1934

Gas and Electricity in Interstate Commerce

Robert L. Howard

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/2199

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
GAS AND ELECTRICITY IN INTERSTATE COMMERCE

By Robert L. Howard*

INTRODUCTION

As originally conceived in the minds of the framers of our constitution, the term interstate commerce probably was understood to embrace little, if anything, more than trade in ordinary tangible commodities and their exchange or delivery by means of water transportation. Such a conception is far removed from that which obtains at present. As the result of a process of gradual judicial extension necessitated by our economic and social development, interstate commerce has come to be understood to embrace all types of commercial intercourse. The transportation

*Professor of Law, University of Missouri, Columbia, Missouri.

1"At the time of the adoption of the constitution, navigation afforded the only means of conducting commerce on a large scale. ... Aside from navigation, commerce among the states was, in 1787, conducted by coaches and wagons, and it appears to have been considered that the control of vehicles engaged in this commerce did not belong to the Federal Government." Prentice and Egan, The Commerce Clause of the Federal Constitution 2, citing Perrin v. Sites, (1802) 1 Day (Conn.) 19.

Mr. Justice Bradley, speaking for the Court in Railroad Company v. Maryland, (1874) 21 Wall. (U.S.) 456, 22 L. Ed. 678, said: "No doubt commerce by water was principally in the minds of those who framed and adopted the constitution, although both its language and spirit embrace commerce by land as well. ... The navigable waters of the earth are recognized public highways of trade and commerce ... the vehicles of commerce being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. ... But it is different with transportation by land. This, when the constitution was adopted, was entirely performed on common roads and in vehicles drawn by animal power. No one then supposed that the wagons of the country, which were the vehicles of this commerce, or the horses by which they were drawn, were subject to national regulation." See also 2 Willoughby, Constitutional Law of the United States, 2d ed., 734n; Prentice, Federal Power Over Carriers and Corporations, ch. V.

It is worthy of note in this connection that the status of navigation as commerce was not entirely free from controversy until 1824 with the famous decision of Mr. Chief Justice Marshall in the case of Gibbons v. Ogden, (1824) 9 Wheat. (U.S.) 1, 6 L. Ed. 23.
of passengers\(^2\) by land or water,\(^3\) the transmission of information or intelligence by means of the telephone\(^4\) or the telegraph,\(^5\) the transmission of oil\(^6\) and gas\(^7\) in pipe lines, and finally the transmission of electric light and power current,\(^8\) and of ether waves


\(^3\) See Mr. Justice Van Devanter's definition of commerce in the Second Employers' Liability Cases, (1912) 223 U. S. 1, 46, 47, 32 Sup. Ct. 169, 56 L. Ed. 327.


\(^5\) Pensacola Telegraph Co. v. Western Union Telegraph Co., (1877) 96 U. S. 1, 24 L. Ed. 708; Western Union Telegraph Co. v. Texas, (1881) 105 U. S. 460, 26 L. Ed. 1067; Western Union Telegraph Co. v. Pendleton, (1887) 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187; Leloup v. Port of Mobile, (1888) 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311; Western Union Telegraph Co. v. Foster, (1918) 247 U. S. 105, 38 Sup. Ct. 438, 62 L. Ed. 1006; Western Union Telegraph Co. v. Speight, (1920) 254 U. S. 17, 41 Sup. Ct. 11, 65 L. Ed. 104. As stated by Mr. Chief Justice Waite in Pensacola Telegraph Co. v. Western Union Telegraph Co., (1877) 96 U. S. 1, 9, 24 L. Ed. 708, "The powers thus granted [to regulate commerce] are not confined to the instrumentalities of commerce, . . . known or in use when the constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth."


giving rise to radio communication,9 have all come to be included.10

Gas and electricity have now come to be definitely recognized as proper articles of interstate commerce. A vastly increasing importance is coming to attach to the problems to which their interstate transmission gives rise. This is due to the tremendously increased production of these commodities,11 and to the facts that a larger proportion of that produced is crossing state lines,12 and that continually greater numbers of our population are coming to be dependent upon their use,13 both for domestic and industrial purposes. The situation with respect to electrical development has been described rather vividly by the Federal Power Commission14 as follows:

"The electric-power industry of the country continues to maintain an amazing growth. The rate of expansion during the past decade has been equalled by but few of the major industries. "Electric power is one of the most vital factors in modern industry. Probably no single element has contributed more to the unparalleled commercial expansion of the past decade. The electric age has come upon us so quickly that its possibilities are still beyond human conception. It is not difficult to foresee, however, that the economic progress of the future will be founded in a large degree upon a low-priced, abundant, and reliable supply of electric energy. Nearly all other industries are already more or less dependent upon the electric industry, and in the constantly extending application to uses on the farms, on the transportation systems, and in household service electricity has become almost indispensible."


10The changing content of the concept, interstate commerce, was well characterized by Mr. Justice Brewer in In re Debs, (1895) 158 U. S. 564, 591, 15 Sup. Ct. 900, 39 L. Ed. 1092: "Constitutional provisions do not change, but their operation extends to new matters as the modes of business and habits of life of the people vary with each succeeding generation. . . . Just so it is 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 will operate with equal force upon any new modes of such commerce which the future may develop."

11Moody, Public Utilities (1931) xxi, xxiii, xlvii.


13Moody, Public Utilities (1931) xxiii, xlvii.

The production of natural gas in considerable quantities is, of course, restricted to localities not numerous, and its extensive use necessitates transmission from state to state. Suitable sites for hydroelectric plants likewise are not equally available in all states, and not infrequently the places where such facilities are most abundant are not those in which the developed power is in greatest demand. Other resources, such as coal, also sometimes influence the location of steam plants at points removed from the chief centers of consumption. As a means of insuring continuous and regular service, systems of interconnecting transmission lines combining the current generated by different plants, both hydro and steam, in different states are being set up. Not by any means an unimportant feature in this connection is the concentration of control, financial and otherwise, in what is popularly referred to as the power trust, which has facilitated large scale development. These factors, together with the recent improvements in the transmission of both natural gas and electrical energy over considerable distances, give added significance to these industries from the standpoint of interstate commerce.

It becomes, therefore, a matter of some interest and importance to consider the problems of governmental regulation and control to which the interstate transmission of gas and electricity gives rise, and, if possible, to mark out somewhat the lines which separate state from national control in these matters. To some of the problems the courts have supplied adequate solutions. To others future determinations are required to point the way.

Governmental regulation and control relative to both gas and electricity, at present, largely take the form of state action by means of public utility commissions. Municipal regulation and

Moody, Public Utilities (1931) xlix.


The Rocky Mountain and Pacific Coast States have more than two-thirds of the available water power resources of the country but actually consume less than 18 per cent of the total product. Maine is fourth among the states in potential water power, but consumes very much less electrical energy than neighboring industrial states. (1929) Ninth Ann. Rep. Federal Power Commission 3; N. E. L. A. Statistical Bull. No. 8 (July, 1932).

For a good illustration of this see South Carolina Power Co. v. South Carolina Tax Commission, (D.C. S.C. 1932) 60 F. (2d) 528.

"The public interests at stake... [are] too great to be waived aside as inconsequential, and it becomes important to determine whether and by whom these interstate energy transfers are to be regulated." (1925) Fifth Ann. Rep. Federal Power Commission 8.
control, if not largely superseded by state control, at least is of minor significance so far as the present consideration of interstate commerce is concerned. Prior to the National Recovery Administration program, the federal government had not made any attempt, either by means of the Interstate Commerce Commission, or by a specially created tribunal for the purpose, to regulate the business conducted by gas and electric companies in interstate commerce.\textsuperscript{20} The result has been that either their operations have been subjected to control by the states, or have gone entirely without governmental regulation. The problems to be considered, therefore, largely reduce themselves to a matter of marking the proper limitations upon state control. As to some matters, the well known theory that the states may regulate local aspects\textsuperscript{21} of interstate commerce until Congress acts to cover the field finds application. As to others, the equally familiar doctrine prevails that with respect to matters of national concern requiring a uniform plan of regulation only Congress can act,\textsuperscript{22} and that the silence\textsuperscript{23} of Congress in such a situation is "equivalent to a declaration that interstate commerce shall remain free and untrammeled."\textsuperscript{24} Also, of course, before interstate commerce in the gas or electricity begins and after it ends, the state is free to act. It is therefore, in all cases, important to consider the instant of time at which the transaction ceases to be local and becomes interstate, or in turn divests itself of its interstate character and again becomes a matter of only local concern.

\footnotesize

The extent to which the federal government is undertaking to control the gas and electric industries as a part of its national recovery program will be discussed infra in Part II dealing with regulation of rates and service.


\textsuperscript{23}For a discussion of the effect of the silence of Congress in such a situation, see Bikle, The Silence of Congress, (1927) 41 Harv. L. Rev. 200.

\textsuperscript{24}Welton v. Missouri, (1875) 91 U. S. 275, 282, 23 L. Ed. 347.
It has been thought feasible to treat the interstate aspects of gas and electricity together because of the distinct similarities between them. It is true that gas is found in nature and that electricity in usable form must be generated or produced. Gas is transmitted by means of pipe lines while electric current passes over wires. The transmission of the latter is more instantaneous than that of the former. In their fundamental characteristics, however, as affecting their means of interstate transmission and use, they are very similar. Neither, ordinarily, is produced in advance and stored for future use. The same process which removes the gas from the well, or generates the electricity, transmits it to the point of consumption in accordance with the consumer's demands as manifested by turning on his gas jet in the one case, or his electric switch in the other. The processes are so far similar that the courts constantly use a determination with respect to one as a complete precedent for the other. And while there are, no doubt, limits beyond which the analogy cannot be carried, most of the important problems here involved lend themselves quite readily to a joint treatment of the two.

PART I.

Restrictions upon the Exportation of Natural Gas and Hydroelectric Power from the State of Origin

Precedents

The furnishing of natural gas and electric current for light and power purposes are well recognized public utility services which may properly be subjected to state control as to rates charged and service rendered. Permits from state public service commissions in the form of certificates of public convenience and necessity, or otherwise, both for the establishment of hydroelectric plants and transmission lines, and for gas pipe lines, are also common requirements. Attempts have been made by some states to go beyond this type of control and assert a power proprietary in its nature by which both gas and electricity may be entirely reserved for consumption by their own inhabitants, or a preference enforced for the satisfaction of local demands before exportation from the state will be permitted. In point of time such restrictions as to natural gas preceded those with respect to electricity. But as to both, the states have based their claim of right upon
Supreme Court decisions dealing with certain other natural resources.

The leading case to which any discussion of this question must go back is that of *Geer v. Connecticut*. There the Supreme Court of the United States sustained a statute of Connecticut regulating the killing of certain game birds within its borders so as to confine their use within the limits of the state. The Court based its opinion very largely upon what it considered the proprietary interests of the state in the wild game found within its own territory. Mr. Justice White, speaking for the majority of the Court, went back to the time of the Greeks and Romans, and traced the control of the state in this respect down through the Middle Ages, through the development of the English common law, and through our own colonial and early state periods. In so doing he purported to show that at all times the state had possessed such power, because of the common ownership of animals ferae naturae, to be exercised as a trust for the benefit of all of its people. The sole consequence, according to the Court, of the statutory provision here in question "forbidding the transportation of game, killed within the state, beyond the state, was to confine the use of such game to those who own it, the people of that state." The contention was urged that as the state permitted the people within its borders to take game and dispose of it, it thereby allowed such game when so taken to become an object of state commerce, and "as a resulting necessity such property... [became] the subject of interstate commerce." But the Court took the position that in view of the power of the state to affix conditions to the killing and sale of game, based upon the peculiar nature of such property and its common ownership by all the citizens of the state, "it may well be doubted whether commerce is created by an authority given by a state to reduce game within its borders to possession, provided such game be not taken, when killed, without the jurisdiction of the state." Such a common ownership as exists in this type of case was sufficient, the Court thought, to carry with it "a right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose." It was further asserted that limitations of the nature here imposed "deprive no person of his property, because he who

---

25*(1896)* 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793.
26*(1896)* 161 U. S. 519, 529, 16 Sup. Ct. 600, 40 L. Ed. 793.
27*(1896)* 161 U. S. 519, 530, 16 Sup. Ct. 600, 40 L. Ed. 793.
takes or kills game had no previous right of property in it, and when he acquires such right by reducing it to possession he does so subject to such conditions and limitations as the legislature has seen fit to impose."\(^{28}\) Referring to state decisions that had reached an opposite result,\(^{29}\) the Court asserted that they were due to a failure to consider properly the "fundamental distinction between the qualified ownership in game and the perfect nature of ownership in other property."

While Mr. Justice White thus rested the decision very largely upon the peculiar nature of the property involved and the special nature of the state's relation thereto, it is important for present purposes also to note that a second sufficient basis was asserted to be found in the police power of the state, "which may be none the less called into play, because by doing so interstate commerce may be remotely and indirectly affected." He asserted that "the source of the police power as to game birds flows from the duty of the state to preserve for its people a valuable food supply."\(^{30}\) That power, he thought, was properly exercised to retain for the people of the state articles which can only become the subject of ownership in a qualified way, and "which can never be the object of commerce except with the consent of the state and subject to the conditions which it may deem best to impose for the public good."\(^{31}\)

\(^{28}\)State v. Rodman, (1894) 58 Minn. 393, 400, 59 N. W. 1098; Ex parte Maier, (1894) 103 Cal. 476, 483, 37 Pac. 402.


\(^{30}\)(1896) 161 U. S. 519, 535, 16 Sup. Ct. 600, 40 L. Ed. 793.

\(^{31}\)Justices Field and Harlan dissented, asserting that when any such game birds had been lawfully killed they became private property, legitimate subjects of interstate commerce, and that the statute in question was a violation of the commerce clause of the constitution of the United States.

Justices Brewer and Peckham took no part in the decision.

Of perhaps more immediate significance for present purposes is the decision of the Supreme Court in *Hudson County Water Co. v. McCarter*, upholding a statute of New Jersey asserting the need of preserving the fresh water supply of the state for the health and prosperity of its own citizens and forbidding the exportation from the state of any of the waters "of any fresh water lake, pond, brook, creek, river or stream" within the state. The New Jersey court, in sustaining the statute and enjoining the diversion of water in large quantities from the Passaic River to supply partially the city of New York, asserted that the "common law recognized no right in the riparian owner, as such, to divert water from the stream in order to make merchandise of it, nor any right to transport any portion of the water from the stream to a distance for the use of others," and that his rights of acquisition were for purposes narrowly limited, and emphasized the proprietary interest of the state in the waters of its streams.

Mr. Justice Holmes, speaking for the Supreme Court and sustaining the holding below, asserted:

"We prefer to put the authority which cannot be denied to the state upon a broader ground than that which was emphasized below, since in our opinion it is independent of the more or less attenuated residuum of title that the state may be said to possess. . . . It is recognized that the state as quasi-sovereign and representative of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned." He thought there were few public interests "more obvious, indisputable and independent of particular theory" than that of a state to maintain its streams substantially undiminished, except so far as, in the interest of public welfare, it might permit. The

349, 96 S. W. 189 (fish and game); Fritz v. State, (1909) 88 Ark. 571, 115 S. W. 385 (fish and game); Jonesboro, L. C. & E. R. Co. v. Adams, (1915) 117 Ark. 54, 174 S. W. 527 (fish and game); Re Pheodovi-neus, (1918) 177 Cal. 235, 170 Pac. 412 (game); Ex parte Florence, (1930) 107 Cal. App. 607, 290 Pac. 652 (abalone); Bayside Fish Flour Co. v. Zellerbach, (1932) 124 Cal. App. 564, 12 P. (2d) 961 (fish); State v. Northern Express Co., (1894) 58 Minn. 403, 59 N. W. 1100 (fish); Ex parte Fritz, (1905) 86 Miss. 210, 38 So. 722 (fish); Cameron v. Territory, (1906) 16 Okla. 634, 86 Pac. 68.


right of a riparian owner to take water was asserted to be subject not only to the "rights of lower owners but to the initial limitation" that he must not "substantially diminish one of the great foundations of public welfare and health."

A. Natural Gas

With these cases as a background the first case involving state restrictions upon the exportation of natural gas beyond its boundaries came before the Court in 1911.\(^3\) A statute of Oklahoma provided that no corporation engaged in the transmission of natural gas within the state should be granted a charter, or the right of eminent domain, or the right to use the highways of the state, unless it be expressly stipulated in the grant that it should neither transmit natural gas beyond the limits of the state nor deliver it to anyone engaged in such transportation. It was urged that the statute was a police measure calculated to conserve the natural resources of the state and necessary to prevent the early depletion of the state's supply of natural gas.

It was not denied that a state might pass reasonable conservation measures to prevent loss or waste of its natural resources such as gas and oil. The leading case to this effect, upon which reliance was placed to sustain the Oklahoma statute, was *Ohio Oil Company v. Indiana.*\(^3\) Mr. Justice White, speaking for a unanimous Court, there recognized the peculiar characteristics of gas and oil as having no fixed situs under a particular surface and as requiring restrictions upon the wasteful operations of individual owners if the common supply is to be preserved. After referring to a Pennsylvania case\(^3\) which alluded to water, oil, and gas as minerals ferae naturae because "possession of the land is not necessarily possession of the gas," he pointed out very clearly the difference between natural gas and animals ferae naturae, which distinction became controlling in *Oklahoma v. Kansas Natural Gas Co.*\(^3\) and similar succeeding cases. It was asserted that while there is some analogy between animals ferae naturae and the moving deposits of oil and natural gas, the analogy is not complete. In things ferae naturae, it was pointed out, all


\(^{36}\) (1900) 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729.


\(^{38}\) (1911) 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716.
persons have an equal right to acquire a private property therein by seeking to reduce them to possession, but in the case of oil and gas no such common right exists. That right exists only in the owners of the surface under which the oil and gas may be found. This difference was said to indicate the distinction which exists between the power of the state over the two.

"In the one, as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession. No divesting of private property, under such conditions, can be conceived because the public are the owners, and the enacting by the state of a law as to the public ownership is but the discharge of the governmental trust resting in the state as to property of that character. On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property."

It was then held that, since there was a co-equal right in all such surface owners to take from a common source of supply, and the exercise by one or a few of their rights might result in the acquisition of an undue proportion to the detriment of others, or, by waste, to the complete destruction of the rights of the remainder, it was proper for the legislature to enact measures to protect all by the prevention of waste. Such a statute was said to

39For a comparison of this notion of public ownership with the corresponding Roman Law concept of res communes, see Pound, Interests of Personality, (1915) 28 Harv. L. Rev. 343, 352, 353.

40(1900) 177 U. S. 190, 209, 20 Sup. Ct. 576, 44 L. Ed. 729.

be, not one depriving owners of their private property without due compensation, as charged, but, in substance, a measure protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of others. No such purpose was served by the Oklahoma statute. Mr. Justice McKenna pointed out that it did just what the Court took pains to show that the Indiana statute did not do. Its provisions were not directed against waste but against any use of the gas except within the state, not to the protection of the property interest of the common owners but to the restriction of the right of use and disposition after it had become private property by being reduced to possession. If, as held in the Ohio Oil Company Case, the surface owners could not be deprived of the right to reduce the gas to possession, it was thought to be quite clear that they could not be deprived of rights which attach to it when in possession.

"Gas, when reduced to possession," said Mr. Justice McKenna, "is a commodity; it belongs to the owner of the land, and, when reduced to possession, is his individual property subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prevent it from being the subject of interstate commerce... If the states have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. . . . If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines."42 In a situation such as this the fact that Congress has not acted was asserted to be of no consequence. Natural gas lawfully reduced to individual possession becomes private property and a legitimate subject of interstate commerce, and "the inaction of Congress is a declaration of freedom from state interference with the transportation of articles of legitimate interstate commerce."43


43 (1911) 221 U. S. 229, 261, 31 Sup. Ct. 564, 55 L. Ed. 716.
Considering the cases thus far dealt with, involving wild game, fresh water, and natural gas, it seems that there is ample justification for the distinctions made by the Court. The basis of the distinctions would not seem to lie so much in the proprietary or non-proprietary interest of the state, indicated by the first proposition in *Geer v. Connecticut*, as in the broader relation of the state or the public to the natural resource in question, and the consequent right to exercise the police power for its preservation. The power of the state in such a situation, properly considered, seems to be governmental in its nature rather than proprietary. This was particularly emphasized by Mr. Justice McKenna in the *Oklahoma Case* when he discussed the opinion in *Hudson County Water Co. v. McCarter*. The principle of that decision was asserted to be that it was in the "interest of the public for a state to maintain the rivers that are wholly within it substantially undiminished, except by such drains upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use." The fresh water of the state's streams was referred to as "one of the great foundations of public welfare and health" which the private right to appropriate should not be permitted to diminish substantially. It was thought to be hardly necessary to say that there was no purpose in the *Water Company Case* "to take from property its uses and commercial rights or to assimilate a flowing river and the welfare which was interested in its preservation" to the regulation of gas wells, or to take from the gas when reduced to possession the attributes of property decided to belong to it." In the case of wild game it may be permissible to assert that the state bears

---

44The terms "governmental" and "proprietary," though frequently confused, are here used to distinguish between the power possessed by a government, by virtue of its sovereignty, to protect the interests of its citizens, as the police power, and that of a proprietor to control because of special property interest in the thing in question.
45(1908) 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828.
46Italics supplied.
a special relation thereto, historically, as representative of the public, sufficient to justify the holding in *Geer v. Connecticut.*

With respect to both wild game and fresh water, the relationship of the public, as well as the nature and extent of the ownership acquired by one who reduces them to possession, is quite different from the situation in a case where a commodity such as natural gas is involved. It is believed that the interest of the public in the preservation of a fresh water supply for local uses, or as the Court has stated it "the welfare interested in its preservation", is such that the state may be justified in pursuing a definite policy for its conservation for use within the state. It may, therefore, as a means of self preservation, properly exercise its police power to impose restrictions which could not be justified as to articles, the nature of the ownership of which is different, and upon the preservation of which the people of the state are less vitally dependent. This is not to overlook the fact that the commercial and industrial welfare of a state may be greatly dependent upon the disposition made of its other natural resources, such as natural gas. Neither is it to lose sight of the fact that the promotion of industrial and commercial well being, as a part of the so-called public convenience and general welfare is a legitimate purpose for the exercise of the state's police power. Nor is it to question the proposition that the police power of a state may not be used to destroy traffic in legitimate articles of interstate commerce. It is rather to assert that the preservation of the natural fresh water supply for the people of a state may be put upon a similar basis of necessity to that which justifies quarantine laws. Surely if a state may pro-

---

48See Mr. Justice White's discussion, (1896) 161 U. S. 519, 522-528, 6 Sup. Ct. 600, 40 L. Ed. 793.

49For a fuller discussion of the relation of the state to fish, game and fresh water, and the effect of its proprietary interest therein, see Williams, The Power of the State to Control the Use of its Natural Resources, (1927) 11 *Minnesota Law Review* 129, 238 et seq.


hibit the exportation of unripe and immature citrus fruits in order to protect the good name of its industry abroad, it may withhold for the use of its own inhabitants its natural fresh water supply upon which their very existence may depend. It may readily be suggested that a similar argument might be made with respect to a fuel supply or a food product, and that the matter of necessity as a basis of distinction in such cases can only be a matter of degree. But in addition to the difference in the nature of private ownership with respect to the latter products, and the fact that they are more readily available on the open market, it may be answered that most distinctions upon the basis of which lines are to be drawn “are distinctions of degree, and the constant business of the law is to draw such lines.” It is believed that the degree of difference involved here is a sufficient one.

It has been suggested that a different basis for a distinction between these cases, from that relied upon by the Court, exists in the fact that in the first two cases the supplies of wild game and of fresh water were not more than needed for domestic consumption, while in the Oklahoma gas case no showing was made that the complete supply was really needed for local demands. This would avoid entirely the necessity of making a distinction between the cases on the basis of a difference in the nature of the commodities in question, or in the relation of the public or the individual thereto. It would suggest that a state might restrict exportation of its natural resources to the excess above local needs or prohibit it altogether when necessary to supply the demands of its own citizens, but where not necessary to protect the needs within the state no power to restrict or prohibit exportation might be asserted. Such, in substance, was the position taken by West Virginia as to its restrictions upon the exportation of its natural resources.

--

65The late Professor James W. Simonton of West Virginia University School of Law in an interesting article, The Power of a State to Control the Export of Hydro-Electric Energy, (1932) 39 W. Va. L. Q. 4, 14, in discussing the Oklahoma gas case suggests that if “Oklahoma could have prohibited the export of natural gas the market of private owners would have been so limited that this commodity for very many years would have been almost worthless,” and that its waste would have been greatly increased.
tion of natural gas in *Pennsylvania v. West Virginia.* The statute there involved required all persons or utilities furnishing natural gas for public use within the state, to the extent of their supply produced therein, to furnish a reasonably adequate supply to all consumers within the state, and empowered the public service commission to enforce its provisions. This statute was passed by West Virginia in an effort to preserve for its own citizens, so far as possible, an adequate supply of a natural resource produced within its borders. The obvious purpose of this statute, as would have been its effect if it had been enforced, was to restrict the exportation of natural gas produced within the state to the extent necessary to supply adequately local needs, even though exportation in interstate commerce should be entirely destroyed.

In support of this restrictive provision, it was urged that the gas companies operating the pipe lines transmitting gas within and beyond the limits of the state were public utility corporations and that the statute merely required such companies to furnish a reasonably adequate service within reasonable territorial limits, an obligation which they assumed by virtue of their quasi-public character. Second, it was asserted that the statute was merely a legitimate conservation measure to preserve for the people of the state one of its natural resources which had come to be no longer sufficient to satisfy local needs if the use abroad were unrestricted. Neither argument appeared convincing to the Supreme Court. Mr. Justice Van Devanter, for the majority, took the position that so far as the business was of a quasi-public character involving an obligation to give adequate service, that character attached to it in Ohio and Pennsylvania as well as in West Virginia, with an equal power in those states to insist upon adequate service. The second contention he regarded as in essence the same as that set up in *Oklahoma v. Kansas Natural Gas Co.* and as controlled by the decision in that case. The doctrine was again asserted that when the owner of the surface reduces natural gas to possession it becomes his property and the subject of commerce like any other product of the forest, the field, or the mine. The principal issue was said to be whether a state in which natural gas is produced and is a recognized subject of commercial dealings may require that in

---

56 (1923) 262 U. S. 553, 43 Sup. Ct. 658, 67 L. Ed. 1117.
57 (1911) 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716.
its sale and disposition "consumers in that state shall be accorded a preferred right of purchase over consumers in other states, when the requirement necessarily will operate to withdraw a large volume of the gas from an established interstate current whereby it is supplied in other states to consumers there."\(^{58}\) This withdrawal from the current of interstate commerce for the benefit of local consumers was regarded as such an interference with interstate commerce as to be a violation of the commerce clause of the federal constitution.\(^{59}\) The Court was apparently concerned not alone with the effects of such a practice in the single case, but also with the broader policy of protecting interstate commerce in general against such restrictions by the states. It was said that "what one state may do others may," and "what may be done with one natural product may be done with others." In other words, if one state may reserve its natural products for the use of its own citizens, all others may do likewise with the result that interstate commerce will be seriously impeded. From the standpoint of national welfare as distinguished from that of the individual states, it is certainly a desirable matter of policy to prevent the states from thus seriously interfering with the conduct of interstate commerce; and the commerce clause of the constitution of the United States undoubtedly was inserted for the very purpose of avoiding in the future state interferences which so seriously hampered interstate and foreign commerce during the period of the Confederation.\(^{60}\)

The Court did not regard the purported distinction from the Oklahoma gas case on the basis of the inadequacy of the supply as being important. Full reliance was placed upon that decision, and the cases of *Geer v. Connecticut*\(^{61}\) and *Hudson County Water Co. v. McCarter*\(^{62}\) were not mentioned. Thus the basis upon which those cases are to be distinguished, established by the Oklahoma gas case, and set out at some length above, would seem to

---

\(^{58}(1923)\) 262 U. S. 553, 595, 43 Sup. Ct. 658, 67 L. Ed. 1117.

\(^{59}\) For cases applying a similar doctrine to hold invalid state statutes attempting to retain for consumption within the state all coal mined therein, see Vandalia Coal Co. v. Special Coal & Food Commission, (D.C. Ind. 1920) 268 Fed. 572; Ohio Collieries Co. v. Stuart, (D.C. Ohio 1923) 250 Fed. 1005.

\(^{60}\) O'Reynolds, The Distribution of Power to Regulate Interstate Carriers Between the Nation and the States, 29, 31; Gibbons v. Ogden, (1824) 9 Wheat. (U.S.) 1, 190, 6 L. Ed. 23; Brown v. Maryland, (1827) 12 Wheat. (U.S.) 419, 445, 6 L. Ed. 678.

\(^{61}(1896)\) 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793.

\(^{62}(1908)\) 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828.
stand. In this connection should be mentioned the case of *Foster Fountain Packing Co. v. Haydel*, which some have thought to have the effect of modifying the doctrine of the *Geer Case*, though the Court expressed its approval of that case and purported to distinguish it. The statute of Louisiana there involved, among other things, made it unlawful to export from the state any shrimp from which the heads and hulls had not been removed, but placed no restrictions upon exportation after such removal. The alleged purpose of the statute was the conservation of the heads and hulls for use in manufacturing fertilizer and chicken feed. The Court thought, however, that the real purpose was to prevent the interstate movement of raw shrimp in order to force the removal of the packing and canning industries from Mississippi to Louisiana. There was no purpose to discourage or restrict the taking of shrimp or their shipment out of the state, but rather the opposite. Neither was there any purpose to preserve any part of them for the use of the people of the state, but rather to condition their entrance into interstate commerce in such a way as to advance the commercial and industrial interests of the state. In accordance with the doctrine of the *Geer Case*, the Court took the position that Louisiana might have retained the shrimp for consumption and use within the state, but since it was not needed there for consumption and the state authorized its unrestricted entrance into intrastate commerce, and into interstate commerce after processed to a certain extent, it thereby released its control and could not impose as a condition of its entrance into interstate commerce that the heads and hulls be removed within the state. The control by the state over game and fish rather than its ownership was emphasized, thus more nearly approaching the same police power basis that has been applied in the case of other natural resources than was

---

63 (1928) 278 U. S. 1, 49 Sup. Ct. 1, 73 L. Ed. 147.

64 See notes dealing with this case as follows: (1929) 3 U. of Cin. L. Rev. 64; (1929) 29 Col. L. Rev. 355; (1929) 14 Corn. L. Q. 245; (1929) 23 Ill. L. Rev. 705; (1929) 35 W. Va. L. Q. 182.

65 Mr. Justice Butler asserted as a feature distinguishing this from the *Geer Case* that, "The conditions imposed by the act upon the interstate movement of the meat and other products of shrimp are not intended and do not operate to conserve them for the use of the people of the state." (1928) 278 U. S. 1, 10, 49 Sup. Ct. 1, 73 L. Ed. 147: cf. Jackson Mining Co. v. Auditor General, (1875) 32 Mich. 488, holding invalid a tonnage tax imposed on all iron ore or minerals exported before being smelted but exempting ores smelted in the state.

done in the *Geer Case*.\(^6\) Mr. Justice McReynolds in his dissent, however, reasserted in its full vigor the proprietary idea when he said, "these crustaceans belong to her (Louisiana) and she may appropriate them for the exclusive use and benefit of (her) citizens." This power could be exercised, he asserted, to promote the shrimp canning and packing industries in the state. Therefore, he thought it proper for the statute to fix the limits upon entry into interstate commerce.

In so far as the attempt to retain fish and game within the state is solely for the purpose of advancing manufacture and industry, as in the shrimp case, there would seem to be no justification not present in the natural gas cases. The historical argument advanced above as a basis for the decision in the *Geer Case* would apply only when the state is exercising its control for traditional purposes, and not when asserted for purposes entirely foreign to the reasons which gave rise to the doctrine. As a practical matter there seems ample justification for drawing the line as indicated by the Court between the *Geer* and shrimp cases. The Louisiana statute would seem to have less to recommend it than that of West Virginia in *Pennsylvania v. West Virginia*. In the latter case the statute was clearly intended and would have operated to conserve a needed supply of natural gas for the people of the state in which it was produced.

This latter case, together with that of *Oklahoma v. Kansas Natural Gas Co.* would seem to put at rest the contention that a state may so far prefer its own citizens in the enjoyment of its ordinary natural resources as to interfere seriously with interstate commerce therein, and, by the only decision consistent with our national needs and a national policy, manifest since the Constitutional Convention of 1787, to maintain the channels of interstate commerce free from undue interference on the part of the states.

Such a statement as this last should probably not be made, however, without some reference to the dissenting opinion of Mr. Justice Holmes in the *West Virginia Case*, in which Mr. Jus-\(^7\) severance tax with respect to all furs taken within the state, greater stress was placed on the police power as the basis of the state's control than in the *Geer* case, though the proprietary idea was also reasserted.

\(^6\)For a recent state case purporting to interpret and apply the distinction between the two cases, see *Ex parte Florence*, (1930) 107 Cal. App. 607, 290 Pac. 652. See also *In re Phoedovius*, (1918) 177 Cal. 238, 170 Pac. 412; *Bayside Fish Flour Co. v. Zellerbach*, (1932) 124 Cal. App. 564, 12 P. (2d) 961.
tice Brandeis concurred. Since the statute sought to reach the natural gas before it became a part of interstate commerce, he thought it should have been sustained. He took the position that "the products of a state until they are actually started to a point outside it may be regulated by the state notwithstanding the commerce clause." In support of this proposition he relied strongly upon Oliver Iron Mining Co. v. Lord, which sustained an occupation tax upon the mining of iron ore although substantially all the ore left the state in interstate commerce and most of it was loaded upon cars for the interstate journey by the same single movement which severed it from its bed. "But as it was not yet in inter-

68(1923) 262 U. S. 553, 600, 601, 43 Sup. Ct. 658, 67 L. Ed. 1117.
70"Mining is not interstate commerce, but, like manufacture, is a local business subject to local regulation and taxation." Mr. Justice Van Devanter in Oliver Iron Mining Co. v. Lord, (1923) 262 U. S. 172, 178, 43 Sup. Ct. 526, 67 L. Ed. 928. While this statement is clearly sound, the case in question does present a situation in which the line between the local act of mining and the interstate shipment of the product is extremely shadowy. The purchase of goods for immediate shipment out of the state is a part of interstate commerce, and the facilities incident to such shipment are facilities of interstate commerce. American Express Co. v. Iowa, (1905) 196 U. S. 133, 25 Sup. Ct. 182, 49 L. Ed. 417; Pennsylvania Railroad Co. v. Clark Bros. Coal Mining Co., (1915) 238 U. S. 456, 35 Sup. Ct. 896, 59 L. Ed. 1406; Pennsylvania Railroad Co. v. Sonman Shaft Coal Co., (1916) 242 U. S. 120, 37 Sup. Ct. 46, 61 L. Ed. 188; Dahmke-Walker Milling Co. v. Bondurant, (1921) 257 U. S. 282, 42 Sup. Ct. 106, 66 L. Ed. 239; Lemke v. Farmers Grain Co., (1922) 258 U. S. 50, 42 Sup. Ct. 244, 66 L. Ed. 458; Stafford v. Wallace, (1922) 258 U. S. 495, 42 Sup. Ct. 397, 66 L. Ed. 735; Flannagan v. Federal Coal Co., (1925) 267 U. S. 222, 45 Sup. Ct. 233, 69 L. Ed. 583; Shafer v. Farmers' Grain Co., (1925) 268 U. S. 189, 45 Sup. Ct. 481, 69 L. Ed. 909; cf. A. G. Spalding & Brothers v. Edwards, (1923) 262 U. S. 66, 43 Sup. Ct. 485, 67 L. Ed. 865; Superior Oil Co. v. Mississippi, (1930) 280 U. S. 390, 50 Sup. Ct. 169, 74 L. Ed. 504. That being true, all of the acts of loading and shipping pursuant to such purchase would seem to come within the same category. Then when a purchase is made of unmined coal at the open pit mines for immediate delivery on cars for shipment out of the state, it would logically seem that both the purchase and the loading would be parts of interstate commerce. Yet the same act that does the loading also constitutes the mining, and the latter, we have just seen, is held to be solely a local business. Something in addition to bare logic must be employed in a rational disposition of this type of case. This situation will be dealt with infra under the subject of state taxation. For an interesting case involving an application of the principles here discussed to a production tax on the production of natural gas transmitted directly from the wells to points outside the state, see Hope Natural Gas Co. v. Hall, (1927) 274 U. S. 284, 47 Sup. Ct. 639, 71 L. Ed. 1049. However fine the line of distinction may be in such cases between what is interstate commerce and what is local, the holdings would not seem to stand as authority for such restrictive statutes as that of West Virginia. For another case sustaining a non-discriminatory mining tax, the incidence of which was alleged to fall on interstate commerce, see Heisler v. Thomas Colliery Co., (1922) 260 U. S. 245, 43 Sup. Ct. 83, 67 L. Ed. 237; cf. Missouri, Kansas
state commerce the tax was sustained.” As the gas here had not yet started on an interstate journey, he thought the same reasoning should apply, and that there is “no relevant distinction between taxing and regulating in other ways.” Other cases were thought to involve more nearly complete analogies and even more strongly to dictate an opposite decision. If a state may prohibit the shipment in interstate commerce of citrus fruits when immature or otherwise unfit for consumption,\(^7\) or by its game laws preserve for its own people a food supply notwithstanding an interference with interstate commerce,\(^7\) or regulate the use of natural gas to prevent waste,\(^7\) or prohibit the manufacture of articles (liquor and colored oleomargarine) intended for export,\(^7\) he saw no reason why West Virginia might not be permitted to prefer its own citizens in the consumption of natural gas produced within its borders. In the face of these cases, however, it appears that there are sufficient differences upon which to make a distinction and support the decision of the Court. In the case of placing an occupation tax upon iron mining no discrimination was imposed upon interstate commerce, and the mere fact that in a particular instance the statute was applied to a case where substantially all of the ore was to be shipped out of the state would seem to be immaterial. Taxation is not the same thing as prohibition, particularly when the tax is non-discriminatory. The same absence of discrimination exists as to the gas conservation cases, and the majority opinion in the principal case as well as in those here referred to would seem amply to justify the distinction. In *Walls v. Midland Carbon Co.*,\(^7\) relied upon in this connection by Mr. Justice Holmes, rather stringent statutory restrictions upon the manner of making use of an important natural resource were sustained, no interference with interstate


\(^4\)Kidd v. Pearson, (1888) 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346 (liquor); Capital City Dairy Co. v. Ohio, (1902) 183 U. S. 238, 22 Sup. Ct. 120, 46 L. Ed. 171 (colored oleomargarine).

shipment being involved. The power to restrict the exportation of citrus fruits to preserve the commercial good name of the state was clearly based upon analogy to the power of a state to exclude articles unfit for human consumption and thus not legitimate articles of interstate commerce, and to the power to pass inspection and quarantine laws. The preservation of wild game for consumption within the state is sufficiently dealt with above. Manufacture, like mining, precedes and is not a part of interstate commerce. While colored oleomargarine, like liquor, may be regarded as a legitimate article of interstate commerce when manufactured, the prohibition of its manufacture, for sufficient police reasons, is not equivalent to a restraint upon the shipment of an existing article of commerce. These cases do not question the proposition that it is beyond the power of a state to forbid or impede the exportation of goods once lawfully called into existence. The object of such statutes is not to prevent or restrict the carrying out of the state of recognized articles of commerce but to prevent the manufacture within the state of articles thought to be harmful.

Mr. Justice Holmes considered the cases above discussed as confirming what he thought plain without them, that "the constitution does not prohibit a state from securing a reasonable preference for its own inhabitants in the enjoyment of its products even when the effect of its law is to keep property within its..."
boundaries that otherwise would have passed outside." He admitted, however, that there was "some general language in Oklahoma v. Kansas Natural Gas Co., a decision that I thought wrong, implying that Pennsylvania might not keep its coal, or the Northwest its timber, etc. But I confess I do not see what is to hinder."

It is submitted that there was ample justification for the decision of the Court, and that such legislation as that of West Virginia materially restricting the free interchange from state to state of recognized articles of interstate commerce is not only highly undesirable from the standpoint of national policy, but also amounts to a substantial violation of both the terms and the purpose of the commerce clause of the constitution of the United States.

B. HYDROELECTRIC POWER

Whether the courts will follow the analogy of the gas cases when they come to dealing with restrictions upon the exportation of hydroelectric energy from the state of its production remains to be seen. Unless there is some fundamental difference in the nature of the commodity involved and the relation of the state thereto, or in the restriction imposed by the state, there would seem to be every reason to expect that the same result would be arrived at.

Only one state has undertaken to impose an absolute statutory prohibition upon the exportation of hydroelectric energy generated in short, every branch of human industry." Mr. Justice Lamar in Kidd v. Pearson, (1888) 128 U. S. 1, 21, 9 Sup. Ct. 6, 32 L. Ed. 346.


82(1923) 262 U. S. 553, 603, 43 Sup. Ct. 658, 67 L. Ed. 1117.

83(1911) 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716.

84For other cases holding invalid statutes restricting or prohibiting the exportation of natural gas from the state of its production, see Haskell v. Kansas Natural Gas Co., (1912) 224 U. S. 217, 32 Sup. Ct. 442, 56 L. Ed. 738; State ex rel. Corwin v. Indiana & Ohio Oil, Gas & Mining Co., (1889) 120 Ind. 575, 22 N. E. 778; Manufacturers Gas & Oil Co. et al. v. Indiana Natural Gas & Oil Co., (1900) 155 Ind. 545, 57 N. E. 912.

85In determining that the transmission of electric current across state lines is interstate commerce, and in dealing with problems in regard to rates, service and taxation, to be discussed infra, the courts have relied almost entirely on the analogy of the natural gas cases. See Public Utilities Commission of Rhode Island v. Attleboro Steam and Electric Co., (1927) 273 U. S. 83, 47 Sup. Ct. 294, 71 L. Ed. 549; Utah Power & Light Co. v. Pfost, (1932) 286 U. S. 165, 52 Sup. Ct. 548, 76 L. Ed. 1038; South Carolina Power Co. v. South Carolina Tax Comm., (D.C. S.C. 1931) 52 F. (2d) 515, (D.C. S.C. 1932) 60 F. (2d) 528; Mill Creek Coal & Coke Co. v. Public Service Comm., (1919) 84 W. Va. 662, 100 S. E. 557.
within its borders. Three others have sought to prefer their own inhabitants and restrict exportation to the surplus above local needs in a manner similar to the restrictions with respect to natural gas involved in Pennsylvania v. West Virginia, while in still other states public service commissions have from time to time promulgated orders more or less restrictive in effect. Several states have passed general water power statutes providing for controlling and regulating the development of the potential water power of their streams. Of these, some specifically assert all the water power resources of the state to be the property of the public for the benefit of all the people;86 others in more general terms have been given a substantially similar interpretation by the courts.87 Practically all such statutes either express or seem to imply the existence of a power on the part of the state to control development and disposition as it may see fit.

The state of Maine, since 1909, has had an absolute statutory prohibition against the exportation beyond the limits of the state of any hydroelectric energy generated therein. Aside from certain minor exceptions not here important, the prohibition applies to all unless an express authorization is conferred by special act of the legislature.88 Such authorization has never been given, however, and no question as to the enforcement of the provisions of this statute has ever been before the commission or the courts of the state.89 In 1929 the Maine Legislature passed a comprehensive act authorizing and making provision for the exportation from the state of surplus power generated therein.90 This act was defeated by popular referendum, with the result that the prohibition against exportation remains substantially complete.

New Hampshire, by statute, imposes a similar prohibition except upon the special authorization of the public service com-

87"All streams within the state capable of developing hydraulic, electrical or other energy or power, shall be under the control and supervision of the state." West Virginia Code Ann. (Barnes, 1923) ch. 54B, sec. 2; Acts 1913, ch. 11, sec. 1; Acts 1915, ch. 17, sec. 2.
For interpretation of this statute, see Royal Glen Land & Lumber Co. v. Public Service Commission, (1922) 91 W. Va. 446, 448, 449, 113 S. E. 749.
88Maine, Rev. Stat. 1930, ch. 68, sec. 1; Maine, Laws 1909, ch. 244, sec. 1, 3.
89Personal letter from the Maine Public Utilities Commission, February 14, 1933.
90Maine, Laws 1929, ch. 280.
mission of the state, with power in the commission to require the discontinuance of such exportation as authorized whenever the electric energy may be needed for use within the state. In practice this is substantially the equivalent of the ordinary preference given to local needs. West Virginia, since 1913, and Wisconsin, since 1915, have had restrictive laws regulating the exportation of hydroelectric power. By an act of 1929 West Virginia provided for a more mild sort of preference in favor of local consumers. This act, however, has been declared unconstitutional as in violation of certain provisions of the state constitution, leaving in effect the more rigid act of 1915 by which the state public service commission is fully empowered to control the sale and distribution of hydroelectric energy to the extent of completely prohibiting its exportation from the state. The Wisconsin statute prohibits the exportation of hydroelectric energy by any grantee of a permit to generate such power, in such a way or to such an extent as to disable the grantee from furnishing adequate service at reasonable rates to consumers within the state, and authorizes the state public service commission to declare null and void any or all contracts for such exportation in so far as they may be found to interfere with such service or rates.

These statutes may be sufficiently accurately characterized by saying that the one, that of Maine, is substantially a complete prohibition upon any exportation from the state of hydroelectric energy generated therein; while the statutes of New Hampshire,

---

91 New Hampshire, Laws 1929, ch. 106. Except for the provision requiring discontinuance of exportation on order of the commission, the statute has been in effect since 1911. New Hampshire, Pub. Laws 1926, ch. 240, sec. 33.

92 West Virginia, Acts 1929, ch. 58, sec. 6(f).


94 West Virginia, Code Ann. (Barnes, 1923) ch. 54B, sec. 15, Acts 1915, ch. 17, sec. 15. A somewhat less drastic restriction had been imposed by the 1913 statute. West Virginia Acts 1913, ch. 11, sec. 19.

95 Wisconsin, Statutes 1931, sec. 31.27; Laws 1915, ch. 380; Laws 1917, ch. 474, sec. 27. By an amendment in 1929 each applicant for a permit is required to file with the commission a written agreement to the exercise of the power of the commission to declare contracts void. Wisconsin, Statutes 1931, sec. 31.095.

For other statutes conferring very broad powers upon state commissions, which might be subject to an interpretation allowing such commissions to require a preference for local demands, see South Carolina, Acts 1932, No. 871, sec. 2 (i) and (j); Vermont, Gen. Laws 1917, secs. 5689, 5690. See also Virginia, Acts 1932, ch. 345.
West Virginia and Wisconsin require a preference in favor of intrastate consumers and restrict exportation to the surplus. It is particularly worthy of note that in the last three states, not only are restrictions imposed upon the granting of permits for the generation of electrical energy and its transmission beyond state lines in deference to local demands, but authority is also placed in the appropriate commission to take care of future shortages of power or future increases in local needs by requiring the curtailment or entire discontinuance of exportation originally authorized. In the Wisconsin statute this latter power is specifically authorized to the extent of declaring null and void existing contracts for the sale and delivery of hydroelectric energy to consumers in other states. The other statutes, in so far as they authorize the compulsory discontinuance of exportation, will, if complied with, equally effectively prevent the fulfillment of such contracts. In none of the statutes is there a provision specifically requiring that extensions of transmission lines shall be made within the state as new demands arise. If the courts should at any time interpret the statutory provisions as so requiring, or if such extension can be compelled under the general law of public utilities, the potentialities of the restrictive provisions are measurably increased.

96 Wisconsin, Statutes 1931, sec. 31.27.
97 One state, without statutory provision, has attempted, through its commission, to reach a somewhat similar result by attaching to its approval of certain interchange contracts of local power companies with a company in another state the proviso that the commission should have the right at any time to terminate the contracts "when in its opinion public interest or convenience requires such termination." Re Commonwealth Edison Co., (1927) 6 Ill. C. R. 576; Re Central Illinois Public Service Co., (1927) 6 Ill. C. R. 880.
98 The nearest approach is the statute of New Hampshire which requires that "any public utility shall make, renew or extend any contract for the delivery of electrical energy to another utility upon such terms and conditions as the public service commission shall order to be for the public good." New Hampshire, Laws 1929, ch. 179. See also South Carolina, Acts 1932, No. 871, sec. 2 (i) and (j). For an interpretation of the New Hampshire statute to indicate that all reasonable demands for electric service within the state, in whatever locality, are to be satisfied in preference to demands of extra-state consumers, see Re Grafton Power Co., (1929) 12 N. H. P. S. C. 194, 198, 199; P. U. R. 1929E 230; Re Grafton Power Co., (1929) 12 N. H. P. S. C. R. 379, 384; P. U. R. 1930B, 346.
99 A Connecticut statute enacted in 1915 regulating the sale and distribution of electricity within the state has been interpreted by the Public Utilities Commission of that state to express a "policy to prohibit within the state the purchase, sale or distribution for power purposes of electricity generated outside of the state." Re Grovenordale Co., (1920) P. U. R. 1920C 144 (Conn. P.U.C. 1920), applying Connecticut, Gen. Stat. 1918, sec. 3902. 3903.
Without special statutory authorization, several state commissions have undertaken to impose restrictions similar in effect to those embodied in the statutes just discussed. Apparently the earliest instance of this practice, and at the same time the most drastic in effect, was an order of the State Board of Irrigation of Nebraska. This order granted a permit to one Kirk to appropriate the waters of the Niobrara River for power purposes, but subjoined thereto the condition that the power generated under and by virtue of the permit must not be transmitted or used beyond the confines of the state of Nebraska. Authority for the exercise of such power was alleged to be derived from the general provision of the statute asserting the water of every natural stream in the state to be the property of the public and dedicated to the use of the people of the state.

Other orders of state commissions have taken the form of requiring that preference be given to local demands or that only the surplus above local needs might be exported, rather than undertaking to impose complete prohibition on exportation.

The Public Service Commission of Vermont was apparently the first state commission to impose the requirement of a preference for local consumers without statutory authorization. In granting the petition of the Colonial Power & Light Company, a Vermont corporation, to acquire the properties of certain other local power companies and of a New Hampshire company, the commission pointed out that the demand for electric current for power, heat, light and other purposes in the territory reached by the corporations in question at the time exceeded the ability of the corporations to supply with their existing facilities, and that such demands were on the increase. With that as its justification, and without any attempt to base its action upon statutory authorization, the commission conditioned the permit on the requirement that in the sale of electric current by the purchasing company persons doing business in that state requiring electric energy for use therein "shall have first right to all electric energy developed by said corporation in Vermont upon demand made for the same." This condition was asserted to be a part of the contract between the state and the grantee of the permit to purchase, any violation...
of which should forfeit the right of the grantee to do business in the state. The effect of such commission orders is quite as restrictive as the statutory provisions for local preferences, though the generality of their application depends, apparently, upon the discretion of the commission in each particular case.

Somewhat similar action has, from time to time, been taken by certain other state commissions to insure the supply of the demands of local consumers. In granting its approval for the so-called Conowingo project in 1926, the Maryland Public Utilities Commission used this device in a very interesting fashion. The contemplated project called for an intercorporate set-up involving two Maryland and two Pennsylvania corporations for the purpose of hydroelectric development on the Susquehanna River. The dam and generating plants were to be entirely within the State of Maryland, but part of the pool created by the dam was to be in Pennsylvania. The high-tension transmission lines were to be largely in the latter state, and it was contemplated that most of the power produced would find its market therein. The Maryland corporations were under definite charter obligations with respect to supplying local demands to the extent of all of the power developed from the Susquehanna River if needed. The commission attached to its order approving the application the provision that all electrical energy from the project, which thereafter should be called for by the commission for use in Maryland in fulfillment of charter obligations of the Maryland companies, should be furnished by those companies and distributed by agencies over which the commission had full control. It further provided that such energy should "not be delivered or distributed in such manner, either wholesale or retail, as may cause it to the extent the same is distributed or used in Maryland, to become in any manner, shape or form, a part of interstate commerce." In view of the charter requirements mentioned above, the practical effect of this provision was that all exportation of energy was to be subordinated to local demands.


Perhaps the most interesting of the situations that have yet developed out of the activities of state commissions, in attempting to control the distribution of electric energy generated by use of water power, is that of New Hampshire in the Bellows Falls Canal Company Case.\textsuperscript{106} The exportation of power generated within the state was not directly involved, but the problem was very closely related thereto. The Canal Company, a Vermont utility, had for many years maintained a dam across the Connecticut River on the boundary between Vermont and New Hampshire. It sought to improve its power facilities, and in so doing to increase the height of its dam. This required the permission of the New Hampshire commission, as well as that of Vermont. Under the New Hampshire statute the commission was authorized to grant such permission only when it found it to be “for the public use and benefit.”\textsuperscript{106} Since the electricity was to be generated wholly within the state of Vermont, the statute authorizing the commission to control the exportation of current could not apply.\textsuperscript{107} Furthermore, the generating company did not propose to furnish electricity directly to New Hampshire, but only by means of delivery to utilities in Vermont and Massachusetts which in turn would transmit it to consumers in that state. The commission was accordingly of the opinion that it lacked authority to control any of the current generated at the dam, that New Hampshire would not necessarily get the benefit of any of the electricity resulting from the proposed increase, and that, therefore, it had no authority to grant the permit. The commission took the position that so far as its power of control was concerned, the Vermont company might at any time completely cease delivering current to the utilities serving New Hampshire consumers, or might charge excessively high rates therefor.

“To overcome this objection, the Bellows Falls Canal Company entered into an agreement and stipulation submitting itself to the jurisdiction of this commission as to the amount of electricity so generated that it should deliver in New Hampshire and as to the reasonableness of the terms upon which it should be delivered.”\textsuperscript{108}

This stipulation was made a part of the order of the commission approving the application, and asserted to be binding upon

\textsuperscript{106}(1927) 11 N. H. P. S. C. R. 174.
\textsuperscript{106}New Hampshire, Pub. Laws 1926, ch. 218, secs. 31-35.
\textsuperscript{107}New Hampshire, Laws 1929, ch. 106, supra note 91.
the successors and assigns of the Bellows Falls Canal Company.

In this manner the commission exerted a more far-reaching control over its water resources than seems to have been contemplated by even the most rigorous of the restrictive statutes. This is made particularly apparent in the opinion of the commission refusing, on the later application of the Bellows Falls Company, to strike out or modify the principal provisions of this stipulation. The position of the commission was that unless it had full control of the power to be created by use of the natural resources of the state it could not find that it was for the "public use and benefit" to erect the dam, and would have no basis upon which it could grant to the company power to condemn New Hampshire lands. Prior to the stipulation here involved, the commission was not in a position to exert any control over the power being generated at the dam, half of which was within New Hampshire territory. By the new arrangement it successfully asserted full control over all the energy to be generated from its own water resources, though generated outside the state, to the extent of requiring all or any part of it to be delivered to consumers within the state.

The above discussion indicates the present status of limitations, statutory and otherwise, upon the exportation of hydroelectric energy beyond the confines of the state in which it is produced.

The purpose of these restrictive measures has no doubt been twofold: to insure for the inhabitants of the state an adequate power supply at a reasonable rate, and to encourage industries needing power to locate within the state. That they have effectually served either of these purposes seems open to serious doubt.

\[109\text{(1928) 11 N. H. P. S. C. R. 357.}\]

\[110\text{For somewhat different situations in which state commissions have so exercised their control over local companies in the granting of permits to enter into contracts with foreign companies as to secure delivery of electric energy within the state from sources outside, see Re Central Illinois Public Service Co., (1921) 1 Ill. C. C. R. 165, and Re United Utilities Co., (1922) 21 Ill. C. C. R. 45.}\]


There may exist other commission orders imposing restrictions upon exportation of hydroelectric energy, but none have been found by an examination of the commission reports available. According to information obtained by means of letters from the commissions in thirty-eight states, in response to letters of inquiry sent to all states, no such orders have been made.
In no instance have the restrictive statutes been questioned as to their validity under the commerce clause of the federal Constitution, either in the courts or before the state commissions. Neither has any commission taken affirmative action to enforce the provisions of one of these statutes by requiring the discontinuance of extra-state delivery previously permitted, by avoiding contracts previously entered into, or by any other means.

With a single exception, commission orders restricting exportation have likewise escaped the scrutiny of the courts. The first such order discussed herein, by which the Nebraska Board of Irrigation conditioned its grant upon a complete prohibition of exportation, was appealed to the state court. It was contended that such a prohibition was beyond the power of the board because it operated to interfere with interstate commerce. In sustaining the action of the board the Supreme Court of Nebraska discussed at length the distinction between the power of a state over natural gas and over wild game, and took the position that the situation involved was analogous to the latter. The court did not discuss the nature of the property rights of the individual in the power produced, or the relation of the state thereto, but dealt with the matter precisely as if the water were being diverted outside the state.

"In this state," said Judge Sedgwick, "running water is publici

---

112See Nichols, Shall the States be Permitted to Export Surplus Power, (1929) 4 P. U. Fortnightly 223; Corey, Keeping Water Power at Home: The Effect on the State, (1932) 9 P. U. Fortnightly 342.
113This provision of the New Hampshire statute (Laws 1929, c. 106, supra note 91) has never been invoked by the commission. Personal letter from the commission, February 14, 1933.
114This provision in the Wisconsin statute (Stat. 1931 sec. 31.27, supra note 95) has never been invoked by the commission. Personal letter from the commission, February 13, 1933.
116This order was probably made in 1911. It came before the courts in 1912.
118The only natural gas case referred to was Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co., (1900) 155 Ind. 545, 57 N. E. 912.
119The reasoning in Geer v. Connecticut, (1896) 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793, was thought to be controlling. Curiously enough, Hudson County Water Company v. McCarter, (1908) 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828, was not mentioned.
juris. Its use belongs to the public and is controlled by the state in its sovereign capacity. . . . The state may reserve such a right of ownership and control of the beneficial use of the running waters of the streams as will enable it to prohibit the transmission or use thereof beyond the confines of the state.”

Not a little importance attaches to this decision because of the fact that it stands alone upon this subject. It is unlikely, however, that it will be controlling when the matter eventually comes before the federal courts. This paucity of court decisions, or of attempts to question the validity of these statutes and orders, is not believed to be due to any general acquiescence in their validity, or any lack of importance attached to the matter involved. It is perhaps due rather to the fact that in their application, or lack of it, opportunity has seldom been presented for testing their validity.

That the restrictive provisions here in question have operated to retard interstate development seems quite apparent. That when tested serious questions will arise as to their validity under the commerce clause seems not open to doubt.

121 In Maine no company, except those so operating before 1909, exports any power. Letter from the commission, February 14, 1933. The state merely refuses to create a corporation or grant a franchise for the export of power. Yet Maine has hydro potentials surpassed by only three other states. N. E. L. A. Statistical Bull. No. 8 (July, 1932). It is estimated that 60 per cent of its potential power is undeveloped. See Corey, Keeping Water Power at Home: The Effect on the State, (1932) 9 P. U. Fortnightly 342, 344.

The exportation from Wisconsin has been inconsequential. That the power to declare void all export contracts at any time might prove a deterrent is not improbable. Other features of the Wisconsin statute to be discussed infra have also probably contributed to the result.

The situation in West Virginia has been described by Chairman Coffman of the Public Service Commission as follows: "West Virginia's experience in the matter of hydro-electric development has not been a happy one from the standpoint of securing the conservation of water power. The $8,000,000 New-Kanawha Power Company project is the sole project of any magnitude for which a license has been sought under the 1915 law. "We depend very largely upon steam-electric power, on the distribution and transportation of which there are no restrictions.

"The law (1915) contained other provisions (in addition to that allowing the commission to control the sale and distribution of power to the extent of retaining all within the state) which were intended to retard development and they have done so. . . . Among such provisions were those requiring a licensee to be a domestic corporation and that its securities should be approved by the state and also a recapture provision very favorable to the state." Corey, Keeping Water Power at Home: The Effect on the State, (1932) 9 P. U. Fortnightly 342, 346, 347.

That the New Hampshire provision in effect since 1929, authorizing the Commission to require a discontinuance of all export service at any time, might prove an obstacle seems highly probable.
1. Attempted Justification for Restrictive Measures

Two theories exist on the basis of which such measures are sought to be justified. One is that the state is dealing with a natural resource within its jurisdiction and over which it may exert full and complete control. The other is that the state is granting a privilege which it might withhold, and to which it may attach such conditions as it sees fit.

It is proposed to examine these two alleged bases of justification in the light of the previous cases, keeping in mind the nature of the interference with interstate commerce, to see if any rationalization can be arrived at as to the probable constitutional validity of such measures. No attempt will be made to deal with each particular statute or order in detail, but rather to generalize as to the broader aspects of the problem involved.

Any litigation involving this problem will undoubtedly present opposing contentions relying on analogy to the wild game and fresh water supply cases on the one hand, and to the natural gas cases on the other. Neither, however, furnishes a complete analogy, or points the way with absolute assurance to the proper solution. As to the former, it is clear that no attempt is here involved to export the water itself, and therein may lie a difference of some significance. On the other hand, the relation of the individual or corporation to the production of water power, and the relation of the state thereto, by virtue of its control over navigable streams, can hardly be said to present the identical problem involved in the case of natural gas.

A. Natural Resource Theory.—With respect to the first basis of justification mentioned above, it may be at once suggested that a natural resource is not being exported. It seems entirely proper to assert that hydroelectric power is not a natural resource of the state in which it is generated. True, it is closely related to and dependent upon a natural resource, but as much could be said of scores of other commodities in everyday use. Hydroelectric power is generated or produced by the application of

---

human ingenuity to forces existing in nature, but certainly is not itself a natural force. Mechanical devices, including turbines and generators, must be employed before electric power is produced. Water power operates the turbines, but that is the end of its function. The turbines in turn operate the generators by which the power is generated. The force of the flow of the river current, or the mechanical energy of falling water, is not transported, but by the application of human skill a distinct product is brought into being which, alone, becomes the subject of exportation from the state.\textsuperscript{125} The nature of electrical energy, once in existence, would seem to be the same whether produced from a hydro plant or a steam plant, yet it is hardly to be suggested that the product of the latter is a natural resource of the state merely because it is dependent upon an available natural water supply, or because other natural resources, such as coal, are essential to its production.

If the above analysis, which the courts seem to approve,\textsuperscript{126} is sound, it would seem that the prohibition of exportation cannot be justified on any theory of preserving a natural resource of the state for the benefit of its own inhabitants.

Even if hydroelectric energy could be considered a natural resource, or if its dependence upon the water power by which it is generated be so complete and its relation thereto so close that it is to be governed by the principles applicable to natural resources, it does not necessarily follow that the state of its creation may compel its retention within its own borders. Mere reference to the natural gas cases suffices to demonstrate that.

Most land bordering upon running streams, as elsewhere, is today in private ownership. Where the common law system of riparian rights prevails, the riparian owner has certain important rights to make use of the water and of the force of its flow as it passes by or through his land. Subject to these rights the

\textsuperscript{125}The courts have distinctly emphasized this conception of the nature of such power in cases involving the imposition of a tax upon its generation, and have likened generation to the manufacture of physical articles of trade later to be shipped in interstate commerce. See Utah Power & Light Co. v. Pfost, (1932) 286 U. S. 165, 179, 181, 52 Sup. Ct. 548, 76 L. Ed. 1038; South Carolina Power Co. v. South Carolina Tax Commission, (D.C. S.C. 1931) 52 F. (2d) 515.

\textsuperscript{126}"It is well settled that electricity made by artificial means is a product of manufacture, and is personal property." Hetherington v. Camp Bird Mining, Leasing & Power Co., (1922) 70 Colo. 531, 533, 202 Pac. 1087, citing numerous cases.
state, for the protection of the interest of its inhabitants, exercises a broad control over the diversion of waters from its streams, whether for use within the state or without. The extent to which the state may exert its control over the force of the flow of a stream is not, by any means, free from doubt, despite the fact that state legislatures not infrequently seem to imply a complete control. The riparian proprietor has, of course, no ownership of the flowing water in a natural stream. He has only a right to take a reasonable quantity thereof for ordinary domestic and industrial uses. He has in addition, ordinarily, a right to make use of the flow of the current for power purposes which is a valuable part of his property as riparian owner. As one writer has stated it,

"the force of the flow of the current of a stream at any point depends on the slope of the land through which it passes. Ordinarily the natural characteristics of the land, including the advantages due to its slope, belong to the owner of the land. While the state in its sovereign capacity has a considerable power of control over the taking of water from the stream, it does not follow that it has a like power of control over the privilege of utilization of the force of the flow of the water in the stream, for the slope of the land which produces the power is a natural characteristic of the land itself and presumably belongs to the land owner."

This attitude appears to be borne out by the authorities. The same writer suggested, however, that if the force of the flow of

---

130 Coulson & Forbes, Law of Waters, 4th ed., 120; Farnham, Waters, secs. 467, 871; Gould, Waters 3rd ed., sec. 206; Long, Law of Irrigation, 2d ed., secs. 34, 63; Wiel, Origin and Comparative Development of the Law of Watercourses, (1918) 6 Calif. L. Rev. 245, 342; Note, Extent of Detention or Retardation of Water Incident to Riparian Rights, (1931) 70 A. L. R. 220. "The use of the hydraulic effect of the stream for the generation of electric current is, of course, a legitimate exercise of the riparian right. . . . The essence of the riparian right to use water for power is that the land owner is entitled to the benefit of the hydraulic effect of the natural flow of the stream measured by its drop from the highest point to the lowest on his land." Seneca Consolidated Gold Mines Co. v. Great Western Power Company of California, (1930) 209 Cal. 206, 215, 219, 287 Pac. 93, and cases cited; Crum v. Mt. Shasta Power Corporation, (1931) 65 Cal. App. 791, 4 P. (2d) 564, and cases cited. "A riparian's right to the use of the flow of the stream passing through or by his land is a right in-
the current is the property of no one, and as a result its utilization may be said to be within the control of the state for the benefit of all the people, perhaps the state may so far regulate hydroelectric development as to prohibit or restrict the exportation of energy beyond its borders. On that premise, the analogy to state control over wild game and running water was thought to be controlling.\textsuperscript{181} If, on the other hand, the right to utilize the force of the flow of the current for the production of power is a property right of the riparian owner, the opposite result was thought to be attainable.\textsuperscript{182} It is not proposed to enter here into any elaborate discussion of the problem relating to the nature of a riparian owner's property rights in the flow of the current of a stream. Suffice it to say that the authorities cited above seem to indicate the existence of a substantial property right therein in most jurisdictions. Going on the basis of the latter assumption made above, the conclusion arrived at would appear to be entirely sound. The right of the riparian proprietor to utilize the water power would seem to be substantially equivalent to the right of a surface owner to reduce to possession oil or gas beneath his land. This is not to lose sight of the fact that the state in all cases has a control to protect the fresh water supply, the fish, and the right of navigation. But aside from these considerations, the power when generated would seem to become private property just as does the oil or gas when reduced to possession. It is definitely recognized as an article of interstate commerce. The


conclusion would then seem to follow that a state can no more prohibit the exportation of such hydroelectric power, or enforce a preference for consumption within the state, than it can impose like restrictions in the case of natural gas heretofore discussed.

If, however, it is assumed that the force of the flow is not property of a riparian owner, is not the property of any one, does it necessarily follow that an opposite conclusion must be arrived at? There would at least seem to be a legitimate doubt. Upon this assumption, of course, the analogy to wild game or the fresh water supply becomes much more striking. In those cases the articles in question are not the property of any one in their natural state, and, whether on the theory of proprietary interest or of mere governmental control for the protection of the interest of all its people, the state is permitted a control which the courts have not as yet evinced a purpose to disturb. In those cases a natural resource is being actually diverted outside the state. The flowing water of one of the streams of a state is proposed to be piped outside the state and sold to residents of another community. The state, under present decisions, may interfere to protect and preserve that supply of fresh water with which nature has endowed it, for the benefit of its own inhabitants. In the case here in question nothing found in a condition of nature is removed from the state. Its waterfall remains where nature placed it. No part of it is diverted to foreign territory. The water power from artificial dam or natural waterfall spends itself when it passes through the turbines and continues as it would had it not been harnessed. Only the resulting "manufactured" product emanating from the generators turned by the turbines is removed from the state. This product which is exported is clearly not something that can be said to be owned in common or by the public and reduced to possession with the consent of the state as is wild game or fresh water. It is an artificial product created by the ingenuity of man and becomes his private property when so produced, and, like other private property, may, it would seem, be made the subject of interstate commerce without let or hindrance by the state.

While it is believed that the result indicated herein can be arrived at on the basis of the above property right analysis, it is also to be borne in mind that the court has from the earliest period of our constitutional existence manifested a policy to enforce
what it believes to be one of the important purposes of the Constitution, to protect interstate commerce from undue interference at the hands of the states. This broad policy will undoubtedly be of greater weight in the determination of such cases when they arise than any nice considerations of the technical rights of property that may be thought to be involved.

If, however, the assumption of lack of private ownership of the force of the flow of the water’s current may be thought to lead necessarily to the conclusion that the state can control exportation, it must be by virtue of the second theory heretofore mentioned upon the basis of which such a result is attempted to be justified. Does this assumed absence of private ownership lead to the conclusion that the state’s control is such that it may permit or refuse to allow the development of water power as it sees fit, and in consequence may impose a condition of non-exportation?

On the basis of what has gone before, a word might, not inappropriately, at this point, be directed to such statutory provisions as that of New Hampshire requiring the discontinuance of export previously allowed when the state commission finds that the public good requires, or that of Wisconsin permitting preexisting contracts for export to be declared void. Let it be assumed that a corporation has been chartered or granted a franchise to generate and transmit hydroelectric power with no restrictions upon exportation. After it has entered into contracts and begun the transmission of power to consumers both within and without the state, the state of production attempts to require that its exportation be discontinued in either manner suggested. This would appear to raise a problem substantially the same as that involved in the gas cases and to require a similar solution. Such a corporation would be lawfully engaged in interstate commerce by transmitting a commodity of its own private ownership to consumers in another state. It is not believed that there is any element in this situation which will justify a differentiation from the natural gas cases heretofore dealt with. In so far as the provisos for the cancellation of contracts or the compulsory discontinuance of exportation are made terms of the charter or franchise which the corporation must agree to in advance, the

133New Hampshire, Laws 1929, ch. 106.
134Wisconsin, Statutes 1931, secs. 31.27, 31.095.
situation becomes again that of granting a permit upon condition.

B. Grants Upon Condition.—In considering the matter of state power to grant or withhold permits for the development of its water power resources and to impose conditions in connection therewith, at least three important aspects deserve attention. In the first place, as indicated above, it is urged that the state has such control over all of its natural streams and the water power sites therein that it may grant or withhold permits to erect dams and develop the water power as it sees fit, and may condition its grant upon the non-exportation of the power. In the second place, if this it not true as to all streams, navigable streams are peculiarly within the control of the state, subject, of course, to the paramount power of the federal government over interstate commerce. Thus it may control the building of dams and other improvements in the exercise of its function of preventing obstructions to navigation.135 Finally, the power of eminent domain is generally essential to the procuring of proper dam sites and flood areas, as also for the erection of the necessary transmission lines. This power, of course, can only be exercised when granted by the state. Such a grant may be denied by a state, apparently, even to a corporation coming into the state to do an interstate business and seeking the eminent domain power in connection therewith.136 Some states, notably West Virginia137 and Wis-

135Wisconsin has attempted to exert its control upon this basis. Wisconsin, Statutes 1931, sec. 30.01 (2), 31.04, 31.06. As interpreted by the state courts, the practical result is that all streams that would have power sites of any consequence are included. Nekoosa-Edwards Paper Co. v. Railroad Commission, (1930) 201 Wis. 40, 45, 46, 229 N. W. 631.
136See Pensacola Telegraph Co. v. Western Union Telegraph Co., (1877) 96 U. S. 1, 24 L. Ed. 708; Western Union Telegraph Co. v. Ann Arbor Railroad Co., (1900) 178 U. S. 239, 243, 20 Sup. Ct. 867, 44 L. Ed. 1052; Western Union Telegraph Co. v. Pennsylvania Railroad Co., (1904) 195 U. S. 540, 563, 569, 574, 25 Sup. Ct. 133, 49 L. Ed. 312; Postal Telegraph Cable Co. v. Southern Railway Co., (D.C. N.C. 1898) 89 Fed. 190, 191; Postal Telegraph Cable Co. v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., (D.C. Ohio 1899) 94 Fed. 234, 237; 1 Nichols, Eminent Domain, 2d ed., sec. 35. This is not to say that a state may prevent a corporation engaged in interstate commerce from exercising the power of eminent domain within its borders if such corporation is created by Congress or has the power of eminent domain conferred upon it by Congress. 1 Lewis, Eminent Domain, 3d ed., sec. 374; 1 Nichols, Eminent Domain, 2d ed., sec. 35; cf. Pensacola Telegraph Co. v. Western Union Telegraph Co., (1877) 96 U. S. 1, 12, 24 L. Ed. 708; Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania, (1888) 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; California v. Central Pacific Railroad Co., (1888) 127 U. S. 1, 39, 8 Sup. Ct. 1073, 32 L. Ed. 150.
137West Virginia, Code Ann. (Barnes, 1923) ch. 54B, secs. 3, 15.
138Wisconsin, Statutes 1931, secs. 31.01, 31.04, 31.05, 31.15, 31.16.
cons, restrict the granting of dam permits and the power of eminent domain for the condemnation of dam sites and of property for transmission lines to domestic corporations. Since the state is under no duty or obligation to create corporations, but may do so or not at its discretion, the added power to impose conditions upon the privilege of being born as a corporation is brought into operation. Whatever may be true as to the first of these three situations mentioned above, it is obvious that as to the last two—permitting obstructions in navigable streams and granting the power of eminent domain—privileges are involved which the state may grant or withhold. May it condition its grant upon the requirement that no power be exported from the state, or that exportation be limited to the surplus above local demands, present and future?

If it may be assumed that the above discussion is sound, that hydroelectric power is not a natural resource but a “manufactured” product and private property in which the state has no such interest as it has in wild game or fresh water, and that in consequence a right to transmit in interstate commerce is protected by the federal Constitution beyond the power of the state to directly interfere with, then it would seem that the attempts of the state to avoid this consequence by granting a permit on conditions restrictive of interstate commerce would present substantially the problem of unconstitutional conditions. It is not proposed to discuss at length this problem which has been elaborately dealt with by other writers. Suffice it to say at this point that prior to the development of the doctrine here in question it was generally considered that where a state had a right at its discretion to grant or withhold a privilege, it might impose such conditions upon the grantee of such privilege as it might see fit. The present doctrine developed in connection with the

138 Some state constitutions, notably those of Arkansas and Nebraska, have for many years forbidden the granting of the power of eminent domain to foreign corporations. Arkansas const. (1874), art. 12, sec. 11 (all corporations); Nebraska const. (1875), art. 11, sec. 8 (railroad corporations).


141 See, e.g. Paul v. Virginia, (1868) 8 Wall. (U.S.) 168, 19 L. Ed.
power of a state to exclude foreign corporations, and, having the power to exclude at will, to admit upon conditions. Attempts by states to limit access of foreign corporations to the federal courts, to interfere with or burden their conduct of interstate commerce, and to tax their property in other jurisdictions led to the establishment of the doctrine by the Supreme Court.

Briefly stated, it denies to a state the power to impose as a condition of admission to do business the relinquishment of a constitutional right, or to set up as a basis of expulsion the refusal to assume a burden against which the federal constitution affords protection. The doctrine has not been wholly restricted in its application to conditions that impinge upon the division of powers between the federal government and the states, such as restricting access to the federal courts or burdening interstate commerce, or that affect the division of powers among the states as in extraterritorial taxation. Neither has it been applied

357; Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania, (1888) 125 U. S. 182, 8 Sup. Ct. 1047, 32 L. Ed. 66.


The earliest cases applying this doctrine in the matter of interstate commerce involved common carriers, either telegraph companies or transportation companies. It has not been restricted to common carriers, however, as witness the last three cases cited herein.

144 Cases cited supra note 143.


146 Frost Trucking Co. v. Railroad Commission of California, (1926)
solely in the case of foreign corporations.\textsuperscript{147} In so far, however, as the creation of domestic corporations is concerned, the doctrine has never been applied to prevent the state from exacting as the price of being born the assumption of burdens affecting interstate commerce and property outside the state.\textsuperscript{148} Whether any justification exists for this difference seems at least open to serious doubt. Suppose a corporation is created, or a domestic corporation is authorized, to erect a dam in a navigable stream and to exercise the power of eminent domain in acquiring sites and building transmission lines. Suppose further that these grants are made subject to the proviso that the public service commission of the state may, at its discretion, require the retention of all power for use within the state. After the corporation has developed its plant, built its transmission lines, and entered upon the transmission of power to outside consumers, the state commission attempts to enforce the proviso that its exportation be discontinued. As heretofore suggested, if such an attempt were made where no requirement had been set up as a condition of the grant, there seems no reason to believe that the Court should not hold it beyond the state's power as an undue interference with the conduct of interstate commerce. The fact that the corporation in question had the obligations of a public utility within the state would not save the situation, as it did not in the \textit{West Virginia} natural gas case.\textsuperscript{149} If this were a foreign corporation, the condition here imposed, which would entirely destroy the

---

\textsuperscript{147}Frost Trucking Co. v. Railroad Commission, (1926) 271 U. S. 583, 46 Sup. Ct. 605, 70 L. Ed. 1101.

\textsuperscript{148}Railroad Co. v. Maryland, (1875) 21 Wall. (U.S.) 456, 22 L. Ed. 678; Ashley v. Ryan, (1894) 153 U. S. 436, 38 L. Ed. 773; Kansas City, Memphis & Birmingham Railroad Co. v. Stiles, (1916) 242 U. S. 111, 37 Sup. Ct. 58, 61 L. Ed. 176. Only the last of these cases, however, has been decided since the doctrine of unconstitutional conditions may be said to have been established by the decision of Western Union Telegraph Co. v. Kansas, (1910) 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; Pullman Co. v. Kansas, (1910) 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378; Ludwig v. Western Union Telegraph Co., (1910) 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423.

\textsuperscript{149}Pennsylvania v. West Virginia, (1923) 262 U. S. 553, 43 Sup. Ct. 658, 67 L. Ed. 1117.
interstate business, would appear to fall within the doctrine of the Court which invalidates a condition for the payment of taxes so levied as to create a burden upon interstate commerce. The fact that the condition is imposed upon the grant of permission to build a dam in a navigable stream, or of authority to exercise the power of eminent domain, rather than upon the mere right to do business in the state in connection with which the doctrine has been developed, would not seem to be material. The power of the state to refuse one grant is as complete as it is with respect to the others. If the Court were to arrive at that conclusion in the case of the foreign corporation, as it is believed it should, there would appear to be great difficulty in sufficiently differentiating the case of the domestic corporation to justify an opposite result.

That the Court is not likely to permit a direct discrimination against interstate commerce in the grant of the power of eminent domain seems quite evident from its decision in *Oklahoma v. Kansas Natural Gas Co.* It was there attempted to prevent the exportation of natural gas by denying the power of eminent domain or the privilege of using the highways for building the necessary pipe lines. At the same time such grants were freely made to companies restricting their enterprise within the confines of the state. This attempt, however, was frustrated by the Supreme Court. It recognized natural gas as a legitimate article of interstate commerce and asserted that "no state by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against or directly regulate interstate commerce, or the right to carry it on." There is no reason to believe that the attitude of the Court would be any different where the matter involved is the erection of transmission lines for the exportation of hydroelectric power.

The most recent case to expound in extenso the doctrine of

---

150Cases cited supra, note 143.
151(1911) 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716.
152(1911) 221 U. S. 229, 261, 31 Sup. Ct. 564, 55 L. Ed. 716. See also Haskell v. Cowham, (C.C.A. 8th Cir. 1911) 187 Fed. 403. But see Consumers’ Gas Trust Co. v. Harless, (1891) 131 Ind. 446, 29 N. E. 1062; Note (1911) 35 L. R. A. (N.S.) 1193, 1196; Note (1924) 32 A. L. R. 331, 334.
the invalidity of unconstitutional conditions applied it to the case of a partnership operating solely in intrastate commerce, and carried it beyond its previous application. A statute of California, construed to require the assumption of the status of common carrier as a condition of permission to use the highways of the state as a carrier for hire, was held invalid. Here were involved none of the features which predominated in the earlier cases referred to above. But since it would have been violative of due process to compel a private carrier to assume the status of a common carrier by affirmative action, the attempt to bring about the same result by making that a condition of the grant of a privilege which, it was assumed, the state might withhold was not permitted. The opinion in that case might well be interpreted to mean that all rights protected by the Constitution are to be placed beyond the bargaining power of the states and brought within the scope of the doctrine of unconstitutional conditions. After reviewing the prior cases in which the doctrine had been applied, Mr. Justice Sutherland, speaking for the Court, said:

"The principle, that a state is without power to impose an unconstitutional requirement as a condition for granting a privilege, is broader than the applications thus far made of it. . . . Acts generally lawful may become unlawful when done to accomplish an unlawful end. . . . 'The states cannot use their most characteristic powers to reach unconstitutional results.'" 154

At least one writer has suggested that this case carries the doctrine too far, and that it should be restricted to the type of cases in connection with which it had its development, i.e., that it should be applied only to cases "bound up with the division of powers among the states, and between the states and the central government," such as the free conduct of interstate commerce, liberty of access to the national courts, and freedom of each state from the effects of extraterritorial legislation by the others. As to constitutional guarantees set up primarily for the benefit of the individual, such as the guarantees of the due process and equal protection clauses, he would deny the application of the doctrine. 155

---

156 Merrill, Unconstitutional Conditions, (1929) 77 U. of Pa. L. Rev. 879, 882 et seq.
What the attitude of the Supreme Court toward such a suggestion may be remains to be seen. Adherence to it would require the reversal of the *Frost Case* and perhaps others. It would not, however, affect one way or the other the case of exportation of hydroelectric power. If held to be within the broader doctrine of the *Frost Case*, it would likewise be within the more restricted formula, since it makes its claim on the basis of interstate commerce, and that is the special province of the federal government.

One other case in this connection merits special consideration, though it does not purport to involve the doctrine of unconstitutional conditions, and no cases which apply the doctrine were mentioned by the Court in its decision. It does, however, directly affect the hydroelectric power problem. It brings in question the recapture provision of Wisconsin's water power statute, requiring as a condition of a permit to erect or maintain a dam in a navigable stream an advance agreement that the state may, after a stated period of time, acquire the property at what the Court admitted or assumed may be less than its fair value. It is worthy of note that the state legislature inserted in this section the proviso, "if the state shall have the constitutional power," and that the state supreme court upheld the statute by an even division. Apparently no such doubts enshrouded the matter before the United States Supreme Court, affirmation being without dissent. The Wisconsin trial court took the position that the right of the riparian owner to utilize the water power of a navigable river by the maintenance of a dam is subordinate to the "plenary power of the state to regulate the use or obstruction of navigable waters; that the state may forbid all obstruction by dam or otherwise;

---


*"That the State of Wisconsin, if it shall have the constitutional power, . . . on not less than one year's notice, at any time after the expiration of thirty years after the permit becomes effective, may acquire all of the property of the grantee used and useful under the permit . . . by paying therefor, the cost of reproduction in their existing condition of all dams, works, buildings, or other structures or equipment, . . . as determined by the commission, . . . and . . . the applicant waives all right to any further compensation." Wisconsin, Statutes 1931, sec. 31.09 (3).*
hence, the right of the riparian owner to develop water power by
the construction of the dam remains inchoate until the state has
given its consent." With this there would seem to be no legitimate
basis for quarrel. The question arises with respect to the fur-
ther provision quoted by Mr. Justice Stone with apparently com-
plete approval.

"If the legislature may wholly refuse permission to erect a dam
or other structure in the navigable waters of the state, it follows
that it may grant such permission upon such terms as it shall de-
termine will best protect the interests of the public. The legisla-
ture could impose the condition that the dam should be removed
when it obstructed navigation or that it should be removed at
the end of a definite period of time, for example, 30 years."

Even with this, the only quarrel would be with an interpretation
of "such terms as it shall determine will best protect the interests
of the public" that would permit the commission to require the
relinquishment of a constitutional right. Certainly a requirement
of removal when the dam proved an obstruction to navigation
would be quite proper. Mr. Justice Stone leaves no doubt as
to the interpretation of the above quotation when he asserts in
his closing sentence that "compliance with section 31.09 [of the
Wisconsin statute] is the price which plaintiffs must pay to secure
the right to maintain their dam."

The theory of the Supreme Court in the case of United States
v. Chandler-Dunbar Water Power Co., that there is no prop-
erty right in a dam maintained under a permit which can be as-
serted against a public need for purposes of navigation, and that
removal of such dam may be required without compensation, falls
short of justification for the decision here in question. No pur-
pose to remove an obstruction to navigation is involved. The
mere fact that the dam is to be maintained merely at sufferance, in
the sense that its removal may be required at any time on the de-
termination that it obstructs navigation, does not mean that it would
not be valuable property, protected against every other sort of
invasion. When the state seeks, not its removal, but its acquisi-
tion for a public use, the principle upon which a requirement of
"just compensation" can be dispensed with is by no means clear.
If such a plant were developed under a permit without condition,

(italics supplied).


it seems quite obvious that the "just compensation" requirement implicit in the due process clause of the Fourteenth Amendment would apply to any attempt on the part of the state to acquire the property for public use. When its surrender for less than the compensation thus constitutionally required is imposed as the price of a permit, it appears to differ from the unconstitutional conditions heretofore dealt with by the Court in no essential particular. If that be true, then assume that the applicant filed the agreement and received the permit. Would the state be permitted to enforce it? Decisions prior to the Fox River Case and culminating in the Frost decision would logically seem to require a negative reply.

The reason for Mr. Justice Stone's complete silence with respect to this matter is not readily apparent. Whether the Court intended to depart from the doctrine of the Frost Case is not clear. Logically the two cases would be difficult to reconcile. However, the application of such constitutional principles is not solely a matter of logic. It is rather a matter of judgment, and as a matter of judgment the Court may well have felt that a distinction can be made between the privilege of using the highways of a state in common with the rest of the public and the privilege of damming up a navigable stream for the sole use of the grantee of the privilege. In view of the important nature of the state's interest in controlling its navigable waters, more vital it would seem than the exclusion of foreign corporations, and the relatively mild invasion of an individual right (something less than an assurance of "just compensation"), the Court may very well have concluded in the exercise of its judgment, upon considerations of policy, that the price involved was one that the company might not

164 The Fox River Company here sought by mandamus to force the commission to proceed with a hearing on its application, although it had not filed the required agreement. None of the cases heretofore discussed or cited involve attempts to compel the issuance of a permit without compliance with the prescribed conditions. Possibly it may be suggested that a privilege is involved which the state may grant or withhold as it sees fit, and that the applicant can, in no event, demand a permit as of right. Like a foreign corporation seeking admission, it cannot compel the state to grant it a permit, regardless of the conditions. Therefore, it has no standing to demand that the privilege be granted otherwise than in accordance with the terms of the statute, but by accepting those terms it will not have waived is constitutional rights and may assert them at the appropriate time to prevent confiscation of its property. There is, however, no language in Mr. Justice Stone's opinion to suggest that any such notion as this may have been entertained by the Court. But see Tennessee Eastern Electric Co. v. Hannah, (1928) P. U. R. 1928D 50, aff'd on the basis of statutory construction in (1928) 157 Tenn. 582, 12 S. W. (2d) 372.
unconstitutionally be compelled to pay for the privilege it sought. Such a determination would not necessarily do violence to prior decisions, but would merely indicate that the Court regards the doctrine of unconstitutional conditions as a flexible one capable of adjustment to the peculiar circumstances of particular cases.

The Wisconsin recapture provision above dealt with is contained in the same statute with the provision heretofore discussed requiring a preliminary agreement to the power of the commission to cancel contracts for the exportation of hydroelectric current. When that provision comes to be tested, no doubt the Fox River Case will furnish strong precedent for sustaining its validity. If, however, the view should be accepted that a distinction should be made between conditions that are related to the working of our federal system of government on the one hand, and those which affect only individual rights on the other, and that the doctrine of unconstitutional conditions should be restricted in its application to the former, then a different result may well be arrived at. The conduct of interstate commerce is clearly involved, and interstate commerce as clearly falls in the former category. No specific indication has yet come from the Court that such a distinction is to be applied. But the decided cases do furnish a very definite indication of the Court's attitude toward the protection of interstate commerce. Perhaps the Fox River Case cannot be distinguished logically from the situation where the export of power in interstate commerce is involved. But the Court is not always controlled by logic. "Commerce among the several states is a practical conception," not to be controlled by analogies that fail to take into account the nature of the condition that is being imposed. The Supreme Court, from the beginning of our federal system, has been very solicitous about the protection of interstate commerce. As a matter of fact, the doctrine of unconstitutional conditions owes its development, in no small measure, to the solicitude of the Court for the protection of interstate commerce from encroachment at the hands of the states. True, the doctrine had much of its early growth in the line of cases dealing with access by foreign corporations to the federal courts.

---

165 Wisconsin, Statutes 1931, secs. 31.27, 31.095, supra note 95.
166 Merrill, Unconstitutional Conditions, (1929) 77 U. of Pa. L. Rev. 879.
168 Cases cited supra note 142.
But one need only turn to the cases intervening between the *Pre-
vit Case* in 1906, upholding a state statute authorizing the expul-
sion of a foreign corporation for taking a case into the federal
courts, and the *Terral Case* in 1922 overruling it, to see the part
played by interstate commerce in this development. The fact,
then, that the Court in the *Fox River Case* had allowed a state to
bargain with respect to a condition that appears to be unconstitu-
tional, but in which only the interests of the other party to the
bargain are involved, does not necessarily mean that it will
allow the same sort of bargaining when the conduct of interstate
commerce is at stake. The privilege sought in the two cases is
the same, but the conditions imposed are vastly different. It is
the condition in each case that is the most significant feature.

2. Conclusion as to Validity

What the ultimate fate of state restrictions upon the exporta-
tion of hydroelectric power is to be, is, of course, still a matter of
no little uncertainty. The states feel that this is a matter of
vital importance to them in the conservation of a natural resource
for the benefit of their own inhabitants. To what extent other
motives have entered in, one can only conjecture. Foreign power
corporations are sometimes viewed as despoilers of the state's
scenic beauty, preying upon the resources of the state for their
own financial profit to the later possible disadvantage of the com-
community. If one approach the matter from this point of view, it is
entirely possible to arrive at the conclusion that the states should
be allowed to exercise a broad power for the protection of local
interests. If another starting point be employed, a different con-
clusion may well follow. This is the sort of matter, however, that

---

poration involved was engaged in interstate commerce. The effect of that
fact is especially discussed in the Harrison case. Even more important for
the later development of the doctrine were the strictly interstate commerce
cases, also decided in this intervening period. Western Union Telegraph Co.
v. Kansas, (1910) 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; Pullman Co.
Western Union Telegraph Co., (1910) 216 U. S. 146, 30 Sup. Ct. 280, 54
L. Ed. 423.
should not be disposed of on the basis of a priori conceptions of doctrinal law, or a mere logical analysis of past decisions; it calls for the application of sound judgment and broad judicial statesmanship. Possibly the present writer has unconsciously adhered too closely to a point of view that interstate commerce in what is fast becoming a commodity of first importance ought not to be subjected to restrictions and prohibitions at the hands of the states. As a matter of national policy, however, such restrictions certainly are highly undesirable. What was formerly a matter of local concern only is no longer so. It must be recognized that here is involved a national problem of vast and growing importance. Its real significance is only realized when inquiry is pursued far enough to see the enormous wealth invested in electric power and its production172 and the closeness with which it touches individuals and communities in their everyday life, both domestic and industrial. When it is realized that the farm,173 the factory, the mine, the mill, the home,174 et cetera, are all coming to be more or less intimately dependent upon the production and distribution of electric power, it must be admitted that the problem here involved is not local but national in its significance and should not be controlled in its ultimate solution by any partial analogies to court decisions of another era. As one writer has recently suggested, "even a lawyer is prepared to admit that functionally the transmission of electric energy ought not to be dependent upon the law of game birds in Connecticut or of shrimp in Louisiana."175

PART II.

STATE CONTROL OVER RATES AND SERVICE

The control of gas and electric rates and service by state public service commissions has, for many years, been a common phenomenon. In so far as interstate commerce in these commodities is involved, so as to be of special interest for the present discussion, the matter is of much more recent development. That the transmission of gas and electric light and power current from one state to another is a transaction in interstate commerce

172N. E. L. A. Statistical Bull. No. 8 (July 1932).
174Moody, Public Utilities (1931) xxii.
175Book Review (1931) 41 Yale L. J. 645.
176Supra notes 7 and 8.
is now definitely well established.\textsuperscript{178} although as to the latter, it is not a determination of very long standing.\textsuperscript{177} That the interstate aspects of the gas and electric power enterprises have recently come to assume very considerable proportions has been sufficiently indicated above. That such service presents the same need for regulation and control that is found in the ordinary local enterprise of a similar nature, perhaps no one seriously doubts. The states have not hesitated to impose regulations for the protection of their own inhabitants though the service in question extended across state lines. For the most part, such regulations have been restricted to attempts to control rates to consumers. But the proper adjustment between the respective spheres of state and federal control in this situation is not a matter of easy determination. With respect to hydroelectric current the difficulties involved have been distinctly recognized by the Federal Power Commission.

"In very few branches of governmental activity is the legal or economic line of demarcation between state and federal control less clearly drawn than in dealing with the use of water for hydroelectric development. . . . The power industry is today neither exclusively local nor exclusively national, and if complete and effective supervision is to be had it must be had through cooperation of both local and national control."\textsuperscript{178} State intervention, assuming complete control in many instances, has been due, partially at least, to the fact that the federal government has not in the past attempted to regulate service or fix rates even when the interstate character of the enterprise has been well recognized.\textsuperscript{179}

\textsuperscript{177}The first court decision to give definite recognition to electric current as an article of interstate commerce was Mill Creek Coal & Coke Co. v. Public Service Commission, (1919) 84 W. Va. 662, 100 S. E. 557.


\textsuperscript{179}It is not proposed to treat the matter of proper administrative adjustments for state or federal control, or possible means of cooperation between the two governments, in this article.

\textsuperscript{178}The rates of gas companies transmitting gas in interstate commerce have not only not been regulated by Congress heretofore, but the Interstate Commerce Act as amended expressly withholds the subject from control by the Interstate Commerce Commission. 34 Stat. at L. 584, ch. 3591, sec. 1; 36 Stat. at L. 539, 544, ch. 309, sec. 7; 49 U. S. C. A. 1 b, 3 Mason's U. S. Code, tit. 49, sec. 1 b.

Section 9\textsubscript{a} of the National Industrial Recovery Act (15 U.S.C.A. 709) authorizes the President to initiate before the Interstate Commerce Commission proceedings necessary to control the operation of oil pipe lines and fix reasonable rates for the transportation of petroleum and its products by pipe lines. The NRA Code for the
Two theories have been advanced in justification of state control over such services not confined within a single state. In

Petroleum Industry, article 1, section 2, provides that the term Petroleum Industry includes the production, transportation and marketing of crude petroleum and its products, including the production of natural gas in conjunction with petroleum.

Other sections of the code specifically authorize control and regulation of shipment in interstate commerce (article III, sections 4 and 7) and wholesale and retail prices (article III, section 6a and article V, rules 4 and 26), but the regulations thus far imposed do not materially affect the problems being discussed herein. Registry No. 711-1-21; Prentice-Hall, Federal Trade and Industry Service, 12321.3-18-21-22-30.52-58; 12334.


Neither has the federal government in the past regulated the interstate transmission of electric current. The Federal Water Power Act of 1920, applicable only to licensees under the Act, provided in section 19 for complete state control where interstate commerce was not involved. It further provided that if a state had no commission or other authority to regulate rates and service, "it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission [Federal Power Commission] . . . [under certain circumstances] to so regulate and control until the state has provided a commission or other authority therefor." 16 U. S. C. A. 812, 1 Mason's U. S. Code, tit. 16, sec. 812.

As to interstate aspects of the power generated by such licensee, control was also left very largely to the states. Section 20, Federal Water Power Act, 1920, 16 U. S. C. A. 813, 1 Mason's U. S. Code, tit. 16, sec. 813.

More recently, however, provision has been made in the National Industrial Recovery Act (Section 202 of Title II—Public Works and Construction Projects) authorizing the Federal Emergency Administrator of Public Works to "prepare a comprehensive program of public works, which shall include among other things . . . (b) conservation and development of natural resources, . . . development of water power, transmission of electrical energy, . . . ." 40 U. S. C. A. 402. In this connection the Federal Power Commission has been directed to prepare a comprehensive national plan for the development of water power and the transmission of electricity, cooperating with the Public Service Commissions of the states, the Public Works Administration, and the Tennessee Valley Authority. Prentice-Hall, Federal Trade and Industry Service 28201.

Such a national power survey is now in the process of being made. At the request of the Senate the Federal Power Commission is also making a study of the cost of distribution of electrical energy in relation to the costs of generation and transmission. A resolution now pending in the House of Representatives authorizes the commission to make an official compilation of electric rates in every community in the United States. (Address of Basil Manly, Vice Chairman, Federal Power Commission, City Club of Boston, March 9, 1934).

How far complete control may ultimately be assumed by the federal government remains to be determined. For the federal government's experiment in production and distribution of electric power both to consumers and distributing companies, with a control over
the first place, the position is sometimes taken that interstate commerce is directly involved throughout. It is assumed that the transmission of such commodities as gas and electricity across state lines in one continuous movement from producing wells or generating plants in one state to consumers in another is interstate commerce from beginning to end. But it is asserted that the business of furnishing gas or electric current within a state to local consumers is a matter so far local in character that the state may act to impose regulations so long as Congress has not seen fit to assume control. In the second place, it is asserted that the interstate commerce involved in the transmission of gas or electric current from one state to another has come to an end, and that the commodities which clearly have been a part of interstate commerce have been so mingled with, and so far become a part of, the common mass of property in the state as to be divested of their interstate character before the impingement of the state regulations. On this basis it is held that distribution and sale to consumers is a purely local business, not unlike that of a local gas or electric company supplying its commodity from sources within the state, and, therefore, completely subject to state regulation and control.

The courts that have had occasion to deal with this problem have divided their allegiance between these two theories.

The courts that have had occasion to deal with this problem have divided their allegiance between these two theories,

resale by the latter, see Tennessee Valley Authority Act, 16 U. S. C. A. 831c (i) and (j), 831i and 831k. For an example of its relation to state commissions, see Re Tennessee Electric Power Company, (Tenn. R.R. & P.U.C. 1934) 2 F. U. R. (N.S.) 4.


Sometimes a doubt has existed as to whether interstate commerce had come to an end, and both theories have been employed in
and even the Supreme Court of the United States has vacillated back and forth, now adhering to the one and now to the other. At the present time the latter formula seems to have become the accepted doctrine of the Court.

While the two theories may lead to the same conclusion with respect to the power of a state to act in a particular case, the choice is nevertheless an important one. If the former, Congress may act at any time to occupy the field and put an end to state control. If the latter, Congress is without power and the states must be left a free hand, except in so far as the doctrine which permits federal regulation of intrastate commerce incident to the regulation of interstate commerce may find application, as it is now being applied under the National Recovery program.

A. Rate Regulation as Local Aspect of Interstate Commerce

The leading case adhering to the doctrine that the whole transaction involved in the transmission of gas or electricity from a source of supply in one state and its distribution to consumers in another is interstate commerce is *Pennsylvania Gas Co. v. Public Service Commission.* The Pennsylvania Gas Company was engaged in transmitting natural gas by its own pipe lines from its source of supply in Pennsylvania and selling and delivering it to consumers in various localities in the state of New York. The public service commission in the latter state asserted its power to reduce the rates to consumers in the city of Jamestown.

---

Footnotes:


2. The National Industrial Recovery Act is specifically made applicable to "transactions in or affecting interstate or foreign commerce." See secs. 3(f) and 4(a) and (b); 15 U. S. C. A. 703(f), 704(a) and (b). See supra note 179.

3. (1920) 252 U. S. 23, 40 Sup. Ct. 279, 64 L. Ed. 434.
and was met by a contention that this was an attempt to regulate interstate commerce and an invalid encroachment upon the constitutional power granted to Congress over such commerce. While the Court vigorously asserted the continuance of the interstate character of the transaction throughout, apparently little difficulty was experienced in arriving at the conclusion that the regulation of such rates was a matter peculiarly local in its nature and subject to the control of the states in the absence of regulation by Congress. This case had been before the New York court of appeals the preceding year, and the present Mr. Justice Cardozo had disposed of the issue in a very able opinion with which the Supreme Court agreed. In the same year the case of *Mill Creek Coal & Coke Co. v. Public Service Commission*, involving a similar problem with respect to hydroelectric light and power current, had likewise brought forth a very exhaustive discussion by Judge Lynch of the supreme court of appeals of West Virginia with the same result. In neither of the cases was there any serious contention that such transmission did not involve interstate commerce. While the *Mill Creek Case* was substantially one of first impression with respect to the interstate transmission of electricity, it was thought sufficient merely to assert that there could no longer be any doubt that interstate commerce was involved and to cite the oil and gas cases as complete authority. Whether the commodities retained their interstate character until the consumers were reached and, if so, whether the state was excluded thereby from exercising its power of regulation to fix rates were the issues to be met. In each case the commodity was supplied directly to the consumer by the company engaged in the interstate transportation without the intervention of a local distributing company. The intervention of such local distributing company and the passage of gas into its mains had been held, in *Public Utilities Commission v. Landon*, to break the continuity of the

---

187(1919) 84 W. Va. 662, 100 S. E. 557.
188The analogy between natural gas and hydroelectric energy was found to be very striking in the problems involved in the first part of this paper, though possibly not so complete as to be fully controlling in all cases. In this part dealing with state regulation of rates and service it is believed that the analogy will be found to be much more complete, due to an absence of any consideration of state control over streams and water power sites. A decision as to one is believed to be complete authority for a similar situation with respect to the other, and the courts have so treated them.
transaction and put an end to its interstate character. In this case the Kansas Natural Gas Company was engaged in transporting natural gas by means of its system of pipe lines from its sources of supply in Kansas and Oklahoma to various points in Missouri and Kansas where it was delivered to local distributing companies for sale to consumers. Permanent physical connections permitted the gas to pass freely from the transportation company's lines into the distribution mains of the local companies. Though not necessary to a decision, sale and delivery to such local companies were treated as parts of interstate commerce and free from state control. But with the passage of the gas into the local mains interstate movement was said to have ended, and on that basis state control of rates to consumers was considered a legitimate regulation of a mere local business.

In distinguishing the Landon Case and arriving at the conclusion that the interstate character persisted throughout the whole of the transaction, the decisions here under consideration relied heavily upon the case of Western Union Telegraph Co. v. Foster. That case involved the transmission of market quotations of the New York Stock Exchange by the Western Union Telegraph Company and its subsidiaries to subscribers in Boston. The local service involved the translation of the quotations from the Morse code into English by a local telegraph operator and their transmission to the tickers in the offices of the subscribing brokers. Mr. Justice Holmes asserted that the "transmission of the quotations did not lose its character of interstate commerce until it was completed in the brokers' offices." The facts that there was a break in the continuous transmission of the quotations by receipt and translation in the local telegraph office and that the transmission from such office to the individual brokers was in a different form were not thought to destroy the interstate character of the transaction. "If the normal, contemplated and followed course is a transmission as continuous and rapid as science can make it from Exchange to broker's office, it does not matter what are the stages. . . ." The interstate character was thought to continue until the point was reached "where the parties originally intended that the movement should finally end."
though the Exchange had no contract with the individual brokers. The doctrine of this case was thought to be entirely applicable to the transmission of gas and electricity. Judge Cardozo asserted as to the gas in *In re Pennsylvania Gas Co.*, that there was "no break in the continuity of the transmission from pumping station in Pennsylvania to home and office and factory in Jamestown," and that "interstate commerce did not end till the gas had reached its goal." Referring to the above quotation from Mr. Justice Holmes in the *Foster Case* relative to continuity of transmission, Judge Lynch in the *Mill Creek Case* asserted that the "transmission of hydro-electricity generated in Virginia to consumers in West Virginia was as expeditious as science could make it;" that it was "a direct transmission from seller to buyer, with an incidental and temporary stop en route for the purpose of transformation into a commercial voltage." In asserting that this reduction in voltage was an immaterial circumstance, he denied the contention of the public service commission that this put an end to the interstate character of the transaction. Mr. Justice Day, speaking for the Supreme Court in the *Pennsylvania Gas Co. Case*, followed substantially the other two decisions herein discussed, but emphasized the absence of any intervening distributing company between producer and consumer, and, on that basis, distinguished the *Landon Case*. Here the transmission was said to be direct, continuous and single, without intervention of any sort between buyer and seller, and interstate commerce throughout.

Having determined this aspect of the situation, there still remained the primary question of whether or not the state had power to regulate rates charged to consumers. If the interstate commerce thus involved could properly be considered essentially

---

195 *Mill Creek Coal & Coke Co. v. Public Service Commission*, (1919) 84 W. Va. 662, 671, 100 S. E. 557.
196 This contention was based on a decision by the court of appeals of Maryland in the same year. The original package doctrine was there applied by analogy. It was held that the reduction in pressure for purposes of distribution to consumers was the equivalent of breaking an original package for the sale of its contents at retail and that the interstate character of the transaction was thereby brought to an end. *West Virginia and Maryland Gas Co. v. Towers*, (1919) 134 Md. 137, 106 Atl. 265.
197 (1851) 12 How. (U.S.) 299, 13 L. Ed. 996.
198 (1913) 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511.
local in its nature, the doctrine of *Cooley v. Board of Wardens of the Port of Philadelphia*\(^{(199)}\) might be applied to bring it within the scope of the state's regulatory power, since Congress had not acted to occupy the field. That doctrine, as expounded by the present Mr. Chief Justice Hughes in the *Minnesota Rate Cases*,\(^{(198)}\) was thought by all of the courts concerned to be clearly applicable. It was there recognized that there exists within certain limits a rather broad range of authority which the states may exercise, although interstate commerce may be affected. Such authority may be legitimately exercised over all of those matters so far local in their nature that it is impossible to derive from the constitutional grant to Congress of power to regulate interstate commerce "an intention that they should go uncontrolled pending federal intervention."\(^{(199)}\)

"Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unregulated wills of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the federal power."\(^{(200)}\)

By the failure of Congress to assume the function of regulating the distribution and sale of gas and electric light and power current in interstate commerce, such service was left to go entirely unregulated unless the states were permitted to act. Experience seemed to demonstrate, however, that regulation by some authority was essential for the protection of the public interest. "The silence of Congress cannot be interpreted as a declaration that public service corporations, serving the needs of the locality, may charge anything they please."\(^{(201)}\)

The services which the state commission had undertaken to regulate in these cases, while considered part of interstate transmission, were rightly thought not to require a national plan of regulation. They involved in each case the furnishing of natural gas or electric current to consumers in a local community within the state. While the pipes or lines which reached the consumers served were supplied with the gas or electric current directly from the mains or transmission lines of the company bringing the commodity into the state, the nature of the service rendered was quite properly considered essentially local. In such a situation


\(^{(200)}\)(1913) 230 U. S. 352, 402, 33 Sup. Ct. 729, 57 L. Ed. 1511.
the distribution pipes or wires occupy the streets of a city by virtue of its permission and in the same way as those of a local plant rendering a similar service to consumers within the city. The local nature of the service rendered is the same whether the commodity furnished originates within or without the state. Such being the nature of the transactions involved, the exercise of authority by the states in the fixing of rates to consumers, so long as Congress has not acted, would seem to be in no way violative of the commerce clause of the federal constitution.

In the cases above discussed the distinction was pointed out between regulating the local sale of the commodity to consumers held to be properly within the competence of the states and regulating the transportation determined to be interstate or the rates therefor, the latter being a field where regulation, if there is to be any, must be uniform. Especially was this emphasized by Judge Lynch in the *Mill Creek Case*.

"The vital distinction should be noted between regulation of rates of transportation and of the rates at which a commodity shall be sold. Transportation across state lines, involving as it frequently does many or all states, is generally a matter of national importance requiring uniformity of regulation respecting the rates thereof, and hence is usually beyond the regulatory power of the state. Because of the very nature of the subject-matter conflicting state regulations respecting rates ordinarily would result in discord and chaos . . .

"In fixing rates of sale, however, as distinguished from rates of transportation, the duty regulated is of an entirely different nature. The duty of the power company to sell at reasonable rates was owed both to the citizens of Virginia and to the public of this state (West Virginia). But the two duties do not overlap as they do where rates of transportation are concerned. The price at which a commodity is sold is essentially local, affecting chiefly those in the community where it is made, and only incidentally, if at all, touching those outside."

It is interesting to note a certain contrast in the method of approach employed in the Supreme Court opinion and in those of the other courts, particularly that of Judge Cardozo. Mr. Justice Day, in speaking for the Supreme Court, dealt with the situation as a matter of interstate commerce requiring regulation as to which the states were competent, by virtue of its local nature,

---


202 *Mill Creek Coal & Coke Co. v. Public Service Commission* (1919) 84 W. Va. 662, 673, 674, 100 S. E. 557.
until Congress should act. Judge Cardozo considered it a matter for the exercise of state police power, which incidentally affected interstate commerce, but which was clearly within the competence of the states until Congress should supersede such measures by an exercise of its commerce power. While the problem is thus approached from slightly different angles, the same result is arrived at in both cases. Regardless of the method of approach employed, the decision reached left the way open for Congress to act at any time it might consider such general regulation to be desirable.

With the conclusion arrived at in these cases, that the states may regulate rates to local consumers although the commodity has been brought directly from another state, there would seem to be little reason for disagreement. The theory of all the cases that maintain the proposition of the continuing interstate character of the transaction is that the business of furnishing gas and electricity to consumers is characteristically a local enterprise, that it does not appropriately admit of a single uniform system of regulation, and is, therefore, not that type of interstate commerce which requires exclusive legislation by Congress. The fact that such price regulation must of necessity affect somewhat the interstate transportation of these commodities does not detract from the soundness of the conclusion as to state power. The matter upon which unanimity of opinion is less likely, and with regard to which the decisions have not been in accord, is the preliminary question of whether or not the interstate character of the transaction may have been brought to an end before the consumer is reached.

B. RATE CONTROL AS REGULATION OF INTRASTATE COMMERCE

In determining that interstate commerce has been brought to an end so that a state may regulate sales to consumers as a purely local enterprise, the courts have frequently made use of the original package analogy, although the same result has been reached in some cases without express application of that doctrine. As ordinarily conceived, the original package doctrine has application, as the term implies, to articles of commerce contained in a conventional package, bundle or crate, convenient for whole-

208 For a discussion of local regulations of interstate commerce by the states, and of police power as affecting interstate commerce, see 2 Willoughby, Constitutional Law of the United States, 2d ed., sec. 598 et seq.; cf. Reynolds, Distribution of Power to Regulate Interstate Carriers Between The Nation And The States 78, 81.
sale shipping, which must be opened before sale of its contents at retail. In such a case it was originally set forth, and, no doubt, in most instances has been so applied. It is clear, however, both from its first assertion and its later application that it need not be so restricted. It is capable of being applied, at least by analogy, as a general principle, to other situations of a similar nature, and is not a restricted definition of the method by which a single type of transaction may divest itself of its interstate character. Mr. Chief Justice Marshall, in the original promulgation of the doctrine, used the expression "original form or package," which may indicate that its application was not meant to be restricted to such articles as are capable of being put up in the form of a package in the commonly accepted meaning of that word. At most, of course, it is only a convenient test by means of which the courts may frequently determine whether a commodity brought from outside has taken on a local character. The broader aspect of the doctrine, of which the package idea is really only a part, which asserts that when the thing imported has been so acted upon by the importer as to become incorporated and mixed up with the mass of property in the state, it loses its character as an import, has also been invoked in the gas and electricity cases. While the term import, as used by Mr. Chief Justice Marshall in the promulgation of the doctrine with respect to state taxation of goods from abroad, has no proper application to interstate commerce, the doctrine finds appropriate place in determining whether a commodity such as here involved has been divested of its interstate character so as to be properly subject to the police power in the state of its destination.

The first state court case to involve the regulation of rates for gas, part of which had been brought from without the state, invoked the original package doctrine to justify the regulation. The position was taken that when the first gas was taken out of the pipe lines and sold within the state the original package was

204 Brown v. Maryland, (1827) 12 Wheat. (U.S.) 419, 442, 6 L. Ed. 509.

205 For the application of the doctrine to oil in tank cars, see Askren v. Continental Oil Co., (1920) 252 U. S. 444, 40 Sup. Ct. 355, 64 L. Ed. 654. While this case has probably been substantially overruled, the inapplicability of the doctrine to oil was not the cause. Sonneborn Brothers v. Cureton, (1923) 262 U. S. 506, 43 Sup. Ct. 643, 67 L. Ed. 1095. See also Texas Co. v. Brown, (1922) 258 U. S. 466, 42 Sup. Ct. 375, 66 L. Ed. 721; Atlantic Coast Line Railroad Co. v. Standard Oil Co., (1927) 275 U. S. 257, 48 Sup. Ct. 107, 72 L. Ed. 270.
broken and the gas ceased to be an article of interstate commerce. "If the analogy of original packages or importation of property in bulk applies to gas in the mains, it ceases to apply when thousands of service pipes are filled with gas to be drawn off at such times and in such quantities as the individual consumer desires. Interstate commerce is at an end when the bulk of the imported gas is broken up for indiscriminate distribution to individual purchasers at retail." The fact that the gas from outside had been mingled in the same pipes with gas produced within the state was also considered a matter of some significance.

In some respects the most important early case applying the original package doctrine to gas or electricity is *West Virginia & Maryland Gas Co. v. Towers.* Natural gas, the regulation of whose rates to consumers was involved, was transmitted in high-pressure pipe lines from West Virginia to the gates of the Maryland communities in which it was to be sold and delivered. There it left the main pipe lines and entered intermediate low-pressure lines for sale and distribution. Its pressure was reduced because that in the main line was too high for service to consumers. In entering the intermediate lines it was so separated from that in the main line that it could not return but awaited consumption as needed. By this process the interstate transmission was thought to be ended, and the subsequent sale and delivery to consumers were considered proper subjects for local regulation.

"Whether the gas is separated from the general bulk of gas and confined in the intermediate pipe lines . . ., or . . . is separated and stored in tanks awaiting consumption, the effect is the same


207 (1919) 134 Md. 137, 106 Atl. 265. An added significance attaches to this case by virtue of its recent complete approval by the United States Supreme Court in East Ohio Gas Co. v. Tax Commission of Ohio, (1931) 283 U. S. 465, 51 Sup. Ct. 499, 75 L. Ed. 1171.

It is worthy of note that the Supreme Court in 1918 had rejected an attempt to apply the original package analogy to the case of telegraph messages. In *Western Union Telegraph Co. v. Foster,* (1918) 247 U. S. 105, 38 Sup. Ct. 438, 62 L. Ed. 1006, a case much relied on in the cases discussed above under A, the translation of stock market quotations from code into English at a local telegraph office and their distribution in the form of new messages to individual brokers was held not to be sufficiently analogous to the receiver of a package breaking bulk and selling the contents at retail to put an end to the interstate transaction before delivery to the brokers.
GAS & ELECTRICITY IN INTERSTATE COMMERCE 673

in determining the question whether the original package has been broken and the gas mixed with the common mass of property in this state.208

It was contended that since the regulators which reduced the pressure on entrance into the intermediate pipes did not interrupt the continuous flow from producing well to consumer, it must be considered interstate commerce throughout. The court asserted, however, that although "there may be a constant movement of the molecules of the gas," it did not see how this movement, "because of the peculiar properties of the article, can affect the question to be determined."209 It thus refused to adopt the view which prevailed in the Pennsylvania Gas Co. and Mill Creek cases. It should be noted in this connection that prior to the decision of the Pennsylvania Gas Co. Case the Supreme Court of the United States in Public Utilities Commission v. Landon210 had sustained the power of a state to regulate the sale to consumers of gas brought from another state in an opinion that seemed to indicate substantial agreement with the West Virginia & Maryland Gas Co. Case. No attempt was made to employ the original package doctrine, but the enterprise was characterized as purely intrastate commerce and subject to complete state control, although it was recognized that interstate transmission would be remotely affected.

"In no proper sense," said the Court, "under the facts here disclosed, can it be said that sale and delivery of gas to their customers at burner-tips by the local companies operating under special franchises constituted any part of interstate commerce. The companies received supplies which had moved in such commerce and then disposed thereof at retail in due course of their local business. . . . Interstate movement ended when the gas passed into local mains.."211

The fact that permanent physical connections permitted the gas to pass freely from the transporting company's mains into those of the distributing companies was considered immaterial. Nothing was said as to reduction in pressure. A distinguishing feature of this case was the intervention of local distributing companies between the transporting company and the consumers. It is not entirely clear whether the Court considered the interstate

character of the transaction to have been destroyed by the sale of the gas to the distributing companies, by its passage into the local distributing mains, or by both.

The intervention of the local distributing companies is the sole distinguishing feature between this case and *Pennsylvania Gas Co. v. Public Service Commission*. In holding the transaction to be interstate throughout in the latter case, the Supreme Court approved the *Landon Case* and gave to it an interpretation that made the local or interstate character of the business of selling gas to consumers depend solely on whether or not there had been a sale to a local distributing company. On the basis of these cases, if one gas or electric company brings its own supply from outside the state, its business of furnishing the commodity to local consumers will be interstate commerce throughout. If another company does exactly the same business, and its supply comes from the same outside source by permanent physical connections, but is purchased from a transporting company making delivery within the state or at the border line, its business will be solely intrastate. Both, however, will, by the cases, be subject to state control. The important difference arises in the fact that the former would be subject to the superior power of Congress, while as to the latter, state control would be complete.\(^2\)

Whether the doctrine of the *Pennsylvania Gas Co. Case* was weakened by the case of *Missouri v. Kansas Natural Gas Co.*\(^3\) is not entirely clear. The problem was not necessarily before the Court in that case, but the facts were the same as in the *Landon Case* and its doctrine was expressly approved. The *Pennsylvania Gas Co. Case* was not questioned, but, after referring to both decisions, the Court asserted, in what amounted to dictum, that “the business of supplying, on demand, local consumers is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies.”\(^4\)

If any inconsistency was thought to exist between the two cases, it

\(^2\)See notes 183 and 184, supra, as to federal regulation of “transactions in or affecting interstate commerce.”

\(^3\)(1924) 265 U. S. 298, 44 Sup. Ct. 501, 68 L. Ed. 1045. The issue here involved was whether or not a state could regulate the sale to a local distributing company by a company transporting from another state. This feature will be discussed under C, infra.

was made quite clear that the Court was in full accord with the *Landon Case*.

No subsequent case involving state regulation of rates or service has been before the Supreme Court. In a recent tax case,\(^2\)\(^1\)\(^5\) however, the issue of interstate or local character of service to consumers was dealt with in a unanimous opinion by Mr. Justice Butler. The doctrine of the *Pennsylvania Gas Co. Case* was repudiated, and with it its interpretation\(^2\)\(^1\)\(^6\) of the *Landon Case*. Delivery of gas was made in this case by the Hope Natural Gas Company of West Virginia at the West Virginia-Ohio state line and carried at high pressure in the transmission lines of the Ohio company to its pressure reducing stations. From these it was transmitted at a lower pressure to its local supply mains wherein the pressure was further reduced to that necessary for delivery to consumers. The transportation of the gas from the source of supply in West Virginia to the connection with the Ohio company's local system was all considered a part of interstate commerce. The delivery of the gas at the state line to the company that was ultimately to make distribution to consumers, the gas having been neither reduced in pressure nor entered into the system from which distribution was to be made, was held not to end the interstate transaction. "The mere fact that the title or the custody of the gas passes while it is en route from state to state is not determinative of the question where interstate commerce ends."\(^2\)\(^1\)\(^7\) Whether the transmission through the so-called distribution lines between the reducing stations and the local supply mains was a part of the interstate transmission, or a part of the intrastate business, the Court did not expressly state. But it appears to have been more closely identified with the business of local delivery than with interstate transmission and might well have been so characterized. With the passage of the gas from these intermediary distribution lines into the local supply mains, it was relieved of nearly all of its pressure, its volume was greatly expanded, and it was divided into numerous tiny streams by which it passed into the service pipes on the consumers' premises. This process was thought by the Court, not merely to characterize it as interstate commerce of a local nature as in the *Pennsylvania*


\(^{216}\) Supra p. 674.

Gas Co. Case, but to completely put an end to the interstate character of the commodity and subject it to complete state control. This was said to be "like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail." The early state cases that had employed the original package doctrine to reach the same result were given approval.

"It follows," said the Court, "that the furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce, but is a business of purely local concern exclusively within the jurisdiction of the state." This was in direct repudiation of the doctrine of Pennsylvania Gas Co. v. Public Service Commission, and that case was expressly disapproved. This decision would seem to put an end to the Court's wavering upon this problem, and in so doing it definitely closes the door to possible federal regulation of rates to consumers as a part of interstate commerce which had theretofore been left open. That federal regulation might be attempted as incident to interstate control in a way analogous to the situation with respect to railroad rates has seemed highly improbable heretofore, in view of the fundamental distinction between the regulation of rates for service and of transportation rates and the difference in the relation of the two to the interstate business involved. But with the present far-reaching regulations under the National Recovery Act of various "transactions in or affecting interstate commerce," it is quite possible that federal control may assume considerable significance.

There seems to be no conceivable reason why the conclusion arrived at with respect to gas should not be applied in the case of

---

221The Court asserted that the Pennsylvania Gas Co. Case had been decided on the basis of a theory not entirely consistent with the views expressed in Public Utilities Commission v. Landon and in Missouri v. Kansas Natural Gas Co., and intimated that, had the same considerations been there presented with respect to the ending of interstate commerce by the passage of the gas into local distribution systems, a different conclusion might have been arrived at. Whether the effect of this case in its repudiation of the Pennsylvania Gas Co. case is to be taken in a restricted sense, because the one case involves regulation and the other taxation, is not entirely clear. This matter is discussed infra in Part III, p. 703.
electric current brought from without the state. While we have no Supreme Court opinion on the matter, the doctrine of the *East Ohio Gas Co. Case* has been fully applied in recent inferior federal court decisions. As in the Supreme Court decision, the matter under consideration was taxation rather than rates for service, but the question of the interstate or local character of service to consumers was dealt with at considerable length. The reduction of the high-voltage current brought into the state in interstate commerce to many currents of low voltage for sale to consumers was thought to put an end to the interstate character of the transaction. "While electric current can hardly be said to 'come to rest' within a state, its interstate journey ends at the transformer which uses it for the production of low-voltage currents for use within the state. The situation is the same in principle as the breaking up of an original package..." The latter of these decisions went somewhat beyond the previous cases and took the position that current not reduced in voltage and not sold to a local distributing company might, nevertheless, lose its interstate character. The broader aspects of the business being carried on were considered, and it was found that the company had a great system of lines within the state for the transmission and sale of electric current. Numerous mills, factories and towns were served from this system. In some cases the current was reduced in voltage at the time of its delivery to the purchasers; in other cases it was delivered from the same lines at high voltage. All such lines maintained for the purpose of distribution and sale of electric current throughout the state, whether at reduced or high voltage, were considered parts of the company's local distribution system and not instruments of interstate commerce. "When current brought in from another state is placed on these lines for local distribution and sale, it loses its interstate character. And it makes no difference that delivery is made to the local customer at high voltage." The business was likened

---

224(D.C. S.C. 1931) 52 F. (2d) 515, 525.
225(D.C. S.C. 1932) 60 F. (2d) 528.
226(D.C. S.C. 1932) 60 F. (2d) 528, 529.
to that of a dealer who brings into the state a cargo of fertilizer in bulk and sells it partly at wholesale and partly at retail. In a more or less strained attempt to apply the original package doctrine, the court said that "the quantity of current is measured, not in volts, but in amperes; and, when current is drawn off the lines, the 'original package' is broken and the amperage remaining on the line is reduced." It should be borne in mind that any doctrine or formula for determining when interstate commerce ends and local business begins, such as the original package doctrine, is, after all, merely a convenient test which may be useful to the courts in appropriate cases. But its inapplicability in a particular case is by no means a matter of controlling significance.

The position of the federal district court in this case would seem to be out of accord with the attitude of the Supreme Court in *People's Natural Gas Co. v. Public Service Commission of Pennsylvania.* There delivery of gas was received at the state line and carried by the People's Company to various points in Pennsylvania for sale and delivery direct to consumers. At the city of Johnstown delivery was made to a local distributing company, and as to this the Court asserted that it was all a part of interstate commerce. The language used was sufficiently broad to apply to the deliveries made direct to consumers, however, and the Court may have been merely following the doctrine of the *Pennsylvania Gas Co. Case,* since repudiated. Furthermore, it was found that the continuity of service there sought to be compelled could be satisfied out of that proportion of the company's supply produced within the state without affecting interstate commerce. Thus the assertion of the Court was not more than dictum. Were it to be considered otherwise, however, there is reason to believe that it should not be followed. The company was making delivery from its pipe lines to large numbers of consumers in numerous communities before the Johnstown city gates were reached. It was maintaining a large system of lines throughout the state by means of which it was conducting an extensive business, serving innumerable consumers with an essential commodity of everyday use. The business was being conducted in competition with local enterprise, and in exactly the same manner. When the gas entered the com-

227(D.C. S.C. 1932) 60 F. (2d) 528, 529. This is quite comparable to the first attempt to apply the doctrine to gas. State v. Flannelly, (1915) 96 Kan. 372, 152 Pac. 22.

228(1926) 270 U. S. 550, 46 Sup. Ct. 371, 70 L. Ed. 726.
pany's network of lines maintained as its distribution system within the state, its interstate character would seem to have come to an end. Whether the analogy to the fertilizer dealer referred to above is an apt one or not, it does seem that the business here conducted is more nearly assimilable to that, or even to that of a salesman who carries his goods with him, than to the ordinary case of a wholesale shipment from another state direct to the purchaser. Where new types of commodities and fundamentally different methods of dealing are involved, however, analogies to transactions placed in certain categories in an earlier stage of our development are of necessity incomplete and of very doubtful validity. Instead of analogies, it is rather a matter of judgment from "the established facts and known commercial methods" that enables one to make a satisfactory classification of such transactions. It is upon that basis that the conclusion herein suggested has been arrived at. In any view of the matter, it seems difficult to say that this is interstate commerce national in character and requiring a uniform plan of regulation.\textsuperscript{230}

Considering this latest case and the \textit{East Ohio Gas Co. Case} together, it becomes clear that no one test is to be applied to determine when interstate commerce ends and local business begins. In the one case, sale to the company that is to distribute to consumers is held not to strip the commodity of its interstate character. In the other, delivery by the company that has conducted the transmission from outside the state to a purchaser without reduction of voltage does not make such sale and delivery a part of interstate commerce. In the former situation, however, the method of doing business was to accept delivery at the state line but continue an uninterrupted high-pressure transmission of the gas to the purchasing company's reducing stations. It was only after passing these that any deliveries were made, or that the busi-

\textsuperscript{229}Public Utilities Commission v. Landon, (1919) 249 U. S. 236, 39 Sup. Ct. 268, 63 L. Ed. 577.

\textsuperscript{230}Since the South Carolina Power Co. case was one of taxation rather than regulation, and since the scope of state power is wider in that respect, it might be suggested that a differentiation should here be made on that basis and the tax upheld on the theory of such cases as Sonneborn Brothers v. Cureton, (1923) 262 U. S. 506, 43 Sup. Ct. 643, 67 L. Ed. 1095, while regulation would not be permitted. There is nothing in the case to suggest any such distinction, nor in other tax cases to be discussed infra, e.g., East Ohio Gas Co. v. Tax Commission of Ohio, (1931) 283 U. S. 465, 51 Sup. Ct. 499, 75 L. Ed. 1171, and State Tax Commission of Mississippi v. Interstate Natural Gas Co., (1931) 284 U. S. 41, 52 Sup. Ct. 62, 76 L. Ed. 156.
ness assumed a local character. In the latter, the company's method of distribution was to tap its high-tension lines and deliver to purchasers, sometimes through transformers at a reduced voltage, sometimes directly at high voltage. But, "applying the cardinal principle that interstate commerce as contemplated by the constitution 'is not a technical legal conception, but a practical one drawn from the course of business,'" it follows that each particular case must be dealt with on the basis of its own peculiar circumstances. On such a basis there would seem to be no reason to quarrel with either decision; and whether the one method or the other be employed, the regulation of rates to consumers seems to be a proper matter for state control.

So far as the decided cases go, the control of the states over rates and service to consumers of gas and electric light and power current would now appear to be substantially complete, although the commodity being furnished comes from outside the state, and whether furnished to consumers by a local distributing company or by a company transporting it directly from the source of supply in another jurisdiction. Except for regulations that may be imposed on the basis of "transactions . . . affecting interstate . . . commerce" in carrying out the policies of the National Recovery program, the attitude of the Supreme Court would seem to indicate that state control is exclusive of any power on the part of Congress because of the prior termination of the interstate aspect of the transaction.

C. EFFECT OF WHOLESALE CONTRACTS

Where the supply of gas or electric light and power current is brought from without the state, an important factor in the determination of rates to be charged by local distributing companies to consumers is the wholesale purchase price of the commodity in question. The ability or inability of the state to regulate that purchase price may have an important bearing upon the effectiveness of its control over local rates. What the state's power in this respect may be must depend upon the nature of the transaction from the standpoint of interstate commerce, whether or not a part of such commerce, and if so,

---

whether predominantly local or national in character. The cases heretofore considered in which a local distributing company intervened have all held that interstate commerce came to an end, by delivery to the local company,\textsuperscript{232} by entrance of the commodity into the local distribution system,\textsuperscript{233} or by its reduction in pressure or voltage preparatory thereto.\textsuperscript{234} In any case it seems to be after the consummation of the wholesale transaction between the transporting company and the distributing company. Whatever test is applied, then, to determine the point of time at which interstate commerce ends and the local business begins, the wholesale transfer would seem to fall within the former category. Such has been the uniform attitude of the courts from the outset. The sole controversy in this respect has been as to whether the transaction is so far identified with the local service as to be subject to state regulation in the absence of action by Congress, or is a part of that commerce which is national in character and within the exclusive domain of the federal government.

Control of such wholesale rates is likely to be much more frequently of immediate concern to the state into which the commodity is being transmitted and in which it is to be supplied to consumers than to the state of its origin. That both states may feel impelled under certain circumstances to undertake such regulation as a means of protecting important local interests is evidenced by Supreme Court decisions. The state of destination not infrequently finds this the most important single element of expense to be taken into account in the determination of a rate base for the utility whose service to consumers it seeks to regulate. Where municipalities maintain their own distribution systems and purchase their supplies from transportation companies for delivery at their own city gates, this charge becomes a controlling factor in their ability to furnish their citizens adequate service at reasonable rates.

The leading case from the point of view of the state of


destination is *Missouri v. Kansas Natural Gas Co.* The business of the gas company was conceded to be almost wholly interstate commerce, transporting natural gas by pipe lines from the source of supply in Oklahoma into Kansas and Missouri and there selling and delivering it in wholesale quantities to local distributing companies supplying consumers in numerous communities in both states. Contrary to the attitude of the Kansas supreme court, the Supreme Court of the United States took the position that such sales were inseparable parts of a transaction in interstate commerce essentially national in character, and that the enforcement by the state of a selling price placed a direct burden upon such commerce "inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve." It was said to be as though the state commission "stood at the state line and imposed its regulation upon the final step in the process at the moment the interstate commodity entered the state and before it had become part of the general mass of property therein." The transportation, sale and delivery were thought to constitute an unbroken chain, fundamentally interstate from beginning to end. By way of contrast with the *Pennsylvania Gas Co. Case* where the transporting company sold and delivered directly to consumers, it was asserted that the paramount interest was "not local but national, admitting of and requiring uniformity of regulation. Such uniformity, *even though it be the uniformity of governmental non-action*, may be highly necessary to preserve equality of opportunity and treatment among the various communities and states concerned." Substantially the same set of facts had been before the Court five years before in the *Landon Case* where the question at issue was the state's power to regulate the sale by the local distributing companies to consumers and where it was asserted by way of dictum that such wholesale transactions would be beyond the bounds of state control.

---


That, in general, the transportation of legitimate articles of interstate commerce across state lines and their sale by previous contract in the state of their destination constitute parts of that type of interstate commerce which is considered to involve interests of a national character and to be beyond the power of such state to control has long been well established.\textsuperscript{230} That the transaction here in question is properly placed within that category seems hardly open to serious doubt. The fact, which all will no doubt concede, that the business is one which, in the interest of the public, should be subjected to regulation by some public authority does not bestow upon the states a power which otherwise Congress alone is competent to exercise. Problems with respect to the proper administrative machinery for the regulation of transactions of this nature thereby arise, due to the peculiar relation of such commerce in gas and electricity to local service in those commodities, which have not been presented by commercial transactions of an earlier period.

That the same doctrine as here asserted with respect to natural gas would be completely applicable to a similar transmission and sale of electric light and power current seems quite obvious. Only three years after the \textit{Kansas Natural Gas Co.} decision, the doctrine was given such application from the standpoint of the state of origin in \textit{Public Utilities Commission of Rhode Island v. Attleboro Steam and Electric Co.}\textsuperscript{240} The Narragansett Electric Lighting Company of Rhode Island, engaged in generating electric current in that state and selling it to local consumers, was under contract to supply the needs of the Attleboro Company of Massachusetts at a specified rate for a stated period of years. Current was delivered under the contract at the state line and metered at the plant of the Attleboro Company in Massachusetts. After some years of operation the Narragansett Company filed new schedules of rates with the Public Utilities Commission of


\textsuperscript{240}(1927) 273 U. S. 83, 47 Sup. Ct. 294, 71 L. Ed. 549. This is the first case in the Supreme Court, or any federal court for that matter, in which it was necessary to decide whether the transmission of electricity across state lines constituted interstate commerce. That was assumed, however, on the basis of Mill Creek Coal & Coke Co. v. Public Service Commission, (1919) 84 W. Va. 662, 100 S. E. 557, and on what was considered the complete analogy to the gas cases, without discussion.
Rhode Island, increasing the charge to the Attleboro Company and seeking the authority of the commission to put them into effect. An investigation by the commission disclosed that the Narragansett Company had been operating at a loss under the contract rates, that its rates to its local customers in Rhode Island, of which there were more than 70,000 and to whom more than 97% of its product was sold, yielded a fair return, and that continued operation under the contract rates would be detrimental to the general public welfare by preventing the company from performing its full duty to its local customers. Accordingly, an order was made putting the new rates into operation. Thus was squarely raised the issue whether a state, in the regulation of one of its public utilities, may, for the protection of the interests of its own inhabitants, so regulate the interstate business of the company as to prevent it from disabling itself from furnishing adequate local service at reasonable rates. The issue thus raised is probably quite as important for the state of origin as that in the Kansas Natural Gas Co. Case for the state of destination. In both cases the effectiveness of the state's power to so control the gas and electric companies operating locally within its borders as to protect the interests of its own inhabitants in fair rates and efficient service is very vitally involved. It was contended in the Attleboro Case that the Rhode Island Commission could not effectively exercise its function of regulating rates and service by the company to local consumers without also regulating the rates in question and that if the Narragansett Company were permitted to continue to supply the Attleboro Company at a loss it would tend to increase the burden upon local consumers and impair the ability of the company to give them good service at reasonable rates. It was therefore asserted that the order of the commission should be sustained as being essentially a local regulation necessary for the protection of local interests and affecting interstate commerce only indirectly and incidentally. Thus considered from the point of view of the state it may well appear to be a matter predominantly of local concern. This was especially emphasized in the Attleboro Case because the great bulk of the company's business was purely local in character. The principle involved, however, would seem to be the same whether much or little of the company's business were of the interstate variety. Such was the attitude of the Court.
Viewed from the standpoint of the particular transaction itself, rather than from that of its effect upon the local business within the state, it assumes the form of a purely interstate transaction. The order in question fixes the price at which a company in one state may sell and deliver in wholesale quantities a legitimate article of interstate commerce to a purchaser in another state. It is not the sale direct to consumers in the conduct of a local business as in the Pennsylvania Gas Co. Case, but an interstate wholesale delivery preparatory to such local resale to consumers by the purchaser, substantially as in the Kansas Natural Gas Co. Case. Referring to the latter case, the Court said it was immaterial that the Narragansett Company was a Rhode Island corporation and subject to regulation by the commission in the conduct of its local business, or that its business was chiefly of that nature. The test of the validity of such state regulations was said to be "not the character of the general business of the company, but whether the particular business which is regulated is local or national in character." It was further assumed that if the state in which the current was generated could place such a direct burden as this would be upon the interstate business on the theory that it would result in an indirect benefit to consumers served by the generating company in that state, the state of destination, by parity of reasoning, might reduce the rates on the interstate business in order to benefit local consumers in that state, with, of course, an impossible situation resulting.

"Plainly, however," said the Court, "the paramount interest in the interstate business carried on between the two companies is not local to either state, but is essentially national in character. The rate is therefore not subject to regulation by either of the two states in the guise of protection to their respective local interests; but if legislation is required it can only be attained by the exercise of the power vested in Congress." The mere fact that pressure or voltage may have been reduced before delivery to a local distributing company will not necessarily destroy the purely interstate character of such a wholesale transaction or bestow upon the state of destination any power to regulate the wholesale delivery. This may appear to be inconsistent with those cases discussed above which find in such changes a

241(1927) 273 U. S. 83, 90, 47 Sup. Ct. 294, 71 L. Ed. 549.
242(1927) 273 U. S. 83, 90, 47 Sup. Ct. 294, 71 L. Ed. 549.
basis for applying the original package doctrine by analogy. But here again each case must depend upon its own peculiar circumstances. In *State Tax Commission of Mississippi v. Interstate Natural Gas Co.* the gas company bringing its product into the state made no local sales to consumers but was engaged exclusively in transporting and delivering the gas to local distributing companies in wholesale quantities. In some instances delivery was made at reduced pressure for the accommodation of the local distributor. As such, the reduction was quite properly characterized as incidental to the sale and delivery to the wholesale customer in interstate commerce.

Since the determination of the *Attleboro* and *Kansas Natural Gas Co.* cases, the door seems to be completely closed to any regulation by the states of rates in interstate wholesale contracts, even though the effect upon local rates and service may be tremendously important. To what extent, with the increasing volume and consequent importance of this type of business, the federal government may feel called upon to assume control of such rates is still a matter concealed within the future.

D. INTERCORPORATE RELATIONS AFFECTING RATE REGULATION

Perhaps the most interesting and important aspects of the wholesale contract problem arise in connection with dealings between interrelated corporate entities. It is there that the wholesale price may be manipulated for the purpose of increasing costs upon which the rate to consumers is to be based, and in this way it becomes a matter of very vital importance from the standpoint of state control. From the foregoing study it has been found that bona fide wholesale contracts for delivery of gas and electricity across state lines are beyond state control, although important local interests may be affected. If all arrange-

---


243(1931) 284 U. S. 41, 52 Sup. Ct. 62, 76 L. Ed. 156.

244For a further discussion of this problem see Part III, infra.

245For other cases holding or assuming that only Congress is competent to regulate rates in interstate wholesale contracts, see *Western Distributing Co. v. Public Service Commission of Kansas*, (1932) 285 U. S. 119, 52 Sup. Ct. 283, 76 L. Ed. 648; *Galloway v. Bell*, (D.C. App. 1926) 56 App. D. C. 172, 11 F. (2d) 558.

ments in the form of such wholesale contracts, though made between interrelated corporate entities, were likewise beyond state competence, serious abuses would be possible and the efficacy of state regulatory commissions would be largely destroyed. Until very recently considerable doubt surrounded the matter of effective state regulation in this type of situation. The price which a local distributing company paid for its supply of gas or electric current was said to be one of the fixed costs which a state commission must allow in fixing rates to consumers. That ordinarily this is true, there would seem to be no doubt. But where the distributing company is a subsidiary of the transporting company, or by other intercorporate relationship there is an absence of the ordinary elements of free bargain and sale between them, as a result of which the wholesale price may conceivably be pushed up for the sole purpose of justifying a higher rate to consumers, there seems to be ample reason for allowing the state authority to inquire into the reasonableness of that wholesale rate as an element of the cost of rendering the local service. The Supreme Court has said that valuation for rate making purposes is a matter of "reasonable judgment having its basis in a proper consideration of all relevant facts." That statement would seem to be as applicable to costs of service as to property valuation, and the element here under consideration clearly is a "relevant fact." This is not to say that the state may fix the wholesale rate. That is still beyond its power. But it may thus have the way opened by which it may refuse to allow more than a reasonable amount for this element of cost in arriving at the proper rate base for the service to local consumers. Such a point of view was forecast by the decision of the United States Supreme Court in *Smith v. Illinois Bell Telephone Co.*,249 where Mr. Chief Justice Hughes asserted that the state might inquire into the reasonableness of the price paid by a local telephone company for equipment being furnished by another company from outside the state, both companies being subsidiaries of the same parent cor-

248 Minnesota Rate Cases, (1913) 230 U. S. 352, 434, 33 Sup. Ct. 729, 57 L. Ed. 1511.
249 (1930) 282 U. S. 133, 51 Sup. Ct. 65, 75 L. Ed. 255. For discussions of this problem prior to the Illinois Bell Telephone Co. case, see Elsbree, Interstate Transmission of Electric Power 75, et seq.; Mosher, Electrical Utilities 119, et seq. For a more general discussion of this matter, see Ballantine, Separate Entity of Parent and Subsidiary Corporations, (1926) 60 Am. L. Rev. 19; note (1928) 13 Corn. L. Q. 99.
poration, and that a like inquiry might be made with respect to the price being paid as rental for instruments furnished, and as compensation for certain services rendered, by the parent corporation. Neither of the two companies to which the payments were being made were doing business locally within the state.

More recently the Supreme Court has elaborated upon this doctrine and applied it to the case of wholesale contracts for interstate delivery of natural gas to local distributing companies, in *Western Distributing Co. v. Public Service Commission of Kansas*. The Western Distributing Company, operating a distribution system for natural gas in a city in Kansas, sought an increase in rates to local consumers. Its supply of gas was being furnished at the city gates by Cities Service Gas Company, by which it was brought from a source of supply outside the state.

Since the wholesale contract in such a case cannot be controlled by the state, and since the distributing company is entitled to a fair return, the burden of the wholesale rates must ordinarily be borne by the consumer. Upon such a basis, the requested increase in rates appeared to be well founded. Where, however, the intercorporate relationship between the transporting company and the local distributing company is such as to suggest the possibility of arbitrary wholesale rates as an indirect means of evading local regulation, the case for some method of relief becomes a very strong one.

In this case a highly complicated intercorporate set-up was found to exist, by which both the transporting and the distributing companies were subject to control by the same holding company. And while it was admitted that the state commission could exercise no control over the wholesale rate, it was asserted that in order to determine the reasonableness of the requested increase in rates to consumers, inquiry must be permitted into the propriety of the wholesale rate as one of the costs necessarily to be considered in fixing local rates. It was contended on the part of the distributing company that such an investigation by the state commission in the alleged effort to determine whether the price paid for its supply was fair and reasonable amounted to an indirect attempt at regulation of the wholesale contract and

---

250 For an earlier case in which the Court allowed the state commission to look through the intercorporate set-up in fixing gas rates, see United Fuel Gas Co. v. Railroad Commission of Kentucky, (1929) 278 U. S. 300, 49 Sup. Ct. 150, 73 L. Ed. 390.

an invalid interference with federal control over interstate commerce. To this contention, Mr. Justice Roberts gave what appears to be a complete answer, and in so doing made possible a more or less satisfactory handling by the states of a difficult problem which has recently come to assume a very considerable importance.

"Having in mind the affiliation of buyer and seller and the unity of control thus engendered, we think the position of the appellees is sound, and that the court below was right in holding that, if appellant desired an increase of rates, it was bound to offer satisfactory evidence with respect to all the costs which entered into the ascertainment of a reasonable rate. Those in control of the situation have combined the interstate carriage of the commodity with its local distribution in what is in practical effect one organization. There is an absence of arms' length bargaining between the two corporate entities involved and of all the elements which ordinarily go to fix market value. The opportunity exists for one member of the combination to charge the other an unreasonable rate for the gas furnished, and thus to make such unfair charge in part the basis of the retail rate. The state authority whose powers are invoked to fix a reasonable rate is certainly entitled to be informed whether advantage has been taken of the situation to put an unreasonable burden upon the distributing company, and the mere fact that the charge is made for an interstate service does not constrain the commission to desist from all inquiry as to its fairness. Any other rule would make possible the gravest injustice, and would tie the hands of the state authority in such fashion that it could not effectively regulate the intrastate service which unquestionably lies within its jurisdiction."

The appellant company contended that by its showing of an inability to secure a lower rate for a similar supply from any other source, together with certain other facts, it had made a prima facie case for the reasonableness of the rate charged. But the Court thought that the elements of "double profit and the reasonableness of inter-company charges must necessarily be the subject of inquiry and scrutiny" by the state commission before the matter of the lawfulness of the retail rate based thereon could be satisfactorily determined. To the further contention that the requirement of proofs demanded by the commission, making necessary an extensive valuation of the pipe line company's property and an analysis of its business, placed upon the appellant an unjustifiable burden, it was said that, "in view of the relations of the parties and the power implicit therein arbitrarily to fix and maintain costs as respects the distributing com-

pany which do not represent the true value of the service rendered, the state authority is entitled to a fair showing of the reasonableness of such costs," although that might necessitate a presentation of evidence which would not be required where the parties were dealing at arms' length and where the usual safeguards of bargaining and competition were present.

Thus it appears that the state into which gas and electric light and power current are transmitted has a fairly adequate means of protecting itself against the most serious difficulties that may arise from the unregulated wholesale interstate transmission of such commodities. The exercise of this power by the state necessarily has an indirect effect upon the wholesale rate and thus upon interstate commerce of a type held to be national in its nature. This effect, however, would seem to be properly classified as only "indirect and incidental," and the imperative necessity from the standpoint of effective regulation by the state of rates properly within its control would appear to be ample justification for the decisions which sustain it.

For the state of origin no such means of control have yet been presented to the courts, but there would appear to be no insuperable obstacle to its inquiry in a proper case into the adequacy of rates for a commodity sent out of the state, in connection with its consideration of whether established intrastate rates are yielding a fair return. The necessity for such action by the state of origin, however, is likely to arise much less frequently than in

---

255For a case in which a state commission disregarded the contract rate at which a power company was delivering current to a subsidiary in another state and substituted therefor production cost plus certain percentages for losses and a legitimate profit, in determining whether rates were yielding a fair return, see In re Kansas City Light & Power Co., (1918) 8 Mo. P. S. C. R. 223, 270.
the case of the state of destination. Interests involved in intercorporate relations are much less likely to dictate an unduly low rate to a subsidiary than an unreasonably high one, the burden of which may be passed on to the consumer.

If the above assumption with respect to the power of the state of origin to look behind the contract price is sound, both states may protect themselves against an unwarranted demand for increased rates. Neither, however, may be able to prevent the standard of service being thereby affected, except in so far as the lowering of intrastate rates or the refusal to allow an increase may result in a modification of the wholesale rate in question.

**PART III.**

**STATE TAXATION**

During the past decade gas and electricity have become common subjects of taxation by the states, and a not inconsiderable volume of revenue is now being raised from levies upon their production, sale, transportation and consumption. Since 1925 more than twenty states have enacted statutes imposing some type of special taxes on gas or electricity, or upon both. The most common tax imposed has been the production tax. Alabama, Gen. Acts 1931, No. 277, p. 325 (tax on gross receipts from electric companies); Arkansas, Acts 1929, Act 283, p. 1127 (production tax on natural gas); Connecticut, Pub. Acts 1927, ch. 210, pp. 4283, 4284 (tax on production and sale of both artificial and natural gas and electricity); Florida, Gen. Laws 1931, ch. 15658, sec. 1 (tax on sale of natural and artificial gas and electricity); Idaho, Laws, Ex. Session 1931, ch. 3 (tax on generation of electricity); Illinois Laws 1933, p. 924, secs. 2 and 3 (retailers' occupation tax measured by gross receipts from sales and construed as applicable to sales of gas and electricity); Indiana, Acts 1933, ch. 50, sec. 3 (tax on gross income of those producing, transmitting or selling gas or electricity); Louisiana, Acts 1928, No. 5, sec. 2 (8) (severance tax on natural gas); Louisiana, Acts 1932, No. 6 (tax on generation, sale and use of electricity); Maine, Laws 1929, ch. 280, sec. 5 (tax on gross receipts from sale of surplus of hydroelectric power); Michigan, Public Acts 1929, No. 48, pp. 85-88 (severance tax on natural gas), Public Acts 1933, No. 167, sec. 1 (b2) (general sales tax applicable to sales of gas and electricity); Missouri, Laws 1933, p. 422 (tax on electric transmission lines and gas pipe lines), 1933 Ex. Sess., p. 157, sec. 2-a (sales tax applicable to gas and electricity); Mississippi, Laws 1930, ch. 88, sec. 163 (tax on transportation of natural or artificial gas in pipe lines), ch. 90, a.1, sec. 2-a (tax on production of natural gas), sec. 2-d (tax on gross income of gas and electric light and power companies); Montana Laws 1933, ch. 180 (tax on distribution or transportation of natural gas through pipe lines); North Carolina, Pub. Laws 1925, ch. 101, sec. 83a (tax on gross receipts from sale of gas and electricity); New Hampshire, Laws 1931, ch. 124, sec. 1 (tax on all persons or corporations engaged in manu-
subjection to a general property tax of the facilities for producing and dealing in these commodities creates no problem of special interest for the present discussion. The same considerations are involved as in the similar application of such a tax to other types of property, and it has long been recognized that the mere fact of use in the conduct of interstate business gives no valid claim to immunity from state taxation. The more specialized types of taxes, however, have given rise to some interesting problems in relation to interstate commerce. The most common of these have been the production taxes and the sales taxes.

A. TAXES ON PRODUCTION AND GENERATION

State taxes on the production of natural gas and the generation of electrical energy have been more widely adopted than any other type of tax affecting these commodities, and at the same time have brought forth the most important questions from the point of view of the student of interstate commerce. Production or manufacture is not a part of interstate commerce, though the commodity produced may be intended for shipment to another state. And while an article in actual transit on its way outside the state is beyond the control of the state, until so started on its interstate

facture, generation, distribution, transmission or sale of gas or electric energy); New Mexico, Laws 1925, ch. 83 (production tax on natural gas); Ohio, Gen. Code (Page, 1931) secs. 5416, 5470, 5475, 5481, 5483 (tax on gross receipts from sale of natural gas); Oklahoma, Session Laws 1931, ch. 66, art. 5 (production tax on natural gas), Session Laws 1933, ch. 196, sec. 4 (tax on gross proceeds of all sales of gas and electricity); Pennsylvania, Laws 1929, No. 285, p. 662-665 (tax on gross receipts from sale of electricity); Rhode Island, Acts and Resolves 1932, ch. 1919, secs. 7, 8 (statute authorizing cities and towns to levy a tax on consumption of gas and electricity); South Carolina, Acts 1931, No. 258, sec. 1 (tax on generation and sale of electric power); Texas, Laws, 5th Call. Sess. 1930, ch. 134, sec. 2 (tax on gross receipts of gas and electric companies); 1931, ch. 73 (tax on production and sale of natural gas and electricity); Vermont, Public Laws 1931, No. 18, Part II, sec. 2 (tax on generation of electricity); West Virginia Acts, Ex. Sess. 1925, ch. 1, sec. 2(a) (tax on production of natural gas).

To this list may be added the Federal Power Tax of 3% of the amount paid for all electrical energy furnished for domestic or commercial consumption. Revenue Act of 1932, sec. 616.


journey, or entrusted to a carrier for that purpose, it may be subjected to taxation by the state of its origin.\footnote{260} For the ordinary type of interstate transactions the doctrines thus announced in Kidd \textit{v. Pearson}\footnote{261} and Coe \textit{v. Errol}\footnote{262} have never been seriously questioned. When the line of demarcation between those acts which produce an article of commerce and those which start it on its interstate journey becomes impossible to draw with clarity, the proper application of these doctrines becomes a matter of no little difficulty.

Prior to the cases involving production taxes on natural gas and electrical energy, the Supreme Court applied these doctrines to a mining case under circumstances that created an important precedent for the cases to be discussed herein. In \textit{Oliver Iron Mining Co. v. Lord},\footnote{263} the Court sustained the application of an occupation tax to the business of a mining company, practically all of whose product was mined to fill existing contracts with consumers in other states and passed at once into the channels of interstate commerce. There was no market within the state for more than a very small percentage of the mining company's product, and most of the ore was loaded on the cars for its immediate interstate journey by the same action of the steam shovels which removed it from its natural bed. That there was a continuity of movement from the instant of severance and thus no perceptible break between the final act of mining and the beginning of the interstate transportation and that the burden of the tax would be shifted wholly to consumers in other states\footnote{264} did not deter the Court from finding that the mining was a local business within the taxing power of the state. Despite its inseparable connection with the interstate shipment on pre-existing orders, the act of severing the ore from its natural bed was treated as a distinct act of production analogous to manufacture.


\footnote{262}(1888) 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346.

\footnote{263}(1923) 262 U. S. 172, 43 Sup. Ct. 526, 67 L. Ed. 929. This case was discussed from a slightly different point of view, supra note 70.

\footnote{264}For an excellent discussion of this aspect of the problem and the consequent effect on interstate commerce, see Powell, State Production Taxes and the Commerce Clause, (1923) 12 Calif. L. Rev. 17.
Because of its similarity to the leading gas production tax case, the decision of the Supreme Court in Heisler v. Thomas Colliery Co. should not be overlooked in this preliminary discussion, although it involved the imposition of a property tax. The tax there sustained by the Court was imposed by a statute of Pennsylvania upon the value of all anthracite coal when prepared for market and ready for shipment or sale. Aside from the peculiar circumstances of the particular case, such a tax, non-discriminatory in its terms, would have no special significance for the student of interstate commerce. Here, however, not less than eighty per cent of all such anthracite was prepared for and went immediately into interstate commerce, and the extra-state consumers were almost completely dependent upon the Pennsylvania supply. Thus again, the burden of the tax was placed almost solely upon consumers outside the state, and the nature of that burden was substantially no


267There was some indication that this fact was one of the reasons for the enactment of the statute. The contention that for that reason it was a burden on or an attempt to regulate interstate commerce and invalid was dismissed by Mr. Justice McKenna with the statement that "a tax upon articles in one state that are destined for use in another state cannot be called a regulation of interstate commerce, whether imposed in the certainty of a return from a monopoly existing, or in the doubt and chances because of competition." The contention, he thought, was substantially an assertion that "the products of a state that have, or are destined to have, a market in other states are subjects of interstate commerce, though they have not moved from the place of their production or preparation. . . . If the possibility, or, indeed, certainty of exportation of a product or article from a state determines it to be in interstate commerce before the commencement of its movement from the state, it would seem that it is such from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries . . . and withdraw from state jurisdiction and deliver to federal commercial control . . . fruits unpicked, cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to states other than those of their production." (1922) 260 U. S. 245, 259, 260, 43 Sup. Ct. 83, 67 L. Ed. 237.

There was no attempt at a rational discussion of the actual effect of such a tax, in the circumstances of this case, upon the interstate commerce in the coal. It was treated as an ordinary property tax on an article later to become the subject of interstate commerce and upheld on the authority of such cases as Coe v. Errol, (1886) 116 U. S. 317, 6 Sup. Ct. 475, 29 L. Ed. 715.
different from that of a tax imposed directly upon the privilege or the act of interstate transportation. The Court saw no serious obstacle to validity in these considerations, nor in the further fact that this was not a general property tax with its safeguards against burdening interstate business more heavily than local business, but a special levy upon a product the principal markets for which were in other states, and thus more or less discriminatory against interstate commerce in its ultimate economic effect.

With these cases as a background, and in the light of their determination, the Court approached the consideration of its first gas production tax case, *Hope Natural Gas Co. v. Hall*, involving a statute of West Virginia imposing an occupation tax upon the business of mining or producing natural gas and other named natural resources, the tax to be measured by the gross proceeds from their sale "regardless of the place of sale or the fact that deliveries are made to points outside the state." Practically all of the product of the Hope Natural Gas Company passed into interstate commerce by a continuous movement directly from the producing wells, and was sold, delivered and consumed in Ohio and Pennsylvania. Where permanent physical connections exist by means of which the gas is released from the producing wells in one state and conducted directly to the burner-tips in another by the single operation of opening a valve or turning a gas jet in the latter state, it is not possible to mark the dividing line between production and interstate transportation in any satisfactory fashion. Even where the natural pressure is insufficient and the gas is pumped at higher pressure, the situation is not essentially different. The continuity of production and transportation is even more direct than in the *Oliver Iron Mining Co. Case*. If, by the doctrine asserted in *Coe v. Errol* and applied in the *Champlain Realty Co.* and *Hughes Brothers Timber Co.* cases, the gas is beyond the state's taxing power the moment it is started on a continuous movement outside the state, and if the single act of pumping or of turning the gas jet under natural pressure which starts the continuous movement is also the only act of production,

---

268 For a careful consideration of this matter, see Powell, *State Production Taxes and the Commerce Clause*, (1923) 12 Calif. L. Rev. 17.

269 (1927) 274 U. S. 284, 47 Sup. Ct. 639, 71 L. Ed. 1049.


it is somewhat difficult to find either a distinct and separate act of production subject to an occupation tax or an instant of time at which there is in existence gas separated from its natural reservoir and not yet a part of interstate commerce so as to be subject to the state's property tax. This feature was not pressed in the case, however, the sole controversy having to do with the method of valuation for tax purposes. It was apparently admitted by the parties and assumed by the courts, on the basis of the mining cases\textsuperscript{272} previously discussed, that such a production tax, measured by the value of the gas at the well, would be valid. But the trial court considered the statute as imposing a tax upon the gross receipts from the sale of the gas, whether within or without the state, and, as to the latter, invalid as an interference with and burden upon interstate commerce. The supreme court of appeals\textsuperscript{272} interpreted the statute as being applicable to the value of the gas within the state and before it entered interstate commerce, said that the gross proceeds from sales in other states were only to be taken into consideration for purposes of finding that value, and modified the decree enjoining collection of the tax. Although this was probably a highly strained interpretation of the statute, it was accepted by the United States Supreme Court, and the tax was sustained. The tax in this case was not restricted in its application to gas but was applicable alike to the production of numerous other natural resources, whether used within or without the state, and although the gas here involved was practically all consumed outside the state, no point was made of the fact that the tax would ultimately have to be paid, as in the \textit{Thomas Colliery Co. Case}, by consumers in other states.

The electrical generation tax cases have brought before the courts as the principal issue the matter of continuity of production and transportation as a single indivisible act which was passed over in the \textit{Hope Natural Gas Co. Case}. The most important of these cases is \textit{Utah Power & Light Co. v. Pfoest}.\textsuperscript{274} A statute of Idaho imposed a license tax of one-half mill per kilowatt hour upon the "manufacture, generation, or production, within the state, for barter, sale, or exchange, of electricity and electrical energy" to be "measured at the place of production."\textsuperscript{275} The Utah Power

\textsuperscript{273}(1926) 102 W. Va. 272, 135 S. E. 582.
\textsuperscript{274}(1932) 286 U. S. 165, 52 Sup. Ct. 548, 76 L. Ed. 1038.
\textsuperscript{275}Idaho, Laws, Ex. Sess. 1931, ch. 3.
and Light Company maintained hydroelectric plants in Idaho at which it generated a large volume of electrical energy and supplied it to consumers in Idaho, Utah and Wyoming. More than eighty-six per cent. of its total product was being sent outside the state of generation, and the tax was attacked as a direct burden on interstate commerce. The issue as stated by the Court was whether the generation of electrical energy was to be considered as a process essentially local in character and complete in itself, like manufacture or production generally, or as so linked with the transmission as to make it an inseparable part of a transaction in interstate commerce. Opposing theories were presented by the Power and Light Company and by the Commissioner of Law Enforcement against whom a restraining order was sought, as to the nature of the process involved in the generation and transmission of electricity. By the former it was asserted that its entire electric system was solely a transferring device for transmitting the force of the falling water to its place of utilization, a single continuous process, all of which was a part of interstate commerce and not subject to the taxing power of the state. On the part of the commissioner it was asserted that the tax was laid upon the generation of electrical energy as a distinct act of production without regard to its subsequent transmission; that the process of generation was one of converting the mechanical energy of the falling water into electrical energy; that the resulting change was substantial and was completed before the pulses of the energy passed from the generator in their flow to the transformer; and that the transmission was subsequent to and separable from generation, in effect, as the transportation of tangible goods is subsequent to and separable from their manufacture. The Court inclined to the latter view. Speaking through Mr. Justice Sutherland, it was asserted that a distinct product was brought into being by the process of generation and transmitted to the places of use.

"The result is not merely transmission; nor is it transmission of the mechanical energy of falling water to the places of consumption; but it is, first, conversion of that form of energy into something else, and, second, the transmission of that something else to the consumers. While conversion and transmission are substantially instantaneous, they are . . . essentially separable and distinct operations."276

In response to the contention that the process is merely one by which the consumer in Utah turns a switch and draws directly

276(1932) 286 U. S. 165, 179, 52 Sup. Ct. 548, 76 L. Ed. 1038.
from the water fall in Idaho electrical energy which appears instantly ready for use, it was asserted by Mr. Justice Sutherland that,

"The turning of the switch in Utah is not to draw electrical energy directly from the water fall, where it does not exist except as a potentiality, but to set in operation the generating appliances in Idaho, which thereupon receive power from the falling water and transform it into electrical energy. In response to what in effect is an order, there is production as well as transmission of a definite supply of an article of trade. . . . The generator and the transmission lines perform different functions, with a result comparable, so far as the question here under consideration is concerned, to the manufacture of physical articles of trade and their subsequent shipment and transportation in commerce."277

It was thought by the Court that the principles adhered to in the Oliver Iron Mining Co. and Hope Natural Gas Co. cases were completely controlling and necessitated a similar result.

As is not infrequently the case, the scientific and engineering experts differed in their opinions as to just what was the real nature of the process.278 But even if it be scientifically correct that there are not two separate and distinct processes, perhaps that should not necessarily control the legal conclusion with respect to the constitutional power of the states.

On the theory that nothing takes place but the transmission of the energy of falling water from the waterfall where nature placed it to the point of consumption in another state, and that the whole process is therefore included in interstate commerce, a distinction would apparently have to be made between the steam and the hydro generated products. In the case of the former, clearly something more takes place than the transmission of the latent energy in coal and water, and probably it would not be seriously contended that the process is not assimilable to that of manufacture for purposes of state taxation. And yet the process is as continuous and instantaneous in the one case as in the other. The same turning of a switch has a like effect in both cases. By either process, according to the courts, a distinct product279 is

---

277(1932) 286 U. S. 165, 179, 180, 52 Sup. Ct. 548, 76 L. Ed. 1038.
279To the contention that there is nothing in the process equivalent to manufacture or production, that no new energy is created but merely that existing energy is changed in form, it may be said that the same is largely true of many other processes about which there is no question in this connection. In the same sense, little but change of form takes place when lumber is made into boxes, leather into shoes, or wheat into flour.
brought into being which is transmitted to points of utilization in other states. If the generation and transmission are more instantaneous than in the case of natural gas or the ore in the Oliver Iron Mining Co. Case, there is nevertheless the creation of a distinct product which is not true in the latter cases. There, instead of production in the sense of manufacture, it is rather the severance or extraction from its place in nature of a commodity already existing. For purposes of applying constitutional principles, however, the processes are distinctly analogous.

There would seem to be no greater difficulty in conceiving of the generation of electrical energy as distinct from its transmission, or as bringing into existence a new article or force, the creation of which is a local process and therefore taxable as such, than in conceiving of electrical energy or force as a commodity of interstate trade in the same sense that coal or shoes or grain are said to be. The latter proposition is, of course, no longer open to question. There is, perhaps, no greater reason for exempting electrical generation from state taxation because the product is to go across state lines than for exempting mining or manufacture for the same reason, although the immediacy of the interstate movement is much greater in the one case than in the others. The real source of difficulty appears to be that our terms, production and transportation, were invented and applied at a time when electric light and power current as an article of trade, or the hydroelectric generating plant as a means of its production, had never yet been dreamed of. It is a question of whether our categories are rigid and restricted to the exact transaction originally placed within them, or are sufficiently flexible to be made to embrace new situations as they arise. Our whole constitutional development points irresistibly to the latter view. The new processes fit neither into the one category nor the other without some readjustment of conventional notions. Manufacture as commonly understood, or even production, hardly describes the process by which a waterfall is harnessed and its energy turned into electricity. Neither is the whole enterprise one of transportation in the sense that a product of manufacture, or a natural object previously prepared therefor, is transported from state to state. The terms manufacture and transportation as thus used are not strait-jackets for the conceptions involved, which can never be varied to include new processes, but, like other language, are merely the vehicles by which the conceptions are given expression, and when applied to those
conceptions upon which the force of governmental powers may be brought to bear, must maintain that flexibility of which the constitution itself as a living instrument is the best exemplification. Our hitherto formulated notions of manufacture or production and transportation as separate transactions, the former of which is essentially local while the latter may be completely interstate, should not be rigidly restricted to those conventional transactions from which they derived their origin. Rather, they should be considered sufficiently broad to include within their scope new and different methods of dealing. The principles as originally enunciated in Coe v. Errol and Kidd v. Pearson, and since adhered to, are not to be considered iron clad dogmas requiring strait-jacketed adherence for all time, but, like the provisions of the Constitution itself, flexible enough to be applied to changing conditions. The question for determination is not solely whether a commodity has been manufactured or produced in the orthodox sense. It is rather, again, a matter of judgment. And when there is conducted within a state, under the protection of local laws, a profitable enterprise which results in a commodity of interstate commerce, there seems ample reason for saying that those principles, originally enunciated as applicable to the production within a state by an ordinary process of manufacture of commodities of interstate commerce, may be made to apply, directly or by analogy, to the new enterprise and bring it within the taxing power of the state.\textsuperscript{280}

\textsuperscript{280}For a full consideration of the problems herein discussed by a federal district court, see South Carolina Power Co. v. South Carolina Tax Commission, (D.C. S.C. 1931) 52 F. (2d) 515. The expert testimony of Dr. Robert A. Millikan, physicist, to the effect that the whole electric system is merely a device for transferring the force of falling water to and applying it at the point of utilization, was set forth at some length and the contention was considered in detail. The court came to the conclusion that the principles of Oliver Iron Mining Co. v. Lord and Hope Natural Gas Co. v. Hall were controlling and sustained the tax. (Aff'd by the Supreme Court in Broad River Power Co. v. Query, (1933) 288 U. S. 178, 53 Sup. Ct. 326, 77 L. Ed. 685.) A variant note is injected by the assertion of the court that the "current generated in South Carolina, upon which the tax is imposed, is not the current transmitted in interstate commerce. The current upon which the tax is imposed is the generated low-voltage current; the current transmitted in interstate commerce is the high-voltage current induced in the transformers of the company. The statute does not attempt to impose a tax upon this." (52 F. (2d) 515, 525).

For a criticism of the cases herein discussed and a point of view contrary to that of the present writer, see Note, State Taxation of Electric Power, (1932) 42 Yale L. J. 94. The position is there taken that if the decisions are to be justified the doctrine of Coe v. Errol must be modified. The Court should assert, it is said, that in all
In the *Utah Power & Light Co. Case* no point was made of the fact that the tax in question was not a general one but a special excise on the generation of electricity, or that all but a small percentage of the current upon which the tax was levied went to consumers outside the state and thus the ultimate burden of supplying that part of the state's revenue fell upon residents of other states. Apparently the *Hope Natural Gas Co. Case* is regarded as having fully settled these matters. Despite the fact that such a tax may place upon interstate commerce substantially the same degree of burden as would a forbidden tax on transportation, the decision in that case is probably sound. That interstate commerce may be taxed if only it is done in the right way is amply borne out by the cases. In the situation here in question there is no positive discrimination against extra-state consumers in the sense that they are made to bear a burden of which domestic consumers are relieved. It merely chances that most consumers of the product reside in other states, and, as the nature of the tax is such that it may be readily shifted by the producer, the ultimate economic burden is borne primarily by such non-residents.

**B. Taxes on Sales and Gross Receipts**

While sales tax statutes applicable to gas and electricity have become a common legislative phenomenon in recent years, few questions involving the commerce clause have been before the courts. Just as a state may not impose a tax upon interstate transportation, it finds a similar obstacle in the commerce clause to cases interstate commerce will be held not to commence until after production is completed, even though the extra-state movement has already begun, and that wherever the doctrines of Coe v. Errol and Kidd v. Pearson conflict, the latter shall prevail.

Of all the electrical energy produced in the State of Idaho in 1931, approximately 40% was exported. N. E. L. A. Statistical Bull. No. 8 (July 1932). According to the study made by the Bureau of Business Research of Harvard University in 1926, Idaho at that time exported 63% of the power generated within her borders. Mosher, *Electrical Utilities* 133.

*Powell, State Production Taxes and the Commerce Clause, (1923) 12 Calif. L. Rev. 17, 18.*

*Powell, State Production Taxes and the Commerce Clause, (1923) 12 Calif. L. Rev. 17, 18, 21, et seq.*

*Supra note 256.*

the taxation of interstate sales. For that reason, no doubt, care has been taken in drafting the statutes in several states to exclude interstate sales. As a result the problem of the sales tax as an interference with interstate commerce has not been a serious one for the state of origin. Such litigation as has arisen has involved the taxing statutes of the states of destination. The one issue of importance has been the determination of when the commodity loses its interstate character and becomes mingled with the mass of property within the state. This question was discussed somewhat at length above in connection with state regulation of rates because of the fact that the Supreme Court in the leading taxation case under the present heading expressly repudiated the doctrine of Pennsylvania Gas Co. v. Public Service Commission theretofore the leading regulation case dealing with this matter. For that reason the present discussion may well be brief.

East Ohio Gas Co. v. Tax Commission of Ohio involved a so-called excise or privilege tax upon all natural gas companies operating in the state, measured by a percentage of the gross receipts from sales in intrastate business. The sole difficulty involved was the determination of what business was thus included. The East Ohio Gas Company obtained three-fourths of its supply from West Virginia and Pennsylvania and one-fourth in Ohio. Some customers were supplied with gas solely from Ohio wells, others from a mixture of that originating within and without the state, and still others with gas of extra-state origin alone. The principal controversy had to do with the tax on the receipts from the last group. Ownership and control of the gas was assumed at the state line, but the whole passage from the producing wells in the other states through the high-pressure lines to the connection with the East Ohio Company's local systems was treated as interstate commerce of a national character throughout. But the reduction in pressure by passing through reducing stations and the division into tiny streams for delivery to consumers were said to be analogous to the breaking of an original package for the disposition of its contents at retail. The subsequent sale and


See, e.g., the statutes of Florida, North Carolina, Pennsylvania and South Carolina, supra note 256.

(1920) 252 U. S. 23, 40 Sup. Ct. 279, 64 L. Ed. 434.

delivery was, therefore, held to be not a part of interstate commerce but a purely local business subject to the complete control of the state. With its interstate character thus ended, in the determination of which the Pennsylvania Gas Co. Case was expressly disapproved, no objection remained to the validity of the state tax. Had the doctrine of this earlier case been followed, it would have been interesting to see whether an attempt would have been made to apply the principle of Cooley v. Board of Wardens of the Port of Philadelphia\textsuperscript{290} to sustain a privilege tax on interstate commerce local in nature. Thus far that doctrine has apparently been restricted to police power cases.\textsuperscript{291} Had the Court been less specific in its disapproval of the Pennsylvania Gas Co. Case, it might be thought that the door was left open for possible application of this doctrine to taxation in the gas and electricity cases. Since the case here under discussion is a tax case and the Pennsylvania Gas Co. Case was one of rate regulation, it may be thought that the latter should be distinguished, but the Court had before it exactly the same problem as to local or interstate business and expressly stated that the former case had been decided on the basis of a theory not entirely consistent with earlier regulation cases,\textsuperscript{292} that the considerations leading to its present decision had not been there presented to the Court, and that “the opinion in that case must be disapproved to the extent that it is in conflict with our decision here.”\textsuperscript{293} The Court may adhere to different theories as to the power to tax and the power to regulate where it considers interstate commerce of a local nature as being involved, but it is hardly likely that it will treat the same business as purely intrastate for one purpose and as interstate, local in nature, for another.\textsuperscript{294}

Certain other theories might be suggested as conceivable bases for reaching the same result in the principal case. An at-

\textsuperscript{290}(1851) 12 How. (U.S.) 299, 13 L. Ed. 996.

\textsuperscript{291}It is interesting to note in this connection that the federal district court in Utah Power & Light Co. v. Pfost, (D.C. Idaho 1931) 52 F. (2d) 226, in sustaining a tax on the generation of electricity, used this as a partial basis for its holding. No mention was made of it, however, in the decision of the Supreme Court, (1932) 286 U. S. 165, 52 Sup. Ct. 548, 76 L. Ed. 1038, discussed supra under taxes on generation and production.


\textsuperscript{293}(1931) 283 U. S. 465, 472, 51 Sup. Ct. 499, 75 L. Ed. 1171.

tempt might have been made, without invoking the original package doctrine, to treat the gas as having been brought into the state for purposes of sale, with its interstate transmission at an end, and on that basis subject to non-discriminatory state taxation under the doctrine of *Sonneborn Brothers v. Cureton.* No such suggestion seems to have been made, however. Possibly also such a business might be likened to that of a salesman from another state who carries his goods with him to serve the needs of an established group of customers, and subject to taxation which makes no discrimination because of the extra-state origin of the articles he has for sale. Be that as it may, perhaps the theory employed by the Court is as satisfactory as any that may be devised, and it appears to reach an entirely desirable result.

The doctrine of the *East Ohio Gas Co. Case* has been applied to a kilowatt tax on the sale of electricity in *South Carolina Power Co. v. South Carolina Tax Commission.* In the first

---

296Wagner v. City of Covington, (1919) 251 U. S. 95, 40 Sup. Ct. 93, 64 L. Ed. 157.
297(D.C. S.C. 1931) 52 F. (2d) 515. The statute of South Carolina, supra note 256, imposed a tax of five-tenths of one mill upon each kilowatt hour of electric power sold in the state. The South Carolina Power Company brought much of its current from its own hydroelectric plants in Georgia and sold and delivered it to consumers in South Carolina. In some cases it delivered to industrial consumers at high voltage and to two towns which had their own distribution systems. In one of the latter delivery was made at high voltage, in the other with voltage reduced. As to all other purchasers, it delivered at reduced voltage ready for consumption. No point was made of these differences in the first case, but an attempt was made to restrain enforcement of the statute as to all as a burden on interstate commerce. The denial of an interlocutory injunction was affirmed by the Supreme Court without opinion in *Broad River Power Co. v. Query,* (1932) 286 U. S. 525, 52 Sup. Ct. 494, 76 L. Ed. 1268. When the case came on for final hearing, (D.C. S.C. 1932) 60 F. (2d) 528, which, for purposes of the present discussion, might be treated as a separate case, the court dealt solely with the deliveries to the towns and industrial purchasers but reached the same result. On final appeal to the Supreme Court in *Broad River Power Co. v. Query,* (1933) 288 U. S. 178, 53 Sup. Ct. 326, 77 L. Ed. 685, where the interstate commerce contention was not pressed, the denial of the injunction was again affirmed. An additional feature of interest in these cases, involving both the validity of the sales tax here considered and that of the generation tax imposed by the same statute and discussed supra in note 280, was the contention of the power companies that as licensees of the Federal Power Commission they were agencies of the federal government and not subject to the taxing power of the state. That contention was dismissed, largely on the authority of *Susquehanna Power Co. v. State Tax Commission of Maryland,* (1931) 283 U. S. 291, 51 Sup. Ct. 434, 75 L. Ed. 1042.
decision of this case, dealing with sales to domestic consumers, it was said that the change in voltage by stepping up or stepping down was not a mere change in the current, but the production of a new and different current. It was therefore concluded that the tax on sales was not levied upon the high-voltage current which comes into the state in interstate commerce, but upon the low-voltage current which is sold. This was not the sole reliance of the court, however. It found an analogy to the original package idea in the breaking up of the high-voltage current and asserted that the *East Ohio Gas Co. Case* was completely controlling to end the interstate character of the transaction and validate the tax. On final hearing, where the matter of deliveries at high voltage to mills and to a town with its own local distribution system was dealt with, a different theory had to be invoked. This problem, which was discussed at some length above in connection with regulation, will not be dealt with fully here. Suffice it to say that the fact of distribution at reduced voltage from the same lines to numerous consumers before the deliveries here in question were made was considered sufficient to characterize such lines as the company's distribution system within the state by means of which it carried on a local business. On that basis the interstate character of the current was thought to be lost when it was placed upon those lines for its local sale and delivery. The fact of delivery at high voltage in some cases was considered immaterial. If this conclusion as to the ending of the interstate business, as previously discussed, is sound, there can be no doubt as to the validity of the tax. If it is not, this would present an admirable situation for an attempt to apply the doctrine of the *Sonneborn Case*.298

**C. Taxes on Transportation**

That a state may not, consistently with the commerce clause of the constitution, impose a tax upon interstate transportation is well settled.299 That the business of local transportation may be subjected to state taxation is quite obvious. The only problem in the application of such a tax is in the determination of whether the transportation is interstate or local. Few states have provided for taxing the transmission of gas and electric light and power current, and such cases as have come before the Supreme Court have resulted in a determination that the state had

---

299Supra note 285.
overstepped the proper bounds. West Virginia imposed a tax some years ago on the transmission of natural gas in pipe lines within the state which came before the Supreme Court of the United States in *United Fuel Gas Co. v. Hallanan.*\(^{300}\) The gas carried by the United Company, for the most part, was gathered or purchased within the state, and the great bulk of it was destined to points outside, either by its own lines or those of connecting companies to whom much of the gas was sold. The whole of the transportation with respect to that part which ultimately moved out of the state was held to be interstate commerce, and beyond the reach of the state's taxing power, although the necessities of the business required that a much smaller part destined to points within the state be carried undistinguished in the same pipes.\(^{301}\) The further fact that as to most of the gas sold to connecting companies the United Company before sale, and the purchasers thereafter, were free to change their minds before the gas left the state and make other disposition of it was considered immaterial.\(^{302}\)

A similar result was reached in the application of a like tax by the state of destination in *State Tax Commission of Mississippi v. Interstate Natural Gas Co.*\(^{303}\) Interstate transportation of gas was being carried on through trunk lines of pipe extending from gas fields in Louisiana into Mississippi and back into the former state. From this trunk line passing through Mississippi, deliveries were made to certain distributing companies with pressure reduced. This reduction in pressure by the pipe line company before the gas passed into the lines of the purchasers was held not to affect the interstate character of the transaction or bring it within the taxing power of the state. It was characterized by Mr. Justice Holmes as being work done upon the flowing gas to help the delivery and plainly incident to the interstate trans-

\(^{300}\)(1921) 257 U. S. 277, 42 Sup. Ct. 105, 66 L. Ed. 234.


\(^{302}\)The state court had taken the position that at the time the gas sold to three of the connecting companies was put in course of transportation it had no fixed destination other than the point of delivery to the purchasing company, that it was not then known what percentage would ultimately leave the state, and that, although past experience justified the assumption that much of it would do so, none of it was, as yet, in interstate commerce. The tax was consequently upheld. *Pipe Line Co. v. Hallanan,* (1920) 87 W. Va. 396, 105 S. E. 506.

\(^{303}\)(1931) 284 U. S. 41, 52 Sup. Ct. 62, 76 L. Ed. 151.
mission. “The plaintiff simply transports gas and delivers it wholesale, not otherwise worked over than to make it ready for delivery to independent parties that dispose of it by retail.” As involving wholesale deliveries direct from interstate transportation lines, the case is entirely consistent with the regulation cases heretofore considered, such as *Missouri v. Kansas Natural Gas Co.* and *Public Utilities Commission v. Landon*, both of which were here relied on. It has been noted that reduction in pressure or voltage has been emphasized in some cases as the equivalent of breaking an original package and as marking the transition from interstate to intrastate business. In those cases, the contention, based on expert testimony, that all stepping up or stepping down in pressure or voltage was merely incident to the proper transportation and delivery of the commodities in interstate commerce was rejected by the courts. This was especially urged in the *South Carolina Power Co. Case* with respect to electricity, but it is equally applicable to gas. In this last mentioned case the reduction in voltage was for the purpose of delivery to consumers, and the current was then put on the wires of the local distribution system. Quite properly, it would appear, this reduction in voltage and entrance upon the system of wires maintained for service to local consumers was held to bring the interstate transaction to an end. What came thereafter was intrastate business. In the *Interstate Natural Gas Co. Case* the reduction in pressure was not for delivery to consumers as a local business, but was merely incident to the convenient reception by the wholesale customer from the interstate transportation company. The cases are, therefore, entirely reconcilable. As previously emphasized, no single test, such as reduction in pressure or voltage, or delivery at the state line, is a never failing guide. “Interstate commerce is a practical conception, and what falls within it must be determined upon a consideration of established facts and known commercial methods.” So it is in these cases with respect to that which brings such commerce to an end and marks the beginning of a local business subject to the taxing power of the states.

---

305 (1924) 265 U. S. 298, 44 Sup. Ct. 544, 68 L. Ed. 1027.