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THE NATURAL GAS ACT EXPERIENCE — A STUDY IN
REGULATORY AGGRESSION AND CONGRESSIONAL
FAILURE TO CONTROL THE LEGISLATIVE
PROCESS

William J. Flittie* and James L. Armour**

"If the Commission had foreshadowed its present course,
I do not suppose the Act would have passed..."1

The growth of regulatory power of the federal government at the
expense of jurisdiction of the state governments is a central
phenomenon of these days. Nowhere is this better illustrated than
in the experience of the natural gas industry. A modest congressional
purpose to close with federal regulation a specific regulatory gap in
which, by reason of previous Supreme Court decisions, the states were
constitutionally forbidden to regulate, has been transformed into an
aggressive instrument. As a result the states are being thrust from
regulatory areas in which the Congress intended they should remain
secure. Perhaps the short term economic interests of natural gas con-
sumers have benefitted, though a case can as well be made to the
contrary. But to the extent the governmental machinery of this nation
with its division of powers between state and national governments
and its checks and balances among executive, legislative and judicial
branches has been damaged, gas consumers, and all other citizens, are
poorer beyond any dollar recompense.

I. THE LEGISLATIVE HISTORY OF THE NATURAL GAS ACT2

In the constitutional law as it stood in 1938 the states had undoubted
power to regulate or not regulate, as they saw fit, the rates at which
consumers of natural gas were supplied by local distributors, a power
they still have, though now by sufferance of the federal government
rather than by virtue of a constitutional barrier against federal en-
croachment. But due to the Supreme Court's Missouri v. Kansas Na-

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1965.
1 FPC v. East Ohio Gas Co., 338 U.S. 464, 488 (1950) (dissenting opinion of Jackson,
J.).
tural Gas Co., and Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co. decisions of the mid 1920's, in all situations but those in which the facts of a case showed the federal interest to be minor, there was no state power to regulate the rates at which the interstate pipeline companies sold gas to local distributors for resale. This power, the Court held, belonged exclusively to the federal government, and, because the Congress had not implemented it with legislation, there was an unregulated gap.

Due to low demand in relation to supply in the period after World War I, the field price of natural gas was extremely low. While controlling a substantial portion of their pipeline requirements in terms of their own production, interstate pipelines were able to contract for additional needed supplies from independent producers at what amounted to distress prices. Local distribution companies, then as now, were dependent on the main line transporters for supplies of natural gas.

The interstate lines were accused of selling gas to local distributors at unreasonable markups. In the absence of any regulation of those sales, the state regulatory agencies were forced, under usual principles of public utility law, to reflect the unregulated prices which local distributors paid in the rates consumers ultimately paid in the same fashion that, today, the unregulated cost of coal is a cost of service element in the regulated rates of electricity generated with its heat content.

Because of this situation, in 1928 the Federal Trade Commission was directed to investigate the entire structure of the natural gas industry. In a series of reports culminating in its 1936 Final Report the

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3 265 U.S. 298 (1924).
4 273 U.S. 83 (1927). This case involves sale of electricity across a state line. There never has been any question but that its precedent applied to natural gas sales as well.
5 The Court decided these cases in terms of practical impact of state regulation upon the federal interest rather than any mechanical test where exclusiveness automatically resulted if a state line was crossed, as demonstrated by Arkansas Louisiana Gas Co. v. Public Util. Comm'n, 304 U.S. 61 (1938) involving informational reporting; Southern Natural Gas Co. v. Alabama, 301 U.S. 148 (1937) upholding state taxation; and particularly Lone Star Gas Co. v. Texas, 304 U.S. 224 (1938), permitting state ratemaking at precisely the point of sale for resale where state regulation was forbidden in usual circumstances.
6 Between 1922 and 1929 the average price of gas in the Southwest fell from 8 cents per m.c.f. to 3.3 cents per m.c.f. In 1940 the average price of gas from all areas was 1.8 cents. McKie, The Regulation of Natural Gas 12 (1957).
FTC concluded that prices charged local distributing companies indeed were excessive and recommended regulation of these sales in a complementary scheme where the federal government would regulate what the states constitutionally could not.\textsuperscript{11}

Recognizing that the Supreme Court in 1932 had held the production of crude oil to be a mining operation subject to state regulation, the FTC concluded that natural gas production had the same status.\textsuperscript{12} It confined itself in this regard to urging the states to adopt regulatory schemes designed to prevent waste occasioned by excessive gas production and consequent dump prices.\textsuperscript{13} Local distributor regulation also was recognized as a state function. In sum, the legislative recommendations of the FTC report were directed solely at the interstate pipeline-local distributor gap. Section 1 of the Natural Gas Act indicates that the FTC recommendations were the measure of congressional concern in its passage.\textsuperscript{14}

The progenitor of the Natural Gas Act was prepared in 1935 at the direction of Congressman Rayburn and was modeled upon a parallel portion of the already drafted Federal Power Act.\textsuperscript{15} It was included as Title III of the Public Utility Act of 1935, Title I of that act being the Holding Company Act\textsuperscript{16} and Title II the Federal Power Act.\textsuperscript{17} The Federal Power Act was in part the result of a parallel investigation by the FTC of the interstate electric industry and was designed to close by federal regulation the corresponding unregulated gap in that industry.\textsuperscript{18}

Title III was withdrawn from the Public Utility Act. A redraft was introduced in 1936 but failed of passage. In 1937 the same redraft was introduced, subjected to extensive consideration and debate in House and Senate, and with minor alterations enacted in the second session of the Seventy-Fifth Congress as the Natural Gas Act of 1938.\textsuperscript{19} Structurally, it is a limited statute purporting to deal only with interstate transmissions of gas as defined in the act;\textsuperscript{20} it is further limited, however, so that the Federal Power Commission has jurisdiction only over transportations of such gas, sales for resale of such gas and

\begin{itemize}
\item\textsuperscript{11} Id. at 609, 616.
\item\textsuperscript{12} Id. at 603, citing Champlin Ref. Co. v. Corporation Comm’n of Okla., 286 U.S. 210 (1932).
\item\textsuperscript{13} Id. at 616.
\item\textsuperscript{14} Natural Gas Act § 1(a), 52 Stat. 821 (1938), 15 U.S.C. § 717(a) (1958).
\item\textsuperscript{15} DeVane, Highlights of Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938, 14 Geo. Wash. L. Rev. 30, 38 (1945).
\item\textsuperscript{18} DeVane, supra, note 15, at 30.
\item\textsuperscript{19} Id. at 39.
\item\textsuperscript{20} Natural Gas Act, §§ 1 (b) and 2(7), 52 Stat. 821 (1938), 15 U.S.C. §§ 717a, b (1958).
\end{itemize}
companies engaged in either such transportations or sales for resale. Thus consumer sales, even though there is an interstate transmission, are not subject to the act though the transportation and the company transporting the gas for direct consumer sales are. Local distribution of gas and the production or gathering of gas are expressly exempted, and, structurally, the act does not reach any components of a gas system confined entirely within the boundaries of a single state.

A. Committee Reports

It must be appreciated that a federal statute is not interpreted in the isolation of its language, but rather with a gloss imparted by the legislative history which sheds light on Congressional intent. Most authoritative in measuring the congressional purpose are the committee reports attending passage of a bill.

House and Senate committee reports concerning the Natural Gas Act are identical, the Senate having adopted the House report. The controlling House report states, in language as uncompromising as the English tongue permits:

The bill takes no authority from State commissions, and is so drawn as to complement and in no manner usurp State regulatory authority. As in the act itself, it is made clear that the guide for drafting the legislation was the FTC report and recommendations. The point will not be labored, for it must be acknowledged by any person willing to engage in a fair reading of the committee reports attending passage of the act that these show only the purpose to regulate where state regulation had been held constitutionally impossible. This limitation once was squarely acknowledged by the Supreme Court in language unmistakably clear:

The purpose of that restriction [the language from the committee report

\[\text{[References omitted]}\]
just quoted] was, rather, to preserve in the States powers of regulation in areas in which the States are constitutionally competent to act.\(^{29}\)

The report further states that the FPC was to have “no authority over distribution, whether or not local in character.”\(^{30}\)

**B. Congressional Debate**

Congressman Lea, who introduced the bill in the House, explained it as follows, “The primary purpose of the pending bill is to provide Federal regulation, in those cases where the State commissions lack authority, under the interstate-commerce law. This bill takes nothing from the State commissions; they retain all the State power they have at the present time . . . .”\(^{31}\) This purpose was explained in similar form by Congressman Wolverton:

It is therefore the purpose of this legislation to close the gap now existing between Federal and State regulation and control and confer upon the Federal Power Commission the right, duty, and authority to exercise such regulatory power in fixing a fair and reasonable rate for gas that is a part of interstate commerce. It seeks to give similar power to regulate and control interstate commerce in gas as now exists in State regulatory bodies with respect to transactions entirely within the States.\(^{32}\)

The same purpose was emphasized in the Senate, with added concern over the producing segment of the natural gas industry and application of the act to it.

Mr. Austin: Mr. President, I should like to inquire whether the bill undertakes to gain control over the natural resource of gas—that is, the natural gas of any State—to enable the Federal Government to control it?

Mr. LaFollette: Mr. President, it is my understanding and I think the Senator will find from a study of the bill, that all it attempts to do is give the Federal Power Commission the right to regulate interstate transportation and sale and resale of natural gas which moves in interstate commerce.\(^{33}\)

Senator Wheeler stated likewise in reference to the jurisdictional scope of the act: “It does not attempt to regulate the producers of natural gas or the distributors . . . . It is limited to transportation in interstate commerce and it affects only those who sell gas wholesale.”\(^{34}\)

There was concern over the possible spread of federal controls at the expense of state regulation. Citing as an example the regulation of

\(^{29}\) [Interstate Natural Gas Co. v. FPC, 331 U.S. 682, 690 (1947).]

\(^{30}\) *Supra*, note 27, at 1-2.

\(^{31}\) *81 Cong. Rec. 6721* (1937).

\(^{32}\) *Id.* at 6723.

\(^{33}\) *Id.* at 8918-19.

\(^{34}\) *Id.* at 9312.
railroad rates by the Interstate Commerce Commission and the imposition of local situations, Senator Connally inquired, "Is it not also true, even though the [state] utility commissioners advocate it [the Natural Gas Act], that whenever a Federal agency takes over an activity such as this the State authorities begin to shift or lose their responsibility?"

Senator Wheeler said, "No. There is no attempt and can be no attempt under the provisions of the bill to regulate anything in the field except where it is not regulated at the present time. It applies only as to interstate commerce and only to the wholesale price of gas." Despite some wording which appears somewhat loose to minds attuned to think in terms of present-day commerce clause concepts, the evidence is overwhelming that the intent and purpose of Congress was to fill only that specific regulatory gap from interstate pipeline to local distributor which had been defined by past Supreme Court decisions. Not without significance, too, is the fact that the legislative history shows the industry groups who would have been affected by possible expansion of the law beyond this purpose quiescent, a patently incredible performance except that they shared with Congress the conviction that under the interstate commerce concepts then current there was no possibility of federal regulation of them.

C. The Federal Power Act

The Natural Gas Act and the Federal Power Act, in their respective regulations of natural gas and electricity wholesales, are sister statutes, quite plainly recognized as such by the Supreme Court, with the qualification that the Federal Power Act lacks the Hinshaw amendment restriction of FPC jurisdiction later introduced into the Natural Gas Act. Both were aimed at the same regulatory gap. The Federal Power Act is the more precisely drawn with regard to state powers in that the statute itself expressly limits FPC jurisdiction to only "those matters which are not subject to regulation by the States,"

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36 Id. at 9313.
39 FPC v. Southern Cal. Edison Co., 376 U.S. 205 (1964). The Hinshaw amendment, which ceded back to the states a jurisdictional area which the Supreme Court had held in the federal ambit is discussed infra, § V B. See also United States v. Public Util. Comm'n of Cal., 345 U.S. 295 (1953), containing much evidence of parallel purpose.
whereas it is necessary to go to the legislative history of the Natural Gas Act to ascertain that the same limitation was intended.

In actual physical conduct of their businesses a practical distinction exists between the natural gas industry and the electric industry which probably was more pronounced at the time of passage of these two acts than at present. Natural gas, most commonly, is purchased by a transporter and reseller while electric energy most commonly is generated by the same company which transports and sells it to local distributors. Thus there is little difficulty in identifying the unregulated single sale gap at which the Federal Power Act was directed, whereas the acquisition by purchase from natural gas producers gives rise to a multiple sales pattern in reaching the local distributors.

The possibility of any distinction between the two acts in this regard was eliminated with the decision of *Phillips Petroleum Co. v. Wisconsin* in 1954, however, when, sixteen years after passage of the Natural Gas Act, FPC jurisdiction over sales in the production and gathering segment of the industry was asserted by the Court. Inquiry should have been made in that decision as to whether the states had power, at the time of passage of the Natural Gas Act, to regulate producer prices, and, if so, FPC jurisdiction should not have attached. That inquiry, however, never was made. Thus, apart from the Hinshaw amendment exemption introduced into the Natural Gas Act, the parallel between the two acts became more perfect than ever. Today a Federal Power Act decision extending FPC jurisdiction at the expense of state jurisdiction is all but certain to be conclusive in the natural gas arena as well. This realization becomes a matter of some importance in assaying the current validity of certain natural gas case precedents not formally overturned.

II. **The Reach of the Commerce Clause**

At this point it becomes desirable to measure the reach of the commerce clause of the United States Constitution as it stood at the time

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42 This distinction was appreciated at the time the two acts were passed, as is demonstrated by the FTC’s discussion of the difficulties inherent in divided federal-state jurisdiction over gas sales as distinguished from electricity sales. *F.T.C., Final Report*, S. Doc. No. 92, 70th Cong., 1st Sess., pt. 84-A 601-02 (1936).


44 U. S. Const. art. 1, § 8, cl. 3. “The Congress shall have power .... To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes ....” Upon this modest and not particularly informative language has been reared one of the most complex bodies of law known to any legal system. This development was inevitable in a federal system of government, with its conflict between the powers of the central government and the states concerning the boundaries of their respective authorities in commercial matters. The progressive increase in the powers of the federal government, so noticeable in the past quarter century, rests more upon interpretations of this clause favorable to national power and adverse to state power than any other constitutional source.
The Natural Gas Act Experience

of passage of the Natural Gas Act and as it has developed since passage. Though difficult to pinpoint because the Supreme Court persistently has interpreted the Natural Gas Act without regard for the constitutional limitation upon the federal power inherent in the statute itself, namely that it was intended to apply only where the federal power was constitutionally exclusive, it seems inescapable that changes in constitutional interpretation of the commerce clause after passage of the act in 1938 have subtly facilitated extensions of the federal power into areas supposedly reserved to the states. Were this not the case, no regulatory area exclusively in the power of the states in 1938 could ever have been invaded by federal power. The Court, in its interpretations of the act, never spells out whether it is acting on a foundation of exclusive federal powers or on preempted concurrent powers. There are strong indications that at times its decisions rest on expansion of the exclusive federal power beyond what it was in 1938 and, at other times on translating what were exclusive state powers of 1938 into concurrent powers which then are held preempted by the Act.

Judicial suggestion that the commerce clause confers upon Congress a virtually unlimited field for legislative activity is not new. In Gibbons v. Ogden,46 decided in 1824, Mr. Chief Justice Marshall stated that all commerce affecting multi-state interests is a unity and that Congress has power to regulate that unity.47 In 1942 Mr. Justice Jackson pronounced Gibbons to enunciate a scope of congressional powers under the commerce clause still unexceeded.48 With the qualification that the preemption doctrine of a later day makes the bite of the federal power more keenly felt,49 this analysis of Marshall's view seems entirely correct.

45 9 Wheat. 1 (1824). The Supreme Court was dealing with an attempted exclusive grant of river navigation rights by the State of New York, which conflicted with a non-exclusive grant of navigation rights under an act of Congress. Navigation is not a subject matter which fairly tested the then-Court's attitudes toward ordinary commercial activities such as manufacturing or farming. The decision can be read as asserting exclusive power to control navigation in the United States, ousting any state power, or as asserting federal-state concurrent powers with the federal power prevailing in cases of conflict. Chief Justice Marshall may have intended the former. 9 Wheat. at 207-208. The actual decree of the Court is consistent with concurrent powers. 9 Wheat. at 240.

46 9 Wheat. at 194. And see Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). Mr. Chief Justice Marshall saw limitations on federal exercise of the commerce power as something to be imposed by political rather than judicial means. 9 Wheat. at 197. Decisions under the Natural Gas Act make it appear that the present Court is not sufficiently sensitive to this aspect of the decision, though willing enough to use Marshall's broad concept in extending the federal power.


48 In some areas of commerce there is concurrent power in both the federal and state governments to act, and state action is valid until the federal government acts so comprehensively as to preempt the area. When this happens, state power is in abeyance. Chicago & Northwestern Ry. Co. v. Fuller, 17 Wall. 560 (1873). Obviously, it can be difficult to determine whether the federal action is preemptive. For an extreme example of an instance
But Congress did not act to implement such supposed powers under the commerce clause for a century after adoption of the Constitution. The implementation began with the Interstate Commerce Act of 1887 and the Sherman Act of 1890.

In the many years prior to these federal enactments, and for half a century after their adoption, the Court developed an extensive body of case law based on interpretations of the permissive reach of state legislation where the state law usually was the only active element in controversy. Absent conflicting federal legislation, only when the federal commerce power was exclusive was fatal conflict found. The lurking limitation if the federal power should be affirmatively asserted in square opposition to state jurisdictional interests was not made apparent until the commerce clause revolution of the early 1940's. The professional and popular understanding which developed concerning commerce subject to federal regulations was a highly restrictive concept, with most gainful activities (notably mining, manufacturing and production in general) denominated "intrastate commerce" and committed exclusively to state control beyond the reach of the federal power. "Interstate commerce" became a term of legal art, descriptive of the limited commerce area where the federal government had power to act, and "intrastate commerce," a term descriptive of the remaining commerce areas the federal government could not reach.

These localizing precedents unquestionably dominated the thinking of legislators, judges and lawyers until the early 1940's. Their force is shown when, in the mid-1930's, they were used by the Supreme Court to strike down some of the early New Deal legislation because it invaded the intrastate commerce area reserved to the states.

where it was so held see Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957) where the regulation imposed by the National Labor Relations Act preempted from the states all powers to act in labor disputes subject to the jurisdiction of the National Labor Relations Board, despite the refusal of the Board to take jurisdiction in the instance of a small company, the operations of which had been characterized by the Board itself as "predominantly local in character." Such decisions create a "no-man's land" where there is no legal recourse.

51 United States v. E. C. Knight, 156 U.S. 1 (1895); Kidd v. Pearson, 128 U.S. 1 (1889); Veazie v. Moor, 14 How. 568 (1852). In Hammer v. Dagenhart, 247 U.S. 251 (1918), the restrictive concept was brought into conflict with a positive enactment of Congress forbidding the shipment in interstate commerce of manufactured goods produced with child labor. The manufacturing limitation prevailed, ousting the federal power from an area today recognized as one of concurrent jurisdiction and subject to federal preemption. This case was the highwater mark of the restrictive concept upon the federal commerce power.

52 Carter v. Carter Coal Co., 298 U.S. 238 (1936); United States v. Butler, 297 U.S. 1 (1936); Schecter Corporation v. United States, 295 U.S. 495 (1935). In the last case the Court forecast that if federal powers under the commerce clause were permitted to reach all activities affecting interstate commerce, the authority of the state over their domestic concerns would exist only at the sufferance of the federal government. 295 U.S. at 546. Most observers would agree this is precisely where the matter stands today. The power is complete; it is just a question of how much of it Congress has invoked.
Though the restrictive interpretation of the commerce clause had but a short life ahead of it, it underlay passage of the Natural Gas Act. In the first place the real roots of this law are in 1935 when its sister statute, the Federal Power Act was passed. In 1935 the restrictive concept was in full flower. In the second place, while it is true that by 1938 the restrictive concept was coming under active challenge in certain congressional enactments, this challenge was made in terms of statutes rested on the “affecting commerce” rather than the “in commerce” principle. The former denotes a more aggressive reach of federal regulatory powers than the latter. The Natural Gas Act is an “in commerce” statute.

As often happens in the complexities of our system of legal development through case law, at about the turn of the century there began to emerge another line of cases based on interpretations of affirmative federal statutes, such as the Interstate Commerce Act of 1887 and the Sherman Act of 1890. These cases supported extensions of the federal power into traditional areas of intrastate activity where the lack of federal regulation had had a substantial deleterious effect upon interstate commerce. The two lines of cases existed side by side without conflict developing until in a 1941 Fair Labor Standards Act case involving manufacturing, a traditional intrastate activity, the line was breached in favor of the federal power.

Just one year later came the landmark decision of Wickard v. Fil-

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53 Ibid.
54 The landmark decision of Wickard v. Filburn, 317 U.S. 111 (1942), which finally overthrew the restrictive concept, involved the Agricultural Adjustment Act of 1938. In passing this act, Congress very plainly did not acquiesce in the then prevailing restrictive commerce concept, but there is nothing to prevent Congress from testing on the one hand and acquiescing on the other.
56 “The provision of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public use, or in interstate commerce, for ultimate public use for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale....” Natural Gas Act § 1(b), 42 Stat. 821 (1938), 15 U.S.C. § 717(b) (1958).
57 Interstate commerce under the act is defined as “commerce between any point in a state and any point outside thereof, or between points within the same state but through any place outside thereof....” Natural Gas Act § 2(7), 52 Stat. 821 (1938), 15 U.S.C. § 717a (7) (1958).
58 Supra, § I.
59 For example, Shreveport Rate Cases, 234 U.S. 342 (1914); Swift & Co. v. United States, 196 U.S. 375, 398 (1905).
60 United States v. Darby, 312 U.S. 100 (1941).
burn, a holding so broad as to adopt into constitutional law the scope of federal commerce powers urged by Chief Justice Marshall more than a century before. Involved were certain 1941 amendments to the Agricultural Adjustment Act of 1938 inflicting money penalties for the production of wheat in excess of federal quotas. Unlike the Natural Gas Act, this statute was part of the New Deal legislative program designed deliberately to invade traditional intrastate areas with federal regulation. It included in its reach all wheat production, whether sold or consumed on the farm where produced. In sweeping language the Court made it clear that even on-the-farm consumption of wheat produced in excess of quotas, because it removed the farmer-consumer from reliance on the market for needed supplies, sufficiently affected the national market, and therefore the federal interest, to support the federal enactment.

Whether the subject of the regulation in question was "production", "consumption", or "marketing", is... not material for purposes of deciding the question of federal power.... That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. The same consideration might help in determining whether in the absence of Congressional action it would be permissible for the state to exert its power on the subject matter, even though in so doing it to some degree affected interstate commerce. But even if... [an] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what at some earlier time has been defined as "direct" or "indirect." Amplifying on this case but in no sense broadening it, for its reach is total, the Court has declared the federal power to be "as broad as the economic needs of the nation," and "if it is interstate commerce that feels the pinch it does not matter how local the operation which applies the squeeze" for the federal power to reach it.

It is regrettable that in its dealings with the Natural Gas Act the Court has not seen fit to weigh the considerations it enunciated in Wickard v. Filburn in measuring the extent of the congressional purpose to regulate, but that aside, in terms of the production, transportation and distribution segments of the industry, the conclusion now is inescapable that Congress does have power to legislate in all segments of the natural gas industry from inception of production to the consumer's burner tip. An industry characterized by an observable

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60 317 U.S. 111 (1942).
61 Id. at 124-25.
continuous flow across state lines of the commodity in which it deals is completely vulnerable.\(^6\)

Moreover, this power could reach gas systems which nowhere cross state lines. The in-state use of gas diminishes the national supply. Its price affects the price of gas in other states. The availability of in-state gas on favorable terms influences the location of industry and hence national economic development.\(^5\)

As of 1965 the conclusion is inescapable that the old constitutional division between interstate and intrastate commerce is eradicated. In the words of a noted attorney whose specialty long has been oil and gas law,

I can see few, if any, of the significant areas of the oil and gas industry that could not be reached by this [Wickard v. Filburn] test . . . Other than to point out that questions can arise under the Due Process Clause of the Fifth Amendment, I find it difficult to question the pronouncement of Former Dean Ribble of the University of Virginia Law School: “From here on, it appears that for all practical purposes, the only commerce questions we will have arising under federal statutes will be questions of statutory interpretation.”\(^6\)

Since state powers now are a matter of congressional sufferance, it becomes acutely necessary to determine accurately the congressional purpose at time of passage of a statute, then keep that purpose fixed throughout the life of the statute. Congress must now be especially careful that words not intended be put in its mouth, for Congress, not the Supreme Court, became the repository of the federal principle which has been the guiding genius of American government from the moment the intrastate commerce concept ceased constitutionally to insulate local activities from federal regulation.

III. EXCLUSIVE, CONCURRENT AND PREEMPTIVE COMMERCE CLAUSE JURISDICTIONS

According to Supreme Court decisions prior to 1942,\(^6\) commerce clause applications fell into three major segments: (1) those in which an overriding national interest demands uniformity of regulation (or


\(^{66}\) Sears, Present Status of Federal and State Jurisdiction In Connection With Regulation of, Exploration For, and Conservation, Production and Sale of Oil and Gas, 15th Oil & Gas Inst. 1, 6 (Sw. Legal Foundation 1964), quoting Ribble, Policy Making Powers of the United States Supreme Court, 3 JOHN RANDOLPH TUCKER LECTURES 11, 37 (1961). See also Ribble, State and National Power Over Commerce (1937); and, Frankfurter, The Commerce Clause (1937).

\(^{67}\) Minnesota Rate Cases, 230 U.S. 350 (1913); Chicago & Northwestern Ry. Co. v. Fuller, 17 Wall. 560, 567 (1873); Gooley v. Board of Wardens, 12 How. 299 (1851).
non-regulation) so completely as to exclude all state powers to regulate,\(^6\) (2) those purely intrastate in character and therefore subject exclusively to state regulation,\(^6\) and (3) those subject to the concurrent regulation of both state and federal governments. With the 1942 decision of *Wickard v. Filburn*\(^10\) the second category vanished, leaving commerce divided into the two categories of federally exclusive and concurrent powers. Unfortunately, "interstate commerce" continues to be a much used terminology.\(^7\) It has validity to the extent that it is a defined statutory term as in the Natural Gas Act;\(^7\) not otherwise. Much loose legal thinking has resulted and will continue to result from use of the expression, for it tends to merge pre-1942 commerce concepts into later applications, on the one hand implying the existence of an area of commerce the federal power cannot reach, and on the other hand inviting intrusion of current standards upon statutes passed under the old concepts.\(^7\)

The category of concurrent powers divides into three phases according to these same Supreme Court decisions:\(^7\) (1) areas of concurrent regulation where the federal government has not undertaken to regulate and hence where the states can regulate until and unless the federal government regulates in a preemptive manner,\(^7\) (2) areas of

\(^6\) The natural gas industry itself provides an example of this category in terms of the various Supreme Court decisions forbidding regulation by the states of wholesales to local distributors after interstate transmission, the unregulated gap which gave rise to the Natural Gas Act. Cases cited *supra*, notes 3 and 4.

\(^6\) This now outmoded classification was exemplified by cases such as those cited *supra*, notes 51 and 52. Broadly, goods not yet commenced on their journey across state lines or which come to rest after such a transit were in the intrastate category and the interval between these division points constituted the interstate commerce area.

\(^7\) 317 U.S. 111 (1942).

\(^7\) Technically, perhaps a shadow existence of this category still is arguable. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). There is, however, no meaningful existence of it when Congress chooses to regulate business activities. *Id.* at 267.

\(^7\) See note 56 *supra*.

\(^7\) At the statutory level, as opposed to constitutional level, the issue of whether the federal power was intended to reach this area of commerce will continue to be hotly litigated, *supra*, note 66, even though the power of the states to regulate has been downgraded from a matter of right to one of sufferance, a consequence foreseen by the Court membership of the 1930's. *Supra*, note 52.

\(^7\) See cases cited note 67 *supra*.


\(^7\) Also, direct consumer sales involving transportation across state lines once were placed in the concurrent jurisdiction category even prior to passage of the Natural Gas Act. *Pennsylvania Gas Co. v. Public Serv. Comm'n*, 252 U.S. 23 (1920), disapproved in *East Ohio Gas Co. v. Tax Comm'n of Ohio*, 283 U.S. 465, 472 (1931). Since about 1942 there can be no doubt of their concurrent status. Because Congress has not acted to regulate, these sales are subject to state regulation. *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n*, 332 U.S. 507 (1947); *Kansas-Nebraska Natural Gas Co. v. City of St. Edmond*, 234 F. 2d 436 (8th Cir. 1956).
concurrent regulation where state power to regulate is in abeyance because the federal government has acted to regulate in a preemptive manner, and (3) areas of concurrent regulation where there is no antagonism between state and federal regulation, hence both can regulate without preemption occurring. Where there is preemption in a concurrent area, it is, from the standpoint of the states, the practical equivalent of the constitutionally exclusive federal power category except that, not being rested on an absolute constitutional exclusion of state power, state regulatory powers would revive with repeal of the preemptsing federal law.

To complete this picture, there is one further limitation upon the states in the concurrent area where state regulation is not ousted by federal preemption. If a particular state regulation should impose an undue burden on commerce, that regulation will be declared invalid.

Taking the example from the natural gas industry, the Supreme Court has conceded the states have constitutional power to regulate the prices paid producers for natural gas even though destined for jurisdictional resale. Cities Serv. Gas Co. v. Peerless Oil and Gas Co., 340 U.S. 179 (1950). Several years later, however, that concurrent power was held preempted by the Natural Gas Act. Natural Gas Pipeline Co. v. Panoma Corp., 349 U.S. 44 (1955); Cities Serv. Gas Co. v. Corporation Comm'n, 180 Kan. 454, 304 P. 2d 528 (1956), rev'd per curiam, 355 U.S. 391 (1958).

In the following recent cases, preemption was found to be appropriate: San Diego Building Trades Council v. Gorman, 359 U.S. 236 (1959), followed in several cases, the most recent of which is Plumbers Union v. Borden, 371 U.S. 690 (1963), represents an extreme extension of the preemption doctrine in that if the facts are "arguably" within the coverage of the National Labor Relations Act, even the right to make the jurisdictional determination is preempted to the NLRB. Campbell v. Hussey, 368 U.S. 297 (1961), is a decision of doubtful merit ousting Georgia tobacco grading standards, though it was conceded these supplemented, rather than conflicted with, the federal standards. The dissenters argued preemption never should be found unless there is a clear congressional indication.

Though not strictly a preemption case, see also Free v. Bland, 369 U.S. 663 (1962), where a mere Treasury regulation permitting joint tenancy with right of survivorship in federal bonds was held to oust Texas community property laws despite no inherent conflict and no revealed congressional purpose to oust state property law in the statute on which the regulation rested. Cases like these demonstrate the likelihood of a considerable bias in favor of preemption in the current Court.

State and federal regulation can coexist in a concurrent area without preemption. Head v. New Mexico Bd., 374 U.S. 424 (1963); Florida Avocado Growers v. Paul, 373 U.S. 132 (1961); Ferguson v. Skrupa, 372 U.S. 726 (1963). And see Shell Oil Co. v. FPC, 292 F. 2d 149 (3d Cir. 1961), cert. denied, 368 U.S. 915 (1961), following Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263 (1960), where the FPC construed a gas sales contract for the purpose of determining if a "most-favored-nation" clause was triggered, but without displacing the controlling state contract law. There is no current example of active concurrent regulation in the natural gas industry, but if Congress were to authorize federal safety standards in the construction of pipelines, concurrent regulation probably would result. So great is the state police power concern with the handling of dangerous substances like high pressure gas that a preemptive purpose or interpretation is unlikely.

See, for example, Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959), striking down Illinois regulations requiring interstate trucks to employ unusual mudguards, different from those required in most states; and see Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945), striking down state regulation of the number of cars permitted in an interstate train passing through Arizona. It is entirely possible that state regulation of gas producing rates, permitted under the cases cited note 75 supra as a concurrent area where the Congress has not undertaken to regulate, nevertheless could run afoul of this test if such regulation resulted in impairment of needed interstate gas supplies not subject to being readily remedied by connection with other producers on reasonable terms.
This sort of invalidity does not strip the states of regulatory powers; it only requires adoption of less onerous regulations by the states.

The gas industry falls naturally into three segments: (1) production and gathering, (2) transportation, and (3) local distribution. Laying these segments upon this commerce clause pattern, the cases which gave rise to the Natural Gas Act establish the transportation segment, where the federal interest is significant, as one of exclusive federal jurisdiction. By this measure the Court's 1963 decision in Northern Natural Gas Co. v. Corporation Comm'n, forbidding state impositions of ratable takes from gas producers upon interstate pipeline purchasers, becomes entirely supportable. Although the Supreme Court did not make such an analysis (but rather relied on a preemption analysis which flies in the face of legislative history), this was an effort to impose state regulation in the forbidden segment which should have been stricken down even in the absence of a Natural Gas Act.

The producing and gathering segment, including sales in the course thereof, though it may have been immune as an intrastate activity in 1938, now is subject to federal regulation. However, the 1950 case of Cities Serv. Gas Co. v. Peerless Oil and Gas Co., squarely holds that even the super-sensitive control of state minimum wellhead price fixing is not constitutionally forbidden the states by the commerce clause and makes it clear that this is a concurrent area throughout. As such, the ratemaking function should not have been preempted by the Natural Gas Act, as it was in 1954, because the legislative history of

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80 See cases cited notes 3-5 supra.
82 Thompson v. Consolidated Gas Util. Corp., 106 U.S. 55 (1917), invalidating a Texas attempt to make interstate pipeline capacity available to producers of gas in the Texas Panhandle, also can be explained on this analysis, though it was decided on a due process theory which quite certainly would have no current validity. See also Republic Gas Co. v. Oklahoma, 334 U.S. 62 (1948).
84 Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954). Only the ratemaking function is preempted. See notes 75 and 76 supra. There are two lower court decisions suggesting that FPC regulation of physical facilities used in production and gathering, when necessary to making rate-regulated sales, also are subject to FPC jurisdiction. Continental Oil Co. v. FPC, 266 F. 2d 208 (5th Cir. 1959), cert. denied, 361 U.S. 827 (1959) and Saturn Oil & Gas Co., Inc. v. FPC, 250 F. 2d 61 (10th Cir. 1957), cert. denied, 355 U.S. 956 (1958). Of course, in these cases producers were seeking to avoid regulation because sales took place before reaching jurisdictional facilities, and that posture goes far to explain the court's reasoning. But as Judge Brown, dissenting in the latter case, points out, such a holding scarcely is necessary to the regulatory scheme when the sales already are established to be jurisdictional by previous decisions, quite without regard for the status of the facilities. Despite these cases, it now is reasonably predictable that no regulation of producing and gathering facilities by the FPC is likely to be sustained by the Supreme Court. If state regulation of facilities should interfere unduly with the gas service represented by a jurisdictional sale, the approach now to be anticipated would be to strike such regulation down as
the act discloses no purpose to preempt any state regulatory powers but only a purpose to regulate where the states were constitutionally prevented from doing so.\footnote{The Court in Phillips apparently realized the difficulty created by its 1950 Peerless decision, 340 U.S. 179 (1950), which conceded concurrent jurisdiction for its 1954 assertion of FPC jurisdiction. In Phillips the Court hints that its constitutional standard for state regulation in 1950 was more liberal than in 1938, the time of passage of the Natural Gas Act. 347 U.S. at 684. The necessary implication of this remarkable (and undeveloped) statement is that in 1938 sales by producers and gathers to the interstate pipelines were exclusively for federal regulation. One must acknowledge that prior to 1938 there was no square holding either way, but the FTC, in its massive 1936 Final Report to Congress, supra, note 10, which underlay the act, certainly did not see it that way. In the Phillips decision the Court deliberately points to an ambiguous parenthetical insert in a portion of the committee report attending passage of the act where, after stating that consumer sales were not to be regulated, the report indicated sales for resale were different. Specifically, "sales by producing companies to distributing companies" was the parenthetical example. This, however, was immediately followed by a flat declaration that the purpose of the legislation was to occupy the field in which the Supreme Court had held the states could not constitutionally act, and the two decisions dealing with wholesales to local distributors, which created the unregulated gap, were then cited. 347 U.S. at 684-85, particularly n. 14. This should have resolved the ambiguity without more, though if it would not, recourse to the full legislative history, which was avoided, would have left no room for doubt it was only the pipeline-distributor sale the Congress sought to regulate, regardless of the latent powers it may have had. The loose parenthetical language probably reflects the situation in the 1930's when the pipelines did produce a large part of their own gas requirements. See note 7 supra. In any case independent producer sales to distributors across state lines in the early 1930's were so unusual as not to occasion mention by the FTC in its 1936 Final Report. Nor is there development in the report of any concept of producer price regulation by the federal government. The suggestion of the 1950 Court would be more liberal than the 1938 Court in measuring the extent of state power as against exclusive federal power has a false ring, for it runs contrary to the whole trend of political-judicial developments from the 1930's to the 1950's.}

In common with the FTC, the state courts believed the states had power to price-regulate natural gas production, based on state statutes long antedating 1938, and in the major test case the Supreme Court did not suggest otherwise. See Citiee Serv. Gas Co. v. Peerless Oil and Gas Co., 203 Okla. 35, 220 P. 2d 279 (1950), aff'd, 340 U.S. 179 (1950). See also Governor's Special Study Committee of the Interstate Oil Compact Commission, A Study of Conservation of Oil and Gas in the United States 206 (1964). Moreover, there are Supreme Court cases arising around 1938 where reasonable state price-fixing regulations, applied to goods destined for interstate shipment, were sustained. Parker v. Brown, 317 U.S. 341 (1943); Milk Control Board v. Eisenberg Co., 306 U.S. 346 (1939). Contrary decisions of earlier vintage, such as Shafer v. Farmers Grain Co., 268 U.S. 189 (1925), and Lemke v. Farmers Grain Co., 258 U.S. 50 (1922), are distinguished in these cases and can be explained as instances of undue burdens on commerce instead of inherent lack of state powers to price regulate. Also, Nebbia v. New York, 291 U.S. 502 (1934), had removed possible constitutional inhibitions upon state price fixing well before 1938. At any rate, the Supreme Court was reluctant to demonstrate the validity of its position beyond mere suggestion. On balance it is all but impossible to seriously urge exclusive federal power over producer sales of natural gas in 1938. But if there was not, there was no gap, and the Natural Gas Act was not intended to apply. Finally, even if there was a gap exclusively in the federal control, the Court does not explain how a statute so patently inadequate to undertake utility regulation of a business having no predictable relationship between cost inputs and service outputs could possibly have been so intended by Congress. The failure to develop firm regulatory methods in ten years of producer regulation speaks eloquently for Mr. Justice Douglas' premonition that a statute so drawn should not be construed as covering producers. Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 690 (1959). For lower court
Turning to the last segment, local distribution, one is met by a series of outmoded Court declarations that this is an intrastate function exclusively for the states. The area now is one of concurrent jurisdiction in which Congress has not acted and is unlikely to act. This segment is expressly exempted by the Natural Gas Act from federal regulation in terms that should be difficult to invade by any interpretation, at least beyond the point of sale to a local distributor. As a practical matter, identification of the division point between the exclusively federal segment and local distribution appears to be in terms of the point of pressure reduction offtake from the high pressure main lines which once marked the interstate-intrastate division. However, it is not any point of pressure reduction which marks the end of exclusive federal jurisdiction. The real test is whether main line transmission has ceased and local distribution is in progress. Successive pressure reductions directed to anything less leave the gas in the federal jurisdiction. Hence it is those points of pressure-reduction which coincide with passage of the gas into distribution systems for marketing, as opposed to further transmission, which rules the question of where the federal jurisdiction ceases and local jurisdiction begins.


87 Cf. cases cited note 75 supra.

88 "[The Natural Gas Act] . . . shall not apply to . . . the local distribution of natural gas or to the facilities used for such distribution . . ." Natural Gas Act § 1(b), 52 Stat. 821 (1938), 15 U.S.C. § 717(b) (1958). Additionally, because the cited section is restricted in coverage to sales for resale, sales to any consumer, as opposed to a reseller, are exempt from the act’s coverage.

89 Panhandle Eastern Pipe Line Co. v. Public Serv. Comm’n, 322 U.S. 507 (1947). See also Mr. Justice Douglas’ opinion in United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134, 136 (1962), where, instead of remanding for state court construction of a law seeking to tax industrial gas sales as did the majority, he would have decided the matter as being within the jurisdiction of the state power because the tax was applied after the point of pressure reduction, citing East Ohio Gas Co. v. Tax Comm’n, 283 U.S. 465 (1919).


91 Of course, a main transmission usually will serve a number of local distributions successively, giving rise to a series of points of jurisdictional division. There is no difficulty here, all are FPC-regulated sales, but direct consumer sales off the main line pose an additional problem. They may be viewed either as local distributions beyond the off-take point or simply as sales in a concurrent jurisdictional area not covered by the act, and hence subject to state regulation. Here, though there is no direct regulation, the exempt sales are made from and utilize portions of jurisdictional line capacity. In making the cost of service allocation between jurisdictional sales and non-jurisdictional sales as these, the FPC must indirectly regulate them by taking such activities into account in setting the rates for the jurisdictional service subject to its direct control. Panhandle Eastern Pipeline Co. v. FPC, 324 U.S. 635, 646-47 (1945).

A problem, unlikely to arise often since it is the usual practice for jurisdictional interstate pipelines to create non-jurisdictional local distributing companies for local distribution...
Since the effect of the commerce clause revolution of the 1940's was confined to transferring the intrastate category of exclusive state powers into concurrent status, Natural Gas Act effects should have been nil, even though it be overlooked that a 1938 statute should be interpreted in the framework of 1938 concepts. The act was not intended to regulate, much less preempt, any concurrent area. Several key cases show the extent to which these underlying considerations have been disregarded in expanding FPC jurisdiction.

A. The Lone Star And City Of Colton Cases

The Supreme Court's 1938 case of Lone Star Gas Co. v. Texas was decided just one month before the Natural Gas Act was passed. It is, thus, the truest available measure of state powers contemporaneous with the act. Under the facts of this case Texas Panhandle-produced gas was transited across a corner of Oklahoma, with some small increments of Oklahoma gas into the line and some small Oklahoma sales off the line taking place before it reentered Texas, where it was sold to local distributors for resale and consumed. Texas regulation of the sales to local distributors after the reentry was sought to be avoided on a claim of exclusive federal jurisdiction. However, on these facts the Texas interest was found to be overwhelming and the national interest, apart from the local Texas interest, small. Following the commerce clause law as it then stood, and despite the superficial resemblance of such facts to those which had given rise to definition of the exclusive federal area in which the states could not regulate, the Court held the Texas Commission could rate-regulate these city gate deliveries for local distribution, using the values of the panhandle producing properties behind the Oklahoma transit and the value of the interstate line in the rate-making process. The Court even went so far as to call it intrastate commerce that was involved, thereby suggesting exclusive state power under the constitutional law of the time. But whether exclusive or concurrent, this holding should have fixed comparable operations as within the regulatory ambit of the states.

Instead of selling directly, would be a situation where the jurisdictional pipeline was also the non-jurisdictional distributor, as in FPC v. East Ohio Gas Co., 338 U.S. 464 (1950). In order to perform its obligation to regulate what is jurisdictional in such a situation without intruding into exempt local distribution, the FPC probably should require the accounting equivalent of a sale which it can rate regulate before local distribution commences.

See FPC v. East Ohio Gas Co., 338 U.S. 464, 472 (1950). If a new constitutional standard raised an absolute constitutional barrier against state regulation where there was none before, the result would be to out any previous state regulation, but this too should not increase FPC powers under the act. It should simply result in an unregulated area susceptible of congressional action if the Congress later chooses to regulate in it.

304 U.S. 224 (1938).

Id. at 238-39.
It would be difficult to so conclude in light of the 1964 City of Colton case,9a a Federal Power Act decision.

Here a major California electric utility wholesaled to the City of Colton, California from one of its main transmission lines. By far the greater portion of the power reaching the city apparently was generated in California, but power generated at federal hydro-electric projects in Nevada and Arizona also made up a part of the line load and reached the city with considerable regularity. The Ninth Circuit Court of Appeals, in its decision,9b noted the express statutory exclusion in the Federal Power Act to the effect that FPC jurisdiction was not to include any service that was subject to state regulation,9c then proceeded to make the case-by-case analysis typified by Lone Star9d to ascertain if, constitutionally, the California Commission could regulate the sale. In part because the out-of-state power supply originated in sales already controlled by the federal government, but more importantly because interests in no other state could be much affected by California regulation in circumstances where, after entering California and there obtaining the major part of its power load, the line never passed to other states, the Ninth Circuit concluded there was constitutional authority for California to regulate. Thus, under the express exemption the situation fell into a regulatory area where the Congress had not intended FPC jurisdiction to attach.

The Supreme Court reversed. In what is unmistakably a preempting decision it held that the general grant of jurisdictional authority under the Power Act overrode the express exemption.9e In so doing it attributed to Congress an intent to draw a "bright line easily ascertained" between respective state and federal jurisdictions, eliminating the need for case-by-case analysis.100 Under such an analysis, of course, the relative amounts of in-state and out-of-state power in the line become a matter of no consequence; if they were of importance there never could be a "bright line," and case-by-case analysis would be inevitable. The decision, by constant reference to the parallel Natural Gas Act, leaves little room to doubt that it applies equally to natural gas transmissions. Indeed, apart from the Natural Gas Act's limited Hinshaw amendment exemption, discussed by the Court, no basis is apparent to the writers for drawing any distinction. If the express exemption of the Federal Power Act is going to be overridden in a preempting

99 Southern Cal. Edison Co. v. FPC, 310 F. 2d 784 (9th Cir. 1962).
97 Supra, note 41.
99 Id. at 215-16.
100 Ibid.
manner, the Natural Gas Act, lacking an express exemption to cover *Lone Star* situations, is even more vulnerable.

But how can the Court find a "bright line" preempting state powers which existed at the time of an act's passage in circumstances where the Court itself, at the time of passage of the law, could provide no line other than the one of case-by-case analysis, and where Congress expressly denied any intent to preempt where fact analysis revealed constitutional power in the states to regulate?

No doubt case-by-case weighing of respective state and federal interests to determine if the states constitutionally can regulate is tedious, uncertain, and distasteful to federal regulators even apart from any desire to expand their powers. The suspicion cannot be stilled that this is a policy decision which attributes to Congress what Congress plainly did not intend, with the objective of producing, in the eyes of the Court and the Commission, a more rational regulatory scheme than in fact the law provided.

The case is a flagrant example of judicial legislation. Given the increasing interconnections of both electric and natural gas systems with sources across state lines from points of local distributor deliveries, it implies a far more severe contraction of state regulatory powers than perhaps generally is realized. It is certain to make the owners of in-state gas or electric systems reluctant to participate in the national and regional interconnections the FPC now urges in the name of efficiency and cost reduction.

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101 304 U.S. 224 (1938).

102 Broad interpretations of congressional statutes sometime are sought to be justified on the theory that Congress can repudiate the extension with legislation if it so desires. For a criticism of this process see Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A.J. 943, 944 (1963). For an example of where a justice conceded judicial legislation in terms of this process see United States v. Public Util. Comm'n, 345 U.S. 295, 320-21 (1953). Unless proponents of this view are willing to support the thesis of minority rule, the experience of the independent producers who twice obtained legislation relieving them of FPC jurisdiction only to see both bills vetoed, after which they were unable to assemble the necessary two-thirds majority to override the vetoes, reveals the inability of Congress to always perform this function. The argument itself is, of course, a palpable perversion of the judicial process. The two bills referred to are the Kerr-Harris Bill (H.R. 1758, 81st Cong., 2d Sess.), vetoed by President Truman in 1950, and the Harris-Fulbright Bill (H.R. 6645, 84th Cong., 2nd Sess.), vetoed by President Eisenhower in 1956. The first bill predates the 1954 assertion of jurisdiction over production and gathering and was designed to avoid the possibility of any such jurisdiction being asserted as a result of certain statements suggesting concurrent federal powers in Interstate Natural Gas Co. v. FPC, 331 U.S. 682 (1947).

103 The FPC's *National Power Survey Report*, issued December 12, 1964, urges regional and national electricity systems integration upon public and private electric utilities. The reward for participating in an efficient regional electric power pool, as demonstrated by the Commission's opinion in Indiana & Michigan Electric Co., —FPC— (1943), Opinion No. 458, is national regulation in lieu of local control. The *City of Colton* case, supra, note 95, makes it virtually certain the Commission will be sustained in the position here asserted.
B. The East Ohio Case

In 1950 the Supreme Court decided the case of FPC v. East Ohio Gas Co.\(^{104}\) Involved was an entirely in-state Ohio gas utility which purchased gas from a jurisdictional interstate pipeline company at the Ohio state line. It then transported the gas through its own high pressure main lines to its own local distribution systems in Ohio, and all gas ultimately was consumed in Ohio. The issue before the Court was whether the FPC could require the Ohio company, as a company engaged in a jurisdictional main line transmission, to comply with the accounting and reporting requirements imposed under the Natural Gas Act. The Ohio company contended that its activity was local distribution, exempted by the act.\(^{105}\) By the Lone Star rationale, it seems quite clear there can be no significant federal interest where, after an FPC regulated state line sale, all further handling and consumption is confined to one state. The antecedent FPC-regulated sale absolutely insulates and prevents any reaction back upon any multi-state interest distinct from the local single state interest. But the Court held the Ohio company subject to FPC jurisdiction. Though never squarely saying so, the Court necessarily placed this segment of in-state main line transmission exclusively in the federal ambit by indicating that the main line transportation facilities of the Ohio company fell within the regulatory gap where the states were forbidden to regulate.\(^{106}\)

Thus the analysis method of the East Ohio case is right. There is inquiry to determine whether the statute-imposed jurisdictional basis for Natural Gas Act regulation exists. But, as trenchantly demonstrated by Mr. Justice Jackson in his dissent, the constitutional conclusion reached is very wrong because under Lone Star standards there existed state power to regulate in situations such as this.\(^{107}\) The case is not to be justified as breaking a close question one way or the other; there is not a close question by 1938 standards. Moreover, the majority's result is conclusory and not a result of weighing respective state and federal interests. The proper approach to the constitutional question of exclusive federal jurisdiction was not even attempted.

Mr. Justice Jackson's dissent also is noteworthy for its realistic appraisal of the bureaucratic urge to expand their jurisdiction which permeates federal regulators and which must be consistently curbed if the purposes of Congress are not to be thwarted by this desire to

\(^{104}\) 338 U.S. 464 (1950).

\(^{105}\) The legislative history of the Natural Gas Act contains specific support for this position. Supra, note 27.

\(^{106}\) 338 U.S. at 472-73.

\(^{107}\) 338 U.S. at 483-484.
extract from the laws of Congress more complete regulatory schemes than Congress intended.\textsuperscript{108}

This case is a disturbing example of enlarging federal jurisdiction by shifting the constitutional standard years after Congress legislated its statute. When this occurs in a context where the changed constitutional meaning does not impose an absolute bar, but involves a regulatory area where Congress has undoubted power to fix the federal-state jurisdictional line, the Court usurps the legislative function and, in effect, amends the law.\textsuperscript{109}

C. The Phillips Case

With the 1954 decision of \textit{Phillips Petroleum Co. v. Wisconsin}\textsuperscript{110} and subsequent decisions enlarging its thrust,\textsuperscript{111} it is today beyond debate that independent producers and gatherers whose sales of gas either directly or eventually reach interstate pipeline purchasers are subject to exclusive FPC rate regulation under the Natural Gas Act. The means whereby this was accomplished are complex. \textit{Phillips} itself hints that such sales in 1938 were in the exclusive federal segment, though by 1950 they were not, a matter considered and criticized elsewhere.\textsuperscript{112} The subsequent decisions, on the other hand, speak the language of preemption. Since sufficient discussion already has been directed toward both of these tactics, attention is directed to the statutory construction methods used by the Court in \textit{Phillips}.

The Natural Gas Act, as passed in 1938, contains an express exemption of “production or gathering of natural gas.”\textsuperscript{113} These words are illuminated in the committee report as follows:

The quoted words are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however un-

\textsuperscript{108} In conclusion, Mr. Justice Jackson stated, “If the Commission had foreshadowed its present course, I do not suppose the Act would have passed, for it certainly would have evoked the resistance of state regulatory agencies instead of their support.” \textit{Id.} at 418.

\textsuperscript{109} With 1954 passage of the Hinshaw amendment the Congress did in fact restore to the states a part of the state jurisdiction usurped by the \textit{East Ohio} decision. See infra, § V B.

\textsuperscript{110} 347 U.S. 672 (1954).


\textsuperscript{112} Supra, note 85.

founded, that the elimination of the negative language would broaden the scope of the act, the committee has included it in this bill.114

It could scarcely be plainer that congressional understanding placed production and gathering in the then-extant category of constitutional intrastate activity which was inherently immune from federal regulation.

Even were one to concede, arguendo, exclusive jurisdiction in the federal government over these sales, so obviously is the act a conventional utility law in its rate regulation aspects, and so obviously is the producer problem not susceptible of such regulation, that the correct statutory interpretation should have been to leave the producers in unregulated status until Congress saw fit appropriately to implement its powers.

In the face of these indications of congressional purpose the method followed by the Court was to read the act literally, with so superficial an inquiry into its legislative history as to amount to no inquiry at all. By the narrowest of constructions an intent to regulate producer sales was found in the phrasing of the jurisdictional exception of producing or gathering. The Court said that had Congress intended to limit FPC jurisdiction to interstate pipelines it should not have used the disjunctive expression of transportation or sales, but the conjunctive form, transportation and sales.115 A moment's reflection will demonstrate transportation or sales still makes sense without attributing to the phrasing any such critical meaning. Not all gas transported is for sale for resale. Some transportation is related to nonjurisdictional consumer sales, and a purpose of the act is to keep this transportation jurisdictional even though the sale is not.116

Of course, the real question is what did Congress mean? For a Court that inquires into the legislative history behind a statute, it lies ill in its mouth to attribute precise meanings to a phrase which is

114 H.R. Rep. No. 709, 75th Cong., 1st Sess. 3-4 (1937). Somehow the majority in Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) was able to conclude that this language demonstrates an intent not to exempt producers and gatherers from rate regulation under the act. Id. at 679, particularly n. 7 and accompanying text. After many readings of the committee report and the Phillips opinion, the writers find it impossible to grasp the thought process followed by the Court. For a directly opposite treatment of the same committee report language in the context of the immediately preceding local distribution exemptions of the same statute see FPC v. East Ohio Gas Co., 338 U.S. 464, 470-71 (1950).

115 Actually the conjunctive-disjunctive dichotomy is not nearly so clear as the Court pretends. Natural Gas Act § 1(b), 52 Stat. 821 (1938), 15 U.S.C. § 717(b) (1958) actually states,

The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale

and to natural-gas companies engaged in such transportation or sale, but

shall not apply to any other transportation or sale or to the production or gathering of natural gas.

116 Ibid. And see infra, § V A.
at worst somewhat ambiguous. Not much of the gloss of legislative
history was permitted to rub off in Phillips!

Phillips contrasts in strange fashion with the 1961 decision of FPC v. Transcontinental Pipeline Corp., where, to find a "legislative
history" which would support expanded FPC jurisdiction, the Court
g went afield from the legislative processes of Congress to an unsuccess-
ful legislative request made by the FPC to a previous Congress two
years before the amendment there in issue was passed. It then applied
the intent found by analysis of this FPC request to the amendment.

As a matter of statutory construction Phillips does have its full
counterpart in the 1964 City of Colton decision where, under the
analogous portions of the Federal Power Act, an even more precise
exemption, designed to protect state jurisdictions, was read out of
the law.

The case developments here considered suggest that since about
1950 the limitations inherent in the Natural Gas Act have been
subordinated to a policy of maximizing FPC control of the natural
gas industry through legal interpretations which are policy-oriented
rather than law-oriented. The effect of these decisions has been to
expand FPC jurisdiction out of the limited exclusive federal segment
upon which it was predicated and thus drive the states from what, as
a minimum, were areas of concurrent jurisdiction on either side of
the exclusive federal segment. State jurisdiction now is confined to
local distribution in the narrowest sense (plus the limited cession back
to the states represented by the Hinshaw amendment added to the act
in 1954) on the one hand, and to physical regulation of producing
properties, including producers' rates of production, on the other. In
addition there is, of course, the limitation on the FPC inherent in the
sale for resale structure of the Natural Gas Act. This is to say state
jurisdiction is driven back upon the express exemptions or structure
of the act, narrowly interpreted. Today a second generation of in-

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119 In contrast with the cases considered in the principal text, the reader should note the
earest efforts to keep Natural Gas Act applications in bounds of the limited jurisdiction
intended by Congress in the earlier cases of FPC v. Panhandle Eastern Pipe Line Co., 337
U.S. 498, 506-13 (1949); Interstate Gas Co., v. FPC, 331 U.S. 682, 688-89 (1947); Colorado
Interstate Gas Co. v. FPC, 324 U.S. 581, 600-03 (1945); FPC v. Hope Natural Gas Co., 320
U.S. 591, 612-13 (1944). These cases involved the necessity of taking a non-jurisdictional
activity into account in the jurisdictional ratemaking function, and the Court was at pains
to demonstrate how no direct jurisdictional consequences were intended. The writers do find
one pre-1950 case, Illinois Natural Gas Co. v. Public Serv. Co., 314 U.S. 498 (1942), in
which the Court seems to have relied on a preemption analysis which cannot be justified, but
the case may be correct in result, as the facts developed indicate an exclusive federal jurisdic-
tion basis may have been present.

120 infra, § V B.
direct control cases, later to be considered, threatens to further restrict the area still open to state jurisdiction.

Enough has been shown under the Natural Gas Act that it is appropriate to make an examination of the generality of recent Supreme Court decisions. It is important to know the extent to which policy permeates the work of the Court.

IV. A Critique of Supreme Court Behavior

The writers of this article are compelled to conclude that the Natural Gas Act cases are not isolated aberrations, but symptomatic of a recent Court performance which accords little respect either to the limitations of the statutes of Congress or to past precedents of the Court itself, even though these are of very recent vintage. The hard fact must be faced that much of the present membership of the Court has deliberately chosen to abandon the traditional adjudicating role of the judiciary and embrace active intercession in the political function. One need look no further than the confrontation of viewpoints which appear in successive speeches of Mr. Justice Goldberg and Mr. Justice Harlan before the 1963 American Bar Association annual meeting in Chicago, Mr. Justice Goldberg espousing a concept that the Court’s role includes guiding the dynamics of social change121 and Mr. Justice Harlan embracing the traditional concept of applying the law as written and decided.122 Even more recently former Justice Whittaker pinpointed the Court-induced fluidity of constitutional interpretation commencing in the mid-1930’s as “the ways and means by which the repository of general governmental powers was changed from the people and their respective States to the Federal government.”123 So serious had the matter become as long ago as 1958 that the Conference of Chief Justices of the States openly called for more judicial restraint from the Court,124 an unusual procedure, and one not lightly undertaken by men whose lives are directed to maintenance of respect for the institutions of the law. One can only conclude that, after much soul-searching, open criticism was deemed more likely to preserve the institution of the Supreme Court than maintaining silence.

The attitude which today seems to permeate a majority of the Court has the approval of an undefined, but undeniably substantial part of our citizenry. They see the Supreme Court as the means of avoiding the difficulties and uncertainties of the political process in attaining their goals. Consider this declaration of the noted columnist, Walter

123 Address by former Justice Whittaker before the Southern Regional Meeting of the American Bar Association, Atlanta, Georgia, Oct. 23, 1964.
Lipmann, a leading lay apologist for judicial activism, concerning the recent question of federal court controls over state legislative reapportionment:

The dissenting opinion [of Mr. Justice Harlan] argued powerfully against bringing the affairs of the state legislatures into the federal courts. The opinion was, in my view, unanswerable but for one enormous fact. That is that the unrepresentative state legislatures are unwilling to reform themselves ... In this situation ... for which there is no known legal remedy, the intervention of the Supreme Court was the only way of breaking the deadlock.\(^\text{125}\)

Professor Kurland of the University of Chicago Law School, in a preface to the Harvard Law Review’s analysis of the Court’s decisions in its 1963 term, found the Court ceasing to be a court, and its unchecked omnipotence frightening. In some of the bluntest language yet spoken he concluded:

There is no threat from the states who are far too busy committing suicide with the weapons that the court has proferred them. One of the last gasps in the 1958 report of the Conference of Chief Justices, an organization that appears to have learned its lesson and is now reduced to its appropriate state of vassalage. There is no danger from the “liberal” element in the community who are in sympathy with the results that the Court has reached. They do not care who makes the laws, or how, so long as the laws are to their liking. The time to attack the Court, for them, is when the Court is formulating the wrong rules. It is then an “undemocratic oligarchy” stifling the will of the people’s representatives.

There is no danger to the Court from the conservative elements in the community that have maintained respect for an institution that does not exist. They are confused by the fact that the wolf now is wearing Little Red Riding Hood’s outfit rather than being adorned in Granny’s bed jacket.\(^\text{126}\)

\[\text{A. Stare Decisis And Maintained Dissents}\]

The doctrine of stare decisis means that a case, once decided, should be maintained as ruling precedent in future litigation involving the

\(^{125}\) Dallas Morning News, Aug. 20, 1964, Sec. 1, p. 16, col. 2. For an able statement of the hazards to the governmental structure and judicial system inherent in this attitude see Harlan, Thoughts at a Dedication: Keeping the Judicial Function in Balance, 49 A.B.A. J. 943 (1963).

\(^{126}\) Kurland, Foreword: “Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,” 78 Harv. L. Rev. 143, 176 (1964). Just prior to the language quoted, Professor Kurland suggests that a point now has been reached where it is farcical to go through the motions of pretending to analyze the Court’s recent decisions by legal methods. See also Kurland interview, Court Feels Free to Decide What is Best for Nation, U.S. News & World Report, January 16, 1965, p. 60; Hyneman interview, This Court Now Sees Itself as Above the Constitution, Id. at 57.
same issues. It is not invariable and immutable. Courts do err and in subsequent decisions may override their erroneous precedents. Conditions do change, and, particularly in the area of private litigation subject to common law development, this change must be reflected in the law. But, so there will exist a predictable body of law upon which men and governments can rely in ordering their existence, the doctrine supposes there will be few errors needful of correction and, over many years, the law continuously will appear so unchanging as to impart an aura of great stability. Even more particularly, it supposes that minority judges will accept and apply the decisions of the majority in the future once their views have been squarely overridden in litigation decisive of an issue. If judges persist in efforts to make their dissents ruling law with any frequency, the stare decisis principle on which our society depends for legal certainty is subverted. Government by law is thereby transmuted into government by men at the changing whims of the current holders of supreme judicial commissions.

Commenting upon one instance where stare decisis had been violated in recent years, Federal District Judge Holtzoff, an able student of the workings of our judicial system, declared:

This is not an isolated instance in recent years of this justice writing a dissenting opinion in an earlier case, then delivering the majority opinion in a later case to the opposite effect without referring to the earlier case, but completely ignoring it . . . . I am advertizing to this circumstance as an indication that in recent years one member of the Supreme Court has attached no binding character to decisions of that tribunal rendered by a divided vote, if he himself were in the minority . . . . Does the principle of stare decisis, which is fundamental to our system of jurisprudence, apply to them?

Should anyone doubt the increasingly fragile nature of the stare decisis principle or the merit of Judge Holtzoff's complaint expanded from one Justice to overall Court performance, he should study the cases collected below. In this study he should note the recent dates

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129 Baker v. Carr, 369 U.S. 186 (1962), as now implemented by Reynolds v. Sims, 377 U.S. 553 (1964) and companion cases, holds the apportionment of state legislatures a justiciable matter for the federal courts, overturning an unbroken line of cases to the contrary, most recent of which is Radford v. Gary, 352 U.S. 991 (1957). Wesberry v. Sanders, 376 U.S. 1 (1964), requiring of the states in their federal legislative apportionments the same pure population standards as Reynolds v. Sims required for state legislatures, is part and parcel of the same line of cases. See also Gray v. Sanders, 372 U.S. 368 (1963), striking down the same Georgia county unit primary system which had survived attack in South v. Peters, 339 U.S.
of the lately valid precedents, now overturned and, by comparison of minority positions in a great many of the overruled precedents with the lineup of Justices in the overruling cases, the persistent and pervasive pattern of maintained dissents which have become law. It will be evident that, in recent years, minority Justices, unreconciled with the Court's earlier decision, have bided their time and, with some change in the Court's membership, ultimately made their dissents ruling law.

It is interesting to speculate what motivates Justices who refuse to

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be bound by the squarely litigated decisions of their peers. Obviously it
is a motivation of some militance for they know the principle of *stare decisis* and the reasons for its existence as well as anyone. Presumably that motivation serves an end which to them is even more
important than the structure of the law. If so, by temperament, they
belong in the political rather than judicial arena. As judges they must
realize that in this way they weaken their own decisions as precedents
and invite their destruction at the hands of subsequent Court mem-
berships. If this assault on precedent continues long enough, destruc-
tion of our case precedent legal system will result and the rule of law
vanish from our society.

Perhaps they rely on future Justices who happen to be of the tra-
ditional school to apply *stare decisis* to the decisions they have rendered
rather than risk further damage to the structure of the law. If so, con-
sciously or unconsciously, it is a shrewd advantage they take because
this is precisely what future Justices of the traditional school likely
will feel compelled to do. This means that correction of the excesses
of the Court cannot come from within it but must come from Con-
gress, or through the process of constitutional amendment. These cor-
rective processes must be put in motion soon or the federal principle
of our governmental structure will be an empty shell. As can be seen,
the active thrust from the judiciary under this analysis is all in one
direction, and it is far advanced.

**B. Statute Construction**

While the principle of *stare decisis* has foundered in considerable
part upon cases involving constitutional issues, cases involving mere

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363 U.S. 144, 161 (1960), shows some of the Justices, whose maintained dissents are com-
mon, very insistent upon the principle of *stare decisis* where they believe the matter to be
foreclosed by a previous case with which they agree. Having dissented from the initial deci-
sion of Phillips Petroleum Co. v. Wisconsin, 374 U.S. 672 (1954), which had the effect of
bringing independent producers under the coverage of the Natural Gas Act, none of the dis-
senting justices maintained their dissents. To the contrary, with that issue once decided they
have proved rather strenuous supporters of the FPC in its regulation of independent producers.

131 For example, consider the powerful dissent of Justice Harlan in Reynolds v. Sims,
377 U.S. 533, 589 (1964), in which this Justice pronounced the majority's position entirely wrong
on the legislative reapportionment issue and of the gravest implications to the future political
life of this nation. Yet in the next term we find him acquiescing in the decided rule in
decisions I join the opinion and judgment of the Court . . . ." Again, in Carrington v. Rash,
380 U.S. 89 (1965), he acknowledges himself bound by the reapportionment decisions though
he considers them entirely wrong. See also Griffin v. California, 380 U.S. 609 (1965), where
he acquiesces in the decided rule concerning the assimilation of fifth amendment standards upon
the states in criminal proceedings through the fourteenth amendment incorporation doctrine,
though he notes his reluctance because he considers the decided principle destructive of the
federal system of government. If this Justice considered himself privileged to maintain a dis-
sent he certainly would have done so in these situations, but he does not.

statute construction demonstrate that the aggressions of the Court have not been confined at this level.

A fair statement of the principle which guided earlier Court memberships, and yet today guides the courts of the states, is embodied in an 1875 Supreme Court decision authored by Mr. Chief Justice Waite: "Our province is to decide what the law is, not to declare what it should be... If the law is wrong it should be changed, but the power for that is not with us." These words enunciate a principle that is not transient with changing times. Any court, and particularly the Supreme Court of the United States, ignores it at peril of eventual loss of its independence or public support and respect, probably both. Yet in the current term and last two terms of the Court, it is possible to identify five instances where statutes of Congress have been squarely set at naught by construing them contrary to their words and legislative history. Such cases are not usual, but their very existence demonstrates an increasing willingness openly to invade the legislative function and declare the law to be what the Court thinks it should be, not what it is.

Unlike these cases are the more usual statutory constructions where the intended coverage is uncertain and where, within limits, interpretations of extent of application could vary. In such a category is the recent spate of cases involving section 7 of the Clayton Act, the anti-merger provision of the antitrust laws. This statute forbids mergers by asset or stock acquisition "where in any line of commerce in any

133 Minor v. Hapersett, 21 Wall. 162, 178 (1875).
134 See Hamm v. City of Rock Hill, 379 U.S. 306 (1964), abating convictions of sit-in demonstrators because of later passage of the Civil Rights Act of 1964, in the face of a general statute forbidding such an interpretation of congressional enactments. See also Rosenberg v. Fleuti, 374 U.S. 449 (1963), excusing an undesirable alien from the summary deportation consequences of voluntary departure from and reentry into the United States in circumstances the Congress had considered but refused as not meriting any dispensation. NLRB v. Fruit and Vegetable Packers & Warehousemen, 377 U.S. 58 (1964), where the Court, charging Congress with failure to specify the meaning of "secondary boycott," held pertinent portions of the National Labor Relations Act applied only to total secondary boycotts, not partial boycotts aimed at only products of the primary employer sold by the secondary employer. Rusk v. Cort, 369 U.S. 367 (1962), where, with completely illogical consequences, an alleged alien out of the country was permitted recourse to declaratory judgment procedures concerning his status so long as he did not apply for a certificate of identity as contemplated by statute. Coppedge v. United States, 369 U.S. 439 (1962), which for all meaningful purposes eliminates the statutory requirement that a federal criminal appeal may not be taken in forma pauperis if the trial court certifies in writing that the appeal is not taken in good faith. Although this last case has possible constitutional implications, they were not considered; it was decided as a matter of statute construction. In contrast with these cases, and indicative that the Court can also apply statutes very strictly, is the remarkably narrow decision of United States v. American Foreign S.S. Corp., 363 U.S. 685 (1960), where the statutory requirement that an en banc court be composed of active federal judges was so strictly applied that a decision was invalidated where a judge, active at the time of rehearing en banc, had retired before the decision was rendered. Yet a federal judge on retirement does not surrender his judicial commission and is able to continue to function as a judge.
section of the country, the effect of such acquisition may be substan-
tially to lessen competition or tend to create a monopoly.\footnote{135}

In a series of cases commencing with the 1962 decision of Brown
Shoe Co. v. United States,\footnote{136} though the Court pays lip service to the
test wherein more must be shown than a mere possibility that compe-
tition will be lessened, so tightly has the Court drawn the noose it now
is almost impossible to conceive a merger involving assets beyond the
\textit{de minimis} level which could hope to pass the test. After three more
cases developing the thesis that Congress intended that all significant
concentration of business be prevented in its incipiency,\footnote{137} the series
culminates in the 1964 case of United States v. Penn-Olin Chemical
Co.,\footnote{138} where a joint-venture company to manufacture sodium chlorate
was organized by parent companies which were not competitors or
engaged in the manufacture of the chemical in the relevant market,
which was southeastern United States. Possibly each might have
entered the line of commerce in that relevant market had they not
gone together in the joint-venture. That speculation aside, it seems
logically inescapable that competition was enhanced over what it been
before the new joint venture company entered the competitive
arena.\footnote{139} This surely should have been more than enough to pass the
statutory test, for that test even contemplates a lessening of compe-
tition which is not substantial. But the Court used the speculative test
of what might have been had the joint venturers entered the manu-
facture on an individual basis, and remanded for further proceedings
to determine if there would have been such independent entry into
the line of commerce absent the joint venture. This amounts to substi-
tuting for the plainly declared statutory test of whether competition
was lessened a Court-imposed requirement of idealized competition
for which there is no legislative basis.

\textit{California v. FPC}\footnote{140} and \textit{United States v. El Paso Natural Gas Co.}\footnote{141}
involve the merger of one major interstate natural gas pipeline com-

\footnote{136} 370 U.S. 294 (1962).
\footnote{137} United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Aluminum
Co. of America, 377 U.S. 271 (1964); United States v Philadelphia National Bank, 374 U.S.
(1964); Handler and Robinson, \textit{The Supreme Court vs. Corporate Mergers}, Fortune Magazine,
January 1965, 164.
\footnote{138} 378 U.S. 158 (1964).
\footnote{139} It might be urged that there were vertical anti-competitive effects because one of the
parent companies was a purchaser of sodium chlorate and would cease to represent a market
for its erstwhile suppliers. The Court's decision attempts no such analysis, however. Moreover
it is difficult to see how competition would be lessened in a forbidden sense simply because a
former purchaser of a product exercised his undoubted right to become a manufacturer, using
the joint venture vehicle to do so instead of going it alone.
\footnote{140} 369 U.S. 482 (1962).
\footnote{141} 378 U.S. 158 (1964).
pany by another, both being subject to the Natural Gas Act and the merger having been approved by the FPC. Nevertheless the merger was invalidated, the Court reasoning that here the competition subject to being lessened was for new increments of demand to be expected in the burgeoning California market. It is unrealistic to find "competition" to serve a gas market in a pipeline utility situation which is wholly subject to the pervasive regulation of the FPC before any market service area can be entered. There is only regulated advantage or disadvantage, as determined by the regulator. Only if viewed as portions of a policy-motivated Court campaign against bigness in business do these decisions make sense.

Two recent Natural Gas Act contribution cases show the pattern in the area of immediate interest. In 1964 it became evident that the Court is able to find enormous powers, nowhere specifically granted in the Natural Gas Act, enabling the FPC to expand its controls over independent producers. Thus in *FPC v. Texaco, Inc.* the Court upheld the Commission in its promulgation of a rule refusing to accept as rate filings, gas sales contracts containing types of price escalation clauses deemed objectionable, despite the fact that the FPC has undoubted power to prevent contractual price increases beyond the just and reasonable standard from being implemented and despite the Court's earlier declarations that the contracting function, as distinct from rates permitted to be collected, is purely a matter of free negotiation between buyer and seller of the gas involved. The justification for the changed position is openly stated to be the administrative convenience of the FPC, an insubstantial basis for invading freedom of contract.

*FPC v. H. L. Hunt* stands for the proposition that a gas producer who, under protest, has accepted a temporary certificate of public convenience and necessity, conditioned that he will seek no price increase during the duration of the temporary certificate (often a matter of several years), and has commenced deliveries thereunder cannot file for a just and reasonable rate during the temporary period. Nowhere in the Natural Gas Act is there any hint that a producer should be indefinitely denied precisely what the law says shall be the

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142 Natural Gas Act § 7(f), 56 Stat. 84 (1942), 15 U.S.C. § 717f (1958) does permit extension of facilities in a service area once such area is assigned by the FPC, but this limited right is far short of permitting competition as that term is usually understood. Also, in keeping with utility principles, service areas granted will tend to be local monopolies in order to avoid uneconomic duplication of facilities.


normal basis of his rate collections. The Court found such authority for the FPC in its broad discretionary powers to accomplish the objective of holding the price of initial service gas “in line,” the “line” itself being a Court-imposed concept nowhere found in the act.

No doubt it is because of Court precedents such as these that a majority of FPC Commissioners are able to arrogate themselves to declare, as they did in a recent case,

In the absence of a direct statement of what Congress intended, we must attempt to determine what Congress would have said about this particular matter if it had been brought to its attention. We do not think it sufficient to ask simply whether the states could constitutionally have regulated the sales at issue here. Rather we are compelled to ask whether a statutory scheme [the Natural Gas Act] which would include wholesale sales at one end of a pipeline but would exclude the same sales, from a common stream at the other end of the pipeline, would make sense... We conclude that had Congress considered the sales here in question, it would have treated them as “interstate commerce.”

The subjective mental attitude disclosed by this statement goes far beyond legitimate interstitial legislation, a process of supplying the details of a regulatory scheme unmistakably outlined in the coverage of a statute. This is administrative law gone mad, the creature declaring itself equal to and independent of its creator. How could there be legislative authority in a situation premised on the assumption that Congress did not even consider it? Has it become impossible for congressional legislative enactments to remain limited, even inadequate, whenever the Commission or the Court determines a more complete or rational scheme is needed? The Congress will do well to ponder the implications of these cases if it proposes to remain master in its own house.

V. Amendments to the Natural Gas Act

A. The 1942 Amendment Of Section 7 And The Transco Case

Since its passage in 1938 the Natural Gas Act has been amended five times, only two of which are pertinent to its jurisdictional reach.

Section 7 was amended in 1942 to give the FPC certificating control over extensions of natural gas service into virgin territory unserved by any natural gas pipeline. Prior to the amendment the

146 United Gas Pipeline Co., 30 F.P.C. 560, 567-68 (1963). The writers agree with the result reached in this case, see infra, § VII B, but not with any such reasoning.
Commission lacked authority to control such extensions, though the line became jurisdictional upon extension. The legislative history reveals that the purpose of the amendment was to permit consideration of (1) financing, economics, adequacy of supporting gas reserves, feasibility and rate structure of the proposed line\textsuperscript{440} and (2) the desirability of the proposed line in terms of economic impact upon competing fuels, such as coal, and their attendant transportation systems\textsuperscript{150}.

From this amendment, in the 1961 case of \textit{FPC v. Transcontinental Gas Pipeline Corp.}, the Supreme Court has distilled a broad purpose of waste prevention, threatening what remains of the state jurisdiction over the natural gas industry. Under the facts of the case a Texas producer proposed to sell gas in a concededly direct, non-jurisdictional, industrial consumer sale to a New York electric utility for use as boiler fuel. To get the gas from Texas to New York the services of a jurisdictional interstate pipeline were required. Transco agreed to construct the necessary facilities and, because it was a jurisdictional company proposing to construct jurisdictional facilities and engage in a jurisdictional transportation, applied for a certificate authorizing it to do these things. The certificate was refused by the FPC on the grounds of (1) preemption of pipeline facilities (not actually involved because new facilities adequate to the service were proposed to be built), (2) objection to the inferior end use of gas as boiler fuel, and (3) price impact of the non-jurisdictional sale on jurisdictional rates in the area from which the gas supply would come. In view of the large use of gas as boiler fuel, which is being increased by current FPC certifications whenever it conceives the improved line load factor to be advantageous in reducing overall rate structures in jurisdictional service situations, it is a reasonable surmise that the real purpose of the Commission stemmed from its evident and strong drive to assert jurisdiction over a maximum amount of gas and to compel sales, if made at all, to be made on a jurisdictional sale for resale basis where it can control rates.

The Court accepted the validity of all three bases of the FPC's objections, relying on the expertise of the Commission in these matters instead of requiring analysis of the record by the reviewing court to determine if the FPC's refusal was justified in the particular case. But because it rested the case upon that portion of the 1942 amendment dealing with certifications of new service, now section


\textsuperscript{150} \textit{Ibid.}

\textsuperscript{151} 365 U.S. 1 (1961).
7(c) of the act, the Court's decision dwells much on the FPC's refusal to certificate for the inferior end use reason.

In so doing there arises one of the most curious cases of statutory construction which ever has occurred. Unable to find authority for the prevention of a non-jurisdictional sale in the legislative history proper, consisting of committee reports and floor debate, the Court went behind the legislative history to a legislative request contained in the FPC's 1940 Annual Report, which request had been implemented by a proposed amendment closely resembling section 7(c) as finally passed by a later Congress in 1942. The portions of the Report quoted in the opinion urged that the FPC be given power to certify proposed extensions of natural gas service into virgin territory so it could assess competitive effects upon other fuels already serving the market and less valuable from a social utility standpoint than natural gas. The FPC statement is highly tentative, indicating that the FPC itself had formulated no firm policies with regard to the end use of fuels. This language, the Court said, supplied the needed legislative intent, brushing aside the fact that the very FPC which had made the request did not believe, in 1944, that it had gained power by the 1942 amendment to consider conservation of gas in direct-sale-to-industry situations.

The import of this case, however, runs far deeper than the questionable manner of ascertaining legislative intent. To see where it brings us the reader must, for a moment, cast his mind back to the limited purpose of the Congress in passing the Natural Gas Act, then consider the words of Mr. Chief Justice Warren in Transco:

[W]hen a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively.... [W]here Congressional authority is not explicit we must ask ourselves whether state authority can practically regulate a given area and, if we find it cannot, then we are impelled to decide that federal authority governs.

The opinion throughout bristles with justification of federal regulatory action wherever, though state regulatory authority exists, some states may be unwilling to implement their powers to prevent waste in an acceptable manner. Of course, in a true federal system there will always be varying state performances. If the national shepherd pursues

153 Supra, note 148.
154 365 U.S. at 10-12.
155 Id. at 15. The contrast of this reasoning with the opinion in Udall v. Tallman, 380 U.S. 1, 16-18 (1965), another opinion by Mr. Chief Justice Warren, is so great one wonders if acceptance or rejection of administrative interpretations is more than a tool with which to reach the results desired by the Court in particular cases.
156 Id. at 19-20.
the lost lamb of the unenlightened state in this manner there results the most perfect device ever invented with which to whipsaw all the states under constantly increasing federal controls. The displacement of state authority for the inevitable inadequacy of one or some operates alike on all.

The FPC is alive to the possibilities of this decision. In a 1964 speech Commissioner O’Connor suggested the 1942 amendment gave the FPC at least some concurrent powers with the states to prevent wasteful production practices. The speech is interesting. Openly stated is the penchant of federal regulators to define when state inaction is not in the “public interest,” then deliberately and for this reason to interpret the reach of the federal regulatory machinery to fill the void — all with considerable confidence in ultimate Court approval.

It is not inconceivable that the FPC might use its certificating power to refuse interstate pipeline connections where it deemed producing practices wasteful. Already it has been suggested that the FPC might help the states in insuring ratable takes of gas from producers, Chairman Swidler responding that he thought the idea a good one and that he would welcome such cooperation with the states.

The control of non-jurisdictional activities through the FPC’s power over jurisdictional companies, facilities, and activities exemplified by the Transco decision will merit close surveillance in time to come. By preventing non-jurisdictional functions from being performed the FPC can at once, in practical effect, further contract state jurisdiction and often force the non-jurisdictional function sought to be performed into a jurisdictional format, thereby effectively enlarging its jurisdiction.

B. The Hinshaw Amendment

Inconsistent with the victory it had won in the 1950 East Ohio case, where it succeeded in subjecting an entirely in-state Ohio main line gas transporter to the Natural Gas Act for reporting purposes because the transporter’s activities fell in the exclusive federal segment, the FPC made no further effort to displace sole Ohio regulation of rates. It was content to have imposed its accounting pro-


157 The Oil Daily, Nov. 24, 1964, p. 1, col. 1. The states now are forbidden to impose ratable takes on interstate pipeline purchases of gas. Supra, note 76.


159 The transporter was also the local distributor, hence there was no sale to rate-regulate at the end of the jurisdictional transportation, unless the FPC imposed the accounting equivalent of a sale at that point. Very likely the FPC won more than it desired to implement in this case.
This compelled the company to keep separate accounts for the State of Ohio and the FPC, all at considerable added costs to its customers. Pressure for corrective legislation developed, and several bills were introduced in Congress. The bill which became the Hinshaw amendment was reported favorably after committee hearings at which witnesses evidenced growing concern with the spread of FPC jurisdiction at the expense of state regulation.

The Committee report attending the bill in the House stressed that the amendment "reaffirms and is thoroughly consistent with the original intent of the Congress in enacting the Natural Gas Act; namely, that the act was to supplement and not supplant state regulation." The purpose of the amendment was explained in these terms:

"The purpose of the amendment was explained in these terms:

[T]he Commission has undertaken regulation of some activities of certain companies engaged in the distribution of natural gas whose operations take place wholly within a single state and which can be completely regulated by the respective States. This has resulted in unnecessary duplication of State and Federal jurisdiction, and has caused extra expense to individual companies because of overlapping requirements regarding the filing of reports and information. This bill eliminates this duplication by leaving the jurisdiction over these companies exclusively in the States, as always has been intended.

In addition, floor debate in both the House and Senate demonstrated the reaction of Congress to the Court's decision in *East Ohio*. For example, Senator Bricker said:

The Congress regarded then [1938], as I am sure it still does, the purchase, transmission, and sale of natural gas for ultimate use within a State as local matters. The Congress believed that all aspects of such transactions should be regulated locally by State regulatory bodies, which were better acquainted with local needs and the activities of local companies.

And, he stated further: "The Court did not give consideration to the actual intent of Congress. Such intent would have been very simple for the Court to have found, if it had attempted to examine the debates which were held upon the floor of the Senate and the floor of the House at the time the Natural Gas Act was passed."

Despite all this, however, an attorney examining the Hinshaw

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161 Id. at 45, 52.
163 Id. at 2.
165 Id. at 3169-70.
amendment in light of Supreme Court’s *East Ohio* decision, must treat it as a congressional cession of power to the states, involving an aspect of the regulation of commerce which the Court previously had categorized as belonging exclusively within federal control. As such, a strict interpretation of the amendment is to be anticipated. Only those natural gas companies able to bring themselves squarely within its terms will be exempted.

The amendment provides:

The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are declared to be matters primarily of local concern and subject to regulation by the several states. A certification from such State Commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

Thus, to qualify for the amendment’s exemption, delivery to the intrastate pipeline must be at the boundary of or within the state where all the gas so delivered will be consumed. A delivery, even a short distance outside the state, would be fatal, and instead of a Hinshaw exemption one would have an undoubted jurisdictional situation.

While it is arguable from the language of the amendment that in order to be exempted such activities need be only subject to state regulation, not actually regulated, recourse to the floor debates and the contemporary words of Representative Hinshaw make such an

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166 See *infra*, § VIII.


168 In *Hearings on H.R. 5976 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 83d Cong., 1st Sess., 26 (1953), the question was raised as to whether gas received from an interstate line a few thousand yards outside the state boundary would fall within the exemption. The General Counsel of the FPC suggested to the subcommittee that if such companies were to be exempted by the amendment, the phrase "or approximately at the border of a state" should be added. In light of this emphasis on the amendment’s language, and subsequent failure by Congress to change the wording, a liberal construction for companies so situated seems impossible.

interpretation unlikely. Nor does the FPC accept any such interpretation. It takes the position that a state commission must be presently exercising regulatory authority, demonstrated by the state commission's certificate to that effect filed with the FPC, before the exemption will be granted. In light of the amendment's wording and legislative history, it is predictable that the FPC interpretation will prevail.

It is unproductive to inquire into what constitutes effective state regulation in these Hinshaw situations. State commissions can issue certificates that insure exemption. If a state commission issues a certificate, it is by law conclusive upon the FPC regardless of the actual effectiveness of the underlying state regulatory system. If a state commission is not willing to issue the certificate, one can be certain the FPC will refuse to find effective state regulation, and its finding on such a record will prove unassailable.

From 1954, when the amendment was passed, through 1963 the FPC had issued 131 Hinshaw exemptions. Inquiry reveals all are based on state certificates of exemption.

The Hinshaw amendment arose from a decision adverse to state regulatory powers where gas from a foreign state entered a consuming state. Situations also can arise in which gas is produced and transported solely within the same state through the medium of a jurisdictional interstate pipeline that acquired the gas on a jurisdictional basis. Even though one assumes that such in-state gas in the hands of such a deliverer is subject to the jurisdiction of the FPC, both the literal application and the spirit of the Hinshaw amendment should exempt a “Hinshaw” purchaser from FPC regulation of his further in-state main line transmissions and sales for resale beyond the point of the FPC-regulated sale to him. It would be gas delivered within a state to be consumed within the state, and that, together with meeting the formalities of the FPC's exempting procedure, is all the law requires.

In dealing with Hinshaw exemptions one always must carefully remember that the sale to the exempted transporter-reseller or transporter-distributor is jurisdictional with the FPC. It is only that pur-

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170 “Mr. Smith: I want to find out about the effect of regulation that would be applied under this bill... in states where there is no State regulatory body or where there is no effective State regulation.

“Mr. Hinshaw: When there is no effective regulation it [the transporter] would be subject to the Federal Power Commission.” 99 Cong. Rec. 10563 (1953).


172 Ibid.


174 It is the conclusion of the writers that such gas is within the jurisdiction of the FPC. See, infra, § VII B dealing with the Florida Paribaxi case.
chaser's subsequent transmissions and distributions or sales for resale that are made non-jurisdictional by the amendment.

VI. THE THRUST TO EXPAND FEDERAL POWER COMMISSION CONTROLS

The reason for the consistent drive to expand the coverage of the Natural Gas Act is not difficult to comprehend. It was ably revealed by Mr. Justice Jackson in his dissent in the 

East Ohio Gas Co. case:

I can well understand the zeal of the Federal Power Commission to expand its control over the natural gas industry. It sprawls over many states . . . . Its regulation cannot be uniform if the Federal Power Commission controls only a middle segment, with production on one end and distribution on the other committed to the control of different states . . . . This obviously subdivides regulation of what has to operate as a unitary enterprise . . . .

The pattern of encroachment developed in previous portions of this article makes it evident enough that the urge to approach unitary control has not subsided but rather has accelerated since this 1950 observation. At this point the writers will undertake to examine certain especially sensitive areas where controversy as to the powers of the FPC either presently exists or may arise.

A. FPC Legislative Program

Whether or not one agrees with the jurisdiction sought, the FPC is to be applauded when it openly seeks specific legislative authority to expand its jurisdiction. At the same time, the legislation sought is revealing of the role the Commission seeks for itself, and the disposition of certain issues where legislation once was sought also reveals that the FPC is unwilling to confine itself to the route of petitioning Congress for increased powers.

Analysis of the FPC's legislative requests from its 1954 Annual Report through its latest 1963 Annual Report discloses the familiar pattern of a federal regulatory agency striving to expand its jurisdiction. Though unlikely ever squarely to admit it (it comes close on occasion),

it is evident from the totality of its decisions, the stance it assumes in court cases, and its legislative requests that the FPC regards all natural gas rates prior to exempt local distribution not subject to its control as a threat to the overall rate structure it seeks to construct and maintain.

At the close of the 88th session of Congress in 1964, the following

requests, among others, by the FPC were outstanding. Not one was enacted, and undoubtedly most will be revived.

1. Authority to prescribe safety regulations with respect to the construction and operation of interstate pipelines.177 Such regulatory powers, if granted, might be preemptive and oust state regulation, though the effect realistically to be anticipated in so sensitive an area of the local police power’s responsibility for public safety would be non-preemptive concurrent regulation, with the federal standards treated as minimums and the individual states permitted to promulgate more stringent regulations to the extent these did not become unduly burdensome upon commerce.178

2. Authority to approve securities issues of interstate natural gas pipelines.179

3. Authority to order interconnections of jurisdictional facilities, and the terms, arrangements and conditions for emergency sale or exchange of gas through such interconnections in jurisdictional situations. The same arrangement is sought on a voluntary basis where jurisdiction does not exist, with a jurisdictional exemption so the voluntarily cooperating non-jurisdictional supplier does not become subject to FPC jurisdiction by reason of supplying gas into jurisdictional lines.180 FPC behavior to date does not inspire confidence that the voluntary cooperation exemption would be maintained.181 By interpretation or a further legislative request it is quite predictable that a time would come when this Commission would attempt to sweep the voluntary suppliers into jurisdictional status.

4. Comprehensive investigative authority over all facets of the natural gas industry, whether or not subject to the jurisdiction of the Commission.182

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177 No bills have been submitted in support of this request. In the series of footnotes following, the FPC requests for legislation may have existed prior to 1954, but annual reports before that date were not checked.

178 See supra, note 77.

179 This request is embodied in H.R. 6790 and S. 1826, 88th Cong., 1st Sess. (1961). It has been carried in all annual FPC reports from 1954 through 1963. See also S. 1700, 88th Cong., 1st Sess. (1963) seeking to authorize the Commission to control security issues designed to finance the construction, acquisition or operation of pipeline facilities for which a certificate of public convenience and security is needed from the Commission.

180 This request, similar in content to what already is contained in the Federal Power Act, 16 U.S.C. §§ 824(c) and (d), is embodied in H.R. 7586 and S. 1843, 88th Cong., 1st Sess. (1963). It has been carried in all annual FPC reports from 1954 through 1963. At present the Commission, by regulation, excepts emergency sales and transportation by an independent producer if limited to a duration of less than 60 days. 18 C.F.R. § 157.29 (1961).

181 See supra, note 103.

182 This request, similar in content to what already is contained in the Federal Power Act,
5. Authority to regulate importation and exportation of natural gas with foreign nations, to the extent these operations are located in the United States, on the same basis as domestic natural gas, instead of the present authority merely to authorize or refuse to authorize imports and exports.\footnote{185} Also to be noted is the Commission's press release of January 14, 1963, giving notice that the FPC is considering claiming jurisdiction over the import and export of liquefied natural gas equal to the jurisdiction it has or obtains over pipeline gas in foreign commerce.

6. Sole authority to pass upon acquisitions of jurisdictional natural gas pipeline companies and their assets to the exclusion of the regular antitrust laws.\footnote{184} This request is an effort to overcome the effects of California v. FPC,\footnote{185} where a merger between jurisdictional pipelines was held subject to the general antitrust laws in addition to FPC regulatory approval.

7. Authority to require FPC approval of alienation of gas reserves owned by an interstate pipeline company.\footnote{186} The request apparently originates in an effort to overcome the 1949 decision of FPC v. Panhandle Eastern Pipe Line Co.,\footnote{187} permitting a jurisdictional interstate pipeline company to spin off producing properties into a non-jurisdictional producing company without the FPC having jurisdiction over the transaction.

Unlike the legal situation at the time of the Panhandle case, when production was not yet treated as per se jurisdictional from the ratemaking standpoint (though if owned by a pipeline it had to be evaluated on some basis in order to include it as an element in jurisdictional sales off the line), it is now established that there is direct ratemaking jurisdiction of any production which goes into an interstate pipeline for resale, and the gas reserves which support such jurisdictional service are treated as dedicated to that service, absent FPC permitted abandonment.\footnote{188} Quite
clearly a transfer of reserves so dedicated must remain dedicated in the hands of a purchaser-successor as well as the owner under which the dedication took place. In situations where independent producers acquire dedicated reserves as successors to the company originally certificated, the FPC has developed procedures requiring the successor to be certificated by it.\textsuperscript{180} Although untested, it is probable that the conditioning power inherent in the certificating process could be used to prevent any rate increase which might be demanded by the successor but could not have been obtained by the predecessor.\textsuperscript{180}

This FPC successor-certificating procedure would seem to apply equally to both independent producer conveyances to independent producer successors and pipeline producer conveyances to independent producer successors. Thus far it has been applied only in the former situation, but the FPC attitude regarding the ratemaking consequences which would flow from the latter situation is fairly well disclosed by some of its recent proceedings.

In a 1962 case\textsuperscript{191} a pipeline company proposed to convey both on-system and off-system reserves to an affiliated producing company which thereafter would continue, as an independent producer, to deliver the on-system reserves to the pipeline for jurisdictional service. Because of FPC staff objections these matters were settled on the basis that on-system reserves were not conveyed but remained in the ownership of the pipeline company, and only the off-system reserves were transferred.

In 1964 the FPC decided, in notably broad and uncompro-mising terms, that deliveries to a jurisdictional pipeline company from its subsidiary producing company should be subject to cost of service-rate base ratemaking, as if produced by the pipeline company itself.\textsuperscript{192} The reverse of this situation, where the jurisdictional pipeline company is in a subordinate or affiliated sister company relationship with the producing company, is presently in litigation on the issue of whether independent producer or pipeline ratemaking methods shall rule the rates there to be permitted.\textsuperscript{193} Given the very broad ratemaking standards accorded the Commission by the Court\textsuperscript{194} and acknowledging that both

\textsuperscript{190} Cf. 30 F.P.C. at 1165.
\textsuperscript{191} Tenneco Corp., 28 F.P.C. 382 (1962).
\textsuperscript{192} Union Producing Co., 31 F.P.C. 41 (1964).
\textsuperscript{193} Cities Serv. Gas Co., Docket No. RP 64-97.
\textsuperscript{194} Wisconsin v. FPC, 373 U.S. 294, 309 (1963).
of these situations are fully-jurisdictional gas deliveries with only the ratemaking method in issue, in the opinion of the writers there appears little likelihood of overturning the FPC in whatever ratemaking method it chooses, provided the method chosen does not yield unreasonable or confiscatory results. Indeed, even as to off-system sales by jurisdictional pipeline producers, which sales are jurisdictional because ending in the jurisdictional service of another pipeline company it is unlikely the Commission must accord such sales independent producer ratemaking treatment, though to date it has done so both in the hands of pipeline producers and of successors to whom such reserves have been sold.

Thus, it appears the FPC does not absolutely need legislation authorizing it to control alienations of pipeline-owned reserves dedicated to jurisdictional service in order to control rates in the hands of successors at a lower level than those to which the successor normally would be entitled. On the other hand, the administrative complications are formidable if control in this manner is the only device available. It is perhaps to avoid such complications, which will arise if pipelines are permitted freely to make these transfers, that the FPC maintains this legislative request, intending, if it gets the power, to prevent the pipelines from making any conveyances of dedicated reserves save in exceptional situations acceptable to it.

One can be quite certain that by its request the Commission does not mean to control the conveyances of pipeline-owned reserves which never have become dedicated to jurisdictional service. But even if this be true, the problem of measuring the extent of pipeline-owned reserves which have become dedicated to jurisdictional service promises immense difficulties.

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105 The broad ratemaking standards of FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944) would make it most difficult to defeat such a result. This would not be a case of separating non-jurisdictional from jurisdictional activities, a matter which must be approached with more precision. See Cities Serv. Gas Co. v. FPC, 337 F.2d 97 (10th Cir. 1964), where an FPC attempt to claim the advantage for ratemaking purposes of losses in non-jurisdictional activities incorporated in a consolidated income tax return with jurisdictional revenues was rebuffed, the court noting that ratemaking discretion is broad, but not so broad as to permit reduction of rates with wholly non-jurisdictional tax benefits.

106 The dedication of reserves by an independent producer is readily enough identified in terms of the properties described in the gas sales contract with a pipeline, but where it is the pipeline's own reserves there is no contract. Suppose a jurisdictional pipeline owned reserves in an area from which it was taking gas into its own system equal to a 100-year supply. Certainly the wells connected to its pipeline and the drilling and spacing unit acreage occupied by producing wells (or practical equivalent in a state not setting drilling and spacing units) should be dedicated. Beyond this, reserve acreage in the area equivalent to the deliverability through time required by the FPC in producer contracts filed as rate schedules might be held dedicated. But it would be confiscatory to require unduly large dedications of reserves simply because they are owned by the pipeline in the immediate area. Discounted present worth is the
8. Authority to regulate direct industrial consumer sales in addition to presently-regulated sales for resale. At the present time there exists indirect authority to prevent such sales through exercise of the certificating power pursuant to FPC v. Transcontinental Gas Pipeline Corp., but this is not so efficient as would be direct regulation. This case and this legislative request well demonstrate the FPC's concern with the price effects of sales which it cannot regulate upon the rates allowed in jurisdictional sales.

From 1956 through 1960 the Commission sought legislative approval for abandonment of the traditional cost of service-rate base methods of ratemaking. Presumably this has been dropped because of numerous cases supporting broad discretionary powers in selecting ratemaking methods, culminating in the Supreme Court's 1963 dictum in Wisconsin v. FPC. In that case, the Court encouraged and tentatively approved the area rate scheme by which producer rates will be determined and scheduled on an industry basis for all independent producers in large geographic areas instead of in terms of the revenue needs of individual producers.

From 1956 through 1960 the Commission sought legislative authority to increase rates without the purchaser's consent. This always has been possible in the open-end rate filings typical of interstate pipeline companies' sales to local distributors. In the contractual rate filings which typify independent producer-pipeline purchaser sales arrangements it is well established that contract prices can be reduced. As to rate increases above contract prices, the Commission has some

real value of any oil and gas property, and that value could be largely destroyed if excessive reserves were required to be committed as measured against the daily service delivery volumes being taken into the pipeline's own system.

This request is embodied in H.R. 7117 and S. 1734, 88th Congress, 1st Sess. (1963). It has been carried in all annual FPC reports since 1961, and in the 1963 report was the subject of comment specially urging passage.


For an able discussion of the area rate scheme and the legal difficulties it will generate, see Ross, The Area Rate Proceedings: An Unsettled Experiment in Public Control of Natural Gas Prices, 18 Sw. L.J. 165 (1964). The writers of this article do not believe the area rate method can bear legal analysis in terms of the "just and reasonable" rate standards for the individual company contemplated by the Natural Gas Act. It will produce windfalls for a few and virtual confiscation for others. Nevertheless the writers anticipate that the Supreme Court will uphold it when the test case arrives, for this is about the only way to clamp a lid back on the Pandora's box the Court opened in 1954, when it held producers and gatherers subject to rate regulation under the Natural Gas Act. That error logically compels development of an expeditious ratemaking device by the Commission and the Court when the statute itself provides none, even though it results in conventional cost of service-rate base ratemaking under which neither confiscation nor windfalls will be possible in the case of jurisdictional pipelines but revenue consequences in relation to costs for independent producers subject to area rates so haphazard it is difficult to conceive of them as utility ratemakings.
power under *FPC v. Sierra Power Co.*, where, in the analagous Federal Power Act area, the Supreme Court suggested that rates might be increased over contract prices if they were so low as to affect the public interest adversely by casting an excessive and discriminatory burden on other consumers. Very likely in ceasing to make this request the FPC has concluded that this power, along with application of area rates to independent producers, will eliminate, in a fairly expeditious manner, rates deemed too low.

Through 1961 the Commission sought power to suspend rate schedules of interstate pipeline companies in sales for resale to industrial users just as in other sales subject to the Natural Gas Act. In 1962 section 4(e) of the act was amended to give it this power.

From 1956 through 1960 the Commission sought legislation authorizing it to eliminate indefinite price escalation clauses in independent producer contracts filed as rate schedules. Unwilling to acquiesce in failure to obtain such legislation, the Commission, by its Order No. 242, attained through rulemaking the result it had sought through legislation.

### B. Rulemaking Powers

That the rulemaking power of the FPC under Section 16 of the Natural Gas Act is a remarkably potent weapon is demonstrated by *FPC v. Texaco, Inc.* Despite previous declarations that contractual arrangements between producer and pipeline purchaser were within the sole discretion of the parties, the Supreme Court upheld FPC Order No. 242 to the effect that, after April 3, 1962, the Commission would refuse to accept for filing as rate schedules any contracts executed on or after that date which contained provisions other than those for increased tax reimbursement, price increases to specified amounts at definite dates, and once-in-five-year price redeterminations. Banned by the regulation were "most favored nation" clauses designed to match prices with those obtained by other sellers under subsequently-negotiated contracts, spiral escalation clauses tied to increased

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201 350 U.S. 348 (1956). See also dictum in United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956), a Natural Gas Act case. In Gulf Oil Corp., Docket No. 9-9520 an FPC examiner, after conducting an overall rate review under § 5a of the Natural Gas Act, ordered Gulf to file new rates revised upward as well as downward, as necessary, to eliminate extreme disparities in individual sales, even though the upward adjustments exceeded contract prices. Whether this properly falls within the *Sierra* principle is unlitigated to date, as the case was settled.


206 Sufrê, note 144.
prices obtained by purchasers of gas, and any other indefinite pricing clauses not permitted under the rule. The basis of this decision can only be administrative convenience, for while such clauses provide the opportunity to seek rate increases in a manner that is frequent and unpredictable, rate increases can be obtained only to the extent that the just and reasonable standards of the Natural Gas Act, as administered by the FPC, are met. The Supreme Court's decision means the Commission's power to legislate interstitially by rulemaking is so great that even an acknowledged substantive legal right freely to contract can be set aside where deemed administratively expedient.

Further evidence that the Court will accord broad rulemaking powers is found in the FPC v. H. L. Hunt opinion which actively encourages the Commission to refuse to take jurisdiction of what it deems to be inconsequential cases. If such a rule comes to pass, producer sales contracts which the Congress believed it lacked power to regulate will be preempted for rate regulation purposes by a law which had no preemptive purpose. Then some persons affected by the regulation thus imposed will be ousted from jurisdictional recourse before the only tribunal authorized to hear them. That what the Court holds to be a rate-regulated utility relationship can be relieved of active regulation for reasons of administrative convenience is a difficult idea to grasp.

Another rulemaking, Order No. 243,208 redefined "independent producer" from a producer not primarily engaged in the operations of an interstate pipeline to one not engaged in the transportation of natural gas in interstate commerce other than as a gatherer. The effect is to narrow the group enjoying what is usually a rate advantage now accorded independent producers and to enlarge the interstate pipeline group subject to relatively low returns by reason of the cost of service-rate base conventional utility ratemaking methods yet applied to them.209 It is conceivable that pipeline producers could be denied the advantages of independent producer status as to their production not taken into their own pipeline systems but sold to other pipelines on a jurisdictional basis for resale.210 At the present time proceedings are in progress to determine whether a gas sale by an oil company to its affiliated jurisdictional gas company shall be accorded independent

209 See DeCrane, Federal Power Commission: Regulatory Evolution At the Ten Year Mark, 15th Oil & Gas Inst. 271 (Sw. Legal Foundation 1964); Rather, Pipeline and Producer Problems Relating to Pipeline Owned Reserves — With Particular Reference to Recent Federal Power Commission Regulation, 1964 Proceedings, ABA Section of Mineral and Natural Resources Law 43.
210 See infra, note 195.
producer rate status or cost of service pipeline status.\textsuperscript{211} In the reverse situation of deliveries to a jurisdictional pipeline company from its subsidiary producing company, cost of service-rate base pipeline rate-making was imposed.\textsuperscript{212}

Docket No. R-199 is a proposed rulemaking designed to restrict the terms of “take or pay” provisions which can be inserted in a contract filed as a rate schedule. Docket No. R-200 is a proposed rulemaking to provide standards for pipeline quality gas, with downward price adjustments for gas of deficient B.T.U. content but no upward adjustments for gas of superior content. On parity of reasoning with the now-established legality of rejecting indefinite pricing clauses, it is predictable that a reasonable “take or pay” restriction also will be upheld. However, the failure to give upward adjustments for gas of superior B.T.U. rating seems an arbitrary discrimination. Natural gas is chiefly valuable for its heat content, and it is quite obvious that any purchaser willing to pay a B.T.U. premium is able, or expects shortly to become able, to so blend gas as to produce an overall line flow at or near minimum requirements. Certainly the purchaser or his customers should not have a windfall by purchasing gas of superior quality for less than it is worth to them.

These rulemakings are rationalized by pointing out that an applicant adversely affected by the rule can apply for an exception.\textsuperscript{213} Of course such applications necessarily must prove exercises in futility. If not, the rule would be ineffective to accomplish its intended purpose.

C. FPC Treatment Of Income Tax Depletion Allowances, Depreciation Deferrals And Investment Credits

Though without any implications to the federal-state regulatory relationship, the behavior of the FPC in the income tax area merits close attention because of the treatment it has accorded tax concessions granted by Congress.

In \textit{El Paso Natural Gas Co. v. FPC}\textsuperscript{214} it was held that tax savings resulting from the percentage depletion allowance, designed by Congress to restore the capital attrition which occurs when a wasting natural resource is produced, could not be retained by gas producers in jurisdictional service situations but had to be flowed through to purchasers for the ultimate benefit of consumers. The rule is no longer of importance to independent producers since abandonment of cost

\textsuperscript{211} \textit{Supra}, note 193.
\textsuperscript{212} \textit{Supra}, note 192.
\textsuperscript{213} \textit{FPC v. Texaco Inc.}, 377 U.S. 33 (1964); 18 C.F.R. § 1.7(b) (1961).
of service ratemaking as to them, but it continues to affect interstate pipeline producers subject to this ratemaking method. The depletion allowance may or may not be overgenerous, a widely disputed point, but to take from any category of wasting natural resource producers the capital restoration allowed them, in the absence of a positive congressional indication they are to be singled out, treated differently from other taxpayers, and denied capital restoration, seems the least likely interpretation to put on the law. It is, however, typical of current FPC attitudes concerning tax advantages provided in the income tax statutes.

In 1954 Congress provided the business community with an option to depreciate qualifying properties by either straight line or accelerated methods. Accelerated methods are designed to give greater depreciation early in the life of an investment, at the expense of later annual depreciations. Total depreciation does not vary, but in the case of an expanding operation the overall impact can be deferred so long as expansion is rapid enough. For obvious reasons it was to the advantage of many companies in the expanding natural gas industry to choose accelerated depreciation.

Where accelerated depreciation was used, the FPC, following principles developed in 1953 involving the amortization of emergency facilities, first permitted an accounting procedure known as "normalization." This allows income taxes to be computed on a straight line basis for ratemaking purposes even though actual tax liability is less because computed by one of the accelerated methods. Through normalization a special fund is accumulated, charged with the burden of the deferred future tax liability. At first the FPC included this reserve fund in the rate base and allowed it the same rate of return as other assets.

In City of Detroit v. FPC the court approved normalization in relation to emergency facilities. This approval of normalization was carried by the FPC into subsequent cases dealing with ordinary accelerated depreciation. As late as 1960 the FPC permitted normalization and a full rate of return on the resulting reserve fund.

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In 1961 the FPC altered its position. While not preventing a natural gas company from using accelerated depreciation for income tax purposes, the FPC may reduce benefits or deny them entirely by refusing to allow a full rate of return on the reserve fund. Thus, the FPC reduced the rate of return that would be allowed on the reserve fund to one and one-half per cent, regardless of the rate allowed on the remainder of the rate base. This reduction was upheld by a sharply divided court sitting en banc in Panhandle Eastern Pipeline Co. v. FPC on the theory that the congressional intent behind accelerated depreciation was to provide investment incentive and, with other advantages, a one and one-half percent return was sufficient incentive. Although the court correctly stated the purpose of the depreciation allowance, its upholding the one and one-half percent limit was a complete non sequitur.

A strong argument can be made that this step was pure defiance of Congress. It amounts pro tanto to denial of the tax advantage intended by Congress to draw a distinction between the rate that is allowed on capital investment depreciated on a straight-line basis and the reserve fund which is its economic equivalent. The dissent in this case is a masterful revelation of how a general congressional enactment can be manipulated to bring about a conclusion opposite to that which normally would follow, by charging Congress with failure to specify in its statute how a particular class of taxpayers should be treated.

The FPC went even further, however, and, in its 1964 decision of Alabama-Tennessee Natural Gas Co., completely reversed its original position. It not only refused to allow any return whatsoever on the accumulated reserve but abolished normalization. Henceforth, cost of service can include only the amount of income tax actually paid. Obviously the FPC was persuaded that a taxpayer able to defer the impact of the eventual higher rates associated with accelerated depreciation through continued expansion should not enjoy the advantages of normalization in any situation subject to its jurisdiction, even though all other taxpayers continue to enjoy the concession in full.

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225 Id. at 663-74. "The majority err... and go beyond their province when they say the sections [of the Internal Revenue Code], though general in language, do not apply literally to regulated companies because their language and legislative history do not show Congress considered their 'regulatory consequences'... This amounts to saying that Congress made a mistake... and that the Commission and this court have the right to amend the section in accord with their 'economic and regulatory philosophy.'" Id. at 673.
The Commission noted that Congress had not specifically directed where the tax advantage was to go in regulated industries. This is hardly a remarkable omission from a general tax law applicable to the totality of millions of American businesses. And, while the majority is correct in stating that its duty under the Natural Gas Act is to insure the lowest reasonable rates, accelerated depreciation was intended by Congress to benefit the entire business community. It is a part of the Internal Revenue Code, not the Natural Gas Act. The FPC seems to have placed the intent of Congress expressed in the Natural Gas Act over the later expressed intent of Congress concerning accelerated depreciation for all businesses. Two separate congressional pronouncements are involved. Absent a clear indication that Congress intended to single out certain businesses for discriminatory treatment, the later law should modify, not be modified by the earlier.

That the congressional purpose was thwarted is indicated by the treatment accorded the importunings of FPC Chairman Swidler when he sought to persuade Congress to remove a specific provision from the Revenue Act of 1964 directing regulatory agencies to allow jurisdictional companies to retain the savings from the investment tax credit that was introduced in the Revenue Act of 1962. The provision was inserted because of FPC and court behavior in regard to accelerated depreciation. The position of the FPC was that these savings, too, should be "flowed through" to the customers of the jurisdictional natural gas companies. Congress refused to eliminate the provision, and it appears in the Revenue Act of 1964 as section 203(e).

There is no congressional directive as to what rate of return is to be allowed on the investment tax credits that companies choose to retain. Since these are permanent tax savings, there is no reason for them to appear in an earmarked reserve fund. Neither is there any reason why a full rate of return should not be allowed on the funds if retained. Very plainly, by enacting section 203(e), Congress indicated that the FPC should not again thwart the operation of its general tax laws.

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227 Supra, note 225.
228 Ibid.
230 Hearings on H.R. 8363 Before Senate Finance Committee, 88th Cong., 1st Sess., 1797-1801 (1961). In seeking to avoid a congressional prohibition of flow-through treatment for the investment tax credit, Chairman Swidler said that both with respect to the merits of the position and with respect to its precedent as destructive of the administrative process the Congress should not specify the tax treatment. Id. at 1801. For a Commission that purported to find authority in these tax situations in the failure of Congress to specify the treatment intended supra, note 225, it truly gives the game away to take this position. It amounts to an assertion to Congress that the administrative process in fact includes the power to legislate, from which Congress is invited to stand aside and let the Commission control.
Were the FPC disposed to be concerned with the intent of Congress, or the courts for it, should reconsider the position that has been taken in these tax matters. Instead, the FPC response to the implications of section 203(e) was the sweeping decision of Alabama-Tennessee Natural Gas Co., entirely eliminating the benefits of accelerated depreciation. Beyond this, there now are indications that the FPC proposes to compel jurisdictional interstate pipelines to "choose" accelerated depreciation so there always will be maximum tax deferrals to flow through.\(^{233}\)

D. Refund Jurisdiction

A refunding obligation upon jurisdictional natural gas companies may arise from a permanent initial certification requiring refund of a portion of the rates collected in the temporary initial certification period,\(^{234}\) collections under bond after the suspension period in the case of requested rate increases,\(^{235}\) or agreements involving either of these types of proceedings settled without final adjudication, on terms agreeable to the FPC and other interested parties.\(^{236}\) Additionally, though overall review of a jurisdictional company’s rates gives rise to no refund obligation as to past collections,\(^{237}\) continued collections under court stay orders pending judicial review of an FPC order directing reduced rates can give rise to a refunding obligation.

It is the view of the FPC that, absent a showing that a particular company is entitled to keep all or part of a refund by reason of having absorbed the increase without passing it on, or by reason of other equity, the refund should be passed along for the benefit of the ultimate consumer. Yet the ultimate service from the purchasing local

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\(^{233}\) FPC v. H. L. Hunt, 376 U.S. 515 (1964). According to Public Serv. Comm’n v. FPC, 329 F.2d 242 (D.C. Cir. 1964), cert. denied, 377 U.S. 963 (1964), this obligation can arise even though there is no stated refund condition in the temporary certificate.


distributor who resells to the consumer clearly is outside of FPC jurisdiction. 8 Lacking that jurisdiction, the FPC thus far has contended itself with controlling refunds as they pass through the chain of jurisdictional natural gas companies to non-jurisdictional local distributors, then urging action by the state regulatory commissions to accomplish the final step. 9 While thus far conceding lack of jurisdiction to effect distribution to ultimate consumers, the FPC has conducted surveys to ascertain the extent to which refunds have been passed on to them and has been sharply critical of the failure of some states to require that these refunds be flowed through. 40 Its attack has drawn spirited rejoinder. 41 The concern of the FPC that refunds be flowed through to the ultimate consumer is evident enough. The hazard to state regulation is that the FPC will attempt to devise means of accomplishing this by indirect procedures. The attempt, if made, very likely would take the form of ordering a jurisdictional natural gas company in the chain of refund to hold the funds, as stakeholder, until the FPC has received assurances that the disposition to be made by non-jurisdictional companies meets its approval. 42 Though its authority so to act could not be rested on jurisdictional transportation or sale for resale insofar as concededly non-jurisdictional companies are concerned, a basis of control is presented in the jurisdictional stakeholder company. Justification for implementing indirectly what cannot be done directly might be found in the purpose of the act, so often stressed in the Supreme Court’s opinions, viz., to insure the protection of ultimate consumers, 43 a result that always is indirect since by the structure of the act the FPC is unable directly to regulate local distribution.

The possibility is by no means fanciful. A very close analogy exists in the Supreme Court’s 1961 decision of FPC v. Transcontinental Gas Pipeline Corporation, 239 previously discussed, where the indirect con-

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239 In Humble Oil & Refining Co., 30 F.P.C. 220 (1963), the FPC stated that if reports submitted by jurisdictional companies in the chain indicated “that the refunds will flow through to ultimate consumers or distribution companies not subject to the Commission’s jurisdiction, the Commission will authorize the release of such refund sums by Humble (unless a State regulatory authority after notification of the sum to be made available to a company subject to its regulatory jurisdiction asks us to defer releasing the funds until it can determine their ultimate disposition).” 9 Fed. Reg. at 9679 (1964).
241 The National Association of Railroad and Utility Commissions has been extremely critical of the FPC in this regard, stating that the FPC has attempted to convey the impression of impropriety if any refunds are retained by a non-jurisdictional company whereas there may be full justification for the retention in any particular instance. Id. at 59.
242 This would be merely an expanded use of the procedure now followed. Supra, note 239.
243 One of the strongest statements of this constantly recurring theme occurs in Atlantic Refining Co. v. Public Serv. Comm’n, 360 U.S. 378, 388 (1959).
244 Supra, note 151 and § V A.
control of the certificating power over a jurisdictional gas pipeline company and its facilities was used to prevent a non-jurisdictional direct consumer sale from a Texas producer to a New York electric utility. Indeed, the opinion in that case is so replete with Court declarations of ultimate consumer concern as a justification for the indirect control there permitted that it practically invites this further step into indirect refund controls at the expense of present state powers to act, or not act, as each state sees fit.

For such remaining light as may be thrown on the refund problem, one must turn to a series of stay order cases involving the disposition of funds collected pending appellate review of FPC rate reduction orders. There is no doubt but that such funds are subject to disposition by the courts in the exercise of their inherent equity powers. The permissible range of authorized disposition, however, is something else.

In Central States Elec. Co. v. Muscatine, the Supreme Court held the circuit court of appeals, under whose stay order such funds were collected, without jurisdiction to order payment to ultimate consumers, because the FPC had no jurisdiction under the Natural Gas Act to have made such an order. This is the dividing line honored by the FPC as its current refund orders. Beyond this, the Court stated that the circuit court should hold the fund intact until consumers had been afforded a reasonable opportunity to litigate their rights to the fund before state tribunals. However, when disposition was made it was to be within the limitations of FPC jurisdiction.

In a subsequent case, FPC v. Interstate Natural Gas Company, this reasoning was extended to include refunds to ultimate consumers where the distributor was a natural gas company subject to FPC jurisdiction, as well as a local distributor. By seizing on a jurisdictional company’s fortuitous ownership of non-jurisdictional distribution facilities to extend the Court’s refund powers to a non-jurisdictional transaction, the case introduces an element of looseness upon which the Supreme Court might seize to justify indirect control of refunds by the FPC. The threat is the more serious because there are dissents in the two cases (the second case making it clear that they are maintained dissents) indicating non-acquiescence in the restrictions of the present rule. Apart from some objection to any limitations upon the inherent power of a court sitting in equity, dissent is rested on the purpose of the Natural Gas Act to protect ultimate consumers. The

245 324 U.S. 138 (1945).
246 Id. at 146.
247 Ibid.
dissenters declare that funds not fairly allocable to companies in the
chain of service should be disbursed to consumers.\textsuperscript{240} It would be a
small step indeed to convert such reasoning into justification for the
indirect control of refunds here explored.

E. In-Place Sales Of Reserves

In-place sales of reserves of natural gas already committed to juris-
dictional service under the Natural Gas Act is not the problem here
taken under consideration. The FPC has developed supplemental certi-
ficating procedures whereby the successor assignees of acreage con-
taining such reserves are substituted for the predecessor assignors, as
sellers in the rate schedules filed. True enough there are problems not
yet firmly resolved with regard to refund obligations incurred, or in
process of possibly being incurred, while the property was in the hands
of the assignor, but there is no doubt since about 1954 of general jurisdic-
tional status.\textsuperscript{250} The difficulties are difficulties of administrative
accommodation only.

The problem here considered is confined to situations where an
interstate pipeline purchaser proposes to acquire natural gas reserves,
(which usually will be in the property form of oil and gas leases) from
which no jurisdictional sales yet have been made. Though the Supreme
Court has stated that the jurisdictional event is not the contract of
sale but rather the actual commencement of deliveries on a jurisdict-
ional basis,\textsuperscript{201} the FPC asserts it has complete jurisdiction over in-place
reserve acquisitions and the parties thereto, just as in ordinary delivery
gas sales contract situations with deliveries in progress. Even though
this position were otherwise sound, it is not apparent how the Com-
mision can have jurisdiction before actual deliveries begin if the in-
place sale is finally consummated before this event occurs. Despite the
fact that it has not thus far succeeded in persuading any court to its
view, the position taken by the Commission has caused the termination
of at least two major in-place sales.\textsuperscript{252}

The most instructive litigation is the case of Public Serv. Comm’n
v. FPC.\textsuperscript{253} In proceedings leading up to this case the FPC had acknow-

\textsuperscript{240} \textit{Id.}, at 598-600.
\textsuperscript{249} \textit{Supra}, notes 188 and 189.
\textsuperscript{250} Atlantic Refining Co. v. Public Serv. Comm’n, 360 U.S. 178, 387-88 (1959). The
FPC has in the past unmistakably taken the same position. Pioneer Gathering System, 21 F.P.C.
260 (1960).
\textsuperscript{251} Humble-Monterey King Ranch leased sales of reserves approximating six trillion cubic
feet, Docket No. CP62-88, withdrawn May 14, 1963. Pan American - Southwest - El Paso,
San Juan Basin lease sales of reserves, Consolidated Dockets CP63-126, CL63-118 and
\textsuperscript{252} 287 F.2d 143 (D.C. Cir. 1960).
ledged the sale of certain leaseholds to a major interstate pipeline purchaser to be exempt under the Natural Gas Act, but its decision was challenged on appeal by an intervenor. The District of Columbia Circuit Court of Appeals agreed that the sale by the producer indeed was non-jurisdictional, but held, as to the jurisdictional would-be pipeline purchaser, that the Commission must either (1) expressly disclaim any approval of the price paid or (2) establish by evidence that the price paid would be consistent with the public convenience and necessity.

The first of these alternatives really is an impossible one for a utility purchaser. Unless the in-place acquisition is intended entirely for non-jurisdictional in-state service (an unusual situation), few jurisdictional pipeline companies, aware of the hazard, would risk purchasing properties at peril of the values upon which the FPC will permit taking them into its rate base. The other alternative, and the only practical one, amounts to effective indirect assertion of jurisdiction through the certificating power over the jurisdictional purchaser who is party to the sales transaction. With the ice already broken on the use of the certificating power to defeat non-jurisdictional sales in the 1961 Transco case, it is very predictable that this lower court position will be sustained by the Supreme Court, for here the sale is not even prevented. It is only controlled by the economic realities of public utility ratemaking processes.

After remand this case again was appealed, this time to the Fifth Circuit. That court reversed the FPC, which on remand had changed its position, claiming general jurisdiction as in other sale of gas for interstate use. The Fifth Circuits 1964 Marr v. FPC decision is written to the same effect as the District of Columbia Circuit's in the first round.

Regardless of the outcome before the Supreme Court, the conclusion seems inescapable that, for practical purposes, litigating the issue of general FPC jurisdiction over these sales is largely futile. The reality is that the FPC's certificating power over would-be interstate pipeline purchasers of in-place reserves (who must submit to the second alternative) is sufficient to control these in detail. Not to be forgotten either is that the measure within which the FPC imposes its requirements when application for approval is made to it is "public convenience and necessity." Given the strong consumer orientation of the

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254 Id. at 145.
255 Id. at 146.
257 336 F.2d 320 (5th Cir. 1964), cert. granted, 379 U.S. 958 (1965).
Supreme Court, the now famous CATCO decision demonstrates that the Court not only will permit but will require such stringent protection of ultimate consumer interests in any valuations which the Commission approves that ordinary jurisdictional contracts of sale will prove the safer and more remunerative device from a business standpoint.

Despite this reality the actions of the FPC in its handing of the case on remand are of interest. Instead of following the remand directions of the Court, the Commission reconsidered the jurisdictional issue. Initially it took the position that the seller and purchaser were forbidden to make their sale in the form of an in-place sale of reserves, but subsequently it receded from this stand so that its current stance is to permit in-place sales of reserves, with both parties to the sales subject to its jurisdiction.

In essence, the FPC's position is that to free these sales from its jurisdiction would create a regulatory gap. The 1949 case of FPC v. Panhandle Eastern Pipeline Co., where the Supreme Court permitted an interstate pipeline producer to spin off its producing properties and thereby prevent the FPC from considering the costs of these properties when establishing rates of jurisdictional sales, is distinguished because this situation is the reverse of those facts—an acquisition by a jurisdictional company, instead of a divestment of its properties. More pertinently, it was noted that the vitality of Panhandle as a precedent is doubtful since the 1954 assertion of jurisdiction over producers of gas dedicated to jurisdictional service. This position is not without some merit, because on the issue that was litigated in that case there can be no question but that the 1954 assertion of jurisdiction effectively overruled its consequences. But nowhere does the FPC come to grips with the problem of how it gets direct jurisdiction over properties which are not yet dedicated to jurisdictional service because deliveries are not commenced.

The FPC also attempts to demonstrate that in-place sales of reserves are in reality a subterfuge, amounting, on analysis, to the equivalent of ordinary contract sales. This argument was emphatically rejected by the Fifth Circuit in the second appeal. All the FPC advanced in support of its contention was that: (1) this sale covered only certain horizontally segregated leasehold rights, (2) the sellers reserved a

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260 Ibid.
262 Marr v. FPC, 336 F.2d 320 (5th Cir. 1964), cert. granted, 379 U.S. 958 (1965).
production payment under which the notes given covering future installment payments could be accelerated if future production exceeded certain volumes, (3) one of the sellers became contract operator for the buyer, and (4) the purchasing pipeline took the properties through conveyance from a subsidiary corporation which had acquired them in the first instance subject to the debt but without any personal liability (that liability remaining with the assigning subsidiary corporation). These all are familiar elements of oil and gas property conveyances. Not one permits the seller, in effect, to reopen and alter the finality of the trade as made.

If, however, the sale had involved future adjustments of price in terms of later gas price levels or future recalculations of reserves with attendant adjustments in price paid or any other element weakening the finality of the sale, the FPC argument would have more merit. Here would be a sale not final in acquisition terms when the jurisdictional event of actual deliveries occurred. On such facts it is very likely the Supreme Court would rule the sale subject to FPC jurisdiction once deliveries commenced, with the possibility of retroactive adjustment against the sale price because the FPC now would have the basis for controlling the price ultimately to be paid.

Of course, it must not be overlooked that the Court may simply hold any such sale made in contemplation of interstate deliveries jurisdictional, whether or not completed before deliveries are commenced. Once policy begins to rule as it has in the Natural Gas Act area, what seem to be unassailable legal barriers tend to evaporate.203

The dichotomy of non-jurisdictional sale, but effective indirect control, is further borne out by two 1965 Tenth Circuit cases. In Pan American Petroleum Corp. v. FPC204 the in-place lease sale was held non-jurisdictional, citing Marr and Panhandle; but in the companion case of Tennessee Gas Transmission Co. v. FPC205 the pipeline purchaser of the same reserves was held subject to plenary FPC jurisdiction.

203 On June 1, 1965, Marr v. FPC, supra, note 262, was decided sub nom. United Gas Improvement Co. v. Continental Oil Co., 35 Sup. Ct. 1517 (1965). In it the Supreme Court held in place sales jurisdictional in what is unmistakably a policy decision designed to flesh out the jurisdictional control the Court has ordered the FPC to assume. Previous pronouncements to the effect the event upon which FPC jurisdiction depends is commencement of actual deliveries are ignored. While it now can be said with certainty that sales of developed reserves destined for interstate use are jurisdictional, problems remain. How of sales of undeveloped or partially developed acreage, and how are these to be defined if they are to be treated differently? How much of the reserve must be predictably destined for interstate transmission before a sale classifies under the rule of this case? Perhaps the commingling principle of Lo-Vaca, 379 U.S. 366 (1965), will effectively render it impossible for interstate pipeline companies to purchase non-jurisdictional reserves in place unless the physical system in which the reserve will be used is a wholly segregated intrastate system in which commingling is impossible.

204 339 F.2d 694 (10th Cir. 1965).
205 340 F.2d 100 (10th Cir. 1965).
in its right to connect the reserves so acquired, and its connection, without specific authority, was illegal. The power thus shown leads directly to the effective control by certificating procedures previously discussed. It also should be noted that the court in *Pan American* passed as non-jurisdictional an in-place sale which was subject to redetermination of reserves in later years, which is to say a sale not final before jurisdictional deliveries commence. The case thus is weaker than the *Marr* case, and will remain a questionable decision even if the FPC fails in *Marr* before the Supreme Court.

It may be necessary to measure the terms of in-place sales with some care to determine if the seller is subject to direct FPC jurisdiction. When in any case, however, one is met with comprehensive indirect controls through a certificating power over the purchaser, to which most purchasers necessarily must submit for economic reasons, the distinction does not seem greatly important.

F. Gas In Jurisdictional Pipelines

1. The Lo-Vaca Case

Though it took the opposite position until 1960, the current position of the FPC is that where gas not otherwise jurisdictional becomes commingled with jurisdictional gas in any segment of an interstate line the whole mass is jurisdictional. The Commission's position is simply that because each molecule of gas cannot be perfectly resegregated by origin, inevitably some jurisdictional gas will be delivered to an otherwise non-jurisdictional use, or vice versa, and that thus its claim of jurisdiction over the whole mass must be sustained.

This position is fully developed in *Lo-Vaca Gathering Co.*, a 1961

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266 In *City of Hastings v. FPC*, 221 F.2d 31 (8th Cir. 1954), *cert. denied*, 349 U.S. 920 (1955), the FPC successfully supported the position that gas destined for direct municipal power plant fuel use, though commingled with jurisdictional gas sold the same city for resale to its inhabitants, was non-jurisdictional. There appears to have been no metering into the line of the two flows. It reiterated that position, again successfully, in *State of North Dakota v. FPC*, 247 F.2d 173 (8th Cir. 1957). Its changed position dates from *Oklahoma Natural Gas Co.*, 23 F.P.C. 291 (1960), not appealed, where an interstate line originated in Texas, transited Oklahoma and passed to Kansas. It was proposed to inject Oklahoma gas into the line with an offtake further north, but still in Oklahoma, which would always be more than the Oklahoma input. The FPC refused to exempt this transaction, seeking to distinguish its earlier position in *State of North Dakota* by claiming the gas in that case was contractually segregated, an argument it abandoned in *Lo-Vaca Gathering Co.*, 26 F.P.C. 606 (1961) when it simply pronounced its earlier position erroneous.

267 *Lo-Vaca Gathering Co.*, 26 F.P.C. 606 (1961). The decision states an exception to this position where the commingling is pursuant to exchange and transportation agreements for the convenience of transporters. *Id.* at 611. The categories of gas under discussion actually are not identified, but local gas commingled with interstate gas must be meant; otherwise, the comment makes no sense. See *Shell Oil Co.*, 25 F.P.C. 1316 (1961). There is little reason to believe this exception has any more standing than an indication that the FPC will not attempt to assert jurisdiction of local gas so commingled at the present time.

FPC proceeding which involves two direct industrial consumer sales by Texas gatherers of natural gas for use as pipeline compressor fuel by a major interstate pipeline company. One sale crosses state boundaries for use in New Mexico. In the other the gas is consumed in Texas, where produced. To effect the sale the gas in each instance is commingled in the purchasing pipeline's Texas-to-California jurisdictional line with gas undoubtedly jurisdictional. Sale contract quantities are metered in and out with precision on a basis that the amount taken off for fuel invariably will exceed the input, thus assuring volumetrically, if not molecularly, that no gas sold will pass beyond the points of consumption. Presumably the additional gas which provides the excess margin is taken from the general jurisdictional line flow.

In this case the Commission is remarkably frank in disclosing its motivation to get control of all gas it can to minimize disruption of its rate structures by uncontrolled competitive sales.260

The FPC argument was rejected by the Fifth Circuit7 on the basis of the large body of case law supporting the separate identity of mingled fungible commodities which can be resegregated by volumetric measurement in an entirely meaningful economic sense. This view also drew the support of the Eighth Circuit in two cases,271 but it is to be noted that the Eighth Circuit cases involved weaker fact situations for non-jurisdictional status. This is because in those cases the claimed non-jurisdictional gas was destined for in-state sale to local distributors. Because of the varying offtake demand inherent in such an arrangement, perfect precision of inputs and offtakes is not possible. Inevitably in its combined flow with dump gas destined for undoubted jurisdictional service, the claimed non-jurisdictional gas will sometimes exceed the requirements of the local distributors and pass across state lines, or possibly vice versa with the concededly jurisdictional gas a cushion on which to draw. Thus, even volumetrically, either some jurisdictional gas will go to the distributors or claimed non-jurisdictional gas will go to jurisdictional service insofar as gas in the line at any given time is concerned. Adjustments necessarily must be made with an after-the-fact time lag factor instead of the line containing at any given time the precise amount of gas subject to the claimed non-jurisdictional offtakes.272

260 26 F.P.C. at 611.
270 Lo-Vaca Gathering Co. v. FPC, 323 F.2d 190 (5th Cir. 1963).
271 State of North Dakota v. FPC, 247 F.2d 173 (8th Cir. 1957); Amerada Petroleum Corp. v. FPC, 334 F.2d 404 (8th Cir. 1964).
272 Cf. United Gas Pipe Line Co. v. Willmut Gas and Oil Co., 231 Miss. 700, 97 So. 2d 530, 534 (1957).
Without so much as discussing the body of law relied on by the two lower courts that have dealt with this problem, in a brief and very murky opinion, the Supreme Court reversed the Fifth Circuit in the 1965 case of California v. Lo-Vaca Gathering Co. Chief reliance appears to have been placed upon a previous Federal Power Act case of which the Court said, "We said in Connecticut Co. v. Federal Power Comm'n, 324 U. S. 515, 529, 'Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test.'" Insofar as can be told from reading the Lo-Vaca opinion, this statement is intended to support the FPC's molecular theory. At least Mr. Justice Harlan, dissenting, treats the decision as an adoption of the molecular theory under the facts of the case, and the extension of this case to reverse the Eighth Circuit position in FPC v. Amerada Petroleum Co., in the Court's brief analysis there made, tends to confirm such a view.

It must be emphatically remarked that the quoted statement, in the context in which it appears, is diametrically opposed to the use the Court now makes of it. Mr. Justice Jackson, author of Connecticut Co. v. Federal Power Comm'n, made the comment concerning scientific and engineering analysis of statutory coverage preliminary to demonstrating that, though the draftsmen drew their bill in such terms, the intent of Congress in passing the Federal Power Act was not to adopt any such test. Instead, it was to preserve a federal type of regulatory system and prevent it from becoming a unitary central government system. In fact, the case stands for the proposition that legal and governmental tests, not physical tests, should be dominant in regulatory statutes such as the Federal Power Act and the Natural Gas Act involving the division of powers between state and federal governments. It is a vastly disturbing thing to see a prior case cast in the role of performing a precedential function opposite to that for which it stands.

In its opinion the Supreme Court does not absolutely close the door to the possibility of comminglings without wholly jurisdictional consequences. However, the extent to which it has accepted the FPC's molecular theory when measured by the facts of the case (in conjunct-
tion with policy declarations of extreme hostility to any means whereby some gas might avoid FPC regulation through creation of an "attractive gap" in which the states might not adequately regulate or whereby a pipeline purchaser might "discriminate" for the benefit of a favored supplier) leaves not much doubt that commingling in a jurisdictional pipeline will prove enough per se to confer jurisdiction in all gas sale situations likely to have business attraction. In reality Lo-Vaca presents about as tidy a fact situation for non-jurisdictional treatment as can be imagined, and it is not enough. Other arrangements should prove even more vulnerable.

In the view of the writers it is wrong to use the excruciatingly narrow technicality of loss of molecular identity as a basis for extending FPC jurisdiction to gas which can be volumetrically resegregated. The opposite result would not have compromised the flow of gas properly within the Commission's jurisdiction. That it would have given rise to a format in which there could be competing gas sales not subject to FPC control is a consequence of the structure of the Natural Gas Act itself. That structure is the work of Congress, and correction, if needed, is the province of Congress, not Commission or Court.

Even without this decision, the FPC already was in a position, by virtue of the 1961 Transco case, to deny use of jurisdictional pipelines for transportation of gas intended for non-jurisdictional sales. If implemented, this indirect control would have been sufficient to force all future non-jurisdictional sales by means of such facilities, if consummated at all, to be consummated in jurisdictional rather than non-jurisdictional status by the expedient of refusing transportation certificates in the case of non-jurisdictional arrangements. But this case sweeps into jurisdictional status many existing deliveries hitherto be-

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278 The Supreme Court's opinions in California v. Lo-Vaca Gathering Co. 379 U.S. 366 (1965), and FPC v. Amerada Petroleum Corp., 379 U.S. 687 (1965), have some implications that commingled gas might remain non-jurisdictional if all producers selling gas into the line enjoyed the same proportions of jurisdictional and non-jurisdictional deliveries. Given the business realities of operating an interstate pipeline, this is an impossible condition to attain, or if attained, to maintain. Such statements, however, do raise some doubt whether the FPC's pure molecular theory actually has been adopted by the Court. Arguably, the decisions rest on objection to any particular supplier obtaining a preference in deliveries of non-jurisdictional gas. In any case the writers find it impossible to conceive a proportionate delivery situation which would be practical from a business standpoint. The backlog of existing jurisdictional contract deliveries at the time a new delivery is contracted makes any proportionate exception to jurisdictional commingling consequences purely hypothetical.

279 Though not mentioned by the Court in California v. Lo-Vaca Gathering Co., supra, note 273, the concept of a "bright line" dividing the federal and state jurisdictions, which lies at the heart of FPC v. Southern Cal. Edison Co., 376 U.S. 205 (1964) and accompanying text, will go far to bring all jurisdictional pipeline commingling situations into FPC jurisdictional status. How could there be such a line, avoiding the case-by-case disposition there denounced, unless the jurisdictional result of commingling is uniform?

280 FPC v. Transcontinental Gas Pipeline Corp., 365 U.S. 1 (1961) and § V A.
lieved non-jurisdictional. The evident drive to maximize FPC jurisdiction and approach unitary control of the industry was well-posted in Lo-Vaca.

2. The Florida Parishes Case

Apart from treating commingling as jurisdictional per se there is another matter of interest. The 1964 City of Colton case\(^\text{281}\) teaches that the old dichotomy of predominantly national-predominantly local interest, exemplified by the Court's 1925 decision in Peoples Natural Gas Co. v. Public Serv. Comm'n,\(^\text{282}\) no longer shelters state regulation when any portion of the line supply comes from connections across state lines. Suppose, however, gas is taken into a jurisdictional pipeline on a jurisdictional rate-regulated basis and the sale for resale occurs before the gas sold leaves the state. This is the situation in the FPC's Florida Parishes case,\(^\text{283}\) currently on appeal to the Fifth Circuit.

The issue in this case is the right of Louisiana to regulate the rates of sales from two interstate pipelines under circumstances where natural gas is taken into the lines through jurisdictional independent producer sales. Gas in one line is from Louisiana offshore and in the other from Louisiana onshore sources. The sales in issue are to Louisiana communities for resale before the lines pass out of Louisiana.

These sales had been under FPC regulation since the inception of FPC regulation of the pipeline company operating the two lines. In 1961 the Louisiana Public Service Commission ordered the company to apply rates prescribed by it, thereby precipitating regulatory conflict between state and federal regulatory systems.

Six of the twenty-one communities involved take gas primarily from the offshore line and the rest from the line having onshore sources. However, there is a loop connecting the two lines, and, to an extent apparently not satisfactorily established by evidence, commingling of offshore gas with onshore gas can and probably does occur. Also there may have been backflows of Mississippi gas into the line with the onshore source. There is no doubt but that gas in both lines reaching the communities is transported while commingled with gas from the respective producing sources destined for delivery in

\(^{281}\) 376 U.S. 205 (1964).

\(^{282}\) 270 U.S. 550 (1925). Contrast Kentucky Natural Gas Corp. v. Public Serv. Comm'n, 28 F. Supp. 509 (E.D. Ky. 1939), affirmed, 119 F.2d 417 (6th Cir. 1941), where application of this test to the facts of that case resulted in a determination the federal interest was dominant. On their facts both of those cases seem correct in the pre-1942 commerce clause context in which they were decided.

states beyond Louisiana. There is no segregation of the gas ultimately used by the communities, the offtakes depending on the day-to-day requirements of the purchasing communities. However, subject to possible lateral and backflow comminglings, there is no question but that the source inputs in each instance are ample to cover the communities' offtakes.

The Commissioners were agreed that the community sales for resale which were dependent on the offshore line were jurisdictional because that gas crossed a state line in coming into Louisiana. However, they split 3-2 on the onshore line service. The majority's basic proposition was that this too is jurisdictional gas because acquired on a jurisdictional basis and commenced in its journey to customers on that basis through a line that goes interstate. The Commissioners constituting the majority were not averse to buttressing this position with reference to the commingling possibilities in the possible Mississippi backflows and in the loop connection with the offshore gas line, but their essential holding is that sales from the onshore line would be jurisdictional even though these circumstances did not exist.

The minority, reading the Natural Gas Act literally, first brushed aside the commingling possibilities as not established by the evidence and in any case de minimis, then made the basic determination that sales from the on-shore line could not be jurisdictional because the Natural Gas Act applies only to sales of gas in interstate commerce; in the act "interstate commerce" is specifically defined as "... commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States."284

The Supreme Court never has had a case just like this one before it. However, as reasonably well demonstrated by the type of analysis made in the 1939 federal district court case of Kentucky Natural Gas Corp. v. Public Serv. Comm'n,285 even in terms of 1938 commerce clause concepts there is a powerful argument that facts like these were in the exclusive federal regulatory sphere. Unlike a situation where the transmission after interstate transit ends in a state and all consumption takes place there, making the federal interest minor enough under the constitutional standards of the 1930's to permit state regulation, this line passes on to other states with its freighting of gas. This gives rise to a very direct impact on substantial national interests, for the in-Louisiana offtake rate must affect significantly the cost of service.

The burden with which the balance of the flow passes from Louisiana. It is no answer that the FPC could take account of the Louisiana Commission's ratemakings in its subsequent ratemakings beyond Louisiana, for to the extent it has to do this it is deprived of plenary regulatory control of the gas passing the state line. It is the federal interest which defines the federal segment, not whether an accommodation can be worked out.

The argument for state jurisdiction in this situation has to rest solely on the act's definition of "interstate commerce," in effect a claim that in at least one respect the Natural Gas Act ceded to the states, from the exclusive federal area, jurisdiction which they did not previously have. There is nothing in the legislative history of the act which supports such an analysis. Moreover, the Supreme Court as long as 1947, in a case comparable except that the sale for resale was a forwarding on toward the state line ultimately to be crossed instead of a distributor sale short of the line, indicated a contrary view when it said, "There is nothing [in the Natural Gas Act] to suggest that Congress intended sales consummated before the gas crosses a state line should not be regarded as being 'in' such commerce."

Another line of cases also gives insight into the probable Court attitude if this case reaches it. Though the Supreme Court never has squarely faced the issue of producer in-state sales for resale short of but leading to the ultimate sale to the pipeline purchaser who will move the gas interstate, several of the circuit courts of appeal have faced the issue on numerous occasions, each time holding such sales to be jurisdictional, and the Supreme Court has given certiorari denied treatment each time review was sought. Probably the leading case in

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286 Cases cited supra, notes 3-5.
288 Interstate Gas Co. v. FPC, 331 U.S. 682, 688 (1947). This case was cited in support of this somewhat obscure statement in California v. Lo-Vaca Gathering Co., supra, note 273 at 369: "The result of our decisions is to make the sale of gas, which crosses a state line at any stage of its movement from wellhead to ultimate consumption, 'in interstate commerce' within the meaning of the Act." Remembering Lo-Vaca deals in part with a Texas offtake of Texas-produced gas from a common stream and holds that offtake jurisdictional, it is likely that the statement means if any portion of a jurisdictional body of gas will cross a state line, the whole of the gas is jurisdictional at any point of sale for resale along the line.
this line is *Deep South Oil v. FPC*,where the Fifth Circuit held to be jurisdictional certain in-state sales from an independent producer to a processor who, after stripping the gas for its wet component, sold the dry residue to an interstate pipeline purchaser. The hurdle of the act's definition of "interstate commerce" was surmounted by pointing out that though no state line was crossed with this sale, in its continuous flow the gas would cross a state line.

While it is true these are cases of forwarding gas toward a state line rather than cases of offtakes for in-state resale to consumers, they do make it evident that the sale for resale is not itself rigidly tied to crossing a state line in pursuance of that particular sale.

On balance the writers believe the law today is that when gas is taken into a jurisdictional pipeline on a jurisdictional rate-regulated basis, the FPC has jurisdiction of any sales for resale off the line, whether or not a state line yet has been reached. Also, when gas is commingled in a jurisdictional line, even with metering and contractual segregation, this too will confer jurisdiction over the whole commingled mass at any point along the line. The interplay of these two principles renders it virtually impossible to avoid FPC jurisdiction where use of an interstate line is involved and the FPC is disposed to assert jurisdiction.

VII. THE IMPACT OF CHANGED COMMERCE CLAUSE CONCEPTS

Rightly or wrongly, constitutional interpretations do change. When the impact of that change is confined at the constitutional level, and the effect is to strike down federal and state laws which were valid before the change, the result is logically supportable. But when radically changed constitutional concepts are imported into a statute that was enacted by Congress in full acquiescence with earlier current concepts, in circumstances where today Congress yet could write a valid statute exactly parallel in effect with the intended effect of the law when passed, and the Court casts its later-evolved concept back

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290 247 F.2d 882 (5th Cir. 1957), cert. denied, 355 U.S. 930 (1958).
291 Apparently in certain situations the FPC may not be disposed to assert jurisdiction. Thus, in Transcontinental Gas Pipeline Corp. v. FPC (1965), opinion No. 449, a producer was permitted to transport its gas commingled in an interstate line for use by it as fuel in its own refinery without jurisdiction attaching. And see supra, note 267. If in its discretion the FPC later elects to change this administrative policy, however, it is quite likely the Supreme Court will sustain an assertion of complete jurisdiction. Federal administrative agencies have considerable discretion in the jurisdiction they elect to assert, supra, notes 48 and 207.
292 Thus in Malloy v. Hogan, 378 U.S. 1 (1964), which assimilates the fifth amendment standards into a rule binding on the states through the now-current interpretations of the fourteenth amendment, we find Mr. Justice Brennan evaluating and discarding a number of past Supreme Court decisions upholding state law applications necessarily rendered invalid by the new standard.
upon the older statute without regard for the hiatus it has caused, the result resembles a syllogism in which a tacit major hypothesis is altered by an innovator; the innovator then making a conclusion different from that intended by the author. When this happens to a federal statute, inescapably it means the Court has legislated, superseding the legislation of Congress even though in the statute not a word changes.

So far as known the Supreme Court never has made meaningful adjustments for this evident phenomenon. Certainly it has not done so in the case of the Natural Gas Act. Instead it has followed a course typified by developments under the antitrust laws where, as the federal commerce power expands through Court interpretation, the coverage of the laws progressively expands. Whether or not this is justified with the antitrust laws, the two situations are in no sense comparable. A limited purpose statute like the Natural Gas Act, designed to complement state regulatory powers as these existed by plugging with federal regulation a specific regulatory gap, does not invite or need such judicial ingenuity as may be required to combat anticompetitive practices in the myriad, undefinable mutations in which they can be raised.

Of course, if the Natural Gas Act were an aggressive statute, indicating in its legislative history a purpose to occupy with federal regulation more than the area constitutionally available to Congress at the time it was passed, there would be some justification for what has happened. There is nothing in the constitutional structure of our national government which prevents Congress from enacting laws overreaching current constitutional interpretations, though there is

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293 In FPC v. East Ohio Gas Co., 338 U.S. 464 (1950) the Court acknowledged an obligation to define the intended coverage of the Natural Gas Act in terms of the gap created by prior constitutional decisions involving commerce exclusively subject to federal regulation. Id. at 472. But, as Mr. Justice Jackson noted in dissenting, Id. 483-84, the majority, after acknowledging this obligation, proceeded to define the 1938 regulatory gap in terms that do not square with previous decisions, particularly Lone Star Gas Co. v. Texas, 304 U.S. 224 (1938). The principle was acknowledged and applied by the Eighth Circuit in Amerada v. FPC, 334 F.2d 404, 408 (8th Cir. 1964), reversed, 379 U.S. 681 (1965), without comment on the Eighth Circuit's statement.

294 Compare United States v. E. C. Knight Co., 156 U.S. 1 (1895), holding acquisition of stock control in the sugar refining industry to be solely a local manufacturing activity despite importation of raw materials and interstate shipment of the product, with Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948), outlawing local agreements fixing the farm price of sugar. The unusual powers the courts have assumed "by common consent" in the antitrust field is notorious. United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 348 (Mass. 1953), affirmed per curiam, 347 U.S. 521 (1954). See comment of Mr. Justice Frankfurter recognizing this exceptional situation in United States v. E. I. duPont de Nemours & Co., 366 U.S. 316, 363-64 (1961), citing Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933), where Mr. Justice Holmes stated that these laws have "a generality and adaptability comparable to that found to be desirable in constitutional provisions."
serious question as to the propriety of the Court accommodating this overreaching with changed constitutional interpretations instead of putting Congress to the amenderatory processes contemplated by the Constitution to establish a basis for the enlarged powers it seeks.\textsuperscript{298} But when a limited purpose statute is so treated, it seriously reduces the role of Congress.

The changed constitutional interpretations enlarging coverage of the Natural Gas Act are quite obvious when the effect is simply to enlarge the exclusive federal jurisdiction segment, as occurred in the 1950 \textit{East Ohio} case\textsuperscript{298} subjecting in-state trunk pipeline transporters to the act. More subtle is the process of translating what, in 1938, were exclusive powers of the states under then valid intrastate commerce concepts into concurrent status, then subjecting them to pre-emption. This involves not only a misuse of the consequences of changed constitutional interpretation but, because the shift to concurrent status in and of itself is not sufficient, a mistaken retroactive attribution of preempting purpose to a statute that has no such purpose. Very likely this is what really happened where the case-by-case weighing of respective state and federal interests exemplified by the 1938 \textit{Lone Star}\textsuperscript{297} decision was ousted by the 1964 \textit{City of Colton} decision.\textsuperscript{298} Almost certainly it is what underlay the 1954 \textit{Phillips}\textsuperscript{299} decision in consequence of which producers and gatherers have been subjected to the act for ratemaking purposes.\textsuperscript{299} Moreover, but for these cases, the indirect control situations previously considered probably would not exist, for had the Commission and the Court kept their attention fixed on identifying the extent of exclusive federal jurisdiction as the threshold question, without which there could be no application of the Natural Gas Act, it is extremely unlikely that the appetite to achieve indirectly what could not be accomplished directly would have developed.

There is a serious hazard in our method of law development by successive case precedents when the original source of power is a statute, as is inevitably the case in any federal regulatory scheme. The system facilitates gradual extension of a statute without real reference back, after a time, to the statutory source of power. Each new decision, a little further departing from the statutory plan, becomes a largely independent precedent for a further extension. The technique, of

\textsuperscript{295} Whittaker, \textit{A Confusion of Tongues}, 51 A.B.A.J. 27 (1965).
\textsuperscript{296} Supra, § III B.
\textsuperscript{297} 304 U.S. 224 (1938).
\textsuperscript{298} Supra, § III A.
\textsuperscript{299} 347 U.S. 672 (1954).
\textsuperscript{300} Supra, note 85.
which there are innumerable examples, is revealed in the following quotation from the 1961 Transco decision.

There is a broader principle . . . . When Congress enacted the Natural Gas Act, it was motivated by a desire "to protect consumers against exploitation at the hands of natural gas companies." Sunray Mid-Continent Oil Co. v. Federal Power Com. 364 US 137, 147, 4 L ed 2d 1623, 1631, 80 S Ct 1392. To that Congress "meant to create a comprehensive and effective regulatory scheme." Panhandle Eastern Pipe Line Co. v. Public Service Com. 332 US 507, 520, 92 L ed 128, 139, 68 S Ct 190. See Public Utilities Com. v. United Fuel Gas Co. 317 US 456, 467, 87 L ed 396, 402, 63 S Ct 369.\(^1\)

Not once does this statement touch base with the underlying statutory law or its legislative history, and for a very good reason. So tested it is not correct. Congress meant no such thing as attributed it by this case by case building block technique. It meant only to provide regulation where the national power was exclusive, thereby making it possible for a state that so desired to complete a comprehensive regulatory scheme\(^2\) — a very different thing.

The sequence of cases whereby the Natural Gas Act first was "loosened up" is of much interest. It starts with cases dealing with the special problem of rate-regulating at the point of undoubted jurisdictional sales for resale from a pipeline that is in part its own on-system supplier from its own production and ends with one of these cases heavily relied upon as a precedent for regulating independent producer and gatherer sales. The transition is accomplished in terms of construction of the act, without inquiry into state regulatory power over producer and gatherer prices in 1938, or, alternatively, whether such power was exclusive in the federal government as of that time. Finally, a preemptive purpose is assumed in the act without fundamental inquiry on that point.

In the 1945 case of Colorado Interstate Gas Co. v. FPC,\(^3\) to establish the rates of jurisdictional sales by a jurisdictional pipeline company, the Court decided its on-system producing properties (actually owned and operated by an affiliated producing company) could be included in the rate base and a rate of return applied. This was not done on any theory that the production was jurisdictional, but merely because some basis obviously had to be established (the company contended for "going field price") and the Court, in the previous case of

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\(^2\) Supra, § I. Even today not all states have seen fit to regulate local distribution, certainly a major lack in any "comprehensive" regulatory scheme which no one can pretend lies within any presently-enacted grant of federal power to cure.

\(^3\) 324 U.S. 581 (1945).
FPC v. Hope Natural Gas Co. had given the FPC a virtual carte blanche in ratemaking methods used, so long as the results achieved were not unjust, unreasonable or confiscatory. Both Hope Natural and Colorado Interstate carefully disclaim any intent to assert direct jurisdiction over production or gathering, in a context which is unmistakably related to rate regulation.

The problem next appeared in the 1947 case of Interstate Gas Co. v. FPC, with the added complication that sales off the interstate line to purchasers who would carry the gas interstate occurred before the line passed from the state in which the company had produced the gas. The company had avoided state jurisdiction of these sales on the plea that they fell in the federal regulatory sphere, and in this case, by contrary argument, sought to avoid federal regulation. The Court rejected the “in-state-produced-and-sold argument,” correctly placing these sales in the exclusive federal pipeline segment to which the Act was intended to apply, then upheld a ratemaking procedure comparable to that approved in the earlier cases. Any intent directly to regulate production and gathering as such was again expressly disclaimed, though in this case it was, for the first time, suggested that producer sales in the course of production or gathering fell in a concurrent regulatory area where Congress had the power, though emphatically not the purpose, to regulate.

That the Court then meant what it said with regard to direct regulation of production and gathering is abundantly confirmed in the 1949 case of Panhandle Eastern Pipeline Co. v. Public Service Commission, in which case the pipeline company was permitted to avoid indirect rate regulation of production (and, prior to 1954, any FPC rate regulation of production) by the expedient of conveying the properties to a spun-off non-jurisdictional producing company created for that express purpose. In the view of the writers the test thus created was psychologically so adverse to the company’s position that, when the Court supported the consequences of what it had done, it amounted unmistakably to accepting the proposition that rate regulation of producer and gatherer prices was not included in the coverage of the act, despite the fact that technically the issue was one of whether

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304 320 U.S. 591 (1944).
305 Id. at 602.
306 Id. at 612-13.
307 324 U.S. at 603.
308 331 U.S. 682 (1947).
309 Id. at 690.
310 337 U.S. 498 (1949).
an in-place sale of reserves was jurisdictional. The Court examined the legislative history of the act at great length in justifying its result.111

After this case the 1950 case of Cities Serv. Gas Co. v. Peerless Oil Co. 12 established that there was no constitutional prohibition against a states' price-regulating gas production, but the question of whether such regulation conflicted with the Natural Gas Act was reserved.113

This, of course, made the power at least concurrent, a matter of some embarrassment to the Court in asserting exclusive FPC jurisdiction four years later.114

Throughout these developments the FPC maintained that it had no jurisdiction of producer and gatherer sales as such115 and, in its 1951 decision of Phillips Petroleum Co.,116 continued to hold consistently to this position.

The appeal from that decision by an intervenor, the State of Wisconsin, resulted in the Supreme Court's 1954 decision of Phillips Petroleum Co. v. Wisconsin,117 the case whereby independent producer and gatherer rate regulation was commenced.118 Instead of any effort to find a jurisdictional basis consistent with the congressional purpose in enacting the Natural Gas Act, much reliance is placed on the not-so-murky 1947 Interstate decision, rendered murky, however, by selective editing of the statements in that case. It is submitted that the very most that can be made of Interstate is a basis of concurrent jurisdictional status for producer and gatherer sales, followed by an express Court disclaimer of any congressional purpose to use that power. Thus, while Interstate takes the step of shifting to concurrent status what probably was exclusively in the power of the states in 1938, it is pure pretense to say that it in any way signalled the second step of preemption. Under correct analysis it is inescapable that this was accomplished by the Court solely in the 1954 Phillips case, in the face of square declarations to the contrary by the 1947 Court in Interstate.

VIII. CONCLUSION

Were the Court ever to acknowledge the incorrectness of shifting the meaning of enacted statutes through changed constitutional concepts — and this is the fundamental flaw which underlies what has

111 Id. at 506-13.
113 Id. at 188.
114 Supra, note 85.
115 16 C.F.R. § 2.54 (1949) revoked by Order 154, 15 F.R. 4633, July 20, 1950, specifically exempted producers and gatherers.
118 On its facts the case dealt with a sale by a gatherer after gathering was completed.
happened under the Natural Gas Act — there exists a well-developed doctrine whereby the result could be avoided and statutes kept constant with their original meaning.

Regardless of the view the Court may have entertained concerning federal powers under the commerce clause, it has always held itself bound to defer to a congressional direction that state regulation be permitted, even to the extent the federal power retires from a regulatory field it has occupied. The Hinshaw amendment, ceding regulation of certain in-state trunk line gas transmissions back to the states, is an example of this process.

This doctrine has operated only to give back to the states what the Court denied them by previous decisions. Yet intellectual and judicial integrity suggest there is just as much reason to use the underlying rationale of this doctrine as a construction device to avoid taking powers from the states in any situation where Congress would have undoubted power presently to write a law of like effect conformably with the new constitutional concepts as the law it did write under older concepts. Such an approach would always force reconsideration of a statute in the setting in which it was passed and end the unwarranted extensions which occur through the method of building on a statute by case precedents not constantly checked against the statutory source of regulatory authority.

Certainly the Court would be hard put to deny that any regulatory area under the Natural Gas Act could not be ceded to the states. This being true, correct construction of the act certainly requires constant vigilance in order that there not be preempted through the device of constitutional change that which the legislative history, in an older constitutional context, makes clear the Congress did not intend to regulate.

Though the record of the Court's current majority offers little hope at the present time, the logic inherent in the cession doctrine should be pressed upon the Commission and courts in every instance in which a new extension is attempted beyond the precise gap defined by Public Util. Comm'n v. Attleboro Steam & Elec. Co. and Missouri v.

The cases cited supra, note 289, demonstrate the consequent extension to all independent producers making sales of gas, ultimately to be acquired by interstate pipeline purchasers for resale.

521 Supra, § VB.

522 273 U.S. 83 (1927).
Kansas Gas Co.\textsuperscript{24} Though a decent regard for \textit{stare decisis} will require adherence to the erroneous but squarely-litigated extensions which have occurred, there is no compulsion in that doctrine to follow the trend of these decisions ever deeper into error. In time a consistent effort to compel an analysis of proposed extensions in terms of the correct threshold question: "Is this a situation which fell within the exclusive federal power to regulate in 1938?", may produce a pattern of refusals to further extend which will be glaringly inconsistent with erroneous past extensions. It is not beyond the realm of hope that one day there can be decisions compelled by \textit{stare decisis} calling on Congress to rectify the excesses of the past. One hopes that Congress will act promptly in the contest over legislative power which an unrestrained Court has forced upon it without needing such an impetus, but the assault on the federal structure has grown so grave that no avenue of precipitating the struggle which impends between Court and Congress should be overlooked.

Laying aside the destructive effects upon our legal structure and the federal principle, the writers most emphatically do not agree that the Commission and the Court have improved the natural gas situation. In effect the Commission and the Court have forestalled the political process by decisions which have anticipated need for legislative action. Thereby they have created a regulatory mess of the most serious proportions yet seen simply because it is not possible to press from a statute not designed for the purpose the means intelligently to regulate an industry. Only the Congress is equipped to set national policy in this matter and write a statute with appropriate standards and means of enforcement. The Commission and the Court seem to have forgotten that Congress meets every year and is entirely capable of revising laws sufficiently in need of revision when there is real popular demand for change.

One cannot know how far Congress would have gone by now had Commission and Court left the legislative process to it. Very likely indefinite pricing clauses in producer sales contracts would have been brought under control. Had this been done it is very doubtful further extensions of direct controls over producers would have been necessary, for the interstate pipelines proved no mean bargainers in the years before real need to bargain was lifted from them.

Possibly there has developed a need for a somewhat greater degree of centralized control over the transportations and sales of natural gas than was the case when the act was passed. The intricate national

\textsuperscript{24} 265 U.S. 298 (1924).
web of high pressure main transmission lines bears little resemblance today to the primitive industry of 1938. But there is always great value in preserving a maximum of local control consistent with the technology of the industry as it develops. This consideration is much too important a matter to be left to federal regulators whose drive always will be to approach a unitary system of controls pleasing to them, and the Supreme Court lacks qualifications or apparatus to assess what is needed. This is something which can be determined only after extended investigations and hearings conducted by the legislature. But these considerations really are only incidental to more serious implications.

Given the origin and purposes of the Natural Gas Act, it is the most seriously, most persistently mangled statute ever enacted by Congress. As such, it becomes the ideal ground upon which to wage the fight to curb the regulatory agencies and force the Court back into its proper judicial role.

The battle will not be easy nor the outcome certain. Any regulatory step, rightly or wrongly taken, confers economic advantage on some as well as disadvantage on others. A king’s ransom would pale alongside the values which are involved. Inevitably vested interests in preserving the new status quo grow up practically instantaneously.

This makes it possible for the FPC to engage in the tactics of divide and conquer, a process which it well understands. A recent manifestation was a speech by Commissioner Black in which he urged gas distributors to join forces with the FPC to roll back any effort by producers to escape FPC regulation. He said there is no effective competitive market in the gas field and raised the hobgoblin of an effective monopolization among major producers to drive up the price of gas, should FPC regulation of them be terminated — as if there were no means to cope with monopoly in our laws and Congress. To prove lack of competition he cited the increase in field price of gas from an average of 6.5¢ in 1950 to more than 16¢ in 1961, then said “competition may somehow have been at work; but it surely wasn’t laboring for you or your customers.” Considering the first price reflected many early distress sales and that increases since 1954 have been subject to FPC regulation which, generally, has allowed prices considerably higher than the 1950 average to be justified under the act’s standards, these tactics are little more than demagoguery. Moreover, it shows a most peculiar understanding of competitive forces when price increases, without more, are declared to prove the absence of competition.

825 Address by Commissioner Black, Annual Convention of the Pacific Coast Gas Association, Coronado, California, September 16, 1964.
While initially FPC regulation taught producers and pipeline purchasers to think in terms of public utility cost of service concepts instead of hard bargaining, thereby probably increasing the price of gas to consumers at an earlier time than otherwise would have occurred, it is undoubtedly true that the purchasing pipelines have enjoyed a stability of purchased gas costs under FPC regulation which has eliminated some of the rate adjustment lag factor which plagues utilities in inflationary times. And the indirect controls which force non-jurisdictional sales into jurisdictional status, if to be made at all, benefit those in the industry who otherwise would be bypassed and would not participate in the business represented.

But too much is involved for narrow advantage to rule. The power of the states to regulate as intended by Congress, which is to say the federal system, is at stake. The ability of Congress to control the extent and effect of its legislation is at stake. The very integrity of our judicial process is at stake.

The world would not end if the Congress simply compelled a return to the regulatory scheme it intended in 1938. But this is 1965, not 1938. The nation has changed and the natural gas industry, relatively, has changed even more. Some of the jurisdictional extension which has been accomplished by usurpation would have come about by legitimate legislation but for the forestalling effects of the usurpation. Some of the extensions, not needed when they occurred, may have become so embedded into the national economy that it now would be unwise to remove them.

Hence, what is really needed is a new Natural Gas Act which, after careful investigations and hearings designed to claim for federal regulation what now is really needed, leaves to the states the maximum possible local regulatory authority. Because lack of ratemaking standards is at the heart of the chaotic conditions which have characterized regulation of the natural gas industry, the new statute should make unmistakable pronouncements for these in each and every situation claimed for the national jurisdiction.

But this is not all the investigation and hearings should develop. With equal care the regulatory developments under the present act should be studied and an unmistakable rebuke delivered the Commission and the Court for presuming to invade the legislative function. If Congress intends to preserve its role of lawmaker to the nation, which it progressively has forfeited by its failure to respond to the usurpations which have occurred, it could choose no better ground upon which to wage its battle than here, where the offense committed against it is most clearly manifested and stubbornly maintained.