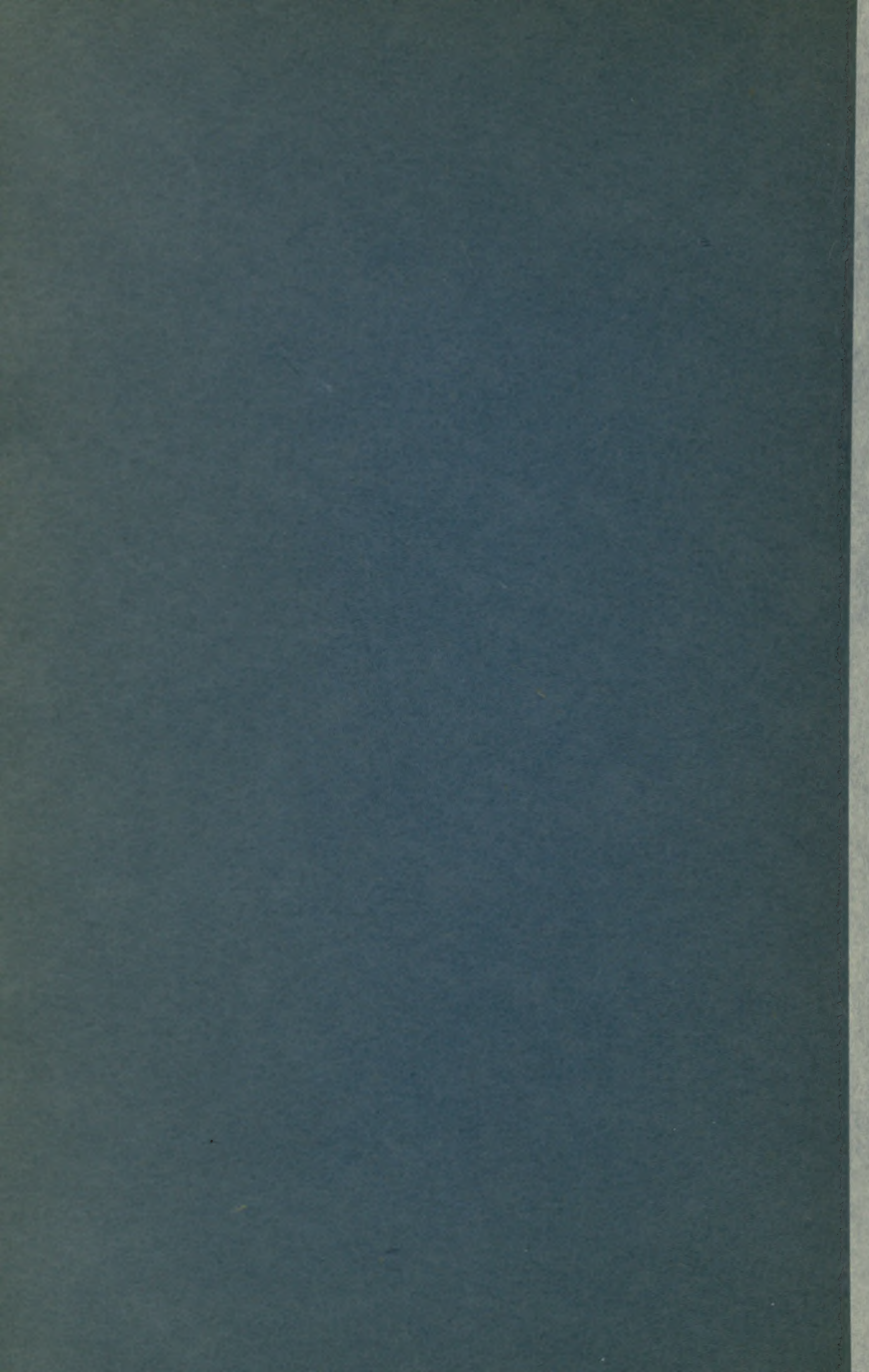

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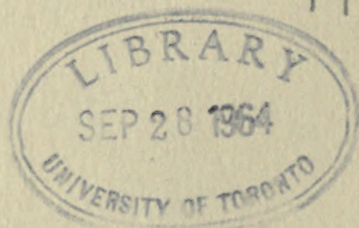

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CONTENTS

PAGE

Political Rate-Making Not an Antidote for Rebates 5
Regulation of Tariff Rates 6
Effective Laws Now Exist 6
Legislative Proposals Classified 8
An Appointive Deputy-Legislature 9
Many Are Misled 10
It is General Political Rate-Making 11
A Powerful Commission Denies Its Power 12
Railways Do Not Trifle with Public Authority 14
The Judicial Power Ample 16
What a Deputy-Legislature Could Do 21
Shall America Become a Bureaucracy? 22
Sidelights on the Present Commission's Theory 24
Results of Law-Made Rates 26
Would Throttle Competition 29

Proposed Solutions of the Railway Rate Problem

BY H. T. NEWCOMB

POLITICAL RATE-MAKING NOT AN ANTIDOTE FOR REBATES.

In order to clear the ground for discussion it is necessary to observe that the legislation discussed in this paper has nothing to do with rebates. Any system of rate regulation must, as its first step, require the publication of rates and attempt to enforce the rates published. When this has been done any rebate; that is, any concession which amounts to carrying the goods of any shipper for less than the tariff rate on those goods, is an offense against the state because it deprives the initial step in the regulative process of its efficacy. For this reason, even more than on account of the grievous wrong to individuals in which they may result, rebates should not be tolerated, and any device by which they are accomplished should be rigorously repressed. Over this there is no controversy. Write the most drastic law practicable and you have but to convince that it is workable and there will be no opposition to its enactment.

The Regulation of Tariff Rates

The purposes of public regulation are not exhausted by the publication and enforcement of a schedule of rates. There may be excessive rates or unjust discriminations among the scheduled rates, and it is urged that prompt and adequate relief therefrom can not always be obtained by negotiation between the shippers and the carriers. The Common Law gives sanction to this by treating the business of common carriers as one charged with a public interest and giving access to the courts to any one to whom service at a reasonable price is denied. And, with regard to railways, both in England and America the makers of statutes have added to the judicial authority to accord relief, and have provided other more or less comprehensive and effective means for compelling changes in the rates and rate adjustments announced in the schedule.

Effective Laws Now Exist

The Congress of the United States has never gone further in the direction indicated than to strengthen the executive power of investigation and prosecution and to extend and expedite the judicial power. The Interstate Commerce Commission is an investigating and prosecuting body, and it is also quasi-judicial in that, in matters of interstate railway commerce, it is, in effect, the general referee for all the circuit courts of the United States. (See Kentucky and Indiana Bridge Company v. Louisville and Nashville, 37 Fed.

Rep. 567.) It has power upon investigation and hearing to order any carrier to cease and desist from any violation of the law and many of its orders are promptly and voluntarily obeyed, but they have no compulsory force until incorporated in decrees of the Federal Courts. If they are disobeyed the Commission may appear itself as a complainant or prosecutor asking the proper court to issue a decree of enforcement and in this proceeding the court can inquire only as to the lawfulness of the order and the fact of disobedience. In these cases the courts have no authority to modify or amend the Commission's order, but if it is lawful must compel obedience by issuing the proper process, while the Commission has no standing as a complainant except to ask for such enforcement and, therefore, can not plead the general equities involved in the case between the shipper and the carrier in support of any different form of relief than that provided in the order. Under the Elkins law, however, the Commission can go at once into court, without having issued a formal order or conducted a formal investigation, whenever it has "reasonable ground for belief" that a carrier is guilty of any "discrimination forbidden by law" and may plead the general equities of the situation in behalf of whatever form of relief the court may regard as adequate and proper. And whatever relief the court considers that justice demands, the court has power to grant. This process is broad and comprehensive, prompt and efficacious; it is unfortunate that the Interstate Commerce Commission has not seen fit to make use of it. So much for existing law.

Legislative Proposals Classified

Many proposals for new legislation are now before the Congress and the people. This paper has been prepared especially to point out certain broad principles in connection with them. The measures proposed fall plainly into two classes. There are proposals which contemplate—

A. A single act of legislation leaving the enforcement of the law to the ordinary executive and judicial machinery supplemented, as at present, by the Interstate Commerce Commission, and,

B. Successive acts of legislation each specially adapted to the conditions peculiar to a particular case.

The Foraker bill (S. 285) belongs to Class A. as does, also, the plan devised and so ably advocated by Judge Peter S. Grosscup. Its principle is that Congress should set up the standards of obligation to which the carriers must conform, but that when they are charged with violating those standards the carriers should have the same right as every one else charged with an offense against the law; that is, the right to defend themselves and if possible to establish their innocence of the charge in a court of justice. It also recognizes the fact that unjust discrimination and excessive charges in railway service are public offenses, and provides that the cost of prosecuting alleged violations of the law shall be borne by the Government. If this measure should be adopted the Com-

mission would make such an examination of each complaint received as should be necessary to convince itself whether there was "reasonable ground for belief" that the law was being or had been violated. There would be, before the Commission, no formal pleadings or hearings, no arguments by counsel, no elaborate, tedious and time-destroying processes of any kind. If a *prima facie* case was made out, the Commission would complain to a Circuit Court of the United States sitting in equity and would ask for such relief as the circumstances demanded. And the order of the court would grant such relief; for that purpose controlling, if necessary or desirable, future rates and rate adjustments.

An Appointive Deputy-Legislature

The idea that there must be a special act of legislation to meet every case is applied in the bill prepared by the Interstate Commerce Commission (printed, but not yet introduced), in the Dolliver bill (S. 2261), in the Tillman bill (S. 1378), in the Hepburn bill (H. R. 10,099), and in the Townsend bill (H. R. 4425). The theory of these bills is that the only power adequate to correct the abuses which exist is the legislative power possessed by Congress. They hold that Congress has power to pass by statute a schedule for all the railroads and covering every service the railways render, but they are not, themselves, willing that Congress should, directly, exercise this power. They contend, however, that

it ought to be utilized, fragment by fragment, and fraction by fraction, as cases which present the conditions that appeal to legislative discretion from time to time arise. But here a difficulty presents itself. Congress is not always in session, its burdens are manifold and heavy, it has no expert knowledge of rates or traffic conditions and no time to acquire such knowledge. Clearly Congress can no more make a fragment of a schedule than it can make an entire schedule; it can not so easily make a whole schedule by fragments as it could make such a schedule at one time. To meet this condition an expedient has been devised which involves a startling departure from the ordinary and orderly processes of legislation. It is proposed to segregate a portion of the legislative discretion entrusted to the elective representatives of the people and the states and to erect a deputy-legislature with members appointed by the President. That is the Interstate Commerce Commission which is now a part of the executive branch of the Federal Government and an adjunct of the judicial branch, is to become a legislative body, but this new and extra-constitutional legislature is not to become, like the rest of the legislative machinery of the country, directly responsible to its constituents; it is to remain the creature of the appointing power of the Executive. To this length proceeds the desire to substitute law-made rates for market-made rates.

Many Are Misled

All true Americans revere the Constitution and, although

no sensible man wishes to make it a fetish, none would depart from its spirit without full consideration and ample cause. Yet it is the proposed deputy-legislature which has seized upon the imagination of many of those who have little direct contact with the railway system and but meagre acquaintance with basic industrial conditions. It is this plan which is said to be favored by that intangible and elusive if really existent public sentiment which looms so large in the eyes of some legislators that it is not yet certain that they may not feel impelled to an enactment which few approve, which fills most with feelings of distrust and alarm. If many Americans have actually been led to favor devolving important legislative power upon an appointive body and thus separating further from the people a part of that authority which a Democracy delegates, reluctantly and only of necessity, to its elected representatives, there must be reasons for their course somewhat equal to the extent of the departure from ancient principles and jealously guarded rights.

There are such reasons. They are to be found in:

A. A false conception of the change proposed;
B. A misunderstanding of the present situation; and,
C. An under estimate of the powers of the Federal Courts of equity and of the scope of the authority which can be conferred upon them.

It Is General Political Rate-Making

It sounds so softly innocuous, on the part of the

Commission, to contend for the power to "correct a rate upon complaint and after investigation" or to "substitute a reasonable rate for one found to be unreasonable." These are the terms in which the advocates of law-made rates describe the proposed substitution of legislative discretion for the impartial enforcement of statutes of general application and the transfer of that legislative discretion to an appointive deputy-legislature unknown to the Constitution and utterly foreign and obnoxious to its spirit. Who would imagine from these words that the Commission rarely considers a case which involves but one rate, that many of its decisions have involved thousands of rates, that it can proceed without complaint "on its own motion" as well as after complaint, that any one can complain of any rates without showing the slightest pecuniary interest in them, or that full power to correct any violation of law now exists? Yet these are the facts.

A Powerful Commission Denies Its Power.

While in the orderly performance of its duties the Commission has been settling thirty-nine out of every forty cases presented to it and seventy per cent of the orders, and substantially all of the lawful orders, which it has issued after formal proceedings have been obeyed without the need of recourse to the courts it has been persistently claimed that the Commission has no real power and that there exists no adequate means of redress for the shipper who is injured by

unreasonable tariff rates. Many such statements have been made by Mr. Charles A. Prouty, one of the members of the present Commission. Addressing a committee of the United States Senate on February 20, 1900, he said:

> "After the decision of the Maximum Rate case in 1897 this Commission had no more power to secure to the vegetable grower of Florida, or to the cotton raiser of Texas, or to the farmer of Iowa, a just and reasonable rate than it had to secure the necessary sunshine and rain to ripen that man's crop. It could intercede with the railroads for the rate, and it might intercede with Divine Providence for the rain, but the power was exactly as great in the one case as in the other."

It was recently suggested in the House of Representatives that an orator can not be "hampered by such commonplace things as facts, but must, like a poet, be permitted, on occasions, to give his imagination full swing." Perhaps the same rule applies to a Commissioner of interstate commerce. At any rate the quoted statement of Mr. Prouty is contradicted by the records of the Commission of which he is a member and by those of the courts, to which he has access. The law provides ample means, in the language of the Supreme Court, "to enable the Commission to enforce any order it is authorized to make," and it is authorized to condemn any rate or rates which, under the statute, are unreasonable in themselves or in their relations to other rates and to order the carriers to cease and desist from collecting them. Yet

the Commission itself has declared in an Annual Report (1897) that—

> "* * * under the Interstate Commerce act, as now construed by the Supreme Court, the carrier is given the right to establish and change its rates independent of the judgment of the Commission and independent of the action and judgment of the court or other tribunal; * * * the right to establish, demand and receive unreasonable and unjust charges is not prohibited; and * * * in respect to the charges which may be demanded and received for any transportation service the carriers are made judges in their own cases as to what is reasonable and just."

It is not strange that statements of this sort emanating from presumably authoritative sources, have obscured the public vision to the fact that even while they were being made the Commission was quietly settling many rate controversies, and that many orders issued under a theory absolutely at variance with the sentences quoted have been obeyed by the carriers, while still others have been enforced by the courts.

Railways Do Not Trifle With Public Authority.

Public sentiment has been further misled by repeated statements, of which the following is typical:

> "Take a rate of twenty cents on hay from Saint Louis and assume the Commission has found it to be

> unreasonable * * * if required to obey it the carrier need only reduce, say, one cent. Now assume that ten cents is a reasonable rate. It would require under that procedure ten suits in the courts of the United States * * * to secure the enforcement of a reasonable rate."

A similar statement appeared in the Annual Report of the Commission for 1904, but the testimony of the members of the Commission before the Senate Committee on Interstate Commerce during June, 1905, shows that in only two instances has the reduction been less than that directed by the Commission, and in those cases it appears that very substantial reductions were made. A distinguished member of the Commission truly and wisely said:

> "The carrier can not afford to trifle with public authority. It can not afford to do a trivial and evasive thing. I must honestly say that I do not believe any railroad manager would make, under such a theory as that, a nominal change in a rate for the purpose of technically complying with an order to cease and desist."

Let the facts be plainly stated. The Commission is a Federal agency of high authority and the law under which it exists is a broad and comprehensive statute which has strongly influenced the economic life of America since its enactment in 1887. It forbids every unreasonable interstate railway rate and every undue discrimination among rates and the Commission has the right to condemn any unlawful

rate or practice. Much of the work of the Commission is accomplished through its agencies for publicity and by conciliation; at least eighty per cent of the complaints it receives are settled by its informal and mediatory action; seventy per cent of its formal orders are voluntarily obeyed. In nearly nineteen years only forty-seven cases of disobedience to its orders have been presented to the courts, and of the thirty-five final decisions rendered all but four have been that the order disobeyed was unlawful. In four cases the orders have been enforced by the courts, thus proving that the power exists when the Commission acts lawfully. In addition the Elkins law has provided a prompt and effective remedy for unjust discrimination. I speak both as a student of commerce and industry and a lawyer when I assert that there is no genuine instance of injustice in interstate railway rates which can not be remedied under the present law, and that the existing remedies can be applied as promptly as those which Government provides or can provide for wrong of any sort when the interests concerned are of great magnitude.

The Judicial Power Ample.

Undoubtedly many advocates of law-made rates favor a deputy-legislature because they believe that the judicial power can not be used to control a future rate; in other words, that the delegation of law-making power to an appointive body is the only way in which the Federal govern-

ment can effectively exercise authority over future rates and their adjustments. This conclusion rests wholly upon the unstable foundation of a bit of *obiter dictum* in the Maximum Rate case (167 U. S. 479). The question before the Supreme Court was whether the Congress had granted to the Commission the power to prescribe future rates, not whether it might have granted such power to the Commission, much less whether it could authorize its exercise by a court. In the course of its opinion, while showing that the power in question had not been granted to the Commission, the court said:

> "It is one thing to inquire whether the rates which have been charged are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act."

Prior to this utterance the Commission did not regard the control of future rates as essentially legislative, for it had never claimed to be a deputy-legislature but had attempted to exercise the power on the theory that it was a judicial power, the preliminary exercise of which was within its function as the general referee of the Federal Courts of Equity. No one to-day believes that the courts can not exercise the power in question, unless his opinion rests upon the slender basis indicated.

But the fact is that the courts do possess this power under the present law, and have exercised it in interstate commerce

cases. In the Wichita case (United States v. Missouri Pacific, 189 U. S. 274) the Circuit Court decided that it had jurisdiction to hear a complaint that the adjustment of the tariff rates as between St. Louis and Wichita, on the one hand, and St. Louis and Omaha, on the other, was such as unjustly to discriminate against persons shipping between St. Louis and Wichita. And it held this even though the Commission, at whose relation the suit was instituted, had made no formal investigation, had given the parties no opportunity to be heard and had issued no formal order. The only possible relief in this case was an injunction against future discrimination, and the decision of the Supreme Court in favor of the jurisdiction of the Circuit Court is equivalent to a decision that the power to give that relief lay with the court. This is not the place to present a brief of decisions which sustain the view that the judicial power is adequate to control future rates, and this part of the discussion will be closed with a single suggestion. The present orders of the Commission have only the force of recommendations until they are incorporated into judicial decrees. After that, those who disobey them have disobeyed the courts and are in contempt of the courts, not of the Commission. Now, certainly, the mere issuance of an order by the Commission can not enlarge the powers of a Federal Court, and *a fortiori* such a recommendation can not enlarge those powers more than they can be extended by a statute duly enacted by the Congress. But substantially without exception the orders

of the Commission do control future rates, and when effectively incorporated in decrees in equity those decrees control future rates. Although the orders of the Commission have rarely met with judicial approval just enough of them have escaped condemnation to prove conclusively that they can be incorporated in such decrees and that the fact that they do control future rates is no obstacle to such incorporation. The attention of the student who wishes to pursue this subject further is invited to Janvrin v. Revere Water Company (174 Mass. 514, 47 L. R. A. 319) decided by Mr. Justice Holmes, now of the Supreme Court of the United States. This case arose under a statute requiring water companies to supply their patrons at reasonable rates and authorizing the court to establish maximum rates on complaint. It was objected that this imposed a non-judicial duty, but the court sustained the statute, saying, *inter alia:*

> "It calls on us to fix the extent of actually existing rights. With regard to such rights judicial determinations are not confined to the past. If it legitimately might be left to this court to decide whether a bill for water furnished was reasonable, and if not, to cut it down to a reasonable sum, it equally may be left to the court to enjoin a company from charging more than a reasonable sum in the immediate future."

Clearly the same reasoning is applicable to interstate railway charges. If any doubt exists on this question there is an indirect method by which the judicial power could be so

utilized as to avoid any excuse for the creation of a deputy-legislature. Congress might authorize complaints in the name and at the expense of the United States in cases of alleged excessive or unjustly discriminatory charges and might require the court deciding such cases to find as a fact in each case what rate or rates would have been reasonable under the conditions and circumstances disclosed and to incorporate such finding in a written opinion. Then there might be enacted a general statute acting upon every such finding and making the rates thus approved, not by virtue of the courts' decrees but by force of a law of the United States, conclusive standards of reasonableness during the continuance of substantially similar circumstances and conditions. No sane person contends that longer force than this ought to be given to the action of any governmental agency. Commissioner Prouty, the extremest applicant for legislative authority, told the Senate Committee on Interstate Commerce during the recent hearings (Vol. IV. p. 2885) that he had:

> "* * * always insisted * * * that the rate fixed by the Commission should be observed for a certain length of time and should then cease to be obligatory on the carrier."

And he added that in his opinion it would "work out all right" if the carrier were merely obliged to charge the Commission's rate for a single day and were then at liberty to make a change if in the opinion of its officers "conditions had changed so as to require another rate."

What a Deputy-Legislature Could Do

I have shown that reasonable rates can be enforced through the orderly judicial processes. Why do any of those who are not misled by the contrary opinion still insist that the defendants in a particular class of controversies shall be compelled to submit to the judgment of a tribunal differing in character and in methods of procedure from the judicial tribunals created under the Constitution and in conformity with the practice of all English-speaking peoples? Why do they still demand their deputy-legislature?

It is not necessary to go far in search of an answer. Courts enforce laws; legislatures enact political and social theories into laws. This distribution of governmental powers, established to guard the freedom of the governed, is a chief attainment of that evolution by which society has risen from despotism. The inquiry of the court is whether a law has been violated; the inquiry of a legislature is whether a new law shall be made. For the inquiry of the former there are prescribed rules of evidence, and formal but not necessarily elaborate or lengthy methods of procedure; the latter may investigate or not as its majority prefers and if it investigates at all may hear testimony that would be rejected by a court and need hear no more than it chooses. Those who still adhere to a demand for a deputy-legislature want to enforce through it certain "theories of social progress" which Congress, the directly responsible legislature, is not inclined to enact and which, therefore, are not enforceable by the courts. Let the Com-

mission be called as a witness. In its Annual Report for 1895 the Commission gravely announced that:

> "No one who understands the intricacies of transportation would care to assert that the determination of a just rate, or the decision as to what constitutes discrimination, is an easy task. To some extent the principles upon which taxation rests must be allowed in fixing a just rate; to some extent the result of a rate upon the development of industry must be taken into account in all decisions which the Commission is called upon to make; to some extent every question of transportation involves moral and social considerations so that a just rate can not be determined independently of the theory of social progress."

Shall America Become a Bureaucracy?

There are many theories of social progress. Almost every one has and every one ought to have such a theory. But there are also Constitutional methods for putting in lawful force those theories of social progress which have the approval of the majority of the people. If these Constitutional methods are not followed, if they are broken in letter or in spirit, there is danger, almost amounting to certainty, that some theories will be enforced which have not the approval of the majority and that will not promote the general welfare. I do not mean that the deputy-legislature would consciously act partially or unjustly but I do mean that we would be safer only in degree, not in principle, in entrusting law-

making power to a commission of five or seven men than the Russians have been in leaving it to a Czar. Indeed all autocrats are forced by the physical limits of individual capacity to act through bureaus and a modern autocracy is always, in fact, a bureaucracy.

Few laws are of greater importance than those which this deputy-legislature would have power to enact. The power to make freight rates and to adjust them relatively to one another is the power to bind or to loose industry, to enrich or to impoverish both labor and capital, to build up or to tear down communities and commerce. Where wheat shall be ground into flour is principally a question of the relation between the rates on grain and on flour. The trend of export commerce is fixed by the relations among the rates from the primary sources of supply to the several ports. Whether a particular homebuilder shall use the lumber of Oregon or Michigan or Arkansas or Georgia is more than likely to be determined by the relative railway rates. And so on throughout the entire list. But the railways can not exercise the tremendous power they apparently possess except to register the rates required by natural conditions. They are held in check by the needs of their patrons, their own dependence upon plentiful traffic and the necessity of profits. It is only when the Government steps in and abolishes the test of pecuniary success that arbitrary rate-making begins. The commercial restraints which control every business enterprise would in no way restrain a deputy-legislature. Such

a body would have complete dominion over the industries of America and Americans. It could deal out prosperity or penury at will; it could give here and withhold there subject only to the restraints imposed by the patience of the people.

Sidelights on the Present Commission's Theory

We are not without information as to the direction in which the Commission would move in substituting a theory of social progress for the normal results of industrial competition. The Commission's ideals as to its policy were announced in an annual report as follows:

> "To give each community the rightful benefits of location, to keep different commodities on an equal footing, so that each shall circulate freely and in natural volume, and to prescribe schedule rates which shall be reasonable, just, to both shipper and carrier, is a task of vast magnitude and importance. In the performance of that task lies the great and permanent work of public regulation."

I wish some one would interrupt me long enough to explain to me how I may hereafter distinguish between the "rightful" and the wrongful benefits of location, how I may know when cotton moving southward to New Orleans is "on an equal footing" with cotton-ties moving northward, what is the "natural volume" in which bananas should move through this port to Chicago and that in which flour should come here from Texas.

From the University of Harvard there came to Washington during the recent investigation an instructor in economics who told the Committee on Interstate Commerce of the United States Senate that "it would be better if we had less transportation in the aggregate," and that there ought, in adjusting rates, to be "more regard for the element of distance." (Prof. W. Z. Ripley, Testimony, Vol. III. pp. 2327 and 2340.) His theory of social progress in its application to railway rates is further indicated by the following:

> "* * * The point I am trying to make is this: That there are influences at work which slowly but inevitably are concentrating our population in the large cities, and the big cities have nothing of which to complain. * * * We should not unduly extend the principle of flat rates for all distances until we have an invasion by railroads of the territory of other railroads."

One of the members of the Interstate Commerce Commission testified in similar vein (Vol. IV. p. 3298). The social theory favored by Mr. Commissioner Prouty has been simply expressed. Writing in The Forum for April, 1899, he said:

> "My proposition is that the business of railway transportation is so far a function of Government that the United States is bound to see that every individual, every industry, every locality, no matter how humble or insignificant, enjoys the advantages to which he or

> it is fairly entitled, and that he or it *is not crushed out of existence by the exigencies of competition.*"*

The discriminating will not find it possible to speak of such a conception of government as paternalistic. The suggested coddling of incapacity is grandmotherly and with grandmother in her dotage. Unwillingness to be crushed out of existence by the exigencies of competition gives impulse to all industry and is the source of all material progress. To relieve the slothful and inefficient in business of this dread would penalize diligence and capacity and condemn posterity to drudgery from which escape through the continuance of normal progress is already foreshadowed. Yet the introduction of any considerations other than those of commerce must mean that the natural operation of the forces of competition are to be mitigated either for the benefit of some of those whom it would cripple or destroy or for the further aggrandizement of some of those to whom protection is superfluous. Commercial considerations can only be applied by commercial means; that is, by the free action and interaction of the natural forces of trade and commerce; a deputy-legislature has no excuse for existence unless to apply political considerations to the performance of whatever functions it may exercise.

Results of Law-Made Rates.

What would be the difference between the results of law-

*The italics are the present writer's.

made and those of market-made rates? Here is this great port of New Orleans with its magnificent facilities for the transshipment of the products of American industry and with many splendid avenues of inland commerce leading to its gates. Why have the railways called upon their shareholders to meet the tremendous outlays necessary to supply this equipment? They have done it to increase the commerce of this port and because the only way to effect that increase was to carry the products of commerce more cheaply and to handle them more cheaply so that the rates to the European markets through New Orleans might be as low or a few mills lower per bushel of grain or per 100 pounds of other freight than those through the North Atlantic seaports. To save these few mills per freight-unit the railroads have spent millions on track, road-bed, rolling stock and terminals and have gladly turned over to the shippers the whole saving in expense which those expenditures have permitted. Whether the exports through New Orleans shall increase or decline is wholly a question of the adjustment of rates. If the rate from the grain fields to New Orleans is enough lower than that from the grain fields to New York the grain is handled in the elevators of this port. The same commercial force which is operating upon your railways is operating upon the railways that connect the grain fields with each port from Halifax to Galveston. Everywhere an incentive to economy, to better methods, to higher efficiency, to lower charges. This is why the average freight rate in America is now but 7.80

mills per ton per mile and barely one-third of the rate of 1870. This reduction is the consequence of market-made railway charges. Let us turn to law-made rates. In England, in France, in Germany, they have such rates and in every one of those countries the efficiency of railways is far below that of our railways, and the rates are far higher and the decline in charges is relatively sluggish. Mr. Acworth, the great English authority, says that the legislation in that country has "taken the heart out of the railway men" and operated to the disadvantage of the general public.

We may expect the same results from similar laws. Give the agitators their deputy-legislature and I venture to predict that one of the earliest demands for law-made rates will be for the purpose of controlling the competition of the railway lines reaching the ports of New Orleans and Galveston. It will be claimed that too great an advantage is accorded this port and that the relation in rates which has recently so increased the commerce of New Orleans ought to be modified in the interest of Boston and New York. Those of us who have followed the various differential investigations of recent decades know that this really means that those ports wish the hand of the law to step in and save them from the neccessity of reducing their port charges. What chance, in such a contest, would New Orleans have before a deputy legislature appointed by a Republican president and constituted—(let us say) like the present one, if the insidious force of sectional politics should be successfully introduced.

Of the present Commission of five members one comes from New England, one from New York, one from the South, two from the Mississippi valley. Of the three who make up its Republican majority two are from New York and New England, one from Illinois. I do not say that these gentlemen have been moved by politics or sectional interests but I do say that if they are made into a deputy-legislature their successors soon will learn to act as partisans.

Would Throttle Competition.

There sits at the council table of the present Commission a statesman who, a dozen or more years ago, retired from the Federal Congress after ten years of distinguished service because he would not yield to the wave of populism that swept over his native State. His service upon the Commission has been longer than all but one of his colleagues. I do not wish to misrepresent him by an omission and I will say that he favors a limited reliance upon law-made rates. He would have a deputy-legislature with power to prescribe maximum charges leaving the railways free to charge less if they chose but would not give it power to fix a minimum or an absolute rate or to name a differential. But as no one engaged in commercial transactions wants a law-made maximum rate except for the purpose of controlling a relation between the charge for the service to which it applies and that for some other service his words apply to all of the proposals for a rate-making Commission. In a dissenting opinion written

within the present year this gentleman, the only Southern member of the Commission, said (In the matter of Differential Freight Rates to and from North Atlantic Ports, 11 Inter. Com. Rep. 80-81):

> "* * * the facts disclosed do not, in my judgment, justify the conclusions reached for the reason that I believe they do violence to the great principle of competition which the Congress and the Supreme Court have so jealously and consistently nourished as one of the fundamental rights of the public. In declaring as between competing lines and competing ports what differentials shall govern, we hamper competition, and by this regulation of distribution effect in reality a division of territory, a division of traffic and a division of earnings, which in substance and effect tend to defeat not only the purposes of the anti-trust act against the restraint of trade, but the pooling provision of the Interstate Commerce Act, with the enforcement of which the Commission is charged * * * May competing carriers lawfully effect through the agency of the Commission restraint of competition and trade by a division of traffic thing through an agency of their own would be unlaw- between themselves and the ports when to do the same ful? I think not.

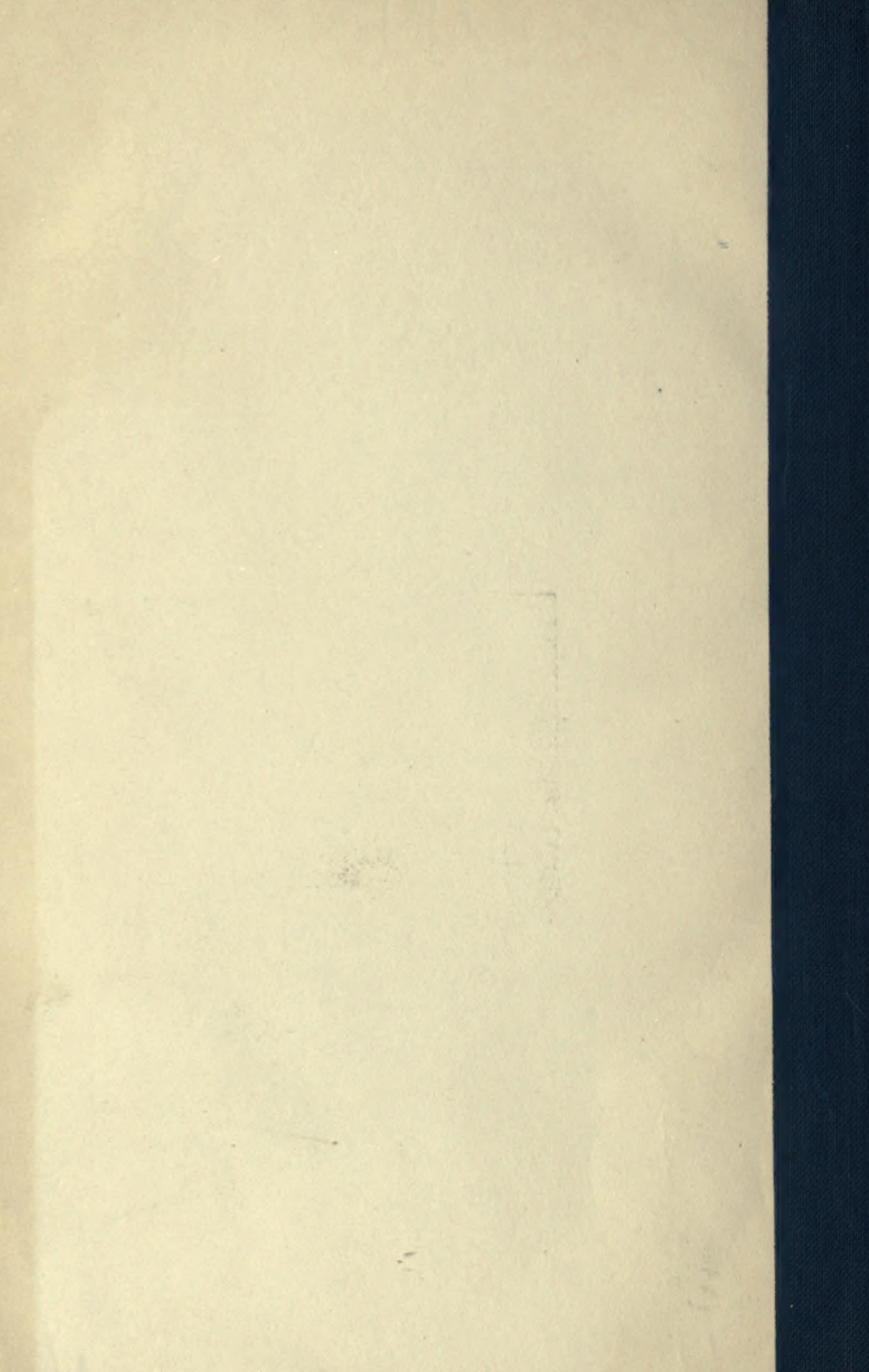
The expectation of putting these questions to ultimate rest could only spring from a Utopian dream. Their permanent rest is perhaps neither practicable in view of the interests of the ports and carriers nor desirable in the interest of the public. The unmolested freedom of competition by lawful methods permitting

> the free course of traffic is more likely to give to each community and carrier the fair and just rewards of its enterprise and public spirit and just rates to the public than any devised plan of fixed differentials between competing carriers to compose conflicting interests by apportionment of the traffic and which in the nature of the case must be more or less arbitrary."

It would be difficult to improve upon the foregoing. Law-made rates are sure somewhere to deny the "fair and just rewards of enterprise and public spirit," they will surely penalize both and put a premium upon political wire-pulling and intrigue. The spirit of the English Common Law, our noblest inheritance from our mother-country, declares that the charges of railway common carriers must be subject to public control but it also insists that the courts of justice shall be open to the weak and the strong alike and that nowhere else shall the relative rights of contesting parties be settled. Let the Congress fix the standards of obligation as strictly as its wisdom suggests, but let this be done directly, not through an irresponsible deputy-legislature. And when the standards are fixed the questions whether they have been violated and whether extraordinary protection against their future violation is necessary are and ought to be for the Federal Courts.

H. T. Newcomb.

Washington, D. C.
Bond Building.
December, 1905.



HE Newcomb, Harry Turner
1843 Proposed solutions of the
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