MUDDLING THROUGH MODERN ENERGY POLICY: THE DORMANT COMMERCE CLAUSE AND UNMASKING THE ILLUSION OF AN *ATTLEBORO* LINE

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INTRODUCTION

The country's transition to a green economy is haunted by a lingering ghost. Our energy policy has emerged as a mélange of often-discordant policies designed to achieve narrow objectives. New policies, after all, generally respond to acute crises, some of which may be real, some occasionally merely perceived, or some possibly long since passed. That has been the fate of energy policy.[1] As the nation explores avenues for reducing greenhouse

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gas emissions and transitioning to a low or zero carbon future in both the transportation and electric generation sectors, it must confront embedded obstacles—policy choices that have become infused in a legal architecture, an architecture that correspondingly incents financial markets, and markets that then support infrastructure development.

When the United States Supreme Court decided *Public Utilities Commission v. Attleboro Steam & Electric Co.*,[2] that is what happened. In 1927, the court held that the Constitution's implied Dormant Commerce Clause prohibits states from regulating rates for the sale of electricity across state lines.[3] That decision prompted the passage of the Federal Power Act (FPA) eight years later,[4] and the unfortunate and suspect ghost of *Attleboro* that haunts us today.

Since then, judges routinely invoke *Attleboro* to draw a jurisdictional line between local distribution and wholesale sales where electrons might flow in interstate commerce.[5] In 1953, Justice Reed explained how *Attleboro*

established what has unquestionably become a fixed premise of our constitutional law but what was not all clear in 1920, that the Commerce Clause forbade state regulation of some utility rates. State power was held not to extend to an interstate sale "in wholesale quantities, not to consumers, but to distributing companies for resale to consumers.[6]

suggestions. The author greatly appreciates all the effort and assistance from the staff at the NYU Environmental Law Journal.

1 *See generally* Sam Kalen, *Embedded Choices: A Resilient Energy Legal Architecture*, 52 IDAHO L. REV. 390 (2015).

2 *See* Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927).

3 *See id.* at 89.

4 *See* Pub. L. No. 74-333, 49 Stat. 803, 847–63 (1935) (codified as amended at 16 U.S.C. ch. 12 (2012)).

5 *See* Jersey Cent. Power & Light Co. v. Fed. Power Comm'n, 319 U.S. 61, 87 (1943); Conn. Light & Power Co. v. Fed. Power. Comm'n, 324 U.S. 515, 524, 526 (1945); United States v. Pub. Utils. Comm'n, 345 U.S. 295, 303 (1953); Fed. Power Comm'n v. S. Cal. Edison, 376 U.S. 205, 212 (1964); Fed. Power Comm'n v. Fla. Power & Light Co., 404 U.S. 453, 458 (1972); New York v. FERC, 535 U.S. 1, 19 (2002). *See generally* James E. Hickey, Jr., *Mississippi Power & Light Company: A Departure Point for Extension of the "Bright Line" Between Federal and State Regulatory Jurisdiction over Public Utilities*, 10 J. ENERGY L. & POL'Y 57 (1989) (discussing federal preemptive power in *Mississippi Power & Light Co. v. Moore*, 487 U.S. 354 (1988)).

6 United States v. Pub. Utils. Comm'n, 345 U.S. 295, 303 (1953).

In *New York v. FERC*, the Supreme Court observed how, when the court earlier held that state regulation of electricity moving between states directly burdened interstate commerce, it created "what has become known as the '*Attleboro* gap'."[7] Indeed, judges today seemingly feel duty bound to begin their analyses by recounting this history.[8] The *Attleboro* line, therefore, has become the *sine qua non* of many contemporary discussions, and it infuses Dormant Commerce Clause considerations into modern state and local efforts to encourage renewable energy development within their borders.[9] It also recently surfaced in the Supreme Court's consideration of whether the Federal Energy Regulatory Commission (FERC) may influence demand-site management programs (encouraging lower energy use and energy efficiency).[10]

This article explores how the illusion surrounding *Attleboro* surfaced and generated the ghost of *Attleboro* that still influences modern efforts to transition to a green economy. Twenty-five years ago, historian Morton Keller observed how "[o]ur public utilities . . . operate under the regulatory system and legal conditions created during the decades before 1930," and while technology has changed considerably since then, "the regulatory and legal response has not deviated significantly from the earlier experience."[11] While that is no longer true for the decades since he penned those thoughts,[12] it seems like an auspicious moment to remove an additional lingering vestige from that era—our ghost. *Attleboro* is useful when explaining what prompted the eventual passage of the FPA, but the language, intent, structure, and purpose of the FPA are what governs today, not *Attleboro*. After all, contemporary constitutional narrative did not compel the decision, and constitutional principles as they evolved shortly thereafter undermined the Supreme Court's rationale. Indeed, the court's analysis is, at best, dubious. It implicitly accepted a doctrine that the court had just undermined, and the opinion is too abstract to justify what has since become the *Attleboro* line

7 535 U.S. at 6.

8 *See, e.g.*, N.J. Bd. of Pub. Utils. v. FERC, 744 F.3d 74, 80 (3d Cir. 2014).

9 *See infra* notes 305–313 and accompanying text.

10 *See infra* notes 314–321 and accompanying text.

11 MORTON KELLER, REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900–1933, at 228 (1990).

12 *See infra* notes 299–303 and accompanying text. *See generally infra* note 317.

distinguishing between wholesale and retail sales. The FPA, instead, establishes the now governing boundary, partly because Justice Sanford's all-too cryptic analysis in *Attleboro* demanded more clarity and partly because the FPA's line was the one advocated by the Federal Power Commission (FPC) and others. Our *Attleboro* ghost, therefore, deserves to be "busted" and laid to rest.

This Article illustrates why *Attleboro* deserves far less attention than it has received, and how the opinion is relevant only for explaining the history of federal energy policy prior to the 1930s. Part I of the Article begins by chronicling the rise of the electric central generating station, as well as the influence of progressivism on the need for regulatory constraints for emerging industries such as the electric utility industry. Part II then explores the constitutional narrative surrounding the appropriate level of regulatory oversight, whether at the federal or state level, and why vacillating Dormant Commerce Clause jurisprudence lacked sufficiently clear guidance for regulating the interstate electric grid. Part III reviews how those options became tested in what seemed like an unimportant contract dispute between utilities in different states, a dispute that occurred amid a national dialogue about the development of a large, interstate, grid dubbed a superpower. This Part, in particular, examines the court's analysis in *Attleboro*, and why that analysis is both suspect and not necessarily prescribed by the prevailing Dormant Commerce Clause narrative. The Article ends by positing that, while *Attleboro* influences modern dialogues, its ghost ought to be relegated to the history pages rather than prominently displayed as a component of any legal argument.

I. CITIES, PROGRESSIVISM, AND ELECTRICITY MARKETS

A. *Electricity Lights a Fair*

When President Cleveland ceremoniously closed the circuit, electrifying the great White City in May 1893,[13] the nation's policy toward energy law began on its path toward a collision course with the future. Chicago's great fair of the 19th century, named the White City, perhaps best captures how energy resources

13 *See* ERIK LARSON, THE DEVIL IN THE WHITE CITY 238 (2003).

would become the foundation for America's "progress."[14] Celebrating the 400th anniversary of Christopher Columbus, the World's Columbian Exposition of 1893 demonstrated how planning, urban life, and electricity combined to illustrate democracy's progress.[15] "The buildings would be lit with 7,000 arc and 120,000 incandescent lamps, which would be among the most striking technologies on display, demonstrating the newfangled wonders of electricity."[16] An "Electricity" building was one structure housed within this diminutive city.[17] This fair, moreover, "outshone" all others, attracting over 27 million visitors.[18] "It was also the most electrified world affair ever held, requiring three times the electricity used to power Chicago on a daily basis and ten times the electrical power used at the 1889 Paris Exposition."[19] And it displayed how nascent technology capable of converting alternating current (AC) to direct current (DC) could power cities, allowing a large generating station to produce high voltage energy

14 This transient replica of a surreal city "into which on some days about three-quarters of a million people crowded, represented the best that America could offer—a city intelligently designed for comfort, convenience, and beauty." HAROLD U. FAULKNER, POLITICS, REFORM AND EXPANSION 1890–1900, at 33 (1959).

15 *See* WILLIAM CRONON, NATURE'S METROPOLIS: CHICAGO AND THE GREAT WEST 341–69 (1991). *See also* SEAN D. CASHMAN, AMERICA IN THE GILDED AGE 164–65 (1993) (observing how the World's Fair endorsed Edward Bellamy's vision in *Looking Backward* and represented what city planning could do for urban living).

16 CRONON, *supra* note 15, at 341–42. Westinghouse provided the electricity, while Thomas Edison who lost that contract secured the ability to light "the fairgrounds with tens of thousands of his incandescent bulbs." W.H. BRANDS, AMERICAN COLOSSUS: THE TRIUMPH OF CAPITALISM, 1865–1900, at 511 (2010).

17 *See* NORMAN BOLOTIN & CHRISTINE LAING, THE WORLD'S COLUMBIA EXPOSITION: THE CHICAGO WORLD'S FAIR OF 1893, at 78–80 (1992). Amidst what one of President Theodore Roosevelt's biographer's calls "a showcase for the revolutionary marvels of harnessed electricity," Roosevelt ensured the fair would pay some homage to a western ideal. DOUGLAS BRINKLEY, THE WILDERNESS WARRIOR: THEODORE ROOSEVELT AND THE CRUSADE FOR AMERICA 257–58 (2009).

18 BOLOTIN & LAING, *supra* note 17, at vii.

19 *Id.* at 8. "When cultural historians look back at the fair, . . . what they see . . . was the glittering arrival of electricity." PHILLIP F. SCHEWE, THE GRID: A JOURNEY THROUGH THE HEART OF OUR ELECTRIFIED WORLD 53 (2007). Social historians, however, see how the fair masked underlying economic problems and delayed temporarily Chicago from experiencing the 1893 recession. *See* RAY GINGER, ALTGELD'S AMERICA: THE LINCOLN IDEAL VERSUS CHANGING REALITIES 92 (1973).

that could then be used for powering the fair's attractions.[20]

At the cusp of the progressive era, Chicago—the "electric city"[21]—and its World's Fair exemplified how technology and demographics became symbiotic with the new economy and its capital concentration, wage laborers, interstate markets and, commensurately, the vertically integrated and centralized electric power grid. 1893, after all, was the year when Emile Durkheim wrote how "science can help us adjust ourselves, determining the ideal toward which we are heading confusedly."[22] The ability to transport products across the nation's railways, to communicate over telegraph wires and through the mail, and to travel with the automobile made it such that "[c]ity and country were growing closer together."[23] But not until the rural electrification movement following WWI would the countryside begin to experience the transformative power of electric energy.[24] The cities, instead, with their rising populations, factories, and burgeoning electric trollies, propelled the need for electric generation.[25] Concentrating

20 *See* Richard D. Cudahy & William D. Henderson, *From Insull to Enron*: *Corporate (Re)Regulation After the Rise and Fall of Two Energy Icons*, 26 ENERGY LAW J. 35, 45 (2005). Several books explore Edison's contributions to the birth of the modern electric system, his battle with others over his support for DC as opposed to AC current, as well as his life. For some of the better ones exploring Edison and the development of electricity, see generally ROBERT L. BRADLEY JR., EDISON TO ENRON 19 (2011); ERNEST FREEBERG, THE AGE OF EDISON (2013); CHRISTOPHER JONES, ROUTES OF POWER 194–226 (2014) ("The Electrification of America"); THOMAS P. HUGHES, NETWORKS OF POWER (1983); JILL JONES, EMPIRES OF LIGHT: EDISON, TESLA, WESTINGHOUSE, AND THE RACE TO ELECTRIFY THE WORLD (2003); MAURY KLEIN, THE POWER MAKERS (2009); DAVID E. NYE, ELECTRIFYING AMERICA 139 (1990); HAROLD L. PLATT, THE ELECTRIC CITY (1991); SCHEWE, *supra* note 19; JOHN F. WASIK, THE MERCHANT & POWER: SAMUEL INSULL, THOMAS EDISON, AND THE CREATION OF THE MODERN METROPOLIS (2006).

21 BRADLEY, *supra* note 20, at 151. Insull even started Chicago's *Electricity City* magazine to encourage consumer demand for electrical appliances. *See* SCHEWE, *supra* note 19, at 70.

22 EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 34 (G. Simpson trans., 1933). 1893 also began the realignment and transformation of political parties. *See* JOEL H. SILBEY, THE AMERICAN POLITICAL NATION, 1838–1893, at 234–35, 238 (1991).

23 CRONON, *supra* note 15, at 332–33. *See also* FAULKNER, *supra* note 14, at 49.

24 *See generally* RONALD R. KLINE, CONSUMERS IN THE COUNTRY (2000).

25 The nation's cities' growth "remains the most arresting demographical development of" the Nineteenth Century's last decade and it occurred in a "rapid and chaotic" manner. FAULKNER, *supra* note 14, at 10, 23. By the end of the century, moreover, most of the nation's wealth was concentrated in urban

ownership and control over that generation, and what would become the electric grid, seemed almost pre-ordained. Henry Demarest Lloyd, a writer for the *Chicago Tribune*, years earlier published his *Atlantic Monthly* article indicting the concentration of power in the railroad and oil industries,[26] followed by his 1894 *Wealth Against Commonwealth*.[27] His *Atlantic* article explored how Americans suffered economically as a consequence of Standard Oil Company's monopolization of petroleum, fixing its prices in U.S. cities (excluding New York) and controlling all the pipelines and transportation networks.[28]

That the electric grid would follow suit seemed natural, particularly once Samuel Insull demonstrated how his emerging empire could efficiently deliver low cost power to Chicago consumers.[29] Insull "ingeniously developed the business model to affordably bring electricity into homes, stores, offices, and industry" and was the "father of the modern electricity industry."[30] He promised to provide affordable electricity to the masses, by capitalizing on the economies of scale associated with large

centers—among manufacturers. *See id*. at 55, 72. Arthur Schlesinger would a few decades later portray the city as the pinnacle of progress and counterpart to Frederick Jackson Turner's thesis on the closing of the frontier. *See* ARTHUR M. SCHLESINGER, THE RISE OF THE CITY, 1878–1898 (1933). It was during the fair, after all, when Turner delivered his remarks. *See* GINGER, *supra* note 19, at 22. And for Chicago manufacturers, for instance, their use of electricity in the factories grew from 4 to 78% between 1900 and 1930. *See* SCHEWE, *supra* note 19, at 77.

26 *See* Henry Demarest Lloyd, *The Story of a Great Monopoly*, ATLANTIC MONTHLY (March 1881).

27 *See* HENRY DEMAREST LLOYD, WEALTH AGAINST COMMONWEALTH (1894).

28 *See Lloyd*, *supra* note 26. "*Atlantic* commentary," however, apparently "distribute[d] blame for the corruption of the political process, for rising class conflict, and for the destruction of social and cultural values fairly evenly between labor and capital." ELLERY SEDGWICK, A HISTORY OF THE ATLANTIC MONTHLY, 1857–1901, at 197 (2009). *See generally* BRUCE BRINGHURST, ANTITRUST AND THE OIL MONOPOLY: THE STANDARD OIL CASES, 1890–1911, at 108–10 (1979) (summarizing the company's influence by 1900). The Supreme Court, in 1911, issued a decree breaking up Standard Oil. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

29 *See* BRADLEY, *supra* note 20, at 148. Increased demand, lower rates, and control over the market also became Insull's approach for saving his gas business—People's Gas. *See id.* at 155–59.

30 BRADLEY, *supra* note 20, at 19. Judge Cudahy and Professor Henderson provide a useful portrait of the history surrounding Insull and Edison. Cudahy & Henderson, *supra* note 20, at 39–72. *See also* FOREST MCDONALD, INSULL: THE RISE AND FALL OF A BILLIONAIRE UTILITY TYCOON (2004).

centralized generating stations that would service large areas, rather than smaller stations serving highly localized areas.[31] He encouraged utilities to agree to state public utility supervision of energy rates (cost of service with a rate of return) in return for an exclusive franchise guaranteeing the exclusive right to serve a territory.[32] For him, regulatory rate supervision posed little risk, because he favored selling energy as low as possible, even "ridiculously" low, in order to ensure that electricity would become a necessity.[33] Of course, while the majority of the population at this time still lived outside of urban centers, the "city" was fast becoming the loci of interest, control, and power. It is not surprising, therefore, that cities were the drivers of development of large-scale energy capacity to feed the needs of mass production, lighting, electric trolleys, and consumers.[34] A lecturer in London in 1893 observed how a central station worked well for large towns due to

> the great inconvenience of generating power in the small quantity and at the irregular times at which it is wanted for many purposes. For good or for ill, population gathers into huge communities, in which there is a complex development of social and industrial life. In such communities there is a constantly increasing need of mechanical power. In addition to manufacturing operations, demands for power arise for transit, for handling goods, for passenger lifts, for water supply, and for sanitation. At first these are met by the erection of scattered motors. But this sporadic production of power in small

31 *See* Cudahy & Henderson, *supra* note 20, at 39–72. Edison too recognized that small electric generators would be uneconomical and "saw the future in *jumbo* generators." *Id*. at 42. This model required sufficient demand (load), and the utilities therefore championed new electrical appliances and abandoning on-site generation—today, distributed generation. *See* BRADLEY, *supra* note 20, at 151. This fit nicely and became embedded in the new consumer economy—all of which flourished in the 1920s. *See* WILLIAM LEACH, LAND OF DESIRE (1993).

32 *See* NYE, *supra* note 20, at 180–81. Insull "crusade[d] to convince the industry to accept rate regulation in return for franchise protection." BRADLEY, *supra* note 20, at 172; *see also id*. at 86–88, 123–26; SCHEWE, *supra* note 19, at 69 (referring to a "Faustian Bargain"). *See generally* Forest McDonald, *Samuel Insull and the Movement for State Utility Regulatory Commissions*, 32 BUS. HIST. REV. 241 (1958).

33 MCDONALD, *supra* note 30, at 104.

34 From the Civil War to 1920, the cities experienced the fastest growth, with workers gravitating toward manufacturing and the extractive industries rather than agriculture. *See* MELVYN DUBOSKY, INDUSTRIALISM AND THE AMERICAN WORKER 1865–1920, at 3 (1996); *see generally* EDWARD GLAESER, TRIUMPH OF THE CITY (2011).

> quantities is quite certainly in many instances extravagantly costly and inconvenient. There is a great probability that power distributed from a central station in towns would be so convenient as to be preferable to power produced locally, even at a somewhat greater cost.[35]

This model, in turn, required developing a transmission infrastructure capable of carrying electricity to specified regions.[36] And by owning, controlling, or influencing all facets from the fuel source to production and distribution[37]—in short by becoming vertically integrated—Insull could build his empire. "Insull's empire," therefore, included "manufactured (coal) gas distribution, natural gas transmission, and urban transportation (a major user of power)."[38] And between the early 1900s and the 1920s, the delivery of electricity shifted from a primarily municipal (street lighting) and industrial base to an economy-wide customer base.[39]

35 WILLIAM C. UNWIN, HOWARD LECTURES: ON THE DISTRIBUTION AND TRANSMISSION OF POWER FROM CENTRAL STATIONS 5 (1894).

36 "Early generating stations produced direct current, which could only serve a small area. With the introduction of alternating current in the 1890s this technical situation changed, permitting long-distance transmission of current." NYE, *supra* note 20, at 139; *see also* Glaeser, *supra* note 34, at 49–52. And by 1920, transmission lines of 100 miles were "common," and those of "up to 250 miles in length are known and regarded as practical." CHESTER G. GILBERT & JOSEPH E. POGUE, AMERICA'S POWER RESOURCES 176 (1921). "The introduction of electric-power transmission not only provided a means of supplying distant manufacturing and domestic demands, but also opened up an entirely new power field, namely, the operation of street railways and lighting plants . . . ." COMM'R OF CORPS., DEP'T OF LABOR & COMMERCE, WATER-POWER DEVELOPMENT IN THE UNITED STATES 1 (1912). As of approximately 1912, the apparent limit (primarily economic) for a transmission line was roughly 200 miles. *See id*. at 8, 86. The limit increased to between 300 and 500 miles by 1931. *See* William H. Rose, *Control of Super-Power*, 80 U. PA. L. REV. 153, 153 n.2 (1931).

37 *See* BRADLEY, *supra* note 20, at 97.

38 BRADLEY, *supra* note 20, at 19. Insull also recognized the value of electric streetcars, which "played a central role in developing larger electrical-generation plants in most American cities." NYE, *supra* note 20, at 92. Like their electric utility counterparts, streetcar companies (whose profitability diminished after the war) became centralized with usually one company per city and operated through a holding company. *See id.* at 91, 134. And they often served as a primary consumer of electric power. *See* W.S. MURRAY ET AL, U.S. GEOLOGICAL SURVEY., A SUPERPOWER SYSTEM FOR THE REGION BETWEEN BOSTON AND WASHINGTON 33 (1921) (half of New York's energy was consumed by its trolley). Insull, therefore, pursued supplying electricity to the Chicago electric transportation market as well. *See* SCHEWE, *supra* note 19, at 68.

39 *See* NYE, *supra* note 20, at 56, 261. "Nationally, as late as 1905 less than 10 percent of all motive power was electrical; by 1930 the figure had jumped to 80 percent." *Id*. at 13. And "[t]he electrification of the domestic market began in

It also moved outward, from the city hub toward surrounding areas and neighboring states.[40] Its web expanded, as well, through agreements with other utilities to pool their resources to ensure an adequate and reliable supply of electricity, rather than building unnecessary generating stations.[41]

B. *The Progressive Tendency Toward Federal Supervision*

The expanding electric grid occurred while governmental supervision of our nation's energy resources was swiftly becoming aligned with Progressivism, tempered marginally by those fearful of encroaching upon state authority.[42] A fundamental tenant for many early twentieth century Progressives was scientific planning and an enhanced role for the government vis-à-vis the regulation of social and economic relations.[43] They "embraced" change and, according to William Wiecek, "sensed that the traditional, local, small town, agrarian, individualist society and mores of the

earnest only after 1918." *Id*. at 265. The growth of central generation stations grew after 1910, and overall electric consumption "more than doubled" in the 1920s. RONALD E. SEAVOY, AN ECONOMIC HISTORY OF THE UNITED STATES: FROM 1607 TO THE PRESENT 268 (2006). The 1920s, therefore, "saw more capital expenditure on electricity than any other single decade of spending during the railroad boom of the previous century." SCHEWE, *supra* note 19, at 109.

40 *See* BRADLEY, *supra* note 20, at 143, 160–62. *See also* MCDONALD, *supra* note 30, at 139–42 (describing Insull's success in connecting outlying communities and diversifying the central station load).

41 *See* BRADLEY, *supra* note 20, at 162.

42 *See* KELLER, *supra* note 11, at 162.

43 *See generally* ARTHUR S. LINK & RICHARD L. MCCORMICK, PROGRESSIVISM (1983); MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA 1870–1920 (2003). "Progressives promoted the growth of government power and a shift from distributive policies into regulative channels that demanded technical expertise and well-developed budgeting and financial skills, rather than the more generalist negotiating talents" characteristic of the previous dominance of political parties. SILBEY, *supra* note 22, at 240. As a consequence of the "[c]haotic urban growth produced by rapid industrialization," order in the cities demanded "expert, scientific" managers rather than municipal control by mere political affiliation. MAUREEN A. FLANAGAN, AMERICA REFORMED: PROGRESSIVES AND PROGRESSIVISMS 1890s–1920s, at 81–82 (2007). For other sources on the Progressive Movement, *see generally* DUBOSKY, *supra* note 34; GEORGE E. MOWRY, THE ERA OF THEODORE ROOSEVELT (1958); AMERICAN PROGRESSIVISM: A READER (Ronald J. Pestritto, William J. Atto, eds., 2008). *See also* J. Leonard Bates, *Fulfilling American Democracy: The Conservation Movement, 1907–1921*, 44 MISS. VALLEY HIST. REV. 29, 30 (1957) ("There was another side to the Progressive Movement—perhaps the most significant side: the decline of laissez faire, the development of a social conscience, the repudiation of Social Darwinism.").

nineteenth century were passing away, to be replaced by a national integrated economy driven by technological change."[44] Many believed in "the need for federal leadership" to usher in technological change.[45] While active federal involvement began during the second half of the 19th century, the cascade of federal legislation occurred shortly thereafter. In 1900, Congress passed the Lacey Act to help facilitate state programs designed to prohibit interstate transport of illegally obtained wildlife.[46] Three years later, when the Supreme Court upheld the interstate transportation of lottery tickets, "Congress took very swift advantage of the new field thus opened to it" and passed a variety of programs.[47] In the economic realm, it passed the 1906 Hepburn Act,[48] the Mann-Elkins Act in 1910 extending the authority of the Interstate Commerce Commission to the telegraph and telephone industries,[49] the Federal Reserve Act of 1913,[50] and the Federal

44 WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937, at 187 (1998).

45 Bates, *supra* note 43, at 31 (discussing Gifford Pinchot). Industry occasionally favored the progressive tendency toward federal authority, "sav[ing] them from the states." ROBERT H. WIEBE, BUSINESSMEN AND REFORM 202 (1962); *see also id.* at 212 (noting that "at least one segment of the business community supported each major program for federal control"). William Leach's fascinating history of the period proffers how "[t]he presence of the federal government in the lives of ordinary Americans was already manifest between 1895 and 1920," and after 1920 it acted "as a decisive agent in the making of the new American mass consumer economy and culture." LEACH, *supra* note 31, at 351.

46 *See* Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27 (1995). *See generally* MICHAEL J. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 15 (1997). Congress also passed the Migratory Bird Treaty Act in 1918, effectuating a treaty with the United Kingdom. The Supreme Court during this period also upheld federal efforts to enforce cattle quarantine measures, under what today would be a cooperative federalism model with states. *See* Thornton v. United States, 271 U.S. 414, 425 (1926). The *Thornton* court found instructive *United States v. Ferger*, 250 U.S. 199 (1919), where the court sustained Congress' power to regulate bills of lading for interstate shipments. *See id*. at 205–06 ("As the power to regulate the instrumentality was coextensive with interstate commerce, so it must be, if the authority to regulate is not be denied, that the right to exert such authority for the purpose of guarding against the injury which would result from the making and use of spurious imitations of the instrumentality must be equally extensive.").

47 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 736 (1926).

48 *See* Pub. L. No. 59-337, 34 Stat. 584 (1906).

49 *See* Pub. L. No. 61-218, 36 Stat. 539 (1910).

50 *See* Pub. L. No. 63-43, 38 Stat. 251 (1913).

Trade Commission Act in 1914,[51] along with a host other programs,[52] including the 1920 Transportation Act (building off the regulation of railroads).[53] It passed food and drug laws as well, affording uniformity in policy across jurisdictional lines; it promoted social welfare through statutes such as the Employers' Liability Act of 1906 (amended in 1908),[54] the Mann Act of 1910 prohibiting human trafficking when associated with prostitution,[55] the Keating-Owen Child Labor Bill prohibiting child labor in certain interstate activities,[56] and the Smith-Hughes Act of 1917 providing federal support for education.[57]

C. *Early Stages of Electric Energy Regulation*

Federal supervision over electric and natural gas infrastructure, however, lagged behind these other areas.[58] For

51 *See* Pub. L. No. 63-203, 38 Stat. 717 (1914). *See also* Fed. Trade Comm'n v. Gratz, 253 U.S. 421, 429, 432 (1920) (Brandeis, J., dissenting) (summarizing how the FTC developed to regulate competition and arrest undesirable aspects of consolidation).

52 *See, e.g.*, Meat Inspection and the Pure Food and Drug Act of 1906, Pub. L. No. 59-384, 34 Stat. 768.

53 *See* Dayton-Goose Creek Ry. Co. v. United States, 263 U.S. 456, 478 (1924); The New England Divisions Case, 261 U.S. 184, 189 (1923). The railroads had been nationalized during World War I, and with the 1920 act they once again were regulated under the Interstate Commerce Act. Introducing the bill, Senator Cummins observed how private ownership, "under strict public supervision," would be "better" and "cheaper" for the public. 3 BERNARD SCHWARTZ, THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY 1538 (1973).

54 *See* Pub. L. No. 59-239, 34 Stat. 232 (1906); Federal Employers' Liability Act, Pub. L. No. 60-100, 34 Stat. 65 (1908).

55 *See* White-Slave Traffic Act, Pub. L. No. 61-277, 36 Stat. 825 (1910).

56 *See* Pub. L. No. 64-249, 39 Stat. 675 (1916).

57 *See* Pub. L. No. 64-347, 39 Stat. 929 (1917). In 1917, Congress also passed the Food and Fuel Control Act, with the Fuel Administration created during WWI to address supply. *See* Pub. L. No. 65-41, 40 Stat. 276 (1917); *see also* Smith-Lever Act of 1914, Pub. L. No. 63-95, 38 Stat. 372 (establishing cooperative extension program).

58 Aside from waterpower, congressional interest focused principally on rights-of-ways through federal property. In 1896, Congress authorized granting various rights-of-way across public lands, including for electricity generation and transmission. *See* Act of May 14, 1896, ch. 179, 29 Stat. 120; Act of May 11, 1898, ch. 292, 30 Stat. 404 (amending the preceding act). In 1901, Congress expanded that authority, including through Yosemite and other national parks and forest reservations. *See* Act of Feb. 15, 1901, ch. 372, 31 Stat. 790. Land withdrawals for irrigation also provided the Interior Department with the authority to lease for ten years, affording preference to municipal purposes, "any surplus power or power privilege." Reclamation Act Amendments of 1911, Pub.

these two industries, attention generally gravitated toward state public utility commissions—establishing and avoiding confiscatory rates, as well as defining the role of the judiciary and developing workable legal rules for contracts, torts and property law as they affect the energy industry.[59] As a consumer advocate attorney, for instance, Louis Brandeis worked with Frederick W. Taylor, the father of "scientific management" in business, to illustrate how better efficiency in the utility industry could avoid increasing rates paid by the public.[60] Scientific management and its normative allegiance toward efficiency perhaps best captures the Progressive ethic.[61] Various reforms at the state commission level converged with an apparent interest in both utility commissions and the industry to explore uniform approaches toward the industry. Indeed, as one observer commented: "innumerable national, professional and trade organizations have

L. No. 61-417, 36 Stat. 930, 930 (albeit allowing up to a 50-year lease for the Rio Grande project in Texas and New Mexico). In 1911, Congress further afforded the Forest Service generic authority to grant easements for power development:

> That the head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes . . .

Agriculture Department Apportions Act of 1911, Pub. L. No. 61-478, 36 Stat. 1235, 1253.

59 *See* JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 156–202 (1927) (discussion of public utility regulation by leading scholar). An author of an early treatise on utility regulation and Harvard Law faculty member (until forced to resign for accepting money from a monopoly) explained how state supervision was the only viable option to the alternative of state ownership. *See* BRUCE WYMAN, THE SPECIAL LAW GOVERNING PUBLIC SERVICE CORPORATIONS AND ALL OTHERS ENGAGED IN PUBLIC EMPLOYMENT (1911).

60 *See* OLIVER ZUNZ, MAKING AMERICA CORPORATE 1870–1920, at 35 (1990). Zunz opines that Brandeis reflected that aspect of progressivism favoring "small against the mighty," "heterogeneity" over "homogenization," and "cultural pluralism." *Id*. at 36.

61 *See* HENRY F. MAY, THE END OF AMERICAN INNOCENCE 133–35 (1959) (describing Scientific Management's importance and acceptance by Justice Brandeis). *See also* SAMUEL HABER, EFFICIENCY AND UPLIFT: SCIENTIFIC MANAGEMENT IN THE PROGRESSIVE ERA 1899–1920, at 75–82, 95 (1964) (generally describing Taylor, Scientific Management, and Justice Brandeis' embrace).

unified the United States to much the same degree that the individual state was unified three decades ago."[62] The judiciary, however, as Herbert Hovenkamp persuasively argues, nevertheless struggled with emerging energy industries, trying to employ traditional legal doctrines to the new technology.[63]

Interest in electrical energy at the federal level centered principally on waterpower development and associated consolidation. During the first twenty years, in particular, Congress explored waterpower development on public lands and in the nation's waters. It passed the 1902 Reclamation Act and various other measures, including specific laws for particular projects.[64] The 1906 General Dam Act (amended in 1910), for example, required individual congressional assent for each project and established conditions for their development.[65] President Roosevelt eventually rejected this approach and instead urged that

62 Clarence M. Updegraff, *The Extension of Federal Regulation of Public Utilities*, 13 IOWA L. REV. 369, 370–71 (1928).

63 *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836–1937, at 114 (1991).

64 *See* JEROME G. KERWIN, FEDERAL WATER-POWER LEGISLATION 81, 85–89, 105–11, 129–30 (1926). *See also* MICHAEL C. ROBINSON, WATER FOR THE WEST: THE BUREAU OF RECLAMATION 1902–1977, at 9–18 (1979). Congress passed various rivers and harbors statutes, including in 1890 and 1899. *See* River and Harbor Act of 1890, ch. 907, 26 Stat. 426, 453–54; River and Harbor Appropriations Act of 1899, ch. 425, 30 Stat. 1121. In 1894, Congress allowed sales of power from irrigation projects, as well. *See* River and Harbor Act of 1894, ch. 299, 28 Stat. 338. Earlier statutes authorized water power development: In 1879, for instance, Congress provided for waterpower development by the Moline Water Power Company. *See* Act of March 3, 1879, ch. 182, 20 Stat. 377, 387. In 1884, Congress granted the Saint Cloud Water Power & Mill Co. the right to develop water power from the Mississippi River. *See* Act of July 5, 1884, ch. 231, 23 Stat. 154. In 1888, Congress authorized the Secretary of War to grant rights for waterpower development along the Muskingum River, Ohio. *See* River and Harbor Act of 1888, ch. 860, 25 Stat. 400, 417. And in 1890 Congress authorized granting waterpower privileges along the Green and Barron Rivers. *See* River and Harbor Act of 1890, 26 Stat. at 447.

65 *See* KERWIN, *supra* note 64, at 111–14. The 1906 Act, as interpreted by the Taft administration in an opinion by Attorney General Wickersham, did not permit charging a waterpower developer a fee for the use of the resources, prompting the amendment in 1910. *See* Charles K. McFarland, *The Federal Government and Water Power, 1901–1913*: *A Legislative Study in the Nascence of Regulation*, 42 LAND ECON. 441, 449 (1966). During this period, the battle over Hetch Hetchy and San Francisco's thirst for water and power emerged as the notable project precipitating widespread interest. *See generally* NORRIS HUNDLEY, JR., THE GREAT THIRST: CALIFORNIANS AND WATER, 1770s–1990s, at 169–90 (1992); ROBERT W. RIGHTER, THE BATTLE OVER HETCH HETCHY 117 (2005).

the nation assemble "the best experts available" to help plan the development of the nation's waterways.[66] Roosevelt tasked the Inland Waterways Commission with developing a comprehensive water resource plan, and consistently with his pledge to rely on experts he added to the Commission "a recognized authority on water power."[67] This became the signal effort to expand the "conservation" agenda beyond national forests.[68] The outcome was the symbolic birth of the "conservation" movement.[69] By 1908, the Progressive "conservation" community began actively exploring how to tap the nation's water resources without allowing private, monopolistic control.[70] A 1909 report by the Commissioner of Corporations to Roosevelt addressed concentration in the waterpower industry, and recommended governmental supervision

66 INLAND WATERWAYS COMM'N, PRELIMINARY REPORT, S. Doc. No. 60-325, at vi (1908).

67 *The Inland Waters Commission*, SCIENCE (June 26, 1908).

68 *See* JUDSON KING, THE CONSERVATION FIGHT: FROM THEODORE ROOSEVELT TO THE TENNESSEE VALLEY AUTHORITY 13 (1959). When delivering the interim report from the Commission he created a year earlier, President Roosevelt lamented how "the failure to use our own [rivers] is astonishing, and no thoughtful man can believe that it will last," adding that river systems need to be deployed to their "utmost"—with irrigation, power and water supply. He posited, in particular, how "[t]he use of water power will measurably relieve the drain upon our diminishing supplies of coal." INLAND WATERWAYS COMM'N, *supra* note 66, at iii–iv. He, therefore, encouraged Congress to establish an "administrative machinery for coordinating the work of the various Departments." *Id*. at v.

69 The Commission's effort led to a White House commission on conservation, and an accompanying call for a conference among the White House, governors and other significant political actors and policy makers (including members of the Supreme Court). Following the conference, the President appointed a National Conservation Commission tabbed with the responsibility of developing a report—a report that would soon be buried by Congress (and whose efforts would be succeeded by the National Conservation Association). *See generally* CHARLES R. VAN HISE, THE CONSERVATION OF NATURAL RESOURCES IN THE UNITED STATES 5–12 (1910); GIFFORD PINCHOT, BREAKING NEW GROUND 326–360 (1947); W. J. McGee, *The Conservation of Natural Resources*, *reprinted in* PROCEEDINGS OF THE MISSISSIPPI VALLEY HISTORICAL ASSOCIATION FOR THE YEAR 1909–1910, at 361, 374–5 (1910); THEODORE ROOSEVELT, THE NEW NATIONALISM 90–91 (1911).

70 New York's Governor, for instance, warned against allowing private, perpetual, control of the nation's resources. *See* KING, *supra* note 68, at 19–20. Progressives generally accepted that waterpower ought to be "controlled" rather than "owned" by "the public." *E.g*., VAN HISE, *supra* note 69, at 133–41. But several governors asserted states' rights when discussing control waterpower. *See Governors Uphold Rights of States*, N.Y. TIMES, Jan. 20, 1910, at 3 (describing addresses by Governor Hughes of New York, Governor Shafroth of Colorado, and Governor Brooks of Wyoming at the Conference of Governors).

over development but not of the electric rates from that development.[71] Wisconsin University President Charles Van Hise echoed the prevailing optimistic sentiment about how the nation's entire power requirements could be fed by waterpower—hindered only by the technical limits on constructing lengthy transmission lines.[72] In 1911, former President Roosevelt championed waterpower's importance and corresponding need for federal supervision rather than allowing state chartered monopolies.[73] A 1911 editorial in the magazine American Conservation reflected on the importance of waterpower and why the fight over governmental control had entered a "critical stage."[74] When the country elected Woodrow Wilson, "[w]aterpower development" had become "a matter of great concern to the whole country; it was before the public as it never had been."[75] And the concept of placing responsibility in a commission for supervising the development of waterpower was gaining currency.[76] This dialogue occurred amidst discussions about whether private interests or the federal government should tap the Tennessee Muscle Shoals for its nitrates and accompanying waterpower.[77] As waterpower

71 *See* Frederick P. Royce, *A Consideration of the Report of Commissioner of Corporations on Water Power Development of the United States*, STONE & WEBSTER 335–36 (May 1912). "This report generated great interest throughout the country and emphasized the need for a definite policy which remained a conspicuous proposal in 1912 just as in 1907 when Roosevelt created the Inland Waterways Commission." McFarland, *supra* note 65, at 450.

72 *See* VAN HISE, *supra* note 69, at 119–122, 136.

73 *See* ROOSEVELT, *supra* note 69, at 58–62, 95–99.

74 *Editorial*, 1 AM. CONSERVATION 193, 195 (July 1911).

75 KERWIN, *supra* note 64, at 171. *See also* COMM'R OF CORPS., *supra* note 36, at xv ("Within the last decade, through the development of electric transmission of power, our water-power resources have come into national importance."). This history is further documented in SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY (1959), one of the most prominent books describing the conservation philosophy of the progressive era. *See also* Gifford Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 GEO. WASH. L. REV. 9 (1945).

76 *See* KERWIN, *supra* note 64, at 204.

77 The Muscle Shoals debate mirrored the larger conversation about the utility of public versus private ownership and development, along with how best to plan for river development. *See* RICHARD RUDOLPH & SCOTT RIDLEY, POWER STRUGGLE 69 (1986) (describing how the Muscle Shoals "debate pitted defenders of public power against the private interests"). For other books describing the debate surrounding the controversy over federal development, *see generally* NORTH CALLAHAN, TVA: BRIDGE OVER TROUBLED WATERS (1980); PRESTON J. HUBBARD, ORIGINS OF TVA: THE MUSCLE SHOALS CONTROVERSY 1920–1932 (1961); C. HERMAN PRITCHETT, THE TENNESSEE VALLEY

development had by then become stymied,[78] a several-year dialogue ensued regarding whether water resources should be privately tapped or owned and controlled by the Federal government.[79]

In 1920, Congress resolved this policy choice by adopting the Federal Water Power Act (FWPA).[80] While congressional consideration earnestly began in 1916, Congress did not pass the FWPA until 1920, resolving the principal issues of payment, net investment and recapture, as well as the scope of waters subject to federal control. Importantly, the Act resolved a fight between private capital investment and federal ownership.[81] It deftly

AUTHORITY: A STUDY IN PUBLIC ADMINISTRATION 3–30 (1943).

78 *See* McFarland, *supra* note 65, at 451.

79 For a historical summary, see generally HAYS, *supra* note 75, at 73-81, 91-121, 160-64, 180-84; KERWIN, *supra* note 64; McFarland, *supra* note 65.

80 *See* Federal Water Power Act, ch. 285, 41 Stat. 1063 (1920) (codified as amended at 15 U.S.C. ch. 12 (2012)). Judson King describes some of the early troubles he was aware of plaguing the FPC. *See* KING, *supra* note 68, at 211–33. "The passage of the Water Power Act," nevertheless, "inaugurated [along with the Mineral Leasing Act of 1920] a new policy of continuing public ownership and federal trusteeship in which conservation and national interest seemed to be the winners." Bates, *supra* note 43, at 53. Also in 1920, the United States Geological Survey explored the possibility for a nationally-owned and controlled electric grid—opposed by the private sector—an idea followed three years later with a scaled down proposal from Secretary of Commerce Herbert Hoover; neither idea survived. *See* BRADLEY, *supra* note 20, at 175.

The FWPA, notably, occurred amid the Muscle Shoals controversy and conversations over whether the Federal government or private interests ought to develop the nation's water resources. *See* ROBERT K. MURRAY, THE HARDING ERA 412 (1969); *see also* PRITCHETT, *supra* note 77, at 4–11 (noting how the creation of the Tennessee Valley Authority began in 1916 with the "Muscle Shoals problem"). *See also* RIGHTER, *supra* note 65, at 167 ("Public-versus-private-power conflicts dominated the world of electricity for half a century."). Senator La Follette's third party presidential campaign advocated federal ownership of water resources, rather than monopoly-controlled private ownership. *See* 4 JOSEPH DORFMAN, THE ECONOMIC MIND IN AMERICAN CIVILIZATION 104–05 (1959). But as of 1920, waterpower development lagged when compared with coal, with the former roughly 7 percent of the latter. *See* GILBERT, *supra* note 36, at 166. A "contribut[ing]" reason for waterpower's retarded growth could have been "the inadequacies of Federal legislation," but other factors apparently were at play as well. *Id*. at 166–70, 178–79, 183, 236.

81 *See* MURRAY, *supra* note 80, at 412 (1969); *see also* NYE, *supra* note 20, at 183. "[E]nough public power companies remained" in the 1920s "to raise troubling questions about fair rates, democratic control, and public service that would be widely debated again in the 1930s." NYE, *supra* note 20, at 183. The authors of a 1921 report suggested the need for a common carrier obligation for electric transmission lines, which might induce and promote development. *See id*. at 236–40. *See generally* KERWIN, *supra* note 64, at 39–42 (discussing factors

avoided establishing jurisdictional lines for the sale and transmission of electric energy, when it modified the approach taken in the 1920 Transportation Act. There, Congress accepted the Supreme Court's holding in the *Shreveport Rate* case and allowed the Interstate Commerce Commission to regulate intrastate rates for transportation that affected interstate rates for transportation.[82] In the FWPA, by contrast, Congress allowed state public utility commissions the ability to regulate rates for sales of electricity in either intra- or interstate transactions.[83] Soon after Congress passed the FWPA, the FPC alluded to its ability, if necessary, to regulate rates for interstate sales, but saw "at the present time little probability that occasion for such action will arise."[84] Utilities had encouraged passage of the Act[85] and after its enactment responded favorably by submitting applications for preliminary permits.[86]

While the dialogue over waterpower raised the specter of monopolizing resources,[87] the electric industry was rapidly

purportedly arresting development).

82 *See* Esch-Cummins Act, Pub. L. No. 66-152, § 400, 41 Stat. 456, 474–75 (1920) (codified as amended in scattered sections of 49 U.S.C.); Houston E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342, 349–59 (1914); GERALD BERK, ALTERNATIVE TRACKS: THE CONSTITUTION OF AMERICAN INDUSTRIAL ORDER, 1865–1917 (1997). *See generally* Paul S. Dempsey, *Transportation: A Legal History*, 30 TRANSP. L. J. 235 (2003).

83 Section 19 of the FWPA conditioned the issuance of a license upon the licensee's abiding by "reasonable regulation" of "any duly constituted agency of the State in which the service is rendered or the rate charged," and in Section 20 further provided "[t]hat when said power or any part thereof shall enter into interstate . . . commerce[,] the rates charged and the service rendered . . . shall be reasonable, nondiscriminatory, and just to the customer" and intimating acquiescence to state authority by adding the Federal Power Commission would have jurisdiction if no state agency exists for any state "directly concerned" to enforce the Act's proscriptions. §§ 19–20, 41 Stat. at 1073–74.

84 FED. POWER COMM'N, FIRST ANNUAL FPC REPORT 62–63 (1921).

85 *See* E. LOUISE PEFFER, THE CLOSING OF THE PUBLIC DOMAIN 120 (1951) ("The water-power question represented the most clear-cut example of the efforts by a major private interest to produce a law favorable to itself.").

86 By the close of 1920, the FPC had 143 applications. *See Water-Power Applications Filed in 1920, 13,000,000 Hp.*, 77 ELECTRICAL WORLD 138 (Jan. 15, 1921). Some states feared that the new act infringed states' rights. *See New York to Defend State's Rights in Water-Power Hearing*, 77 ELECTRICAL WORLD 169 (Jan. 15, 1921); *New York State Opens Fight on Water-Power Act*, 77 ELECTRICAL WORLD 219 (Jan. 15, 1921); *see generally* William H. Rose, *Control of Super-Power*, 80 U. PA. L. REV. 153, 171–73 (1931). *See also* KERWIN, *supra* note 64, at 290 (noting New York's withdrawal of its lawsuit).

87 In his 1908 message accompanying the interim report of the Inland

consolidating—coinciding with the national conversation over corporate capitalism and "bigness."[88] To be sure, consolidation and creation of holding companies helped secure capital investment and ensure sufficient electric generation capacity and a corresponding load. Arrangements with the electric or inter-urban trolley system (as Insull achieved with Chicago Edison[89]), for instance, guaranteed a ready market and a favorable load curve ensuring a consistent generation need. Consolidating ownership of facilities allowed companies the ability to generate sufficient capital for the large investments necessary to expand their systems and diversify their load for different patterns of use.[90] But public

Waterways Commission, President Roosevelt emphasized the evils of the "consolidation of companies controlling water power." INLAND WATERWAYS COMM'N, *supra* note 66, at V.

88 *See generally* GLENN PORTER, THE RISE OF BIG BUSINESS: 1860–1920 (2005) (discussing the growth of big business, the affect it had on society and markets, and the factors that prompted its growth); MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916 (1988) (describing what the author terms the "corporate reconstruction of capitalism," which facilitated the growth of big business during the Progressive era). Some, such as Louis Brandeis, simply opposed bigness, while others accepted concentration but thought its evils could be regulated by federal intervention. *See, e.g.*, Louis D. Brandeis, *An Illegal Trust Legalized*, 21 WORLD TODAY 1440 (1911), *reprinted in* THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS 101 (Osmond K. Fraenkel ed. 1962). Brandeis shared his opposition toward bigness with progressive Wisconsin senator Robert La Follette. *See* MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 328 (2009).

89 *See* HUGHES, *supra* note 20, at 222–23 (noting importance of providing electricity to traction companies). Maury Klein explains how "[t]he streetcar business fit Insull's evolving business model for central stations perfectly. Trolleys swallowed huge amounts of power at the morning and evening rush hours, which fit neatly between the demand for lighting and factory power." KLEIN, *supra* note 20, at 418. The relationship of the utilities to the traction companies is part of the larger story about the growth of large holding companies, demonstrated by the Chicago Tribune's 1908 story *Traction Merger One Step Nearer*, CHI. TRIBUNE, Nov. 24, 1908 (noting proposed merger by Insull's company).

90 *See* RONALD SEAVOY, AN ECONOMIC HISTORY OF THE UNITED STATES FROM 1607 TO THE PRESENT 270–72 (2006); KERWIN, *supra* note 64, at 45–46 (Westinghouse and General Electric monopoly over waterpower). "The concern of many people over this concentration which in the early years of water-power activity was unregulated, and even now is not regulated altogether satisfactorily, was quite justifiable." KERWIN, *supra* note 64, at 56. A 1912 report highlighted the industry's considerable concentration. *See id*. at 156; *see also* COMM'R OF CORPS., *supra* note 36, at 9, 95–98 (explaining why concentration for waterpower may be different). Companies would own electric trollies, electric lighting companies, electric generating companies, and possibly natural gas companies. *See id*. at 166, 186 (e.g., Stone & Webster).

outcry questioned whether the electric transportation network and accompanying electric generation system should be in public or private ownership—or controlled by a select few.[91] And who should or could control these companies, whose financial situation was highly precarious and often beyond the reach of state regulation?[92] In 1925, the FTC began examining the problem with industry concentration, precipitating a more robust inquiry a few years later.[93]

As natural monopolies, however, holding companies could capitalize on the economies of scale, attract private capital, and correspondingly expand the electric grid.[94] As of 1922, there were

91 "A more comprehensive attack took place on those gas, light, and street-railway utilities which provided city services. Affecting intimately the lives of all urban citizens, the utility seemed to be an impersonal, greedy octopus . . . ." SAMUEL P. HAYS, THE RESPONSE TO INDUSTRIALISM 1885–1914, at 109 (1957). A nationally prominent organization's 1907 report concluded that, while public or private ownership should be determined by the local community, legalized monopolies with public regulation was warranted. *See* RUDOLPH, *supra* note 77, at 39. Writing in 1915, New York University Professor Benjamin P. DeWitt urged public or utility ownership of utilities as a component of progressivism. *See* BENJAMIN P. DEWITT, THE PROGRESSIVE MOVEMENT: A NON-PARTISAN, COMPREHENSIVE DISCUSSION OF CURRENT TENDENCIES IN AMERICAN POLITICS 352–57 (1915). According to Herbert Hovenkamp, this movement may have been hampered by existing theories of "ruinous competition" (rejected under the Sherman Act), if a franchise already had been awarded for the geographic area. HOVENKAMP, *supra* note 63, at 309–15.

92 *See* Nidhi Thakar, Note, *The Urge to Merge: A Look at the Repeal of the Public Utility Holding Company Act of 1935*, 12 LEWIS & CLARK L. REV. 903, 908–09 (2008).

93 *See* BRADLEY, *supra* note 20, at 176. The Preliminary Report from the Inland Waterways Commission emphasized the need for active federal and state regulation of the monopolization in the power sector. *See* KING, *supra* note 68, at 14. The FWPA generally prohibited "combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service . . . ." Federal Water Power Act, § 10(h), ch. 285, 41 Stat. 1063, 1070 (1920) (codified as amended at 15 U.S.C. ch. 12 (2012)). By the mid-1990s, roughly 85 percent of the nation's electric generation was under the control of only 16 holding companies. *See* RUDOLPH, *supra* note 77, at 46. The concern escalated, leading to various committees and recommendations and ultimately the passage of the Public Utility Holding Company Act of 1935. *See generally* James W. Moeller, *Requiem for the Public Utility Holding Company Act of 1935: The "Old" Federalism and State Regulation of Inter-State Holding Companies*, 17 ENERGY L.J. 343, 357–58 (1996). The Act may have been "the most bitterly contested of the New Deal." Cudahy & Henderson, *supra* note 20, at 75.

94 *See* NYE, *supra* note 20, at 140. Governmentally owned electric systems (public power) began waning by the 1920s, and "[b]y 1932 . . . produced only

reportedly 3,774 privately owned electric systems and 2,581 municipally owned systems.[95] Between 1900 and 1934, the country's energy production rose from 2 billion kWhs to 90 billion kWhs.[96] Privately-owned utilities promoted Insull's view of minimal state regulatory oversight through public utility commissions. However, as they grew in organizational structure and infrastructure, achieving even greater economies of scale, these utilities naturally pushed the boundaries of effective state oversight.[97] Although the numbers may not be precise, one author suggests that by the time of *Attleboro* roughly "10.07 percent of the power produced for public consumption moved interstate."[98] And it was well understood at the time that the industry's growth was tied to an interconnected interstate grid.[99]

II. CONSTITUTIONAL NARRATIVE FOR EMERGING ENERGY MARKETS

The Supreme Court would need a constitutional narrative under the Commerce Clause for reviewing state regulation of this burgeoning business. That the court's idiosyncratic and unresolved constitutional narrative would surface for these newly evolving energy industries seemed pre-ordained with the Progressive imperative favoring the development of nation's water power.[100]

about 5 percent of the nation's electricity." *Id*. at 179–80.

95 *See* NAT'L ELEC. LIGHT ASS'N, POLITICAL OWNERSHIP AND THE ELECTRIC LIGHT AND POWER INDUSTRY 5 (1925). "Rural electric development," at the time, was arguably limited "under municipal ownership because communities are without authority to conduct any business or activities outside of their corporate limits." *Id.* at 21.

96 *See* Dozier A. 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 (1945).

97 *See* NYE, *supra* note 20, at 182–83.

98 DeVane, *supra* note 96, at 31. DeVane explains how some state commissions examined rates for power produced elsewhere or being shipped elsewhere. *See id.* (e.g. Maryland).

99 The interstate market comprised roughly 9% of total generation, and it was increasing dramatically. *See generally* William C. Scott, *State and Federal Control of Power Transmission as Affected by the Interstate Commerce Clause*, 14 PROC. ACAD. POL. SCI. 135 (1930). Overall, between just 1922 and 1930, total electric generation about doubled. *See* Cudahy & Henderson, *supra* note 20, at 55.

100 Benjamin P. DeWitt, for instance, quotes favorably a 1912 Report of the Secretary of the Interior that "[t]here is no more important subject now pending before Congress and the country than the adoption of a definite and comprehensive water-power policy." DEWITT, *supra* note 91, at 182. *See also* PINCHOT, *supra* note 69, at 334 ("The Government's problem, as we saw it, was

That narrative had been apparent for the railroad industry: two markets emerged, the short haul in-state service market and the interstate long-haul transport market, and state commissions promoted harmful economic rate discrimination favoring the former over the latter.[101] Therefore, when, Justice Brandeis reviewed Congress' ability to regulate intrastate railroad activities that affected the interstate market because of potentially discriminatory actions at the state level, he observed that

> Congress has power to assume not only some control, but paramount control, insofar as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce.[102]

The fact that Congress could or perhaps should act—a theme imbued throughout Progressivism,[103] did not resolve how far state jurisdiction would extend or whether both the states and Congress could share potential jurisdiction subject to Congress' preemptive authority.

The Supreme Court, however, generally disallowed concurrent jurisdiction if it deemed an activity as involving interstate commerce.[104] The court's analysis expanding the scope of federal power "also served to provide a boundary beyond which a state legislature might not go."[105] This occurred because the

to ensure the fullest possible development of water power and its sale to the consumer at the cheapest possible price."). In 1910, Pinchot described "conservation of water power" as one of the most "pressing" "conservation" issues. GIFFORD PINCHOT, THE FIGHT FOR CONSERVATION 83 (1910). Theodore Roosevelt similarly commented about "[t]he enormous importance of water power sites to the future of industrial development." ROOSEVELT, *supra* note 70, at 58.

101 *See* HOVENKAMP, *supra* note 63, at 131–39.

102 Colorado v. United States, 271 U.S. 153, 165 (1926). *See also* R.R. Comm'n v. S. Pac. Co., 264 U.S. 331 (1924) (ability to regulate issuance of securities for interstate activities).

103 William Swindler posits that progressives sought to replace *laissez-faire* with "the need and opportunity for implementing a series of nationalistic laws." WILLIAM F. SWINDLER, COURT AND CONSTITUTION IN THE 20TH CENTURY 192 (1969).

104 *See generally* Sam Kalen, *Dormant Commerce Clause's Aging Burden*, 49 VAL. L. REV. 723 (2015).

105 WALTER F. PRATT JR., THE SUPREME COURT UNDER EDWARD DOUGLAS WHITE, 1910-1921, at 118 (1999).

court generally had treated those matters involving interstate commerce as exclusively within Congress' domain.[106] In 1925, the conservative Justice Van Devanter echoed the prevailing doctrine when he observed how states could "incidentally and remotely" affect interstate commerce for *permissible* reasons, but regardless of a state's motivation it could not "directly interfere[] with or burden[] such commerce."[107] A state could not, according to Van Devanter, impose certain burdens on foreign corporations doing business within a state, such as requiring that foreign corporations accept state (over federal) court jurisdiction as either a plaintiff or defendant.[108]

A. *Porous Lines*

In the transportation realm, the Supreme Court wrestled with the somewhat porous federal-state dividing line, allowing some state authority when the court perceived of it as a valid exercise of the police power but otherwise limiting the state's ability to regulate the interstate activity itself. In *Buck v. Kuykendall*,[109] for instance, Justice Brandeis invalidated a Washington State law that required a certificate of public convenience and necessity before a motor vehicle company could use the highways to transport passengers for hire. Washington denied Buck's request for a certificate on the grounds that the route was otherwise adequately served by other transportation means. Buck then claimed that Washington denied him his rights under the Fourteenth Amendment and that the program violated the Commerce Clause. Brandeis accepted that certain state measures would be permissible, if they were reasonably related to a legitimate state interest and avoided directly regulating interstate commerce.[110] But Washington's program addressed neither safety nor

106 *See* Hannibal & St. Joseph R.R. Co. v. Husen, 95 U.S. 465, 469 (1877).

107 Shafter v. Farmers' Grain Co., 268 U.S. 189, 199 (1925).

108 *See* Sioux Remedy Co. v. Cope, 235 U.S. 197, 204 (1914).

109 *See* 267 U.S. 307 (1925).

110 *See* 267 U.S. at 315. The court already had established that states could impose safety-related measures for interstate railroads. *E.g.*, Atl. Coast Line R.R. Co. v. Georgia, 234 U.S. 280 (1914) (headlights); Vandalia R.R. Co. v. Pub. Serv. Comm'n, 242 U.S. 255 (1916) (headlights on trains); Smith v. Alabama, 124 U.S. 465 (1888) (fitness of railroad engineer). *Cf.* S. Ry. Co. v. King, 217 U.S. 524, 539 (1910) (Holmes, J., dissenting) (suggesting that case dismissed on procedural grounds violated Commerce Clause because it might have impermissibly impeded interstate travel and the mails).

conservation; rather, it focused on competition in interstate travel—not just burdening but "obstruct[ing]" it contrary to Commerce Clause.[111] By contrast, a state could enforce traditional common law common carrier obligations on interstate carriers.[112] For the exploding automobile industry, the Supreme Court in *Hendrick v. Maryland*[113] established that states could require vehicle owners (even if they will travel in interstate commerce) to register and license their vehicles in the state. And a state could even deny a permit to travel along its roads if it reasonably concluded that additional traffic might cause a hazard—the exercise of a traditional or permissible police power.[114] Similarly, a state's police power—absent "national legislation"—extended to reasonable limitations on vehicle weight, even when those vehicles travelled in interstate commerce.[115]

An unacceptable exercise of the police power seemingly occurred if a measure appeared problematic under prevailing Fourteenth Amendment liberty and property doctrines. Indeed, the

111 *Id*. at 316. *See also* George W. Bush & Sons Co. v. Maloy, 267 U.S. 317 (1925) (invalidating permit requirement for motor vehicle carrier). This same year the court upheld Congress' authority to pass the National Motor Vehicle Theft Act. *See* Brooks v. United States, 267 U.S. 432 (1925).

112 *See*, *e.g.*, Mo. Pac. R.R. Co. v. Larabee Flour Mills Co., 211 U.S. 612 (1909) (duty to serve local mill and transfer railroad cars, when serving others in the area). Justice Brown began one railroad case by observing how

> Few classes of cases have become more common of recent years than those wherein the police power of the state over the vehicles of interstate commerce has been drawn in question. That such power exists and will be enforced, notwithstanding the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employees, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good.

Cleveland, Cincinnati, Chi. & St. Louis Ry. Co. v. Illinois, 177 U.S. 514, 516 (1900).

113 *See* 235 U.S. 610 (1915). The court observed how such regulatory authority, unless preempted by Congress, was an essential aspect of traditional police power authority—albeit capable of being examined for its reasonableness. *See id*. at 622–23. *See also* Kane v. New Jersey, 242 U.S. 160 (1916) (following *Hendrick*, upholding New Jersey's licensing program).

114 *See* Bradley v. Pub. Utils. Comm'n, 289 U.S. 92 (1933) (Justice Brandeis upholding the denial of a certificate base on overly congested highway). In *Bradley*, *id*. at 95, Justice Brandeis referenced the Fourteenth Amendment case of *Stephenson v. Binford*, 287 U.S. 251 (1932), allowing a certificate of public convenience and necessity.

115 *See* Morris v. Duby, 274 U.S. 135 (1927).

loci of many cases otherwise involving interstate commerce centered on the Fourteenth Amendment and state and local actors' ability to regulate the price for commodities shipped in interstate commerce.[116] In *Michigan v. Duke*,[117] for instance, the state attempted to convert a private carrier traveling between states into a common carrier. This upset the carrier's existing contracts for hauling products, and imposed additional obligations, costs, and liability on the carrier without any justification for "public safety or order in the use of motor vehicles upon the highways, or to the collection of compensation for the use of the highways."[118] If an activity was affected with a public interest, quite possibly the jurisprudence would have allowed such an imposition[119]—but imposing it on highway traffic would have adversely altered the use and development of the nation's burgeoning transportation network. Absent treating the activity as affected with a public interest, the Supreme Court's precedent established that Michigan's measure violated the Fourteenth Amendment. A state, for instance, could not convert a private crude oil pipeline into a common carrier—under the Fourteenth Amendment, unless

> in the beginning or during its subsequent operation the pipe line was devoted by its owner to public use, and if the right thus extended to the public has not been withdrawn, there can be no doubt that the pipe line is a public utility and its owner a common carrier whose rates and practices are subject to public

116 *See*, *e.g.*, Williams v. Standard Oil Co., 278 U.S. 235 (1929). Judicial scrutiny of rates and probing whether a rate was confiscatory posed an imponderable dilemma for the court, particularly as the court delayed interring the doctrine from *Smyth v. Ames*, 169 U.S. 466 (1898). *See*, *e.g.*, Newark Nat. Gas & Fuel Co. v. City of Newark, 242 U.S. 405 (1917) (rates for sale of natural gas not confiscatory); Wilcox v. Consol. Gas Co., 212 U.S. 19 (1909) (whether natural gas rates confiscatory). *See* ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 549 (1949) (noting that the doctrine was chaotic and "delusive").

117 *See* 266 U.S. 570 (1925).

118 *Id*. at 578. *See also* Smith v. Cahoon, 283 U.S. 553, 563 (1931) (certificate of public convenience and necessity and tax for *all* carriers "manifestly beyond the power of the state" under Fourteenth Amendment); Cont'l Baking Co. v. Woodring, 286 U.S. 352 (1932) (Kansas statute did not impose common carrier obligation on private carriers, and upheld reasonable license and fee requirements); Stephenson v. Binford, 287 U.S. 251, 271–72 (1932) (reviewing cases and concluding that statute at issue did not convert carrier into common carrier, and upholding Texas' purportedly reasonably related effort to address harm to its highways).

119 *See* Munn v. Illinois, 94 U.S. 113 (1876); *see also* Nebbia v. New York, 291 U.S. 502 (1934); New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

regulation.[120]

The court concluded, therefore, that Michigan's measure violated the Fourteenth Amendment, but then added how it also violated the Commerce Clause because the measure imposed an unjustifiable burden on interstate commerce.[121]

In a somewhat analogous context of regulating interstate transmission of telegraph messages, Justice Holmes had issued a seminal (though not necessarily analytically sound) opinion indicating that states were barred from regulating such transactions.[122] The state commission ordered that the telegraph companies (which provided the ticker services) refrain from engaging in discriminatory behavior when sending price quotations from the New York Stock Exchange. The telegraph companies had contracts with the Exchange, limiting ticker services to those brokers approved by the Exchange. The Exchange denied approval for ticker services to a Boston stockbroker, who had previously been served and sought approval from the Exchange to renew his service. Nothing suggested that the broker had done anything to warrant the Exchange's decision.[123] And prior cases already confronted the unique nature of the contracts between the Exchange and the telegraph companies.[124] Justice Holmes "reasoned" that, because the transmission was in interstate commerce,

> the order cannot be sustained. It is not like the requirement of some incidental convenience that can be afforded without seriously impeding the interstate work. It is an attempt to affect

120 Producers' Transp. Co. v. R.R. Comm'n, 251 U.S. 228, 230–31 (1920).

121 The reasoning seems terse. It simply announces that "[t]he police power does not extend so far." *Michigan*, 266 U.S. at 57. Justice Brandeis later invalidated a state measure imposed on bus companies—a business naturally open to the public. The measure did not distinguish between intrastate and interstate bus service, and Brandeis held the reasonable imposition did not violate the Fourteenth Amendment. *See* Sprout v. City of South Bend, 277 U.S. 163 (1928). Yet treating the Commerce Clause issue as more serious, he then carefully reviewed prior cases and, in characteristic fashion, examined the facts surrounding the imposition of a fee on the bus service, concluding that the license fee was not necessarily limited to intrastate activity and, as such, impermissibly taxed the privilege of engaging in interstate commerce. *See id*. at 171. *Compare id.*, *with* Bode v. Barrett, 344 U.S. 583, 585–86 (1953) (Justice Douglas, over the dissent of Justices Frankfurter and Jackson, distinguishing case from *Sprout*).

122 *See* W. Union Tel. Co. v. Foster (*Foster II*), 247 U.S. 105 (1918).

123 *See* W. Union Tel. Co. v. Foster (*Foster I*), 113 N.E. 192 (Mass. 1916).

124 *See, e.g.*, Tucker v. W. Union Tel. Co., 158 N.Y.S. 959 (Sup. Ct. 1915).

> in its very vitals the character of a business generically withdrawn from state control—to change the criteria by which customers are to be determined and so to change the business.[125]

Interstate commerce, according to Holmes, lasts until the article of commerce reaches its endpoint (derivative of the soon to be abandoned original package doctrine).[126] And then he added, without any explanation, that legitimate means could not be used for illegitimate ends, and that "[w]ithout going into further reasons we are of opinion that" the lower court's decision must be reversed.[127] Of course, the Massachusetts Supreme Court had avoided any meaningful discussion by concluding that the transmissions were neither part of interstate commerce nor governed by the Act of June 18, 1910, regarding interstate telegraph transmissions.[128]

B. *Natural Resources and Energy*

Additional wrinkles surfaced, however, when the Supreme Court confronted the distinction between permissible police power measures and impermissible restraints on interstate commerce involving state regulation of natural resources. "[I]t is difficult to define [the police power] with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety."[129] Contemporary scholars, for instance, debated whether a state enjoys an unfettered propriety interest in its natural resources within its borders, as well as whether the Commerce Clause imposes any restraint on the exercise of that power, assuming some proprietary interest.[130] After all, capacious state control over water resources posed

125 *Foster II*, 247 U.S. at 114.

126 *See id*. at 113.

127 *Id*. at 114.

128 *See Foster I*, 113 N.E. at 198. In *Hopkins v. United States*, 171 U.S. 578, 597–601 (1898), the court held that stock yard exchange transactions were not part of interstate commerce.

129 Hannibal & St. Joseph R.R. Co. v. Husen, 95 U.S. 465, 470–71 (1877).

130 *See* Dwight Williams, *The Power of the State to Control the Use of Its Natural Resources*, 11 MINN. L. REV. 129 (1926–27). Williams explains how, though a criticized fiction, the "theory had been developed by writers on natural law long before Blackstone" and embraced "not only wild animals but light, air, and water." *Id*. at 130. Courts generally embraced a theory that a state as a sovereign could protect such common resources in trust for its citizens. *See* State v. Rodman, 59 N.W. 1098 (Minn. 1894).

problematic issues for interstate ways.[131] But so did general game laws, where states sought to regulate hunting, fishing, and subsequent shipment of illegally obtained game or fish.[132] Professor Ernst Freund explained how history supported state control, but he doubted it would justify allowing greater freedom for preventing the export of game out of a state.[133] And this seemed implicit in *Greer v. Connecticut*,[134] where the Supreme

131 In 1903, water resource planner Elwood Mead wrote how "[i]t would seem that some sort of interstate regulation is required." ELWOOD MEAD, IRRIGATION INSTITUTIONS: A DISCUSSION OF THE ECONOMIC AND LEGAL QUESTIONS CREATED BY THE GROWTH OF IRRIGATED AGRICULTURE IN THE WEST 337 (1903) (describing the nascent fight between Colorado and Kansas). When New Jersey sought to restrict the ability of a riparian water right holder from transporting water from the Passaic River to New York, Justice Holmes averted an array of doctrines by engaging in a cursory discussion about the line between a permissible exercise of a state's police power and when that exercise renders property so valueless as to require compensation, and with *Greer v. Connecticut*, 161 U.S. 519 (1896), *Kansas v. Colorado*, 185 U.S. 125 (1902), and *Georgia v. Tennessee Copper Co*., 206 U.S. 230 (1907), as precedent, he observed how states enjoy quasi-sovereign (at one point called "omnipresent") interests in its resources and could protect those resources. *See* Hudson Cty. Water Co. v. McCarter, 209 U.S. 349, 356 (1908).

132 *See*, *e.g.*, *In re* Phoedovious, 170 P. 412 (Cal. 1918); Hornbeke v. White, 76 P. 926 (Colo. App. 1904); State v. Snowman, 46 A. 815 (Me. 1900); Stevens v. State, 43 A. 929 (Md. App. 1899); State v. Whitten, 37 A. 331 (Me. 1897); State v. Rodman, 59 N.W. 1098 (Minn. 1894); *In re* Maier, 37 P. 402 (Cal. 1894); Roth v. State, 37 N.E. 259 (Ohio 1894); Phelps v. Racey, 60 N.Y. 10 (1875); *cf*. Allen v. Wyckoff, 2 A. 659 (N.J. 1886); Moulton v. Libbey, 37 Me. 472 (1854). In *Hornbeke*, the Colorado court of appeals explained how the Supreme Court "laid down the principle that the state, in its sovereign capacity, has power to limit and qualify the ownership which a person may acquire in game with such conditions and restrictions as it may deem necessary for the public interest, and that there is a fundamental distinction between the ownership which one may acquire in game and the perfect nature of ownership in other property." 76 P. at 929. In *In re Maier*, the court avoided the Dormant Commerce Clause by observing how regulated meat that arrived in the state and removed from its original package became a commodity in the intrastate market. *See* 37 P. at 406.

133 *See* ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 445–46 (1904).

134 *See* 161 U.S. 519 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979). *Greer* first addresses the civil and common law background surrounding a sovereign's control over wildlife, *see id*. at 522–30, and then explains why game is not an article of commerce or if so not interstate commerce. *See id*. at 530–35. The court, in particular, found persuasive its precedent allowing states to prohibit selling alcohol. *See id*. at 532. Also, in Manchester v. Massachusetts, 139 U.S. 240, 265–66 (1891), the court had allowed state enforcement of a "reasonable" and "impartial" measure to protect fishery resources, unless otherwise regulated by the United States. Later,

Court upheld Connecticut's ability to prohibit the interstate shipment of lawfully obtained game. Oil and natural gas resource programs followed a similar path; states could protect such common resources against waste, and even regulate their production as a matter of local concern.[135]

Although many cases addressed somewhat vague Fourteenth Amendment claims,[136] the court wielded the Commerce Clause to prevent states from monopolizing oil and gas resources within their borders. Absent some check on state action, the emerging use of liquid fuels and accompanying transportation network could have been severely affected—at precisely the time when such fuels were competing with coal and becoming the basis for the nascent automobile industry. In *West v. Kansas Natural Gas Co.*,[137] for

however, the court made it abundantly clear that a state could not discriminate against interstate commerce by forcing interstate businesses to locate in the state in order to tap the state's natural resources. *See* Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (examining the actual purpose animating Louisiana's Shrimp Act and invalidating Act). Where, however, the court found a state measure "reasonable," it had little trouble dispatching Dormant Commerce Clause and Fourteenth Amendment claims. *See, e.g.*, Leonard v. Earle, 279 U.S. 392 (1929) (Maryland's license fee for Oysters, including for those from out-of-state).

135 *See*, *e.g.*, Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900). Here, Justice White rejected a claim that Indiana's program denied due process under the Fourteenth Amendment by taking private property. He explained how oil and gas could suffuse many surface estates and absent an ability for state control any owner choosing to capture the resource could waste the entire resource. *See id*. at 201. While White accepted some similarity between "animals *feroe naturoe* and the moving deposits of oil and natural gas, there is not an identity between them." *Id*. at 209. All, he posited, may potentially enjoy the common resource for the former, while only a limited set (surface owners overlying the resource) may enjoy the common resource for the latter. *See id*. at 209–10. Earlier, the court accepted as part of "common experience or knowledge" the unique "ownership" nature of oil and gas resources. Brown v. Spilman, 155 U.S. 665, 670 (1895); *see also* Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900); *cf*. Lindsley v. Nat. Carbonic Gas Co., 220 U.S. 61 (1911) (statute protecting against waste of mineral waters and carbonic acid not violate Fourteenth Amendment). The court subsequently rejected a Fourteenth Amendment challenge to a state severance tax on production, if the tax and any distinctions were reasonable. *See* Ohio Oil Co. v. Conway, 281 U.S. 146, 160 (1930).

136 *See*, *e.g.*, Pierce Oil Corp. v. Hopkins, 264 U.S. 137 (1924) (claim that gasoline seller required to collect tax from purchaser using gas for vehicles on state highways violates due process clause).

137 *See* 221 U.S. 229 (1911). The statute purportedly operated as a conservation measure designed to arrest the large waste of gas occurring at the time; subsequent statutes made gas pipelines common carriers. *See* J. STANLEY CLARK, THE OIL CENTURY 160–61 (1958).

instance, the court invalidated Oklahoma's attempt to prohibit interstate transportation of natural gas produced in the state. While the court accepted some similarities with other resources such as wildlife, it held that a state would violate the Fourteenth Amendment if it denied all right to develop the resource; and here Oklahoma's purpose of creating a limited (in-state) market was unacceptable.[138]

The court, however, seemingly tolerated less intrusive rate regulation for petroleum and natural gas. It allowed state supervision over natural gas delivered by distributors to retail customers in the state, even if that gas arrived through interstate channels. In *Public Utilities Commission v. Landon*,[139] for example, the court applied Chief Justice Marshall's original package doctrine, a legal fiction, permitting a state's exercise of its police power once a product had come to rest in a state and been removed from its original package. And in *Pennsylvania Gas Co. v. Public Service Commission*,[140] it even upheld state regulation of

138 According to the court,

> Gas, when reduced to possession, is a commodity; it belongs to the owner of the land, and, when reduced to possession, is his individual property, subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation . . . commercial.

Kan. Nat. Gas Co., 221 U.S. at 255. Continuing, the court reflected its concern by adding how any other holding might allow hoarding of resources by resource-abundant regions. *See id*. *See also* Kan. Nat. Gas Co. v. Haskell, 172 F. 545, 572 (E.D. Okla. 1909) (statute conditioning ability to incorporate on keeping gas instate infringes on constitutional right, merging Commerce Clause and the Fourteenth Amendment). The *Kansas Natural Gas Co.* court's reasoning effectively protects what it believes was a federally protected right to engage in interstate commerce—beyond a state's domain for legitimate articles of commerce. *See* Kalen, *supra* note 104, at 750–63; *see also* Sam Kalen, *Reawakening the Dormant Commerce Clause in Its First Century*, 13 U. DAYTON L. REV. 417 (1988) [hereinafter Kalen, *Reawakening*].

139 *See* Pub. Utils. Comm'n Kan. v. Landon, 249 U.S. 236, 240, *vacated*, 249 U.S. 590 (1919).

See W. Oil Ref. Co. v. Lipscomb, 244 U.S. 346 (1917) (certain shipment of oil was not intended for state and mere stoppage did not break interstate character).

140 *See* 252 U.S. 23, 31 (1920) ("This local service is not of that character which requires general and uniform regulation of rates by congressional action," and even though "the business" being "conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest and has not been attempted under the superior authority of Congress.").

natural gas sales delivered directly to local consumers when the gas moved in interstate commerce. But Justice Holmes, over a dissent joined by Justice Brandeis, effectively condemned a state's ability to tax petroleum produced in two different states and gathered together and shipped through an interstate pipeline.[141] Holmes reasoned that, because no party has title to any specific oil, and therefore its particular destination (in-state or out-of-state) is unknown,[142] it was beyond the state's reach. According to Holmes, the "transmission of this stream of oil was interstate commerce from the beginning of the flow" and, consequently, the tax was invalid.[143] Holmes' somewhat cryptic opinion and conception of the market ultimately would become problematic if applied to electric energy. It also would become problematic for Holmes, who was willing to afford considerable leeway to states when protecting resources for instate residents.[144]

This became evident two years later, when the Supreme Court resolved an original jurisdiction challenge by Pennsylvania and Ohio against West Virginia.[145] West Virginia, at the time, was the largest producer of natural gas and initially allowed foreign and domestic corporations to operate (and even exercise eminent domain authority) within its borders and ship gas through pipelines to markets in Pennsylvania and Ohio. As those markets developed, consumers grew dependent upon West Virginia's gas.[146] Indeed,

141 *See* Eureka Pipe Line Co. v. Hallanan, 257 U.S. 265, 272 (1921); U.S. Fuel Gas Co. v. Hallanan, 257 U.S. 277, 281 (1921). Holmes did not question West Virginia's ability to tax petroleum used in the state. The pipeline companies then generally kept the oil on behalf of the producers and would deliver oil to parties so designated by the producer (this was required under state law), in accordance with a tariff under the Interstate Commerce Act.

142 "No bailor has title to any specific oil, and to deny the character of interstate commerce to the whole stream simply because some one [sic] might have called for a delivery that probably would have been made from it in an event [sic] that did not happen, is going too far." *Eureka Pipe Line*, 257 U.S. at 272.

143 *Id.* The opinion contains little analysis, and Justice Clarke (joined by Justice Brandeis) discussed whether the Court should have even taken the case. The dissent further observed how Holmes had engaged in a "too highly technical conception," and inappropriately "allows the mere business convenience of the company (it saves storage tankage) to convert into interstate commerce that which all the parties, by their contract and conduct treated, and charged and paid for, as an intrastate transportation . . . ." *See id.* at 276 (Clarke, J., dissenting).

144 *See supra* note 132, and accompanying text.

145 *See* Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

146 *See id.* at 585.

the court emphasized gas's importance for domestic consumption for schools and other users; the "health, comfort, and welfare" of the citizens seemed to be at risk.[147] But as demand began exceeding supply, not all states could enjoy the resource.[148] In 1919, West Virginia addressed the risk by passing a statute requiring "retention within the state of whatever gas may be required to meet the local needs for all purposes"—affording West Virginia citizens a preferential right to the perceived dwindling gas supply.[149] The neighboring states sued immediately, and while the court accepted the case and recognized its national importance,[150] it observed that precedent favored Ohio and Pennsylvania. Natural gas was an article of commerce, and West Virginia "serious[ly] interfere[red]" with its transmission in interstate commerce.[151] The court's earlier decisions in *West v. Kansas Natural Gas* and *Landon* made that clear.

Oddly, Justice Holmes, joined by Justice Brandeis, would have upheld the statute, reasoning that the act applied before the gas began moving in interstate commerce.[152] Holmes, in short, saw "nothing in the commerce clause to prevent a State from giving a preference to its inhabitants in the enjoyment of its natural advantages."[153] But Holmes' dissent aside, by the mid-1920s the

147 *Id*. at 592.

148 *See id*. at 589.

149 *Id*. at 594.

150 *See id*. at 595.

151 *Id*. at 597.

152 *See id*. at 600–01 (Holmes, J., dissenting), 605 (Brandeis, J., dissenting).

153 *Id*. at 602. Justice Brandeis analogized the suit to the original jurisdiction natural resource disputes (interstate water, interstate pollution) and suggested that, while they could be brought, this suit was premature. *See id*. at 605, 611–12 (Brandeis, J., dissenting). He also expressed concern about the court's capacity to award relief without exploring the regional dynamics of the gas market—something beyond the court's ken. *See id*. at 618–22. The case was closely divided, and possibly quickly decided to avoid losing Justice Day's vote who was about to retire. *See* ALPHEUS T. MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 224 (1964). According to Brandeis, it also was poorly argued and garnered little interest from the bar—even though it was of national significance. *See* Letter from Louis Brandeis to Felix Frankfurter (Nov. 20, 1923), *in* 5 LETTERS OF LOUIS D. BRANDEIS 104–105 (Melvin I. Urofsky & David W. Levy eds., 1978). Yet Justice Day oddly wrote for a majority of the Court in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), concluding that Congress could not prohibit articles manufactured with the aid of child labor and destined for an interstate market. According to Day, "the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce clause." *Id*. at 271–72. And while Day did not object

law seemed clear—even if somewhat confusingly and inappropriately constructed: states could not interfere with the interstate shipment of natural gas; rather, they could only regulate local sales. In *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*,[154] therefore, the court explained how retail sales to consumers were local—as if the interstate article had come to rest in the state and could be regulated, but until then the wholesale transactions in interstate commerce were of a national character. For the emerging interstate gas market, while this made state regulation difficult, it was seemingly workable because the court tolerated the authority of a state commission to force a company to continue servicing a local community from gas produced in the state even though the gas was comingled with gas transported from another state in interstate pipelines and sold both to local consumers and to a local distribution company.[155] But as the Supreme Court recently observed, these cases precluded a host exporting state from regulating the sale of gas to an out-of-state local distributor for resale, eventually prompting the passage of the Natural Gas Act.[156]

III. THE INTERSTATE GRID AND A RATE INCREASE?

A notorious northeastern electric utility precipitously forced the Supreme Court to apply this unsettled constitutional narrative to state electric utility regulation. By the time the court decided *Attleboro*, electricity had become the foundation for the new consumer economy. It transformed cities through the formation of city-dominated factories, lighting, and electric trollies, among other things. It also generally helped lift the country out of its pre-World War I depression.[157] The electric utility industry,

to Congress' authority to regulate wages for interstate railway employees, he did object to its regulation as a violation of due process. *See* Wilson v. New, 243 U.S. 332, 365–66 (1917) (Day, J., dissenting).

154 *See* 265 U.S. 298, 309 (1924).

155 *See* People's Nat. Gas Co. v. Pub. Serv. Comm'n, 270 U.S. 550 (1926). The court accepted that the comingled gas was "separable," with the percentages of local and out-of-state gas identifiable. *Id*. at 554–55.

156 *See* Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591 (2015).

157 *See generally* JEFFRY A. FRIEDEN, GLOBAL CAPITALISM: ITS FALL AND RISE IN THE TWENTIETH CENTURY 143–47 (2006). Frieden hints how electricity furnished the basis for the new consumer economy, with household goods as well as factories—such as those that would build the Model T—dependent upon electricity. *See id*. at 157–59. *See also* DAVID E. NYE, CONSUMING POWER 157–85 (1998). By 1923, there were 102 central-station corporations or public agencies" generating "in excess of a hundred million kilowatt hours each of

particularly in the Northeast, wrestled with how to interconnect transmission systems, whether and how states could control their own natural water resources for waterpower development, and whether state public utility commissions were capable of regulating an expanding grid. The utility trade association as well as the FPC understood how actors in the unfolding utility industry, including the utility commissions, would need to develop uniform standards.[158] The FPC, for instance, commented on the need for a "settled public policy of uniform application" for the industry, not just with hydroelectric generation, and that such a policy should embrace "harmonious action between the Nation and the States and between State and State."[159] This would mean that state utility commissioners ought to be appointed for their expertise rather than "political affiliations," and states ought not to erect barriers to the interchange of electricity.[160]

An interconnected system seemed particularly necessary in the northeast and the idea of a superpower surfaced.[161] When WWI ended, railroad bottlenecks, coal strikes, capital markets, as well as the 1920 FWPA and other influences prompted electric utilities to explore new arrangements for interconnecting grids—or regional

electric energy." 4 FED. POWER COMM'N ANN. REP. 14 (1924).

158 In 1921, the president of the National Electric Light Association told his members that, while utilities "are vitally essential to the industrial world," they must secure "the co-operation of the public and the unanimous support of the other branches of the industry." Martin J. Insull, *The Electric Public Utility Outlook*, 77 ELECTRICAL WORLD 3 (Jan. 21, 1921).

159 3 FED. POWER COMM'N ANN. REP. 8 (1923).

160 *Id*. at 9. The Commission further observed:

> State interests must, nevertheless, be harmonized in a policy and program which will be to the common interests of them all. This will require cooperative action and reasonable uniformity of legislation. There must be no State barriers against the interchange of energy, and no type of development that can not [sic] become an integral operating part of the combined system. Legislation which interferes with the programs should be repealed or modified; necessary affirmative legislation should be had; public officials of both State and Nation should lend the program their support; and, finally the industry itself should harmonize its own conflicting interests. It should no longer be permissible for any utility to draw plans for future extension except in such manner that interconnections may be readily effected whenever its territory merges with the territory of any other utility.

Id. at 9–10.

161 Of course, Insull too favored a superpower in the Midwest. *See* WASIK, *supra* note 20, at 136–37.

systems.[162] One prominent idea was establishing a supergrid in the Northeast.[163] The region between New England and the nation's capital explored developing a "superpower" utility—an interconnected, "regional power system with which to generate, transmit and distribute electrical energy to the railroads and industries within" its territory.[164] Utilities at the time appreciated the need to cooperate in interconnecting and delivering energy in an efficient manner.[165] Herbert Hoover delivered a speech to the National Electric Light convention in April 1922, urging the merits of a coordinated approach toward power supply—but the idea languished as New York and Pennsylvania's governors were more concerned about public rather than private ownership of power generation.[166] A participant in the development of the Colorado River Company, Hoover in 1923 again encouraged that utilities cooperatively develop "uniform principles and policies for 'coordinated State regulation.'"[167] He repeated this again a few years later, adding that states enjoyed sufficient regulatory ability

162 *See* RONALD SEAVOY, AN ECONOMIC HISTORY OF THE UNITED STATES FROM 1607 TO THE PRESENT 268, 274 (2006) (regional systems under construction in the 1920s).

163 *See* KENDRICK A. CLEMENTS, THE LIFE OF HERBERT HOOVER 257 (2010).

164 W.S. Murray, *Superpower Investigation Between Boston and Washington*, 77 ELECTRICAL WORLD 27 (Jan. 1, 1921). Murray supervised the Department of the Interior's report on the superpower system. *See* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L. J. 685, 709 n.98 (1925).

165 "In these days of team play among public utilities the subject of interconnection rises to large importance . . . as a policy to be followed whenever feasible." *Effective Interconnection Requires Team Play*, 77 ELECTRICAL WORLD 186 (Jan. 15, 1921); *see also* A.T. Throop, *Improvement of Interconnection by Liberal Co-operation*, 77 ELECTRICAL WORLD 202 (Jan. 15, 1921). Engineering, however, was not considered a barrier for a superpower, but rather—along with financial considerations—the need to overcome some state corporation laws by establishing a federally chartered company that would be supervised by state utility commissions. *See Second General and Executive Session: Samuel Insull and James A. Perry Make Notable Addresses—Superpower Survey Discussed—Reports of Rate Research and Lamp Committees*, 77 ELECTRICAL WORLD 1287 (June 4, 1921).

166 *See* CLEMENTS, *supra* note 163, at 257. Hoover had been the "chairman of the Northeastern Super Power Committee, composed of federal officials, and the chairman of public utility commissions of ten northeastern states," with the mission of "interconnecting all the private companies in these states and thus secure to them the financial benefits of an integrated 'superpower system' extending from Boston to Washington." KING, *supra* note 68, at 142; *see also id*. at 167.

167 CLEMENTS, *supra* note 163, at 257.

to oversee the industry.[168] Such coordinated, interconnected efforts were becoming technologically more feasible with the advent of high power 220kv transmission lines.[169] The FPC that same year noted how "[t]here has been much discussion in recent years of the subject of 'superpower'."[170] Indeed, the FPC observed that a considerable portion of the Pacific already had been interconnected with the exception of a 25 mile gap; that the Southeast too had been interconnected; and that the features of the Northeast to Mid-Atlantic were appropriate for a similar endeavor.[171]

The superpower concept garnered sufficient attention that the prominent 1925 article by Felix Frankfurter and James Landis included a lengthy discussion about the role of compacts for future energy development.[172] Their article explored the superpower dialogue and encouraged putting the electric utility industry under some federal control analogous to the Interstate Commerce Commission.[173] The initial question posed was not whether states could act (or enter into interstate compacts), but rather whether states enjoyed exclusive authority to regulate the industry.[174]

168 *See* WASIK, *supra* note 20, at 149–50.

169 *See Power Transmission at 220,000 Volts*, 77 ELECTRIC WORLD 74 (Jan. 8, 1921) ("Transmission at 220,000 volts will be brought into the realm of actuality at a very near date."). *See also* Clinton Jones, *Building First 220,000-Volt Transformers*, 77 ELECTRICAL WORLD 301 (Feb. 5, 1921).

170 3 FED. POWER COMM'N ANN. REP. 5 (1923). The Commission defined a superpower as "existing generating stations . . . electrically interconnected to a greater degree than now prevails and that, whether as additions to existing facilities or as substitutes for what has become obsolete or inadequate, new stations when built shall be of large size and high efficiency." *Id*. at 6. Participants acknowledged unresolved legal issues, such as whether state created charters or a federal charter would be necessary. *See Murray Declares Superpower System Must Have Adequate Return*, 77 ELECTRICAL WORLD 220 (Jan. 22, 1921).

171 *See id*. at 6. The considerable investment required for large hydroelectric projects, as well as the ability to supplement other forms of generation, made interconnecting essential. *See id*. at 7.

172 *See* Frankfurter & Landis, *supra* note 164, at 708–18.

173 *See id*. at 711–12.

174 *See id*. at 713–14. They referenced several cases allowing state regulation of resources that would move in interstate commerce. *See, e.g*., United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344, 410–11 (1922) ("[C]oal mining is not interstate commerce, and obstruction of coal mining, though it may prevent coal from going into interstate commerce, is not a restrain of that commerce, unless the obstruction to mining is intended to restrain commerce in it, or has necessarily such a direct, material, and substantial effect to restrain it . . . ."); Heisler v. Thomas Colliery Co., 260 U.S. 245, 259 (1922) (coal tax); Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923) (state occupation

While rejecting any suggestion that Congress could not act, they instead proposed an "interstate arrangement,"[175] and eloquently added:

> The frequent resort in recent years to the Commerce Clause as a source of regulatory power by Congress, has blurred its historic purpose and its continued use as a veto power on obstructive and discriminatory State action. It is a reservoir of Federal power and not a dam against State action.[176]

A. *Utility Commission Changes a Contractual Rate*

The failure to develop a uniform system or superpower permitted one of the largest loads in the Northeast, served by the Narragansett Electric Light Company (Narragansett) and aided by the Rhode Island Public Utility Commission (R.I. PUC), to test that dam and presumably how far a state utility commission might favor local residents over out-of-state electric needs. At the time, Providence was the second largest load center in New England, with about 58% of the load of Boston,[177] and Narragansett was one of the largest utilities, chartered by Rhode Island in 1884 and originally engaging in business solely within the state. With Marsden Perry at its helm, Narragansett grew as a multi-faceted company controlling a large portion of the state's electric lighting, gas lighting, water service, and electric streetcar service. With political assistance, it secured the necessary long-term exclusive (monopoly) franchise to provide service. The streetcar service secured a "'perpetual' franchise . . . to replace the old-twenty-to-twenty-five year franchises" and with power being supplied from

tax on mining for mostly out-of-state customers); United Leather Workers' Int'l Union v. Herkert & Neisel Trunk Co., 265 U.S. 457, 625 (1924) (following *Coronado* for striking against business in leather goods and trunks). Notably, Frankfurter and Landis apparently favored Maine's ability to prevent the exportation of any hydroelectric generation, as an effort in "experimentation" and designed to conserve "precious resources within their borders." Frankfurter & Landis, *supra* note 164, at 716. Proponents of the superpower were aware of Maine's prohibition, as well as Connecticut's ban against imported waterpower, and believed that a federally chartered corporation could resolve the legal constraint. *See Legal and Financial Aspects of Superpower Plan*, 77 ELECTRICAL WORLD 1156 (May 21, 1921) (comments by the president of the New England Power Company).

175 Frankfurter & Landis, *supra* note 164, at 714–18.

176 *Id*. at 719.

177 *See* MURRAY ET AL., *supra* note 38, at 32.

the electric company it seemingly had an assured market.[178] By controlling all these entities, Perry became "the state's utility king."[179] Although Perry was long gone, the company by the 1920s was undoubtedly well known and remained mercurial as it considered whether to join the New England Power System.[180] After all, it was under Perry's leadership when, in 1902, the nation witnessed one of its more prominent strikes—with Perry refusing to abide by the newly passed 10-hour work law.[181] And it was under Perry and others (including Rhode Island's powerful Senator Nelson W. Aldrich) when muckraker Lincoln Steffens focused national attention on the holding company's control over the state's utility system: writing for *McClure's Magazine* in 1905, Steffens exposed how the electric utility and street railway curried political favoritism and insulation.[182]

Thus, it is not surprising that the R.I. PUC obliged when Narragansett sought a rate increase affecting its only out-of-state customer. It is quite exceptional, however, that prevailing constitutional dogma on the Commerce Clause would envelop the dispute. The case, after all, involved the evolving authority of a public utility commission to alter a contractual rate when it determines that the rate has become discriminatory. It was a "minor" quibble, and "no one expected that it would result in an important ruling."[183] Attleboro Steam and Electric Co. (Attleboro),

178 WILLIAM G. MCLOUGHLIN, RHODE ISLAND: A HISTORY 177–79 (1986). *See also Narragansett Co. Would Acquire United Railway*, HARTFORD COURANT, Sept. 10, 1926, at 19 (noting that long-term agreement to provide electricity to trolley line).

179 SCOTT MOLLY, TROLLEY WARS 67 (1996). Molly provides a fascinating account of the dynamics surrounding the railroads, traction companies, and the utilities, and political influence. *See generally id.*

180 *See Narragansett Not In Power Merger*, CHRISTIAN SCI. MONITOR, Jan. 19, 1926, at 4B. *See also R.I. Utility Merger is Still Under Discussion*, HARTFORD COURANT, Aug. 14, 1926, at 5 ("Evidently the great majority of the stockholders desire the Narragansett Electric Lighting Company to continue as an independent organization, free from outside control.").

181 *See* MOLLY, *supra* note 179, at 131–51.

182 *See* Lincoln Steffens, *Rhode Island: A State for Sale*, 24 MCCLURE'S MAG. 337 (1905). Steffens wrote how this group "conceived and carried to success a scheme to buy up, equip with electricity, and not only run, but finance, the hold horse-car lines of Providence, Pawtucket, and later, of the State." *Id*. at 347. The scheme ultimately morphed into consolidating all the utilities "into one great parcel, 'The Rhode Island Company,'" with exclusive and effectively long-term franchises. *Id*. at 248.

183 *Federal Control of Power Forecast*, NEW YORK TIMES, Jan. 16, 1927, at

a Massachusetts based utility, had contracted in 1917 with Narragansett (with R.I. PUC approval) to purchase electricity for twenty years at a fixed rate with a transfer of "ownership" at the state line. Seekonk Co., as an agent for Attleboro, would transmit the electricity from the Massachusetts state line to Attleboro's lines.[184]

World War I changed the economics of the Narragansett/Attleboro contract and made the rates for electricity being sold to Attleboro uneconomic and lower than Narragansett's rates for Rhode Island customers.[185] Indeed, "[b]y 1923 Rhode Island was a bitterly divided state, socially, economically, and politically," with a considerable portion of its dominant textile industry unable to compete with the South's industry.[186] Narragansett understandably requested that the Rhode Island PUC approve a new rate schedule. Created in 1912, the Rhode Island PUC enjoyed the typical authority to establish just and reasonable rates if it determined that a rate is unjust, unreasonable, insufficient, or unjustly discriminatory or preferential. While Attleboro protested, it did not otherwise present information and subsequently "refused to pay the new rate" and filed a lawsuit to enjoin the application of the new rate.[187] Attleboro warned that it lacked sufficient access to electrical generation and absent energy from Narragansett "the City of Attleboro would be deprived of electrical energy and power to . . . incalculable damage" to itself and the city's residents.[188] This, according to Attleboro, was particularly unfair because Narragansett had convinced Attleboro

E13.

184 Narragansett delivered the electricity at the state line between the town of Seekonk, Massachusetts, and the town of East Providence, Massachusetts, and it was metered by Attleboro in Massachusetts. Transcript of Record, at 258, Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927) (No. 217).

185 Transcript of Record at 59, 111, 120–21, Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927) (No. 217).

186 MCLOUGHLIN, *supra* note 178, at 191; *see also id*. at 195–96. In 1921, however, Narragansett Electric's use of more oil than coal apparently saved the company money and strengthened its financial outlook for future years. *Narragansett Company Saves $362,000 by Use of Oil as Fuel*, 77 ELECTRICAL WORLD 503 (Feb. 26, 1921).

187 Petition for Writ of Certiorari at 3, *Attleboro*, 273 U.S. 83 (No. 217).

188 Attleboro Steam & Elec. Co. v. Narragansett Elec. Lighting Co., 295 F. 895, 896 (D.R.I. 1924). Indeed, Attleboro "*dismantled* and *removed* their own generating plant in reliance on th[e] contract." Transcript of Record at 117, *Attleboro*, 273 U.S. 83 (No. 217) (emphasis added).

to enter into the contract rather than to construct its own additional generation.[189] After a district court enjoined the PUC's action, effectively on procedural grounds,[190] Attleboro's counsel informed the PUC that it believed that its contract with Narragansett could not, in effect, be abrogated,[191] and that the Commission lacked jurisdiction because the *contract* involved interstate commerce, and that the courts would need to decide the matter—intimating that it was not clear whether the Commission could entertain the issue.[192] Attleboro's invocation of the Commerce Clause presumably could have been deployed as its principal mechanism for avoiding a fair consideration of its rate dispute with Narragansett—which otherwise would be a state rather than federal issue, unless it could argue that the abrogation of the

189 *See* Transcript of Record at 189–90, *Attleboro*, 273 U.S. 83 (No. 217). Attleboro's need for generation had increased, and according to news reports, would have cost the company $630,000 to build. It became efficient, therefore, to connect with Narragansett's system and build a new 12-mile transmission line (operated by the Seekonk Electric Company) for transmitting the power. *See Typical Benefits from Plant Interconnection*, 71 ELECTRICAL WORLD 449 (Mar. 2, 1918). Narragansett lacked authority to construct facilities in Massachusetts and its contract with Attleboro addressed the allocation of costs and agreement with Seekonk. *See* Transcript of Record at 253, *Attleboro*, 273 U.S. 83 (No. 217). At the hearing, Attleboro's counsel suggested that Narragansett's rate increase was to recover some of Narragansett's costs for building that line. *See* Transcript of Record at 203, *Attleboro*, 273 U.S. 83 (No. 217).

190 *See Narragansett*, 295 F. at 895. A report about the case noted that the PUC even permitted the rate to go into effect immediately, "without the statutory notice of thirty days." *See Increase in Contract Rate Between Companies Authorized*, 77 ELECTRICAL WORLD 1184 (May 21, 1921).

191 *See* Transcript of Record at 195–98, *Attleboro*, 273 U.S. 83 (No. 217). Indeed, Narragansett complained how Attleboro used its contract price as a shield rather than accepting negotiating a modified rate, prompting the dispute. *See id*. at 213. The *Boston Globe* reported how, apparently, Narragansett offered to alter the rate to increase the annual cost by only $20,000, which met with "indignation." *Rate Case Is Won by Attleboro Firm*, BOS. GLOBE, Jan. 4, 1927, at 14. At the hearing, Attleboro's motion argued that "as a matter of constitutional law and as a matter of statutory construction, that the contract of 1917 cannot be abrogated." Transcript of Record at 350, *Attleboro*, 273 U.S. 83 (No. 217).

192 *See* Transcript of Record, at 36–37, *Attleboro*, 273 U.S. 83 (No. 217); *see also id.* at 151 (counsel objected on the record to PUC's jurisdiction). Counsel's first argument was that PUC lacked statutory authority, because law only applied to in-state public utilities. *See id.* at 157. The PUC responded by observing:

> We feel that our jurisdiction extends to all of the practices of the utility there which is within our jurisdiction. If we assumed any other position, why, these utilities might furnish electricity outside the State, completely outside our jurisdiction and out of any one's else jurisdiction.

Id. at 163.

contract violated the Contract Clause or the Fourteenth Amendment.

The Rhode Island PUC nevertheless proceeded and engaged in a more robust proceeding, concluding that Narragansett was likely to have a net loss of about $1.5 million over the life of the contract. Yet Attleboro's counsel argued that Narragansett was trying to shift its new capital costs onto Attleboro because Narragansett's only other large (indeed largest) customer was New England Power Company and it could not determine how much fixed costs it could impose on that company.[193] Narragansett's proposal would force Attleboro to pay about an additional $50,000 annually.[194] The PUC's new rate ostensibly still afforded Attleboro a reliable source of electricity at a cost below Attleboro's own cost of operation. Attleboro objected and filed a challenge before the Rhode Island Supreme Court, attacking the order as well as the PUC Act itself, claiming that it deprived the company of its property without due process, denied it equal protection of the laws, impaired its contractual relationship, and impermissibly "interfer[ed] with interstate commerce."[195] The Rhode Island Supreme Court avoided the principal issue of whether or when it could alter a contractually established rate, opting instead to address the latter argument and finding the principles of *Missouri v. Kansas Natural Gas Co.*[196] dispositive—concluding the state's

193 At the hearing, Attleboro's counsel believed that Narragansett had sought higher rates because (1) it failed to distinguish between a wholesale and retailer purchaser; (2) had added to its plants to serve New England Power Co. (receiving roughly 50% of its energy through other entities, whether Atlantic Power Company or R.I. Power Transmission); and (3) that the new proposed rate would apply primarily if not exclusively to Attleboro. The difficulty, apparently, was that Narragansett could not calculate how much energy it sold as an interruptible service (called "secondary" current) to New England Power and secondary energy would not include a demand or capacity charge as part of the rate (e.g., not charge New England Power for cost of capital assets). Narragansett's original 1917 rate may not have included a sufficient demand charge, and the capital costs since the war allegedly doubled. *See* Transcript of Record at 111–12, *Attleboro*, 273 U.S. 83 (No. 217). And Attleboro's counsel secured an admission from Narragansett's witness that it would not need "$50,000 more from the Attleboro Company to make" it "a successful company with dividends reasonably assured on reasonable rates charged to" its customers. *Id.* at 104.

194 *Id.* at 189.

195 Petition for Writ of Certiorari at 8, *Attleboro*, 273 U.S. 83 (No. 217).

196 *See* 265 U.S. 298 (1924). *Cf.* Mfrs' Light & Heat Co. v. Ott, 215 F. 940, 945 (N.D. W. Va. 1914) (reasonable rate regulation a local matter unless a state attempted to "prevent the transportation and sale of natural gas from" one state to

action amounted to an impermissible "direct" burden on interstate commerce, regardless of purpose. And from that decision, the Rhode Island Attorney General initiated the U.S. Supreme Court's review.

That the case provoked a legitimate Commerce Clause issue seemed peculiar under the Supreme Court's precedent. Almost all state jurisdiction might be usurped if, for example, states were precluded completely from regulating goods produced in their state. Some of those goods might be destined for interstate markets, or perhaps not. While possibly a Fourteenth Amendment claim, nothing suggested that the Commerce Clause would block a state from regulating products that eventually would move in interstate commerce.[197] Also, the court previously had placed manufacturing within the states' realm and outside the Commerce Clause.[198] It would be cumbersome to explore on a case-by-case basis the likely movement of products. Assuming theoretical lines could be erected for distinguishing between goods likely to remain in the state and those marked for interstate markets, producers naturally might favor escaping regulation by tilting toward out-of-state sales—effectively discriminating against intrastate markets. This occurred many decades later when the court oddly gave the FPC rather than states jurisdiction over natural gas production and gathering for gas intended for interstate markets.[199] The court by this time also had permitted states and the federal government to share spheres of jurisdiction—albeit subject to Congress' paramount power.[200]

another).

197 *See supra* note 174. The Supreme Court even had prevented Congress from regulating goods before they entered commerce. In *Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918), for instance, Justice Day famously wrote that "[o]ver interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce is a matter of local regulation." *See also* Heisler v. Thomas Colliery Co., 260 U.S. 245, 259 (1922) (noting that "a tax upon articles in one state that are destined for use in another state cannot be called a regulation of interstate commerce"). Also, in *Coe v. Town of Errol*, 116 U.S. 517, 525–29 (1886), the court allowed a state tax on goods before their final journey across state lines, reasoning that it would be "untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation."

198 *See* United States v. E.C. Knight Co., 156 U.S. 1 (1895).

199 *See* Phillips Petroleum v. Wisconsin, 347 U.S. 672 (1954). *See generally* Robert R. Nordhaus, *Producer Regulation and the Natural Gas Policy Act of 1978*, 19 NAT. RES. J. 829 (1979) (explaining gap created by the case).

200 *E.C. Knight* aside, the court sanctioned federal regulation when activities

States, therefore, enjoyed a measure of regulatory latitude over instate activities. They could exercise their police power to regulate businesses to protect the public health and welfare.[201] In *Sligh v. Kirkwood*,[202] for instance, the Supreme Court allowed Florida to regulate the sale of citrus fruits destined for interstate commerce. Absent an ability for states, as with Florida in *Sligh*, to regulate the flow of goods into what had fast become a national consumer-oriented market, consumers (at least prior to the FTC

sufficiently influenced interstate commerce. *See, e.g.*, Stafford v. Wallace, 258 U.S. 495 (1922); R.R. Comm'n v. Chi, Burlington & Quincy R.R. Co., 257 U.S. 563, 588 (1922); Ferger v. United States, 250 U.S. 199, 203–04 (1919). The *Shreveport Rate Cases*, for instance, established the Interstate Commerce Commission's authority to affect intrastate rates when a "close and substantial" relationship between the two exists. Hous., E. & W. Tex. R.R. Co. v. United States, 234 U.S. 342, 351 (1914). This same theory justified the court's anti-labor interpretation of the antitrust laws as applying to strikes designed to impede a manufacturer's ability to sell goods into an interstate market. *See, e.g.*, Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37, 47–49, 54 (1927).

201 *See, e.g.*, Barbier v. Connolly, 113 U.S. 27 (1884) (allowing California to regulate laundries, primarily targeting Chinese immigrants). In the infamous oleomargarine cases, the court in *Plumley v. Massachusetts*, 155 U.S. 461 (1894) allowed the state to prevent the sale of colored margarine, presumably deceiving consumers into believing it was butter. Conversely, in *Schollenberger v. Pennsylvania*, 171 U.S. 1, 14 (1898), the court invalidated as a direct burden on interstate commerce Pennsylvania's complete ban against importing oleomargarine, a legitimate article of interstate commerce according to the court. *See also* Reid v. Colorado, 187 U.S. 137 (1902) (quarantine against infectious cattle within states' power but here preempted by Congress); Patapsco Guano Co. v. Bd. of Agric., 171 U.S. 345, 354 (1898) (North Carolina's fertilizer inspection program, with court commenting "[i]nspection laws are not in themselves regulations of commerce"). In *Hebe Co. v. Shaw*, 248 U.S. 297 (1919), Justice Holmes rejected Fourteenth Amendment and Commerce Clause challenges to Ohio's ability to regulate condensed milk brought in from Wisconsin. Notably, Brandeis joined two conservatives in dissent, reasoning "[w]e are unable to find in these statutes anything which prohibits the sales of condensed, skimmed milk when it is a part of a wholesome compound sold for what it really is, and distinctly labeled as such." *Id*. at 305, 306 (Day, J., dissenting). But Brandeis found nothing arbitrary nor unreasonable about state efforts to regulate the amount of butter fat in ice cream shipped in interstate commerce, to warrant a violation of the Fourteenth Amendment. *See* Hutchinson Ice Cream Co. v. Iowa, 242 U.S. 153 (1916). *See also* Or.-Wash. R.R. & Navigation Co. v. Washington, 270 U.S. 87, 96 (1926) (allowing quarantine against alfalfa hay possibly containing the alfalfa weevil); Amour & Co. v. North Dakota, 240 U.S. 510 (1916) (regulating lard).

202 *See* 237 U.S. 52 (1915). The court in *Sligh* observed how "[t]he right to preserve game flows from the undoubted existence in the state of a police power to that end, which may be none the less efficiently called into play because by doing so interstate commerce may be remotely and indirectly affected." *Id*. at 60.

and passage of robust food and drug laws) could be deceived or worse, defrauded. The court, as a consequence, allowed Indiana to regulate the sale of International Stock Food—an allegedly medicinal drug for domestic animals—into the interstate market.[203] And for natural resources, including potentially wildlife, water, oil, natural gas, coal, and possibly hydroelectric power, as discussed earlier, the court already afforded states greater latitude in their regulation, even allowing in some circumstances favoring instate over out-of-state interests.[204]

But Dormant Commerce Clause principles throughout the pre-New Deal period were fluid, making application to a specific situation—particularly to the new electric utility industry—somewhat problematic. The court had crafted various formulas, which soon thereafter would be abandoned, such as asking whether a particular activity was local or national in character—a concept that surfaced in *Cooley v. Board of Wardens*[205] and received wider endorsement during the end of the nineteenth and early twentieth centuries.[206] The court also had employed other formulaic tests, such as whether an activity directly or substantially burdened interstate commerce, or only indirectly or incidentally burdened interstate commerce.[207] And in many cases, courts were beginning

203 *See* Savage v. Jones, 225 U.S. 501 (1912).

204 *See supra* notes 130–138 and accompanying text. The ability of states to protect against waste and limit production for oil destined for instate markets was upheld (against a Fourteenth Amendment challenge) again in *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210 (1932). There, the court observed that "[i]t was not shown that the commission intended to limit the amount of oil entering interstate commerce for the purpose of controlling the price of crude oil or its products, or of eliminating plaintiff or any producer or refiner from competition, or that there was in any way combination among plaintiff's competitors for the purpose of restricting interstate commerce . . . ." *Id*. at 232.

205 *See* 53 U.S. (12 How.) 299 (1851).

206 *See* Kalen, *supra* note 104, at 749.

207 *See, e.g.*, Lemke v. Farmers' Grain Co., 258 U.S. 50, 59 (1922) (direct burden). In Shafter v. Farmers' Grain Co., 268 U.S. 189 (1925), Justice Van Devanter noted:

> The decisions of this court respecting the validity of state laws challenged under the commerce clause have established many rules covering various situations. Two of these rules . . . that a state statute enacted for admissible state purposes and which affects interstate commerce only incidentally and remotely is not . . . prohibited . . .and the other that a state statute which by its necessary operation directly interferes with or burdens such commerce is . . . prohibited . . . regardless of the propose . . . These rules, although readily understood and entirely consistent, are occasionally difficult of application . . .

to take a keen interest in whether or not the state or local entity was targeting and, therefore, discriminating against interstate commerce—an inquiry that soon would become the touchstone for most Dormant Commerce Clause analyses.[208]

B. *Whose Case Controls?*

The 1924 *Missouri v. Kansas Natural Gas Co.* opinion, therefore, reflected a narrow band of the Supreme Court's tortured effort to bring some coherence to Commerce Clause jurisprudence, some of which is explored above in Part II. The *Attleboro* litigants argued over the narrow question of *Kansas Natural Gas Co.*'s application, effectively championing the position expressed by the Federal Power Commission. The Federal Power Commission, after all, had somewhat myopically opined in 1925 that the *Kansas Natural Gas Co.* decision naturally extended to electric energy supplied in interstate commerce, leaving the only outstanding question of whether it would apply to all energy sold across state lines or only that sold at wholesale rather than directly to consumers.[209] According to the Commission, most energy sales fell within the first category.[210] Even so, the Commission

> [And] as might be expected, the decisions dealing with such exceptional situations have not been in full accord.

Id. at 199.

208 Elsewhere I suggest how focusing on "discrimination" arose out of a notion that individuals enjoyed a federal right to engage in commerce and from a cross pollination of Fourteenth Amendment jurisprudence. *See* Kalen, *supra* note 104, at 750–63.

209 *See* 5 FED. POWER COMM'N ANN. REP. 8 (1925). While the Commission recognized several instances of interstate transmission, it treated the interstate market as small and not likely to grow too much; nevertheless, it found the issue significant enough to warrant resolving "by whom these interstate energy transfers are to be regulated." *Id.* When, however, the Commission subsequently rejected the notion of interstate compacts to resolve the problem, it raised the specter of too many interstate transactions. *See id.* at 10. Possibly fearful of losing influence, it challenged the idea of a compact for the superpower—commenting how it "would, in effect, have merely created for such purpose another Federal Government to serve in place of the one we now have." *Id.* Oddly, the following year the Commission heralded the success and ability of states and the Commission to coordinate regulating of one of the largest hydroelectric projects of its time, the Conowingo Dam, which would transmit and sell power into various states. *See* 6 FED. POWER COMM'N ANN. REP. 6–9 (1926).

210 Here, the Commission merely quoted from the Supreme Court's natural gas cases to support the claim. *See* 6 FED. POWER COMM'N ANN. REP. at 8–9 (1926).

recommended distinguishing between wholesale sales and sales directly to consumers, believing that this would "simplify the problem of regulation."[211] It explained, in cavalier fashion and with questionable assumptions even at the time:

> Whether or not this separation does in fact take place, the instances in which regulation by the Federal Government will be required will be few in number and simple in character, since they will have to do only with wholesale transactions in interstate commerce. Even in these instances Federal regulation should be limited to those cases in which a formal complaint is filed, and in which the State either alone or in cooperation can not [sic] effectively control the situation. Any attempt to extend Federal regulation to control over rates and services to consumers would be both unnecessary and unwise.[212]

Attleboro's argument, half of which addressed Fourteenth Amendment claims, was quite simple.[213] Because the transaction involved interstate commerce, it was outside state control unless "there is anything to take the case out of the general rule that rates for interstate service rendered by a public utility cannot be fixed by state action."[214] And *Kansas Natural Gas Co.*, it argued, was controlling.[215] Attleboro briefly reviewed telegraph, motor carrier, and other cases, but without any appreciation for the nuances of those cases or the court's changing approach toward the Commerce Clause.[216] Overall, the analysis rested upon a simple

211 The Commission's rationale was that then local distribution companies would be forced to incorporate in their state, eventually splitting the wholesale generation business from retail distribution. *See id*. at 11.

212 *Id*.

213 *See* Brief for the Respondent, Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927) (No. 217).

214 *Id*. at 10.

215 *See id*. Counsel argued that "[t]he service is, moreover, strictly wholesale, the entire product being transmitted to a single recipient, which performs independently [sic] the local service of distribution." *Id*. at 12. Indeed, counsel informed the court "it is unnecessary to consider what the rule would be if the respondent were only one of many customers affected by the order and if the others were all in Rhode Island." *Id*. at 17.

216 For instance, counsel lumped together with little thought and dismissed the natural resource line of cases, *see supra* notes 130–135 and accompanying text, with the statement that "[w]hen the commodity is a natural product and the sale of it may deplete the natural resources of the State, the argument in favor of the right to regulate such sale is exceedingly plausible. This court, however, has refused to recognize any such right even in cases of that kind." Brief for the Respondent, *supra* note 213, at 19.

tautology: If the activity was in interstate commerce, it was an impermissible regulation of interstate commerce, unless it was a valid exercise of a state's police power—which would only occur if it was designed to achieve a traditional police power purpose rather than a regulation of interstate commerce.

Rhode Island countered by describing how Dormant Commerce Clause cases distinguished between direct and indirect interference with commerce, seeking to persuade the court that public utility rate regulation fit within the latter.[217] Its brief accepted a similarity between gas and electric energy,[218] emphasizing how the order did not discriminate against either Attleboro or interstate commerce.[219] According to the Rhode Island, the case involved a classic example of a state regulating a matter of local concern that only indirectly affected commerce because one of Narragansett's customers happened to engage in interstate commerce:[220]

> In the present case it is impossible for the Rhode Island Commission to exercise effectively its power to regulate the rates for electricity furnished to local consumers, without also regulating the rates for other service furnished by the Narragansett Company. On that ground the regulation of such other service should be allowed, even though it incidentally affects interstate commerce.[221]

Rhode Island argued against the application of *Kansas Natural Gas Co*. That case, it asserted, involved an effort by the receiving state (which in this case would be Massachusetts) to keep the price of wholesale gas lower than it had been, which was not the case here. Also, unlike there, the "business of the Company

217 *See* Brief for Petitioners, *Attleboro*, 273 U.S. at 83 (No. 217).

218 "The only difference which might have any bearing on the present case is that with gas (at least natural gas), as with water and oil, the principal element of the cost of furnishing it to a customer is the cost of transportation, while with electricity the principle element is the cost of generating the current." *Id*. at 19. This arguably overlooks the fact that part of the underlying dispute seemingly occurred because of the cost to Narragansett of the transmission line! The state also addressed adverse language in *Galloway v. Bell*, 11 F.2d 558 (D.C. Cir. 1926), *cert. denied*, 271 U.S. 666 (1926), noting simply it was dicta without any additional commentary. *See* Brief for Petitioners, *supra* note 217, at 28–30.

219 *See* Brief for Petitioners, *supra* note 217, at 19.

220 Rhode Island discussed gas and electric cases to illustrate how, when products are sold solely within a state it is a matter of local concern. *See id*. at 19–21.

221 *Id*. at 21 (italics removed).

is chiefly intrastate, not interstate. The paramount interest is local, not national."[222] But when purportedly articulating a line beyond which state jurisdiction could not extend, Rhode Island's brief confusingly stated that the jurisdictional line should be drawn in this case, "even though prohibiting it in cases similar to the *Missouri* [*Kansas Natural Gas Co*.] case."[223] The brief then made two Commerce Clause points: First, Narragansett was a state-franchised company. Second, the rate was for a "commodity produced within the State, as distinguished from a rate for transportation."[224]

C. *The Court Decides*

Responding to these arguments and affirming the Rhode Island Supreme Court, Justice Sanford's majority opinion avoids any serious analytical treatment of the court's evolving struggles with the Commerce Clause. According to Sanford, the court's decision in *Kansas Natural Gas Co*. controlled.[225] With a simple *ipso facto* statement, he announced that the Rhode Island PUC's order establishing a new rate directly burdened interstate commerce and was invalid.[226] With an implicit nod toward the questionable original package doctrine, he added "[t]he forwarding state obviously has no more authority than the receiving state to place a direct burden upon interstate commerce."[227] From there, he proceeded perfunctorily to justify his conclusion.

First, he intimated that if Rhode Island could establish rates

222 *Id*. at 25–26.

223 *Id*. at 27. R.I. admitted its jurisdiction would be doubtful if Narragansett chiefly sold its energy to recipients outside the state, and it further observed that, if Narragansett delivered energy to both local consumers and public utilities in Massachusetts, it likely would be subject to that state's utility commission. *Id*. at 27–28.

224 *Id*. at 30. An amicus brief filed by another company indicated a similar issue was pending elsewhere, and asserted states should be afforded the ability to regulate rates that only indirectly affect interstate commerce. *See* Motion of Southern Sierras Power Co. for Leave to File Brief as Amicus Curiae, *Attleboro*, 273 U.S. 83 (No. 217). *See also* Ariz. Edison Co. v. S. Sierras Power Co., 17 F.2d 739 (9th Cir. 1927) (contract dispute for power being transmitted across state lines), *cert. denied*, 274 U.S. 757 (1927).

225 *See* 273 U.S. at 89. Justice Sanford's opinion poses a binary question: Does the "case come[] with the rule of the Pennsylvania Gas Co. Case [relied on by Rhode Island] or that of the Kansas Gas Co. Case upon which Attleboro Company relies[?]" *Id*. at 87.

226 *See id*. at 89.

227 *Id*. at 90 (citing Pennsylvania v. West Virginia, 262 U.S. 553 (1923)).

for sales in interstate commerce then quite possibly it could discriminate in favor of local residents. The problem with this analysis is that, while the PUC hearing explored Attleboro's claim of discrimination in favor of New England Power, the possibility of discrimination was neither the finding of the PUC nor of the Rhode Island Supreme Court and, as such, Sanford's suggestion could only serve as an abstraction, not a factual assessment.[228] Of course, the PUC-approved "rate" itself was not a rate for interstate sales, it was a rate effectively altering Attleboro's contractual rate—for an interstate sale. It did not, however, on its face target interstate commerce.[229] And while undoubtedly concern about possible discrimination influenced his decision, the posture of the case made it difficult for Sanford to rely on precedent prohibiting states from discriminating against interstate commerce—a holding that might have been less exceptional. How, therefore, the approved rate "directly" "burdened" interstate commerce seems unclear. It is equally hard to assess how much it "burdened" commerce, because Attleboro continued to receive service and had been paying the new rate since the PUC's order. In addition, the new rate cost Attleboro $50,000 annually and there was no analysis of its actual impact on Attleboro or its customers.

Second, Sanford described the "interstate business" of the two companies "as essentially national in character" rather than "local to either state" and as such neither the exporting nor importing state could regulate the rates—instead, it would be a matter "vested in Congress."[230] His attempt to distinguish the two primary cases, *Pennsylvania Gas Co*. and *Kansas Natural Gas Co*., suggests he believed "national character" of the business operated as the critical factor here. Again, though, he offers a simple conclusion. What brings it within the domain of cases employing the local/national (or *Cooley*) rationale is missing. The country already had a national marketplace for most goods and services. Distinguishing between what requires uniformity in treatment and

228 *See id*.

229 Attleboro's counsel argued that the case was "unlike a speed law. . . which applies to all classes of traffic alike," this PUC order "is avowedly aimed solely at the respondent and will not affect any other customer." Brief for the Respondent, *supra* note 213, at 17. Yet, absent a different record or framing the issue differently, the case was presented as an abstract issue of a PUC order that applies to any company purchasing energy under a rate, whether for intra or interstate.

230 *Attleboro*, 273 U.S. at 90.

what does not could not be governed simply by a product's movement in commerce. Surely, rates for the sale of electricity would not need (nor could it be possible) uniform treatment throughout the nation. But that is what Sanford's opinion unfortunately suggests. Perhaps, then, what he meant was that "jurisdiction" over the sale and delivery of electricity in interstate commerce constituted a matter of national not local interest. This would mean it was not the particular order of the Rhode Island PUC changing the contractual rate for the sale, but rather his belief that Attleboro's business of purchasing and transporting electricity in the interstate market through an interconnected system was beyond state interference, warranting national attention.[231] But little about the Supreme Court's precedent suggested that a potentially concurrent exercise of state police power could be prohibited when it would be better if regulated by the national government. Section 20 of the FWPA expressly allowed state regulation of rates for licensees selling energy in interstate commerce, with the FPC given jurisdiction to address complaints in the absence of sufficient state authority.[232] What appears conspicuous, therefore, is that the presumably conservative Sanford—a Chief Justice Taft recruit having joined the court only four years earlier—avoided any factual inquiry or confronting the court's considerable jurisprudence,[233] only a fraction of what this

231 This is how Justice Sutherland framed the question in *Kansas Natural Gas Co*. *See* Missouri *ex rel.* Barrett v. Kan. Nat. Gas Co., 265 U.S. 298, 305 (1924).

232 Federal Water Power Act of 1920, Pub. L. No. 66-280, § 20, 41 Stat. 1063, 1073–74.

233 Little is known about Justice Sanford's judicial philosophy, author of the well-known free speech opinion in *Gitlow v. New York*, 268 U.S. 652 (1925). *See*, *e.g.*, Lewis L. Laska, *Mr. Justice Sanford and the Fourteenth Amendment*, 33 TENN. HIST. Q. 210 (1974). Alpheus Mason describes "the long-forgotten Edward T. Sanford" as a protégé of—and ideologically aligned with—Chief Justice Taft as a constitutional conservative. MASON, *supra* note 153, at 164, 174 (1964). I suspect that Sanford's background as a conservative yet progressive pushed him toward believing that federal legislation was necessary in the field of energy, a previously neglected area (with the exception of hydroelectric power). In other instances, for example, he appreciated the need for a factual inquiry, such as when he presided over a claim involving Coca-Cola's use of potentially harmful caffeine in its soda. *See* U.S. v. Forty Barrels & Twenty Kegs of Coca-Cola, 191 F. 431, 433 (E.D. Tenn. 1911) (United States alleging the soda was adulterated under the Food & Drug Act of 1906). He purportedly believed strongly that common carriers must furnish unimpaired non-discriminatory service. *See* Postal Cable Tel. Co. v. Cumberland Tel. & Tel. Co., 177 F. 726, 728 (M.D. Tenn. 1910). And in *Bedford Cut Stone Co. v. Journeyman Stone*

Article portrays, and instead rendered a decision seemingly designed to trigger federal legislation.

Finally, Sanford dubiously suggested that the *Kansas Natural Gas Co*. "precedent" was so dispositive to warrant little discussion. Relying almost exclusively on *Kansas Natural Gas Co*., though, had three defects. First, Justice Sutherland's fairly short opinion in *Kansas Natural Gas Co.* treated all too cavalierly state rate regulation for sales of gas into the interstate market as beyond the traditional local police power of states, such as with "inspection laws, quarantine laws, and, generally, laws of internal police . . . ."[234] One scholar argues that Sutherland feared the "whims of turbulent democratic majorities controlled by political factions."[235] While accepting perceived legitimate police power measures, he protected economic freedom when he believed that a state had acted inappropriately.[236] Illegitimate state behavior necessarily surfaced when states sought to discriminate against or impose a particular burden on those engaged in interstate commerce. The style of his opinion mirrored and relied upon on

Cutters' Ass'n, 274 U.S. 37 (1927), decided only a few months after *Attleboro*, Sanford apparently "grudgingly" concurred separately with the anti-labor majority opinion, simply stating in one sentence that *Duplex Co. v. Deering*, 254 U.S. 443 (1920), dictated the outcome. *See* MASON, *supra* 153, at 229.

234 265 U.S. at 307. Although Rhode Island's counsel avoided the issue, sales of gas and electricity differ in key respects: Electricity as opposed to gas cannot be stored, it must be delivered when generated, and with AC current it can flow in different directions toward the path of least resistance if connected to other systems.

235 Samuel R. Olken, *Justice George Sutherland and Economic Liberty: Constitutional Conservatism and the Problem of Factions*, 6 WM. & MARY BILL RTS. J. 1, 6 (1997).

236 Sutherland emulated Justice Field's conservatism and studied law under Thomas Cooley, the conservative scholar and judge who sought to restrain perceived impermissible exercises of state police power. *See id.* at 7. "Thomas Cooley and Stephen Field, both instrumental in the rise of economic substantive due process, emphasized equal operation of the law as the touchstone of economic liberty necessary for individuals to flourish in a thriving democracy." *Id*. Less critically perhaps, Paul Murphy characterized Sutherland as "that prime architect in readapting the law in the twenties to fit the needs of business and in reembodying [sic] the principles of laissez-faire . . . ." PAUL L. MURPHY, THE CONSTITUTION IN CRISIS TIMES 1918–1969, at 112 (1972). The conservative wing of the court seemingly trusted the judiciary more than either federal or state administrative agencies. *See, e.g.*, Fed. Trade Comm'n v. Gratz, 253 U.S. 421 (1920) (limiting the Federal Trade Commission's ability to prosecute unfair methods of competition); Ohio Valley Water Co. v. Borough of Ben Avon, 253 U.S. 287 (1920) (denied water company due process if no opportunity for judicial review of whether rates confiscatory).

nineteenth century opinions that assumed two spheres of jurisdiction, either federal for interstate commerce or state for a police power.[237] Only a few years after *Attleboro*, for instance, Sutherland would ignore *Attleboro* and uphold an Idaho tax on Utah Power & Light (UP&L) even though UP&L's energy was intended for an interstate market.[238] The tax, he reasoned, was imposed on electric generation rather than on transmission.[239] Indeed, in his *Kansas Natural Gas Co.* opinion, Sutherland urged the need for "equality of opportunity and treatment among the various communities and States concerned."[240] That was not, however, the posture of *Attleboro*.

Also, Justice Sutherland's *Kansas Natural Gas Co*. opinion implicitly accepted the moribund "original package doctrine," establishing a jurisdictional divide between state and federal authority once a product ceased its movement in interstate commerce. The original package doctrine, announced by Chief Justice Marshall, insulated foreign imports from state taxation until they were removed from their "original package,"[241] and it had been applied sporadically to interstate rather than foreign

237 He referenced *Robbins v. Shelby County Taxing District*, 120 U.S. 489 (1887), *Welton v. Missouri*, 91 U.S. 275 (1875), and even *Hall v. DeCuir*, 95 U.S. 485 (1877). For how these cases illustrated a paradigm, see Kalen, *Reawakening*, *supra* note 138, at 450–57, 462–83.

238 *See* Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932). Idaho argued that *Attleboro* was distinguishable because the rate there included a charge for both generation and transmission. Brief of Appellees at 44, *Pfost*, 286 U.S. 165 (No. 722). UP&L argued that, under *Attleboro*, "[i]f the regulation of the rates for which electric energy can be sold to a company distributing such energy in another state burdens interstate commerce, it must follow that the imposition of a tax upon the process which transmits that energy likewise burdens such commerce." Brief for Appellant at 38, *Pfost*, 286 U.S. 165 (No. 722).

239 Utah Power & Light Co., 286 U.S. at 181–82.

240 Missouri *ex rel.* Barrett v. Kan. Nat. Gas Co., 265 U.S. 298, 310 (1924).

241 Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827). States presumably regulated foreign products after they were removed from their original packages; courts then examined whether the regulatory regime impermissibly discriminated against interstate commerce. A fascinating example is Washington State's attempt to regulate foreign eggs. A three-member district court canvassed various state inspection and labeling programs and refused to enjoin Washington's undoubtedly discriminatory program designed to alert purchasers of the foreign source of the eggs. *See* Amos Bird Co. v. Thompson, 247 F. 702 (W.D. Wash. 1921). In *New York ex rel. Silz v. Hesterberg*, 211 U.S. 31 (1908), the Supreme Court allowed New York to prohibit the sale of lawfully obtained foreign game because it might be confused with local game during periods when the state prohibited hunting local game.

commerce. Sutherland applied the doctrine when explaining how sales to consumers were local—as if an interstate article had come to rest in the state and could be regulated. Until then, wholesale transactions in interstate commerce were of a national character:

> The transportation, sale and delivery constitute an unbroken chain, fundamentally interstate from beginning to end, and of such continuity as to amount to an established course of business. The paramount interest is not local but national, admitting of and requiring uniformity of regulation. Such uniformity, even though it be the uniformity of governmental nonaction, may be highly necessary to preserve equality of opportunity and treatment among the various communities and States concerned.[242]

Sutherland, therefore, dismissed other natural gas cases, discussed in Part II above, because he viewed them as involving local distribution of gas that had ceased its character of being in interstate commerce. Sanford must have found such reasoning persuasive when, as noted above, he alluded to the problem confronting an importing state.[243]

The original package doctrine nevertheless had lost its appeal by 1927, and only served as at most an illustrative tool. The doctrine as a jurisdictional divide seemed doomed because state or local efforts to regulate traditional activities, now routinely part of interstate commerce and the burgeoning consumer economy, would—if applied—otherwise halt most state police power measures.[244] A good example involved the movie industry. In the 1920s, the movie industry challenged as violating the original package doctrine the ability of states to regulate the showing of

242 *Kan. Nat. Gas Co.*, 265 U.S. at 309–10.

243 *See supra* notes 140-157, 224-226 and accompanying text.

244 When, for example, distributors objected to getting a distributor license for advertising Jell-O Ice Cream Powder, because their product had been shipped from New York to Washington State and still in their original packages, a lower court decided that it was a reasonable regulation to avert a nuisance and rejected the distributor's use of *Brown v. Maryland* and other cases. *See* Jell-O Co. v. Brown, 3 F. Supp. 132 (W.D. Wash. 1926). "It is a matter of hornbook knowledge," wrote another judge, "that the original package statement of Justice Marshall was an illustration, rather than a formula, and that its application is evidentiary, and not substantive." City of Galveston v. Mexican Petroleum Corp., 15 F.2d 208 (S.D. Tex. 1926) (claiming that oil in the case was still in its foreign import state). Congress employed the doctrine, however, in the Harrison Anti-Narcotic Act, distinguishing between wholesalers and retailers. *See* Harrison Anti-Narcotic Act, Pub. L. No. 223, 38 Stat. 785 (1914). *See, e.g.*, Alston v. United States, 274 U.S. 289 (1927).

films. The U.S. District Court for the District of Connecticut issued an impassioned opinion about the authority of states under their police power to oversee the industry. Films at the time, the court opined, were created only in New York and California, and therefore the industry—with the exception possibly those two states—was undoubtedly engaged in interstate commerce. Addressing the application of the original package doctrine, the court explained that the Supreme Court had made it clear that the "analogy between imports and articles in original packages in interstate commerce in respect to immunity from taxation fails."[245]

This description by the district court may have overstated the clarity of the Supreme Court's opinions. Undoubtedly the Supreme Court no longer accepted the original package doctrine as a litmus test. In *Red 'C' Oil Manufacturing Co. v. Board of Agriculture*,[246] it allowed North Carolina to inspect and therefore regulate imported kerosene and other oils for sale in the state. The Supreme Court accepted the lower court's judgment that North Carolina's charge was similar to that of other states, and therefore implicitly not discriminatory.[247] In *Texas v. Brown*,[248] a unanimous court discussed the original package doctrine only when deciding when a state may impose a fee in excess of the cost of inspection and effectively discriminate against interstate commerce.[249] The case involved Georgia's inspection (and tax) program for petroleum and petroleum products brought into the state and then distributed throughout the state to local agencies or distribution stations. The lower court had enjoined the program for products being sold or intending to be sold in their original package. However, it upheld the program for the products being sold after "breaking the original package."[250] Justice Pitney, who would leave the court shortly before *Attleboro*, relied on *American Steel & Wire Co. v. Speed*[251]

245 Fox Film Corp. v. Trumbull, 7 F.2d 715, 722 (D. Conn. 1925), *appeal dismissed*, 269 U.S. 597 (1925).

246 *See* 222 U.S. 380 (1912).

247 *See id*. at 393. *See also e.g.*, Cleveland Ref. Co. v. Phipps, 277 F. 463, 466 (S.D. Ohio 1921) (the state may "collect the necessary expense of its inspection laws, with the result that interstate commerce to that extent would be lawfully burdened").

248 *See* 258 U.S. 466 (1922).

249 *See id*. at 475–76.

250 *Id*. at 472.

251 *See* 192 U.S. 500 (1904).

and *Woodruff v. Parham*[252] to conclude that the doctrine no longer applied—the question instead was whether a state tax discriminates against interstate commerce.[253] This was seemingly settled with *Sonneborn Bros. v. Cureton*.[254] In an account described by Alexander Bickel, a majority of Justices in *Sonneborn Bros.* apparently were inclined to apply the original package doctrine, provoking a drafted dissent by Justice Brandeis rejecting its application and arguing that the determinative factor is whether the measure discriminates against interstate commerce.[255]

252 *See* 72 U.S. (8 Wall.) 123 (1868).

253 *See Texas*, 258 U.S. at 475–76. Pitney added how his analysis was consistent with *Askren v. Continental Oil Co*., 252 U.S. 444, 449–50 (1920). In *Askren* and the accompanying *Bowman v. Continental Oil Co.*, 256 U.S. 642 (1921), the court confronted a state's ability to tax interstate activity without an effort by the state to separate in-state versus out-of-state activity or receipts. The conservative Justice Day authored *Askren* and with little analysis simply invoked the doctrine. Justice Day similarly authored *Standard Oil v. Graves*, 249 U.S. 389 (1919). *Graves* involved a Washington State oil inspection program for products being shipped into the state from California. The oil "cannot be lawfully sold at all until the importer has paid the inspection fee." *Id.* at 395. Justice Day relied principally upon *Foote v. Maryland*, 232 U.S. 494 (1914), when concluding the fee as applied to the original package was a direct and therefore unconstitutional burden on interstate commerce. This is where conservative justices conflated Commerce Clause and Fourteenth Amendment jurisprudence. The reason programs in *Graves* and *Foote* violated the Constitution, they reasoned, is because the fee was excessive—*i.e*., unreasonable. These justices willingly examined police power measures and, upon finding them unreasonable, concluded they were not a legitimate exercise of the police power and, therefore, must constitute a regulation of commerce. In *Foote*, Justice Lamar concluded that Maryland's oyster inspection fee was disproportionate to the service rendered. *Cf.* Pure Oil Co. v. Minnesota, 248 U.S. 158 (1918) (upholding petroleum inspection fee as reasonable); Gen. Oil Co. v. Crain, 209 U.S. 211 (1908) (holding, in the context of petroleum inspection, that oil is not property in interstate commerce).

254 *See* 262 U.S. 506 (1923).

255 *See* ALEXANDER M. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 100–18 (1957). Brandeis apparently was skeptical about Justice Pitney. In *Bowman*, 256 U.S. at 642, Pitney had employed the doctrine. Yet, in *Wagner v. City of Covington*, 251 U.S. 95 (1919), Pitney upheld a local license fee imposed on peddlers of goods received from out of the state. Even Justice Holmes, although unnecessary to his opinion, had earlier discussed the doctrine as if it had force. *See* Hebe Co. v. Shaw, 248 U.S. 297, 304 (1919). *See also* Armour & Co. v. North Dakota, 240 U.S. 510, 517 (1916) (rejecting Commerce Clause challenge by noting a retail sale no longer in original package); F. May & Co. v. New Orleans, 178 U.S. 496, 503 (1900) (Justice Harlan questioning concept in case involving cigarette sales). Justice Cardozo would later invoke the doctrine for illustrative purposes in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 526–27 (1935). *See also* Whitfield v. Ohio, 297 U.S. 431, 439–40 (1936); James Clark Distilling Co. v. W. Md. Ry. Co., 242 U.S. 311, 325, 330 (1917). *See*

His dissent became unnecessary, however, when Chief Justice Taft employed his reasoning and rejected the application of the doctrine to the case. Taft's opinion for the court carefully examined the doctrine, reviewed the court's precedent and concluded that it would not apply; the touchstone would be whether the tax discriminated against interstate commerce.[256]

Sanford's *Attleboro* opinion unfortunately skirted this entire constitutional dialogue animating the Justices before his arrival.

Sanford, moreover, too quickly accepted rhetoric from *Kansas Natural Gas Co.*, reflecting the philosophy of Justices Van Deventer, Day, and his fellow Tennessean James McReynolds, without appreciating the evolution of the constitutional narrative for the Commerce Clause.[257] There, an interstate company threatened to shut off deliveries to local distribution companies (LDCs) if the LDCs refused to pay a higher rate—an additional 5 cents per 1,000 cubic feet of gas. To protect their LDCs, each state sought to enjoin the company from placing its LDC in such a quandary.[258] Justice Sutherland and the other conservatives, such as Van Devanter, failed to appreciate that Commerce Clause jurisprudence had evolved since the nineteenth century. They adhered to rigid jurisdictional categories, asking whether something served a valid police power purpose or constituted a regulation of interstate commerce, the latter being prohibited and the former acceptable if reasonable, not discriminatory, and only indirectly (or incidentally) affecting interstate commerce. The original package doctrine, after all, served as a simplistic formula for distinguishing a regulation of commerce from an exercise of the police power. Illustrative is Justice Van Devanter's opinion in

generally Noel T. Dowling & F. Mores Hubbard, *Divesting an Article of its Interstate Character: An Examination of the Doctrine Underlying the Webb-Kenyon Act*, 5 MINN. L. REV. 100 (1921).

256 *See* 262 U.S. at 508–21. Justice McReynolds concurred, observing that "[a]pparently not great harm, and possibly some good, will follow a flat declaration that irrespective of analogies and for purposes of taxation we will hold interstate commerce ends when an original package reaches the consignee and comes to rest within a state, although intended for sale there in unbroken form." *Id*. at 522 (McReynolds, J., concurring).

257 *See generally* Kalen, *supra* note 104.

258 *See* Missouri *ex rel.* Barrett v. Kan. Nat. Gas Co., 282 F. 341 (W.D. Mo. 1922); Cent. Tr. Co. of N.Y. v. Consumers' Light, Heat & Power, 282 F. 680 (D. Kan. 1922); State *ex rel.* Helm v. Kan. Nat. Gas Co, 208 Pac. 622 (Kan. 1922). The prior rate had been fixed by a federal court and approved by a public utility commission. *See Helm*, 208 Pac. at 622.

Dahnke-Walker Milling Co. v. Bondurant,[259] involving the movement of wheat across state lines by a common carrier: determining whether the transaction was in interstate commerce became dispositive of constitutionality. In another grain case, Justice Day followed *Dahnke* and asked whether North Dakota's grain inspection statute constituted a regulation of interstate commerce, and added that if it regulated interstate commerce, it would fail.[260] Echoing older opinions, Day resurrected the notion of a federal right to engage in interstate commerce only capable of being burdened by Congress.[261] But by 1927 it had become evident, illustrated by the court's decision in *Di Santo v. Pennsylvania*, that such mechanistic formulas no longer captured how to address Dormant Commerce Clause challenges.[262] Dissenting, Justice Stone urged replacing unworkable talismanic tests with searching factual inquiries designed to tease out whether particular matters were of a national or local concern.[263]

Justice Brandeis' dissent in *Attleboro* further illustrates why an appreciation for how Commerce Clause jurisprudence was

259 *See* 257 U.S. 282, 292–93 (1921).

260 *See* Lemke v. Farmers' Grain Co., 258 U.S. 50, 56 (1922). Day invoked Justice Holmes' stream of commerce concept justifying how regulating goods destined for interstate markets fell inside the federal sphere of interstate commerce. *See id*. at 55 (citing Swift & Co. v. United States, 196 U.S. 375 (1905)). Attleboro expectedly raised *Lemke* in its brief. *See* Brief for the Respondent, *supra* note 213, at 15. Justice Brandeis wrote President Wilson that in *Lemke* "a promising effort of a state to protect itself met its doom." Letter from Louis Brandeis to Woodrow Wilson (March 3, 1922), *in* 5 LETTERS OF LOUIS D. BRANDEIS, *supra* note 153, at 47. Responding to the claim the state validly exercised its police power, Day in *Lemke* dismissed the claim as having "no application where the State passes beyond the exercise of its legitimate authority, and undertakes to regulate interstate commerce by imposing burdens upon it." 258 U.S. at 59. Three months later when the court, per Chief Justice Taft, used the "throat of commerce" concept to uphold the Packers and Stockyards Act, Justice Day did not participate (he left the court six months later). *See* Stafford v. Wallace, 258 U.S. 495, 527 (1922).

261 Justice Day borrowed language about the "privilege of engaging in interstate commerce," a privilege shielded from state or local governments infringement. *Lemke*, 258 U.S. at 59–60. Dissenting, Justices Brandeis, Holmes, and Clarke explained that whether the sale was in interstate commerce or not "does not preclude application of state inspection laws, unless Congress has occupied the field or the state regulation directly burdens interstate commerce." *Id*. at 61, 64 (Brandeis, J., dissenting).

262 *See* Di Santo v. Pennsylvania, 273 U.S. 34 (1927). *See generally* Sam Kalen, *Dormancy Versus Innovation: A Next Generation Dormant Commerce Clause*, 65 OKLA. L. REV. 381, 392 (2013).

263 *See* 273 U.S. at 43–45.

evolving was critical—although lacking in the majority's opinion.[264] Brandeis' background, perhaps more so than any of the other justices, made him acutely aware of the public utility industry.[265] His modern biographer, Melvin Urofsky, observes how "few people of his generation understood so well the inner workings of the economic system."[266] As the people's advocate, Brandeis worked on high profile gas utility matters, as well as on state-granted charters for elevated electric streetcars.[267] Indeed, he may well have come across the utility when examining the associated traction company.[268] Previous opinions by Brandeis,

264 *See* Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83, 91 (1927) (Brandeis, J., dissenting).

265 *See* LEWIS J. PAPER, BRANDEIS 68–79 (1983) (describing his involvement in the "Gas Fight"); *see also supra* note 151 and accompanying text. *E.g.*, Louis D. Brandeis to Daniel Kiefer, July 11, 1913, *in* BRANDEIS LETTERS Vol. III, *supra* note 259, at 132 ("charters should confer upon cities the right of municipal ownership").

266 MELVIN I. UROFSKY, LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION 124 (1981). Alpheus Mason, Brandeis' former foremost biographer, explained how the justice was "[k]eenly aware of the new industrial era's complexities." ALPHEUS T. MASON, BRANDEIS AND THE MODERN STATE 55 (1936). "The most influential critic of trusts during his generation, Brandeis served from 1912 until 1916 as Woodrow Wilson's chief economic adviser and was regarded as one of the architects of the FTC [working with George Rublee]. Above all else, Brandeis exemplified the anti-bigness ethic without which there would have been Sherman Act, no antitrust movement, and no Federal Trade Commission." THOMAS K. MCGRAW, PROPHETS OF REGULATION 82, 122 (1984).

267 *See* MASON, *supra* note 266, at 24–37. *See, e.g.*, Louis D. Brandeis, *How Boston Solved the Gas Problem*, AM. REV. REVS. 592 (1907); *see also* Letter from Louis D. Brandeis to Edward Francis McClenen (March 14, 1916), *in* 4 LETTERS OF LOUIS D. BRANDEIS, *supra* note 153, at 120.

268 *See* Letter from Louis D. Brandeis to Charles Sanger Mellen (Nov. 18, 1907), *in* 2 LETTERS OF LOUIS D. BRANDEIS, *supra* note 153, at 48 (searching for financial information of the "United Traction & Electric Co. of Providence"). Brandeis, in fact, fought against the Rhode Island Company's effective parent, the New Haven railroad monopoly. *See* Louis Brandeis, *The New Haven—An Unregulated Monopoly*, BOS. J., Dec. 13, 1912; LOUIS D. BRANDEIS, FINANCIAL CONDITION OF THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY AND OF THE BOSTON & MAINE RAILROAD 3, 7, 27 (1907). *See generally* HENRY L. STAPLES & ALPHEUS T. MASON, THE FALL OF A RAILROAD EMPIRE: BRANDEIS AND THE NEW HAVEN MERGER BATTLE (1947); Richard M. Abrams, *Brandeis and the New Haven-Boston & Maine Merger Battle Revisited*, 36 BUS. HIST. REV. 408 (1962). He sufficiently explored the financial situation of the New Haven that he predicted its economic collapse. *See* MASON, *supra* note 266, at 93. And he became familiar with franchises for traction companies. *See* Letter from Louis D. Brandeis to Arthur H. Vandenberg (April 1, 1911), 2 LETTERS OF LOUIS D. BRANDEIS, *supra* note 153, at 419 (talking about his article on the franchise for street railways in Boston).

moreover, had explored aspects of utility regulation.[269] Dissenting in *Pennsylvania v. West Virginia*, he illustrated his predilection toward deferring to expert administrators trained in exploring facts, rather than accepting the majority's willingness to second-guess an administrative judgment.[270] In a letter to Felix Frankfurter, Brandeis posited that the West Virginia case was "decided largely on ground that natural gas had been made an article of interstate com[merce]" and he feared a state would either have to prevent its "power" from entering the interstate market and risk "robbery" or secure federal legislation that delegated authority to the states to regulate the market.[271] This seemed all the more justified because Justice Holmes had, in 1905, observed how "commerce among the States is not a technical legal conception but a practical one drawn from the course of business."[272]

In his *Attleboro* dissent, Brandeis began by observing that the Rhode Island PUC had exercised a valid police power over a matter of local concern involving one of its own utilities to ensure against discrimination of rates for customers within Rhode Island.[273] He then illustrated why resolving whether it offended the

269 *See* Galveston Elec. Co. v. City of Galveston, 258 U.S. 388 (1922); Missouri *ex rel.* Sw. Bell v. Pub. Serv. Comm'n, 262 U.S. 276 (1923) (Brandeis, J., concurring).

270 This case, Urofsky posits, exemplifies the fight over emerging principles of administrative law and deference to expert agencies. *See* UROFSKY, *supra* note 88, at 614–15. In *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 517–34 (1924) (Brandeis, J., dissenting), Brandeis presented a flurry of facts to undermine the ill-conceived assumptions of the majority opinion striking down Nebraska's standard weight bread law. Several years later, Brandeis would explain how "[t]he certificate of public convenience and necessity is a device—a recent social economic invention—through which the monopoly is kept under effective control by vesting in a commission the power to terminate it whenever that course is required in the public interest." New State Ice Co. v. Liebmann, 285 U.S. 262, 280, 304 (1932) (Brandeis, J., dissenting). Brandeis, after all, introduced the notion of a "Brandeis" brief where the court would be presented with actual economic and social facts surrounding legislative activity. *See* MASON, *supra* note 266, at 136–46; *see also* NANCY WOLOCH, MULLER V. OREGON (1996).

271 Letter from Louis D. Brandeis to Felix Frankfurter (June 17, 1923), *in* 5 LETTERS OF LOUIS D. BRANDEIS, *supra*, note 153, at 98. Brandeis recognized the uncertainty surrounding Congress' ability to sanction state activity if the matter was considered exclusively national by "applying the Webb-Kenyon doctrine." *Id*. *See also supra* note 153 (noting case poorly argued).

272 Swift & Co. v. United States, 196 U.S. 375, 398 (1905).

273 *See* Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83, 91, 92 (1927) (Brandeis, J., dissenting).

Commerce Clause required a more thorough analysis than the majority opinion suggested.[274] Simply because the matter involved a transaction in interstate commerce and could be regulated by Congress did not, he believe, answer the question.[275] Until Congress acted, or unless congressional silence suggested that the matter should be free from regulation until Congress acts, the state's exercise of its police power was not restrained.[276] The principal issue, instead, was whether the order of the Rhode Island PUC somehow obstructed or directly burdened interstate commerce.[277] Here, he opined that preventing discrimination against its own citizens was "not obstruct[ing] or plac[ing] [such] a direct burden on interstate commerce."[278] It would be no different, he reasoned, than if the state had simply placed an added tax on the cost of a product that would then be sold into the interstate market. Nor was it, according to Brandeis, any different than the *Pennsylvania Gas Co*. case.[279] He ended his dissent with two principles generally permeating Dormant Commerce Clause jurisprudence: the state had neither discriminated against interstate commerce nor sought to regulate a business engaged solely in interstate commerce.[280]

Justice Sanford ignored altogether Brandeis' dissent, however. Federal legislation was now necessary to regulate *any* electricity that would be transmitted in interstate commerce. A utility commission rate that applied to both intrastate and interstate sales could not be enforced against the latter.[281] There was no distinction between retail or wholesale sales, although Sanford's indirect reliance on the questionable original package doctrine may have suggested such a distinction. It may be that Sanford was aware of the FPC's assessment and implicitly sought to trigger a federal response and issued an opinion with such a sweeping

274 *See id*.
275 *See id*.
276 *See id*.
277 *See id*.
278 *Id*.
279 *See id.* (citing Penn. Gas Co. v. Pub. Serv. Comm'n, 252 U.S. 23 (1920)).
280 *See id*.
281 Parties could still contract for such sales, but the obligation would become fortified against changes by one party or that party's utility commission. In 1928, the FTC reported that, while interstate sales might not be supervising by state commissions, the rates were still low. *See* 1928 FED. TRADE COMM'N ANN. REP. 28.

suggestion. Or, it may well be that Sanford was influenced by the well-recognized need for federal involvement in protecting against abuses within the corporate structures of the electric utility industry.[282] And perhaps he intended the opinion would signal that not only was the FWPA constitutional,[283] but also that a uniform federal approach would make more sense. He had, after all, ended his opinion with precisely that call.

D. *The Desired Result?*

The opinion ignited a desire for a congressional response, particularly as the industry already had become interconnected across state lines. Only the year before, the *Washington Post* reported that Secretary of Commerce Herbert Hoover projected that "there will develop a series of superpower stations, located at strategic points, and serving vast territories over a network of transmission lines" that could be addressed by regional

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282 That issues of corporate structure were intertwined with utility regulation is captured by a *New York Times* report on *Attleboro*:

> The efforts of some large holding companies to evade State regulation by various devices, utility men fear, may result in all being placed more speedily under Federal regulation. Charges of excessive capitalization, inflated organization expenses and exaggerated valuations made in interstate consolidations of electrical companies, it is argued, may then come under the scrutiny of Federal officials, while the task of analyzing the various complex factors entering into the production and interchange of electricity would be enormous and expensive.

Federal Control of Power Forecast, N.Y. TIMES, Jan. 16, 1927, at E13. A few years earlier the Federal Power Commission observed how state commissions could not effectively establish rates because of their inability to examine "the accounts of public utilities." 5 FED. POWER COMM'N ANN. REP. 5 (1925). The FTC investigations begun amid widespread reports about the industry—infusing even dialogues about educators' independence. *See generally* KING, *supra* note 68, at 169–72, 198–206.

283 *See* New Jersey v. Sargent, 259 U.S. 328 (1926) (dismissing for lack of jurisdiction on what today would be standing, although recognizing Congress' authority to regulate navigable waters). *Cf.* Econ. Light & Power Co. v. United States, 256 U.S. 113 (1921) (upholding Congress' authority under Rivers & Harbors Act of 1899 to regulate activities on waters previously navigable and potentially navigable in the future). The authority to pass the Act would be questioned a few years later, as well. *See* KING, *supra* note 68, at 220–25. The Attorney General, for instance, opined how the Commission could exercise authority over projects on non-navigable water only if the Commission found the project would affect commerce. *See Issuance of License for Water Power Development on New River, VA.*, 36 U.S. Op. Att'y Gen. 355 (1930), 1930 WL 1800 (issuing minor part licenses); *see also* United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940) (affirming jurisdiction over New River project).

cooperation among states through compacts, and if monopolies spanned too many states then those monopolies could be federally regulated.[284] That notion became moot once the Supreme Court decided *Attleboro*. Indeed, the press reported how the opinion effectively stymied efforts at regional coordination and establishing a superpower system.[285] The *New York Times* reported that *Attleboro* established a "New Principle" that "transmission of electric power across State borders is 'interstate commerce' . . . not subject to regulation by State Commissions."[286] The decision was "particularly interesting, lawyers hold, because Congress has not attempted to vest in any Federal agency the regulation of electric power sales from one State to another."[287]

For the FPC, *Attleboro* was a clear victory. The next year the Commission parroted its observations from a few years earlier—undoubtedly anxiously awaiting some new authority.[288] This time it added, presumably as a consequence of the apparent importance of *Kansas Natural Gas Co.*, that its analysis of drawing a line between wholesale sales and sales to a local distribution company was the appropriate jurisdictional line. The Commission's report suggested that such a division would make sense, because only in the latter circumstance could a state arguably (the receiving or importing state) exercise jurisdiction under the—albeit moribund—original package doctrine.[289] The Commission ended

284 *Interstate Power Systems*, WASH. POST, Dec. 20, 1926, at 6.

285 *See Federal Control of Power Forecast*, N.Y. TIMES, Jan. 16, 1927, at E13.

286 *Bars State Control of Exported Power: Supreme Court Decides Rhode Island Cannot Tax for Electricity Sent to Bay State*, N.Y. TIMES, Jan. 4, 1927, at 40.

287 *Id*.

288 *See* 8 FED. POWER COMM'N ANN. REP. 8 (1928). When the Commission again suggested instances of interstate transactions would be low, it nevertheless referenced Conowingo Dam as an example of an interstate sale to a local distribution company, *see supra* note 209, and then cited the Attleboro example. *See* 8 FED. POWER COMM'N ANN. REP. at 8–9. Later, however, the Commission observed how such interstate transactions, at the time constituting roughly "9 percent of the total of power generated," were likely to "becom[e] increasingly more numerous." *Id*. at 12–13.

289 "When the interstate commerce consists of the importation from without a State by a corporation or other agency, which itself sells and delivers the imported energy to its customers, the State may regulate the rates of charges made to such customers until the subject matter is regulated by Congress." 8 FED. POWER COMM'N ANN. REP. at 10. The Commission further indicated it lacked jurisdiction over wholly intrastate transactions (unless under Section 19 of

its review of *Attleboro* with a few conclusions and recommendations. It proclaimed the federal government enjoyed "ultimate authority to regulate interstate commerce in electric energy electric energy," that such authority was "exclusive" when transfers involved wholesale sales (again presumably as a consequence of the original package doctrine), that federal regulation of all transactions would be too cumbersome, and that too much authority in the states might prompt "interstate conflicts or deadlocks or inaction."[290] Eschewing any formal recommendation, it then posited how states might be given exclusive authority over intrastate transactions, and original jurisdiction over interstate transactions subject to the power of "some Federal agency" to supervise and act as an appellate body if necessary.[291]

E. *Congressional Response*

Congress resolved the regulatory "gap" in 1935, eight years after *Attleboro*, passing what is now Part II of the Federal Power Act, and also passing the Public Utility Holding Company Act that same year. "The primary purpose of Title II, Part II of the 1935 amendments to the Federal Act," the Supreme Court wrote in 1943, "was to give a federal agency power to regulate the sale of electricity across states lines" that *Attleboro* "denied to the States."[292] It gave the FPC (which would later become the Federal Energy Regulatory Commission, or FERC) jurisdiction over "the transmission of electric energy in interstate commerce and . . . the sale of electric energy at wholesale in interstate."[293] And it

the Act the state lacked a utility commission); but it enjoyed exclusive authority over interstate wholesale sales by its licensees; and it could exercise jurisdiction over local sales of interstate electricity wherever a state lacked a commission or the commission lacked authority. *See id*. at 11–12.

290 *Id*. at 13.

291 *Id*. Shortly after Congress passed the FPA, the Commission's counsel explained to the trade association that the goal of the FPA was to "strengthen and supplement" rather than "supplant" the "regulatory power of the states." Harry M. Miller, *State and Federal Regulation—Their Proper Spheres*, PUB. UTIL. FORT. 30, 33 (1950). Miller lamented that this understanding became shattered when the court issued *Jersey Central Power & Light Co. v. Federal Power Commission*, 319 U.S. 61 (1943).

292 *Jersey Cent.*, 319 U.S. at 67–68.

293 16 U.S.C. § 824(b)(1) (2012). It defined such interstate transactions as energy "transmitted from a State and consumed at any point outside thereof." § 824(c). It further defined "sale of electricity at wholesale" as "a sale of electric

disclaimed, except as otherwise specifically allowed, any federal authority "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."[294]

CONCLUSION

It is too simplistic to suggest that the language of the FPA mirrored any line identified by Sanford in *Attleboro* or that it addressed a particular jurisdictional "gap." Sanford's perfunctory analysis effectively ignored the context of the case and, as such, produced a categorical holding: it required federal regulation of the industry because (1) the rate applied to a product, electricity, that was being delivered across state lines and warranted national rather than local attention, and (2) because of an unstated risk that in-state residents might be favored. *Attleboro*, though, did not itself establish a line between wholesale and retail sales to customers in another state. That was a line the Commission had drawn, and it would be a line fabricated by commentators, justified merely because of Sanford's citation to the *Pennsylvania Gas Co*. case.[295] "Thus there is a gap,"[296] now the *Attleboro* gap, which prompted the congressional response and presumably filling the gap for wholesale sales.

When, therefore, the Supreme Court later held that *Attleboro* "reiterated and accepted the holding of *Pennsylvania Gas Co*. . . . that sales across the state line direct to consumers is a local matter within the authority of the agency of the importing state,"[297] it perpetuated a particular understanding of *Attleboro*, not necessarily an accurate one—the case presumably appeared too dubious to

energy to any person for resale." § 824(d).

294 16 U.S.C. § 824(b)(1).

295 *See*, *e.g*., Scott, *supra* note 99, at 138–39 (noting that *Attleboro* applied to wholesale sales and that, while not expressly decided, likely did not apply to retail sales because the court "evidently deems analogous to power" what it had held in *Pennsylvania Gas Co.* for natural gas).

296 *Id*. at 139. Professor Noel T. Dowling accepted this reading of *Attleboro* as well. *See* Noel T. Dowling, *State Control of Interstate Power Transmission—The Doctrine of Congressional Permission*, 14 PROC. ACAD. POL. SCI. 132 (1930).

297 United States v. Pub. Utils. Comm'n, 345 U.S. 295, 711 (1953).

accept at face value absent the line and subsequent gap. The parties had litigated whether *Kansas Natural Gas Co*. or *Pennsylvania Gas Co*. governed, and Sanford simply accepted the former. His analysis may have intimated an acceptance of the rejected original package doctrine embedded in *Pennsylvania Gas Co*., but that is about it. His reasoning, though, rested on the asserted national character of the business and a perceived need to avoid discrimination—neither of which necessarily justifies a retail/wholesale divide. And while *Attleboro* was neither analytically sound when issued, nor consistent with how Dormant Commerce Clause analysis would unfold shortly thereafter,[298] its ghost remains with us today.

Some observers adhere to *Attleboro* and argue that states can regulate wholesale transactions when the sales and consumers are located within the same state.[299] But most academic conversations about today's electric grid accept *Attleboro* and focus instead on exploring new governance structures that blur the line between state and federal authority, by encouraging regional governance and cooperation rather than any increased state authority.[300] These dialogues collectively reflect the urgency of incorporating renewable energy into the grid and displacing fossil fuel generation.[301] Ashira Ostrow, for instance, posits that states and

298 *See* Kalen, *supra* note 104.

299 *See generally* Frank R. Lindh & Thomas W. Bone, Jr., *State Jurisdiction Over Distributed Generators*, 34 ENERGY L.J. 499 (2013). The authors argue states may establish feed-in-tariffs, or the wholesale purchase price for renewable energy resources a utility will pay the generator.

300 Alexandra Klass and Elizabeth Wilson, for instance, encourage developing regional compacts to address transmission constraints. *See* Alexandra B. Klass & Elizabeth J. Wilson, *Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch*, 65 VAND. L. REV. 1801, 1804 (2012).

301 *See, e.g.*, *Symposium, Greening the Grid: Building a Legal Framework for Carbon Neutrality*, 39 ENVT. L. 929 (2009); Christopher J. Bateman & James T.B. Trip, *Toward Greener FERC Regulation of the Power Industry*, 38 HARV. ENVTL. L. REV. 275 (2014); Alfred C. Lin, *Lessons from the Past for Assessing Energy Technologies for the Future*, 61 U.C.L.A. L. REV. 1814 (2014). One noted constraint is the ability to construct interstate electric transmission lines: transmission facilities capable of carrying renewable resources far from their source must overcome the hurdles of state siting, cost allocation, integration with the grid and reliability issues for the balancing authority, and in organized markets the appropriate financial incentives and approvals. *See generally* Ashley C. Brown, Jim Rossi, *Siting Transmission Lines in a Changed Milieu: Evolving Notions of the "Public Interest" in Balancing State and Regional Considerations*, 81 U. COLO. L. REV. 705 (2010); Klass & Wilson, *supra* note

the federal government could work more effectively together when encouraging or discouraging infrastructure development, and that one solution could be to establish a "National Network Coordinator" that could "coordinate—rather than replace—state regulation . . . ."[302] Hari Osofsky and Hannah Wiseman propose instead that we develop a hybrid structure that merges the governmental pyramid with other stakeholders to create a regional institution.[303] These suggestions by Ostrow, Osofsky, and Wiseman were, in some form or another, also discussed around the time of *Attleboro* but shelved once *Attleboro* forced Congress' hand.[304]

In practice, however, an effective transition to a different energy grid may necessitate re-examining or abandoning *Attleboro*'s purportedly simplistic "bright line." An advisor to a FERC commissioner wrote in 1986 that

> much of the debate . . . centers on which side of the "bright line" one thinks the regulatory function in question should reside. That thinking, of course, underlies most of the strong positions take on the Narragansett doctrine, which really

300; Jim Rossi, *The Trojan Horse of Electric Power Transmission Line Siting Authority*, 39 ENVTL. L. 1015 (2009). Projects also must overcome occasionally fierce opposition from affected property owners. The $2 billion, over-700-mile high-voltage direct-current merchant transmission line proposed by Clean Line would deliver wind energy to distant markets, and yet it has encountered several hurdles at the state level. *See generally* Leslie Newell Peacock, *The Messy Clean Line Issue*, ARK. TIMES, June 18, 2015; Jeffery Tomich, *Clean Line Transmission Project in Limbo After Mo. Rejection*, E&E NEWS, July 2, 2015. Arkansas' Senator Lamar even weighed in against the project, believing it would not benefit Arkansas. *See* Dave Flessner, *Sen. Larmar Alexander Questions Need for Wind Energy Transmission Line to TVA*, TIMES FREE PRESS, May 14, 2014.

302 Ashira P. Ostrow, *Grid Governance: The Role of a National Network Coordinator*, 35 CARDOZO L. REV. 1993, 1996 (2014).

303 *See* Hari M. Osofsky & Hannah J. Wiseman, *Hybrid Energy Governance*, 2014 ILL. L. REV. 1, 12 (2014). *See also* Hari M. Osofsky & Hannah J. Wiseman, *Dynamic Energy Federalism*, 72 MD. L. REV. 772 (2013). Daniel Lyons similarly encourages a regional structure embodying cooperative federalism, rather than what he sees as the "dual federalism approach embodied by the Federal Power Act [that] offers a false dichotomy between state and federal regulation." Daniel A. Lyons, *Federalism and the Rise of Renewable Energy: Preserving State and Local Voices in the Green Energy Revolution*, 64 CASE WESTERN RES. L. REV. 1619, 1624 (2014). Robin Craig accepts the trend toward regional governance and explores the constitutional issues confronting state and local governments when they do so. *See generally* Robin K. Craig, *Constitutional Contours for the Design and Implementation of Multistate Renewable Energy Programs and Projects*, 81 U. COLO. L. REV. 771 (2010).

304 *See* Frankfurter & Landis, *supra* note 164, at 709.

> comprises the effort to legally police the *Attleboro* "bright line."[305]

The first chairman of FERC (when the agency changed from the FPC to FERC in the 1970s), along with other prominent energy experts, expressed the view that "federal and state regulators will 'muddle through'" the jurisdictional divide.[306] That muddling includes—so far unsuccessful—efforts by states to wrest from FERC's jurisdiction the ability to control aspects of local or regional electric generation capacity markets. The Fourth Circuit invalidated Maryland's program for encouraging new capacity in the wholesale market, reasoning that the *Attleboro* line and resulting FPA placed that authority exclusively within FERC's domain,[307] with the Supreme Court concluding that the FPA preempted Maryland's program.[308] The Third Circuit held that the FPA similarly preempted New Jersey's program for incentivizing the construction of new electric generation facilities.[309] And the Second Circuit rejected New York's challenge to FERC's presumption for the dividing line between the bulk power system under its domain and local distribution under state jurisdiction.[310] State efforts to entice renewable generation beyond the bounds of the Public Utility Regulatory Policies Act are similarly being challenged as transgressing an *Attleboro* line.[311] And along with

305 Reinier H.J.H. Lock, *Models for Bulk Power Deregulation: What Promise for the Future?*, 38 ADMIN. L. REV. 349, 358 (1986).

306 Rod Kuckro, *Without Congress Acting, Electric Markets Will 'Muddle Through'—Panel*, E&E NEWS, Sept. 8, 2014. Robert Nordhaus explains how the court in *Federal Power Commission v. Southern California Edison Co.* (*Colton*), 376 U.S. 205, 206–07 (1964), effectively solidified the *Attleboro* "bright line" and how in recent years "a host of new jurisdictional issues have challenged the states, the FERC, and the courts in applying the 1964 Bright Line." Robert R. Nordhaus, *The Hazy "Bright Line": Defining Federal and State Regulation of Today's Electric Grid*, 36 ENERGY L.J. 203, 207 (2015).

307 *See generally* PPL Energyplus, LLC v. Nazarian, 753 F.3d 467 (4th Cir. 2014).

308 *See* Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (2016).

309 *See generally* PPL Energyplus, LLC v. Solomon, 766 F.3d 241 (3d Cir. 2014). *See also* N.J. Bd. of Pub. Utils. v. FERC, 744 F.3d 74, 80 (3d Cir. 2014) (discussing *Attleboro*, Congress' response, and the modern jurisdictional divide, when deciding challenge to tariff for PJM).

310 *See generally* New York v. FERC, 783 F.3d 946 (2d Cir. 2015) (New York questioned the presumptive threshold for local distribution lines at 100 kV, adopted for implementing reliability standards under the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594).

311 *See, e.g.*, Allco Fin., Ltd. v. Klee, 805 F.3d 89 (2d Cir. 2015) (rejecting jurisdiction to challenge against Connecticut program, where lower court

these challenges there is the escalating chorus of scholarship fearful that the Dormant Commerce Clause is chilling state and local efforts to reduce greenhouse gas emissions.[312] The Dormant Commerce Clause even surfaced as an issue in the initial stages of the highly publicized Cape Wind offshore wind project, when Massachusetts originally required utilities within the state to acquire renewable generation located "within the jurisdictional boundaries of the commonwealth."[313]

The continued resonance of the *Attleboro* jurisdictional line surfaced in FERC's defense of its regulations of demand response to reduce greenhouse gas emissions. In Order No. 745, FERC required that certain large customers, including factories and commercial facilities, receive full market prices when they reduce their consumption.[314] The concept is simple. Instead of increasing generation of electricity to meet consumer demand, possibly from fossil fuel fired plants, the grid operator can request that certain consumers reduce their demand and thus avoid the need for additional energy generation. Demand response, therefore, provides an attractive option for greening the grid.[315] One of the

concluded that *Attleboro* line not violated).

312 *See generally* Jeffery S. Dennis, *Federalism, Electric Industry Restructuring, and the Dormant Commerce Clause:* Tampa Electric Co. v. Garcia *and State Restrictions on the Development of Merchant Power Plants*, 43 NAT. RES. J. 615 (2003); Steven Ferrey, Chad Laurent & Cameron Ferrey, *Fire and Ice: World Renewable Energy and Carbon Control Mechanisms Confront Constitutional Barriers*, 20 DUKE ENVTL. L. POL'Y F. (2010); Kalen, *supra* note 262; Lindh & Bone, *supra* note 299; Ari Peskoe, *A Challenge for Federalism: Achieving National Goals in Electricity Industry*, 18 MO. ENVTL. L. & POL'Y REV. 209 (2011); *see also* KATE KONSCHNIK & ARI PESKOE, MINIMIZING CONSTITUTIONAL RISK: CRAFTING STATE ENERGY POLICIES THAT CAN WITHSTAND CONSTITUTIONAL SCRUTINY (2014), https://statepowerproject.files.wordpress.com/2014/11/minimizing-constitutional-risk2.pdf. *See, e.g.*, Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013) (rejecting challenge to state low carbon fuel standard).

313 *See generally* Town of Barnstable v. O'Connor, 786 F.3d 130 (1st Cir. 2015) (describing program and noting geographical limitation subsequently removed). *See also* Energy & Envtl. Legal Inst. v. Epel, No. 14-1216, 2015 WL 4174876 (10th Cir. July 13, 2015) (rejecting challenge to Colorado renewable standard).

314 *See* Demand Response Compensation in Organized Wholesale Energy Markets, 134 FERC ¶ 61,187, 2011 WL 890975 (2011) (to be codified at 18 C.F.R. pt. 35). The order applies to both real time and day ahead markets and requires compensation for the full market price for the energy based on the locational marginal price.

315 FERC defines "demand response" as "a reduction in the consumption of electric energy by customers from their expected consumption in response to an

leading scholars on demand response, Joel Eisen, writes that it is important for FERC to possess the authority to require demand response.[316] The grid is becoming "smarter," allowing enhanced and two-way communication between consumers and energy suppliers, and accompanying this evolution of the electric grid is the ability to manage our electric needs with more precision and deliberation than we have in the past.[317] FERC has promoted this in the wholesale market. Put simply, FERC provided a compensation mechanism for enticing entities that regulate the grid and operate wholesale markets (Independent System Operators and Regional Transmission Organizations) "to use demand-side resources to meet their systems' needs for wholesale energy, capacity, and ancillary services."[318] The D.C. Circuit Court of Appeals, however, held that FERC intruded into states' authority to regulate retail sales—embodied in the FPA.[319] After the Supreme Court accepted certiorari, the solicitor general argued that *Attleboro* established "that the Commerce Clause bars States from regulating *certain* interstate electricity transactions, such as wholesale power (*i.e.*, a sale for resale)" by a utility "across state

increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy." 18 C.F.R. § 35.28(b)(4) (2012). In the 2005 Energy Policy Act, Congress encouraged demand response. Pub. L. No. 109-58, § 1252(f), 119 Stat. 594, 966 (2005). For discussions about reducing demand and demand response, see Michael P. Vandenbergh & Jim Rossi, *Good for You, Bad for Us: The Financial Disincentive for Net Demand Reduction*, 65 VAND. L. REV. 1527 (2012).

316 *See generally* Joel B. Eisen, *Who Regulated the Smart Grid?: FERC's Authority Over Demand Response Compensation in Wholesale Electricity Markets*, 4 SAN DIEGO J. CLIMATE & ENERGY L. 69 (2012–2103).

317 *See generally* Joel B. Eisen, *An Open Access Distribution Tariff: Removing Barriers to Innovation on the Smart Grid*, 61 U.C.L.A. L. REV. 1712 (2014); Joel B. Eisen, *Smart Regulation and Federalism for the Smart Grid*, 37 HARV. ENVTL. L. REV. 101 (2013).

318 *See* Elec. Power Supply Ass'n v. FERC, 763 F.3d 216, 219 (D.C. Cir. 2014), *rev'd*, 136 S.Ct. 760 (2016). *See generally* Sharon B. Jacobs, *Bypassing Federalism and the Administrative Law of Negawatts*, 100 IOWA L. REV. 885 (2015).

319 *See generally Elec. Power Supply Ass'n.*, 763 F.3d 216. FERC subsequently rejected PJM's (a regional transmission organization) effort to change its tariff to allow wholesale entities to bid load reductions into three year out capacity markets. PJM Interconnection, LLC, 150 FERC ¶ 61,251 (March 31, 2015). Former FERC Commissioner Wellinghoff reflects how, when the Commission issued Order No. 745, "no one seriously challenged" whether it had jurisdiction to address demand response. *Former FERC Chairman Defends Demand-Response Program as it Heads to Supreme Court*, BNA DAILY ENVT. (June 8, 2015).

lines."[320] In upholding FERC's program, the court agreed how it had previously prohibited states from regulating wholesale interstate sales when it "created what became known as the '*Attleboro* gap.'"[321] However, that is an illusion, and it was not accurate then and it is not accurate now.

320 Brief for Petitioner at 3, FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760 (2016) (No. 14-840) (emphasis added), 2015 WL 4237680, at *3.

321 FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 767 (2016). While endorsing the divide between retail and interstate wholesale rates, the court nonetheless, according to Jim Rossi and former commissioner Wellinghoff, "approached FERC's jurisdiction in a functional manner, endorsing pragmatism over formalism in the regulation of energy markets." Jim Rossi & Jon Wellinghoff, FERC v. EPSA *and Adjacent State Regulation of Customer Energy Resources*, 40 HARV. ENVTL. L. REV. F. 23, 24 (2016).