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Gas and Electricity in Interstate Commerce*

GENERAL CONSIDERATIONS

There is perhaps no other concept in the whole field of governmental or constitutional jurisprudence today of more immediate practical significance than that of interstate commerce.

In rather striking contrast with conditions of an earlier day, interstate commerce has come to be very closely related to everyday life in a great variety of ways. Regulations now imposed in the name of interstate commerce affect practically every mouthful of food we eat, every article of clothing we wear, everything we buy or sell as well as the fuel with which we cook our food or heat our homes, to mention only some of their more important ramifications.

What is embraced within the concept commerce, so that when state lines are crossed it will constitute interstate commerce and subject it to the power of Congress to regulate, has undergone a great change in recent years.

As originally conceived in the minds of the framers of our Constitution when they bestowed the power of regulation upon the National Congress, the term interstate commerce probably was understood to embrace little, if anything, more than trade in ordinary tangible commodities and their exchange or delivery by means of water transportation. Navigation was then the only means of conducting commerce on anything like a large scale, and such minor traffic as was carried on over land by the horse or ox-drawn vehicle was not thought of as being such commerce as to invoke the regulation of Congress, even though it chanced in some instances to cross state lines. That early conception, however, is far removed from that which obtains at present. As the result of a process of gradual judicial extention necessitated by our economic and social development, interstate commerce has now come to be understood to embrace all types of commercial intercourse. The trans-

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1. Art. I, Sec. 8, "The Congress shall have power...to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

2. PRENTICE AND EGAN, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION (1898) 2, citing Perrin v. Sikes, 1 Day (Conn.) 19 (1802); PRENTICE, FEDERAL POWER OVER CARRIERS AND CORPORATIONS (1907) Ch. v; 2 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed 1929) 734 n; Railroad Company v. Maryland, 21 Wall. 456, 470 (1874).
portation of goods or passengers\textsuperscript{3} by land, by water,\textsuperscript{4} or by air;\textsuperscript{5} the transmission of information or intelligence by means of the telephone\textsuperscript{6} or the telegraph;\textsuperscript{7} the transmission of oil\textsuperscript{8} and gas\textsuperscript{9} in pipe lines; and finally the transmission of electric light and power current,\textsuperscript{10} and of ether waves giving rise to radio communication,\textsuperscript{11} have all come to be included.\textsuperscript{12}


4. See Mr. Justice Van Devanter's definition of commerce in the Second Employers' Liability Cases, 223 U. S. 1, 46, 47 (1912).


7. Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1 (1877); Western Union Telegraph Co. v. Texas, 105 U. S. 460 (1881); Western Union Telegraph Co. v. Pendleton, 122 U. S. 347 (1887); Leiloup v. Port of Mobile, 127 U. S. 640 (1888); Western Union Telegraph Co. v. Foster, 247 U. S. 105 (1918); Western Union Telegraph Co. v. Speight, 254 U. S. 17 (1920). As stated by Mr. Chief Justice Waite in Pensacola Telegraph Co. v. Western Union Telegraph Co., supra at 9, "The powers thus granted (to regulate commerce...) are not confined to the instrumentalities of commerce, . . . known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth."


12. The changing content of the concept, interstate commerce, was well characterized by Mr. Justice Brewer in In re Debs, 158 U. S. 564, 591 (1895): "Constitutional provisions do not change, but their operation extends to new matters as the modes of business and habits of life of the people vary with each succeeding generation. . . . Just so it is with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce.
With such a tremendously broadened conception of what is included in interstate commerce, the ways in which federal regulation through this channel may touch our everyday lives are very greatly increased. Likewise an entirely new significance may now come to attach to those doctrines developed some years ago by means of which the national regulatory power may be exerted over matters not in themselves interstate. Rates for intrastate transportation may be regulated where necessary to prevent resulting discrimination against competing interstate goods.13 Local activities,14 or activities not involving commerce,15 may be controlled if necessary to prevent obstruction or restriction of interstate commerce, or if so interwoven with or so related to that which is interstate as to necessitate the extension of federal control thereto in order to protect or make effective its regulation of that which is interstate.16 Finally there is the concept of a “current of commerce”17 justifying the extension of the federal power to many local transactions so placed in relation to a general chain of traffic from state to state as to make them customary incidents of an established course of interstate dealing.18

This power of Congress to regulate interstate commerce, thus broadened to include the regulation of local matters “affecting” such commerce, is of particular importance at the present moment when the federal government is attempting to extend its power of regulation in various ways heretofore far beyond its recognized scope. It is this power, of course, which constitutes the first ground work upon which rests the whole structure of the National Industrial Recovery Program, with its hundreds of codes of fair competition commerce unknown to the fathers, and will operate with equal force upon any new modes of such commerce which the future may develop.”


and myriads of orders and regulations that affect very vitally everything that we do, or buy, or sell, or eat, or wear.

The Recovery Act as passed by Congress, and all of the codes, orders, regulations, and what-not thereunder, are applicable—in the terms of the Act itself—"to transactions in or affecting interstate or foreign commerce." Almost everything we do under our present social and economic set-up affects interstate commerce. How vitally or how intimately it must affect interstate commerce in order to subject it to the regulatory power of Congress is as yet a secret locked up within the intelligence of those nine venerable gentlemen in Washington who compose our Supreme Court. Until they have spoken the rest of us can only speculate or consult decisions of an earlier day set forth in the light of vastly differing conditions and needs.18a.

That this doctrine may play an important part in the regulation of the gas and electric enterprises is by no means improbable. Both gas and electricity have now come to be definitely recognized as proper articles of interstate commerce, and a vastly increasing importance is coming to attach to the problems to which their interstate transmission gives rise. This is due to a combination of several facts. The production of both gas and electric current is greatly increasing.19 A much larger proportion of that produced is crossing state lines20 than ever before, and continually greater numbers of our population are coming to be dependent upon the use21 of these commodities, both for domestic and industrial purposes.

So far as the interstate commerce aspects of these industries are concerned natural gas is much more important than the artificial or manufactured product, the latter crossing state lines to only a very limited extent: and hydroelectric energy—that generated from the harnessing of water power—is much more important than that generated in steam plants. It is in these two types—

18a. Both installments of this article in revised form were in press when the Supreme Court invalidated the National Industrial Recovery Act by its decision in A. L. A. Schechter Poultry Corporation v. United States, 55 S. Ct. 837 (1935).
19. The production of natural gas has maintained a gradual increase from a total of 338,842,562,000 cubic feet in 1906 to 1,943,421,000,000 cubic feet in 1930 when the high point was reached. The increase from 1921 to 1930 was approximately 200% which was nearly 2½ times the increase in the manufactured product during the same period. Gross revenues from the natural gas industry showed a steady increase from $46,873,932.00 in 1906 to $415,519,000.00 in 1930. MOODY'S, PUBLIC UTILITIES (1934) a47.
20. Production of electric light and power current has shown a similar increase. In 1929 when the high point was reached, central station energy in excess of 97,000,000,000 kilowatt hours was produced, with gross revenues from its sale in substantial excess of $2,000,000,-

000.00. Due to the depression and consequent decreased demands for industrial purposes, the production since that time has been slightly less. Ibid. a16.
21. In 1932, 21% of all natural gas produced in the United States was transmitted across state lines. Ibid. a 52.

In 1931 more than 14% of all electrical energy produced in the United States entered interstate commerce. N. E. L. A, STATISTICAL BULL. NO. 8 (July 1932).

In 1930 approximately 25,000,000 consumers and 70% of the homes in the United States were being served with electric light and power current. Domestic consumers of natural gas increased from 884,018 in 1906 to 7,037,000 in 1932, while it was estimated that 81% of the total production was being consumed by industrial users. MOODY'S, PUBLIC UTILITIES (1931) xxiii, xlviii; (1934) a 47.
natural gas and hydroelectricity—that greatest increases in production have taken place.\textsuperscript{22}

Long distance transmission of natural gas has now come to be regarded as a distinct success, e. g. Texas to Minneapolis and Chicago, and Louisiana to St. Louis.\textsuperscript{23} Just now we seem to be on the eve of a great expansion in the industry, particularly in the long distance, interstate, features of it. Illustrative of this prospect is the proposed PWA construction of a fifty-eight million dollar one thousand mile pipe line from the Panhandle gas field of Texas to St. Louis and Detroit. The effect of such a single construction would be quite important. It would create an outlet in interstate commerce for what is estimated to be more than a billion cubic feet wasted daily in that field,\textsuperscript{23a} and would probably affect very materially the cost to consumers in the vicinity of the proposed line.\textsuperscript{24}

Such prospects for development and expansion, coincident with the present proposals in Congress\textsuperscript{26} to subject to the control of the federal government the whole of the industry of producing and distributing natural gas on an interstate basis, indicate a possibility of far-reaching changes in the industry shortly. The conviction is rapidly spreading that the natural gas industry is beyond the proper control of the individual states and a proper subject for national legislation if the control is to be effective.

The production of electric light and power current has shown even more phenomenal increases in recent years than in the case of natural gas. The significance of electrical development a few years ago in this country was rather vividly described in the annual report of the Federal Power Commission for the year 1929.

"The electric-power industry of the country continues to maintain an amazing growth. The rate of expansion during the past decade has been equalled by but few of the major industries. . . .

"Electric power is one of the most vital factors in modern industry. Probably no single element has contributed more to the unparalleled commercial expansion of the past decade. The electric age has come upon us so quickly that its possibilities are still beyond human conception. It is not difficult to foresee, however, that the

\textsuperscript{22} Supra note 19. The proportion of the total production of electric current attributable to hydro plants continues to show a decided increase, exceeding 40\% in 1932 and 1933. \textit{Ibid.} (1934) a 12.

\textsuperscript{23} The Texas Panhandle Line to Chicago is 950 miles long; that to Minneapolis 900. There were in 1932 a total of 50,000 miles of natural gas pipe lines operating in 35 states and serving approximately 4000 cities and towns. \textit{FEDERAL TRADE COMMISSION, PUBLIC UTILITIES RELEASE NO. 246, Jan. 10, 1935.}

\textsuperscript{23a} See the Progress Report of the Special Natural Gas Committee of the Board of Aldermen of the City of St. Louis, pages 39 and 63.

\textsuperscript{24} Estimates reported in the daily press of the probable rate likely to result from this proposed construction together with a public Service Commission investigation of the gas industry in St. Louis have ranged around one-third of the present rate.

\textsuperscript{25} The Wheeler-Rayburn Bill introduced in both houses February 6, 1935, Senate Bill No. 1725, House Bill No. 5423.
economic progress of the future will be founded in a large degree upon a low-priced, abundant, and reliable supply of electric energy. Nearly all other industries are already more or less dependent upon the electric industry, and in the constantly extending application to uses on the farms, on the transportation systems, and in household service electricity has become almost indispensable."  

Just as in the case of natural gas, the production of which in considerable quantities is restricted to localities not very numerous and its extensive use necessitates its transmission over considerable distances and from state to state, so the suitable sites for hydroelectric plants are not equally available in all states. Not infrequently the place where water power facilities for the location of hydroelectric plants are most abundant are not those in which the developed power is in greatest demand. The Rocky Mountain and Pacific Coast States have more than two-thirds of all the available water power resources of the country but actually consume less than eighteen per cent of the total product. Maine is fourth among the states in potential water power, but consumes very much less electrical energy than neighboring industrial states.

With respect to both of these areas, if potential power is to be developed the interstate transmission must be greatly increased. Until a very few years ago the radius of successful economic transmission was about one hundred fifty miles from the central station. More recently that has been increased to three hundred miles. Early in 1935 there was announced by the American Institute of Electrical Engineers what purports to be a practical solution of the problem of long distance transmission of electric energy with substantially no loss of current. If successful, this should revolutionize possibilities for the interstate development of the industry. As a means of insuring continuous and regular service, systems of interconnecting transmission lines combining the current generated by different plants, both hydro and steam, in different states, have been extensively set up. By no means an unimportant feature

27. MOODY'S, PUBLIC UTILITIES (1931) xlix.
29. Ibid.
31. U. S. News, Jan. 28, 1935, p. 16, col. 5. See Willis, Bedford and Elder, Constant Current D-C Transmission (January 1935) 54 ELECTRICAL ENGINEERING 102. A personal letter from Mr. Willis indicates that this project is still in the experimental stage. In 1932 there were more than 251,000 miles of high-tension electric transmission lines in the United States, or approximately 4,000 miles more than the total mileage of all steam railroads in the country in the same year. FEDERAL TRADE COMMISSION, PUBLIC UTILITIES RELEASE NO. 246, Jan. 10, 1935.
32. For a good illustration of this see South Carolina Power Co. v. South Carolina Tax Commission, 60 F. (2d) 328 (E. D. S. C. 1932).
in this connection has been the concentration of control, financial and otherwise, in what is popularly referred to as the power trust, which facilitates large scale development.

Not less significant than the physical developments, both real and prospective, in the gas and electric industries, is the problem of governmental regulation and control. The interests of the public at stake in these enterprises are far too great to permit them much longer to go without complete and satisfactory regulation.

It becomes, therefore, a matter of no little interest and importance to consider the problems of governmental regulation and control to which the interstate transmission of gas and electricity gives rise; and, if possible, to mark out somewhat the lines which separate state from national control in these matters. To some of the problems the courts have supplied adequate solutions. To others future determinations are required to point the way.

Governmental regulations and control relative to both gas and electricity, at present, largely take the form of state action by means of public utility commissions. Municipal regulation and control, if not largely superceded by state control, at least is of minor significance so far as the present consideration of interstate commerce is concerned. Heretofore the federal government has not seen fit by means of direct congressional action, by the Interstate Commerce Commission, or by a specially created tribunal for the purpose, to undertake to regulate the business conducted by gas and electric companies in interstate commerce.\(^3\) The result is that either their operations are subjected to control by the states, or are entirely without governmental regulation. The problems to be considered, therefore, largely reduce themselves to a matter of marking the limitations beyond which the states may not go because of the interstate character of the enterprise. As to some matters the courts have applied the well known theory of constitutional law to the effect that the states may regulate the local aspects of an interstate business—interstate commerce—until such time as Congress acts to cover the field.\(^4\) As to others, the equally familiar doctrine prevails that with respect to those features not local in nature, but requiring a uniform plan of regulation over a larger area than a single state, only Congress can act,\(^5\) and that the silence of Congress in such a situation is “equivalent to a declaration that interstate commerce

\(^3\) The extent to which the Codes under the recovery legislation affect the gas and electric industries, as well as prospects for further federal control, will be discussed *infra* under regulation of rates and service.

\(^4\) Cooley v. Board of Wardens of the Port of Philadelphia, 12 How. 299 (1851); Escanaba & L. M. Transportation Co. v. Chicago, 107 U. S. 678 (1882); Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204 (1894); Minnesota Rate Cases, 230 U. S. 352 (1913).


\(^6\) For a discussion of the effect of the silence of Congress in such a situation, see Bikle, *The Silence of Congress* (1927) 41 HARV. L. REV. 200.
shall remain free and untrammeled."\textsuperscript{37} Also, of course, before interstate commerce in the gas or electricity begins and after it ends, the state is free to act. It is therefore, in all cases, important to consider the instant of time at which the transaction ceases to be local and becomes interstate, or in turn, divests itself of its interstate character and again becomes a matter of local concern and for state control.

When the peculiar nature of these commodities and the methods of their production and transmission are considered, it becomes apparent that the determination of when interstate commerce begins and when it ends is an exceedingly difficult matter. Ordinarily neither natural gas nor electric energy is produced and stored for future use. The same process which removes the gas from the well or generates the electricity, also transmits it to the point of consumption in accordance with the consumers' demands as manifested by turning on their gas jets in the one case or their electric switches in the other. The production of natural gas and the generation of electrical energy in the past have been considered so far local enterprises as to make them proper subjects for state regulation, similar to ordinary manufacture. But the interstate transmission of both, because of its nature as interstate commerce, can only be subjected to control by the federal government. The line between these two—production or generation on the one hand, and interstate transmission on the other—is an extremely shadowy one. Even more difficult is the proper determination of when such a commodity, once in interstate commerce, entirely sheds its interstate character and again becomes a subject of solely local concern.

So far similar are the problems relating to the gas and electric enterprises that it has seemed feasible to treat them together. True, gas is found in nature and electricity in usable form must be generated or produced; gas is transmitted by means of pipe lines while electric current moves over wires; the transmission of the latter is more instantaneous than that of the former; but in their fundamental characteristics, affecting their interstate transmission and use, they are very similar. The courts have constantly used determinations with respect to one as complete precedents for the other. And while, no doubt, there may be limits beyond which the analogy cannot be carried, most of the important problems involved lend themselves quite readily to a joint treatment of the two.\textsuperscript{38}

State action in these two fields have taken substantially identical courses. A determined effort has been made by numerous states to prevent or restrict the entry of these commodities, produced within their borders, into interstate commerce. Nearly all states have similar extensive regulations for the control

\textsuperscript{37} Welton v. Missouri, 91 U. S. 275, 282 (1875).

\textsuperscript{38} Quite commonly the same utility interests, particularly the same holding companies, control portions of both industries. FEDERAL TRADE COMMISSION, PUBLIC UTILITIES RELEASE NO. 246, Jan. 10, 1935.
of rates and service to consumers of both gas and electric current, whether coming from a source of supply within or without the state. Likewise, there is much agitation at present for federal control of both industries. And finally both enterprises have been subjected to widespread taxation by the states in such a way as to present important problems from the point of view of inter-state commerce. It is proposed to examine in some detail state action of these three types in the following pages.

PART I

RESTRICTIONS UPON THE EXPORTATION OF NATURAL GAS AND HYDROELECTRIC POWER FROM THE STATE OF ORIGIN

A. Precedents

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

The leading case to which any discussion of this question must go back is that of Geer v. Connecticut. There the Supreme Court of the United States sustained a statute of Connecticut regulating the killing of certain game birds within its borders so as to confine their use within the limits of the state. The Court based its opinion very largely upon what it considered the proprietary interests of the state in the wild game found within its own territory. Mr. Justice White, speaking for the majority of the Court, went back to the time of the Greeks and Romans, and traced the control of the state in this respect down through the Middle Ages, through the development of the English common law, and through our own colonial and early state periods. In so doing he purported to show that at all times the state had possessed such power, because of the common ownership of animals ferae naturae, to be

exercised as a trust for the benefit of all of its people. He applied the doctrine that the state may do as it chooses with its own property. That since it owns the wild game within its borders it may deny altogether the right of an individual to acquire a property interest therein by reducing it to possession, or subject any qualified interest he may be permitted to acquire to such limitations as it sees fit,\textsuperscript{40} to the extent of denying entirely entry into interstate commerce. Referring to state decisions that had reached an opposite result,\textsuperscript{41} the Court asserted that they were due to a failure to properly consider the "fundamental distinction between the qualified ownership in game and the perfect nature of ownership in other property."

While Mr. Justice White thus rested the decision primarily upon the peculiar nature of the property involved and the special nature of the state's proprietary relation thereto, it is important for present purposes also to note that a second sufficient basis was asserted to be found in the police power of the state to preserve for its people a valuable food supply, "which may be none the less called into play, because by doing so interstate commerce may be remotely and indirectly affected."

The police power of the state, rather than state ownership, would seem to be a much sounder basis upon which to rest the decision, especially in view of later cases involving substantially the same factual set-up.\textsuperscript{42} Its use, however, was apparently made contingent upon the ownership idea by the assertion that it was properly exercised to retain for the people of the state, articles which can only become the subject of private ownership in a qualified way, and "which can never be the object of commerce except with the consent of the state and subject to the conditions which it may deem best to impose for the public good."\textsuperscript{43}

\textsuperscript{40} State v. Rodman, 58 Minn. 393, 400, 59 N. W. 1098 (1894); Ex parte Maier, 103 Cal. 476, 483, 27 Pac. 402 (1894).
\textsuperscript{41} Territory v. Evans, 2 Idaho 634, 23 Pac. 115 (1890); State v. Saunders, 19 Kan 127 (1877); cf. Sherwood v. Stephen, 13 Idaho 399, 90 Pac. 345 (1907).
\textsuperscript{42} Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1 (1928).
\textsuperscript{43} Justices Field and Harlan dissented, asserting that when any such game birds had been lawfully killed they became private property, legitimate subjects of interstate commerce, and that the statute in question was a violation of the commerce clause of the Constitution of the United States.

Justices Brewer and Peckham took no part in the decision.

Of perhaps more immediate significance for present purposes is the decision of the Supreme Court in *Hudson County Water Co. v. McCarter,*\(^4\) upholding a statute of New Jersey asserting the need of preserving the fresh water supply of the state for the health and prosperity of its own citizens and forbidding the exportation from the state of any of the waters "of any fresh water lake, pond, brook, creek, river or stream" within the state. The New Jersey court, in sustaining the statute and enjoining the diversion of water in large quantities from the Passaic River to partially supply the City of New York, asserted that the "common law recognized no right in the riparian owner, as such, to divert water from the stream in order to make merchandise of it, nor any right to transport any portion of the water from the stream to a distance for the use of others,"\(^45\) that his rights of acquisition were for purposes narrowly limited, and emphasized the proprietary interest of the state in the waters of its streams.

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

"We prefer to put the authority which cannot be denied to the state upon a broader ground than that which was emphasized below, since in our opinion it is independent of the more or less attenuated residuum of title that the state may be said to possess. . . . It is recognized that the state as quasi-sovereign and representative of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned."\(^746\)

He thought there were few public interests "more obvious, indisputable and independent of particular theory" than that of a state to maintain its streams substantially undiminished, except so far as, in the interest of public welfare, it might permit. The right of a riparian owner to take water was asserted to be subject not only to the "rights of lower owners but to the initial limitation" that he must not "substantially diminish one of the great foundations of public welfare and health."

**B. Natural Gas**

With these cases as a background the first case involving state restrictions upon the exportation of natural gas beyond its boundaries came before the Court in 1911.\(^47\) A statute of Oklahoma provided that no corporation

\(^4\) [Abolone]; Bayside Fish Flour Co. v. Zellerbach, 12 P. (2d) 961 (Cal. 1932) (fish); State v. Northern Express Co., 58 Minn. 403, 59 N. W. 1100 (1894) (fish); Ex parte Fritz, 86 Miss. 210, 38 So. 722 (1905) (fish); Cameron v. Territory, 16 Okla. 634, 86 Pac. 68 (1906).


\(^45\) 70 N. J. Eq. 695, 708.

\(^46\) *Supra* note 44, at 355.

engaged in the transmission of natural gas within the state should be granted a charter, or the right of eminent domain, or the right to use the highways of the state, unless it be expressly stipulated in the grant that it should neither transmit natural gas beyond the limits of the state nor deliver it to anyone engaged in such transportation. It was urged that the statute was a police measure calculated to conserve the natural resources of the state and necessary to prevent the early depletion of the state's supply of natural gas.

It was not denied that a state might pass reasonable conservation measures to prevent loss or waste of its natural resources such as gas and oil. The leading case to this effect, and upon which reliance was placed to sustain the Oklahoma statute, was *Ohio Oil Company v. Indiana.* Mr. Justice White, speaking for a unanimous Court, there recognized the peculiar characteristics of gas and oil as having no fixed situs under a particular surface and as requiring restrictions upon the wasteful operations of individual owners if the common supply is to be preserved. He recognized fully the proprietary basis of the decision in the *Geer* case and, after referring to a Pennsylvania case which alluded to water, oil, and gas as *minerals ferae naturae* because "possession of the land is not necessarily possession of the gas," he pointed out what he conceived to be the difference between natural gas and animals *ferae naturae,* which distinction became controlling in *Oklahoma v. Kansas Natural Gas Co.* and similar succeeding cases. It was asserted that while there is some analogy between animals *ferae naturae* and the moving deposits of oil and natural gas, the analogy is not complete. In things *ferae naturae,* it was pointed out, all persons have an equal right to acquire a private property therein by seeking to reduce them to possession, but in the case of oil and gas no such common right exists. That right exists only in the owners of the surface under which the oil and gas may be found. This difference was said to indicate the distinction which exists between the power of the state over the two.

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

48. 177 U. S. 190 (1900).
50. *Supra* note 47.
51. For a comparison of this notion of public ownership with the corresponding Roman Law concept of *res communes,* see Pound, *Interests of Personality* (1915) 28 HARV. L. REV. 343, 352, 353.
52. *Supra* note 48, at 209.
It was then held that, since there was a co-equal right in all such surface owners to take from a common source of supply, and the exercise by one or a few of their rights might result in the acquisition of an undue proportion to the detriment of others, or, by waste, to the complete destruction of the rights of the remainder, it was proper for the legislature to enact measures to protect all by the prevention of waste. Such a statute was said to be, not one depriving owners of their private property without due compensation, as charged, but in substance, a measure protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of others. No such purpose was served by the Oklahoma statute. Mr. Justice McKenna pointed out that it did just what the Court took pains to show that the Indiana statute did not do. Its provisions were not directed against waste but against any use of the gas except within the state; not to the protection of the property interest of the common owners but to the restriction of the right of use and disposition after it had become private property by being reduced to possession. If, as held in the Ohio Oil Company case, the surface owners could not be deprived of the right to reduce the gas to possession, it was thought to be quite clear that they could not be deprived of rights which attach to it when in possession.

"Gas, when reduced to possession", said Mr. Justice McKenna, "is a commodity; it belongs to the owner of the land, and, when reduced to possession, is his individual property subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prevent it from being the subject of interstate commerce. . . . If the states have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. . . . If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines."

In a situation such as this the fact that Congress has not acted was asserted to be of no consequence. Natural gas lawfully reduced to individual possession becomes private property and a legitimate subject of interstate commerce, and “the inaction of Congress is a declaration of freedom from state interference with the transportation of articles of legitimate interstate commerce.”

Considering the cases thus far dealt with, involving wild game, fresh water, and natural gas, it seems that there is ample justification for the distinctions made by the Court. The basis of the distinctions would not seem to lie so much in the proprietary or non-proprietary interest of the state, indicated by the first proposition in *Geer v. Connecticut*, as in the broader relation of the state or the public to the natural resource in question, and the consequent right to exercise the police power for its preservation. The emphasis throughout the cases upon the property concept, largely to the exclusion of police power, is, perhaps, unfortunate. The Court might better have considered the relative importance of the commodities from the standpoint of interstate commerce on the one hand and the state’s police power on the other, and in the light thereof have determined the reasonableness of the restrictions imposed. This approach is somewhat emphasized by Mr. Justice Holmes in the *Hudson County Water Company* case. He justifies the *Geer* case by saying that “on this principle of public interest and the police power, and not merely as the inheritor of a royal prerogative, the state may make laws for the preservation of game.” He then asserted with respect to the case in hand that it was in the “interest of the public for a state to maintain the rivers that are wholly within it substantially undiminished except by such drafts upon them as the guardians of public welfare may permit for the purpose of turning them to a more perfect use.” The fresh water of the state’s streams was referred to as “one of the great foundations of public welfare and health” which the private right to appropriate should not be permitted to substantially diminish.

In the case of wild game it may be permissible to assert that the state bears a special relation thereto, historically, as representative of the public, historically. Walker, 15 P. (2d) 114 (Okla. 1932) (oil, gas and reservoir energy); Quinton Relief Oil & Gas Co. v. Corporation Commission, 101 Okla. 164, 224 Pac. 156 (1924) (oil and gas); C. C. Julian Oil & Royalties Co. v. Capshaw, 145 Okla. 237, 292 Pac. 841 (1930) (oil); cf. McReady v. Virginia, 94 U. S. 391 (1876) (fish); Manchester v. Massachusetts, 139 U. S. 240 (1891) (fish); Silz v. Hesterberg, 211 U. S. 31 (1908) (wild fowl). For a more extended discussion of the problem of prevention of waste as involved in the Ohio Oil Co. case and in *Walls v. Midland Carbon Co.*, *supra*, see Williams, *The Power of the State to Control the Use of its Natural Resources* (1927) 11 MINN. L. REV. 129, 233 at 238 et seq.

54. *Supra* note 47, at 255.
56. 209 U. S. at 356.
58. The latter part of the opinion, however, seems to revert somewhat to the proprietary idea of the *Geer* case, where it is said that “a man cannot acquire a right to property by his desire to use it in interstate commerce. Neither can he enlarge his otherwise limited and qualified right to the same end.” *Ibid.* 357, citing *Geer v. Connecticut*. 
sufficient upon which to justify the holding in the Geer case. With respect to both wild game and fresh water, the relationship of the public, as well as the nature and extent of the ownership traditionally acquired by one who reduces them to possession, is quite different from the situation in a case where a commodity such as natural gas is involved. It is believed that the interest of the public in the preservation of a fresh water supply for local uses, or as the Court has stated it "the welfare interested in its preservation", is such that the state may be justified in pursuing a definite policy for its conservation for use within the state. It may, therefore, as a means of self preservation, properly exercise its police power to impose restrictions which cannot be justified as to articles, the nature of the ownership of which is thought to be different, and upon the preservation of which the people of the state are less vitally dependent. This is not to overlook the fact that the commercial and industrial welfare of a state may be greatly dependent upon the disposition made of its other natural resources, such as natural gas. Neither is it to lose sight of the fact that the promotion of industrial and commercial well being, as a part of the so-called public convenience and general welfare, is a legitimate purpose for the exercise of the state's police power. Nor is it to question the proposition that the police power of a state may not be used to destroy traffic in legitimate articles of interstate commerce. It is rather to assert that the preservation of the natural fresh water supply for the people of a state may be put upon a similar basis of necessity to that, for example, which justifies quarantine laws. Surely if a state may prohibit the exportation of unripe and immature citrus fruits in order to protect the good name of its industry abroad, it may withhold for the use of its own inhabitants its natural fresh water supply upon which their very existence may depend. It may readily be suggested that a similar argument might be made with respect to a fuel supply or a food product, and that the matter of necessity as a basis of distinction in such cases can only be a matter of degree. But in addition to the difference in the traditional nature of private ownership with respect to the latter products, and the fact that they are more readily available on the open market, it may be answered that most distinctions upon the basis of which lines are to be drawn "are distinctions of degree,

59. See Mr. Justice White's discussion, 161 U. S. at 522-528.
60. For a fuller discussion of the relation of the state to fish, game and fresh water, and the effect of its proprietary interest therein, see Williams, op. cit. supra note 53, at 238 et seq. Cf. GAVIT, THE COMMERCE CLAUSE (1932) Secs. 37, 155.
and the constant business of the law is to draw such lines." It is believed that the degree of difference involved here is a sufficient one.

It has been suggested that a different basis for a distinction between these cases, from that relied upon by the Court, exists in the fact that in the first two cases the supplies of wild game and of fresh water were not more than needed for domestic consumption, while in the Oklahoma gas case no showing was made that the complete supply was really needed for local demands. This would avoid entirely the necessity of making a distinction between the cases on the basis of a difference in the nature of the commodities in question, or in the relation of the public or the individual thereto. It would suggest that a state might restrict exportation of its natural resources to the excess above local needs or prohibit it altogether when necessary to supply the demands of its own citizens, but where not necessary to protect the needs within the state no power to restrict or prohibit exportation might be asserted. Such, in substance, was the position taken by West Virginia as to its restrictions upon the exportation of natural gas in Pennsylvania v. West Virginia. The statute there involved required all persons or utilities furnishing natural gas for public use within the state, to the extent of their supply produced therein, to furnish a reasonably adequate supply to all consumers within the state, and empowered the public service commission to enforce its provisions. This statute was passed by West Virginia in an effort to preserve for its own citizens, so far as possible, an adequate supply of a natural resource produced within its borders. The obvious purpose of this statute, as would have been its effect if it had been enforced, was to restrict the exportation of natural gas produced within the state to the extent necessary to adequately supply local needs, even though exportation in interstate commerce should be entirely destroyed.

In support of this restrictive provision, it was urged that the gas companies operating the pipe lines transmitting gas within and beyond the limits of the state were public utility corporations and that the statute merely required such companies to furnish a reasonably adequate service within reasonable territorial limits, an obligation which they assumed by virtue of their quasi-public character. Second, it was asserted that the statute was merely

64. Mr. Justice Holmes in Dominion Hotel v. Arizona, 249 U. S. 265, 269 (1919).
66. The late Professor James W. Simonton of West Virginia University School of Law in an interesting article, The Power of a State to Control the Export of Hydro-Electric Energy (1932) 39 W. VA. L. Q. 4, 14, in discussing the Oklahoma gas case suggests that if "Oklahoma could have prohibited the export of natural gas the market of private owners would have been so limited that this commodity for very many years would have been almost worthless", and that its waste would have been greatly increased.
67. 262 U. S. 553 (1923).
a legitimate conservation measure to preserve for the people of the state one of its natural resources which had come to be no longer sufficient to satisfy local needs if the use abroad were unrestricted. Neither argument appeared convincing to the Supreme Court. Mr. Justice Van Devanter, for the majority, took the position that so far as the business was of a quasi-public character involving an obligation to give adequate service, that character attached to it in Ohio and Pennsylvania as well as in West Virginia, with an equal power in those states to insist upon adequate service. The second contention he regarded as in essence the same as that set up in *Oklahoma v. Kansas Natural Gas Co.* and as controlled by the decision in that case. The doctrine was again asserted that when the owner of the surface reduces natural gas to possession it becomes his property and the subject of commerce like any other product of the forest, the field or the mine. The principal issue was said to be whether a state in which natural gas is produced and is a recognized subject of commercial dealings may require that in its sale and disposition “consumers in that state shall be accorded a preferred right of purchase over consumers in other states, when the requirement necessarily will operate to withdraw a large volume of the gas from an established interstate current whereby it is supplied in other states to consumers there.”

No doubt the needs of consumers in Pennsylvania and Ohio, based on a service established at a time when West Virginia had a surplus, were entitled to consideration along with those of consumers in the latter state. This attempted withdrawal from the current of interstate commerce for the benefit of local consumers was regarded as such an interference with interstate commerce as to be a violation of the commerce clause of the federal Constitution. The Court was apparently concerned not alone with the effects of such a practice in the single case, but also with the broader policy of protecting interstate commerce in general against such restrictions by the states. It was said that “what one state may do others may,” and “what may be done with one natural product may be done with others.” In other words, if one state may reserve its natural products for the use of its own citizens, all others may do likewise with the result that interstate commerce will be seriously impeded. From the standpoint of national welfare as distinguished from that of the individual states, it is certainly a desirable matter of policy to prevent the states from thus seriously interfering with the conduct of interstate commerce; and the commerce clause of the Constitution of the United States undoubtedly was inserted for the very purpose of avoiding in the future state interferences

68. *Supra* note 47.
69. *Supra* note 67, at 595.
70. For cases applying a similar doctrine to hold invalid state statutes attempting to retain for consumption within the state all coal mined therein, see Vandalia Coal Co. v. Special Coal & Food Commission, 268 Fed. 572 (D. C. Ind. 1920); Ohio Collieries Co. v. Stuart, 290 Fed. 1005 (N. D. Ohio 1923).
which so seriously hampered interstate and foreign commerce during the period of the Confederation.  

The Court did not regard the purported distinction from the Oklahoma gas case on the basis of the inadequacy of the supply as being important. Full reliance was placed upon that decision, and the cases of Geer v. Connecticut and Hudson County Water Co. v. McCarter were not mentioned. Thus the basis upon which those cases are to be distinguished, established by the Oklahoma gas case, and set out at some length above, would seem to stand. In this connection should be mentioned the case of Foster Fountain Packing Co. v. Haydel, which some have thought to have the effect of modifying the doctrine of the Geer case, though the Court expressed its approval of that case and purported to distinguish it. The statute of Louisiana there involved, among other things, made it unlawful to export from the state any shrimp from which the heads and hulls had not been removed, but placed no restrictions upon exportation after such removal. The alleged purpose of the statute was the conservation of the heads and hulls for use in manufacturing fertilizer and chicken feed. The Court thought, however, that the real purpose was to prevent the interstate movement of raw shrimp in order to force the removal of the packing and canning industries from Mississippi to Louisiana. There was no purpose to discourage or restrict the taking of shrimp or their shipment out of the state, but rather the opposite. Neither was there any purpose to preserve any part of them for the use of the people of the state, but rather to condition their entrance into interstate commerce in such a way as to advance the commercial and industrial interests of the state. In accordance with the doctrine of the Geer case, the Court took the position that Louisiana might have retained the shrimp for consumption and use within the state, but since it was not needed there for consumption and the state authorized its unrestricted entrance into intrastate commerce, and into interstate commerce after processed to a certain extent, it thereby released its control and could not impose as a condition of its entrance into interstate commerce that the heads and hulls be removed within the state. The control by the state over game and fish rather than its ownership was emphasized, thus more

71. Reynolds, The Distribution of Power to Regulate Interstate Carriers Between the Nation and the States (1928) 29, 31; Gibbons v. Ogden, 9 Wheat. 1, 190 (1824); Brown v. Maryland, 12 Wheat. 419, 446 (1827).

72. Supra note 42.

73. See notes dealing with this case as follows: (1929) 3 CIN. L. REV. 64; (1929) 29 COL. L. REV. 355; (1929) 14 CORN. L. Q. 245; (1929) 23 ILL. L. REV. 705; (1929) 35 W. VA. L. Q. 182; GAVIDT, op. cit. supra note 60, Sec. 37.

74. Mr. Justice Butler asserted as a feature distinguishing this from the Geer case that, "The conditions imposed by the act upon the interstate movement of the meat and other products of shrimp are not intended and do not operate to conserve them for the use of the people of the state." Supra note 42, at 10; cf. Jackson Mining Co. v. Auditor General, 32 Mich. 488 (1875), holding invalid a tonnage tax imposed on all iron ore or minerals exported before being smelted but exempting ores smelted in the state.
nearly approaching the same police power basis that has been applied in the case of other natural resources than was done in the Geer case. Mr. Justice McReynolds in his dissent, however, reasserted in its full vigor the proprietary idea when he said, "these crustaceans belong to her (Louisiana) and she may appropriate them for the exclusive use and benefit of (her) citizens." This power could be exercised, he asserted, to promote the shrimp canning and packing industries in the state. Therefore he thought it proper for the statute to fix the limits upon entry into interstate commerce.

In so far as the attempt to retain fish and game within the state is solely for the purpose of advancing manufacture and industry, as in the shrimp case, there would seem to be no justification not present in the natural gas cases. The historical argument advanced above as a basis for the decision in the Geer case would apply only when the state is exercising its control for traditional purposes, and not when asserted for purposes entirely foreign to the reasons which gave rise to the doctrine. But as a practical matter the cases would seem to be distinguishable without resort to historical considerations. In each instance, what the state attempted constituted an interference with interstate commerce, but measured in terms of reasonableness there seems ample justification for drawing the line as indicated by the Court. The Louisiana statute would seem to have less to recommend it than that of West Virginia in Pennsylvania v. West Virginia. In the latter case the statute was clearly intended and would have operated to conserve a needed supply of natural gas for the people of the state in which it was produced.

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

Such a statement as this last should probably not be made, however, without some reference to the dissenting opinion of Mr. Justice Holmes in the West Virginia case, in which Mr. Justice Brandeis concurred. Since the statute sought to reach the natural gas before it became a part of interstate commerce he thought it should have been sustained. He took the position that "the products of a state until they are actually started to a point outside

75. In Lacoste v. Department of Conservation of Louisiana, 263 U. S. 545 (1924), sustaining a state severance tax with respect to all furs taken within the state, greater stress was placed on the police power as the basis of the state's control than in the Geer case, though the proprietary idea was also reasserted.

76. For a recent state case purporting to interpret and apply the distinction between the two cases, see Ex parte Florence, 107 Cal. App. 607, 290 Pac. 652 (1930). See also In re Pheodovius, 177 Cal. 238, 170 Pac. 412 (1918); Bayside Fish Flour Co. v. Zellerbach, 12 P. (2d) 961, 124 Cal. App. 564 (1932).
it may be regulated by the state notwithstanding the commerce clause." In support of this proposition he relied strongly on *Oliver Iron Mining Co. v. Lord,* which sustained an occupation tax upon the mining of iron ore although substantially all the ore left the state in interstate commerce and most of it was loaded upon cars for the interstate journey by the same single movement which severed it from its bed. "But as it was not yet in interstate commerce the tax was sustained." As the gas here had not yet started on an interstate journey he thought the same reasoning should apply, and that there is "no relevant distinction between taxing and regulating in other ways." Other cases were thought to involve more nearly complete analogies and even more strongly to dictate an opposite decision. If a state may prohibit the shipment in interstate commerce of citrus fruits when immature or otherwise unfit for consumption; or by its game laws preserve for its own people a food supply notwithstanding an interference with interstate commerce; or regulate

77. 262 U. S. 552, 600, 601.
78. 262 U. S. 172 (1923).
79. "Mining is not interstate commerce, but like manufacture, is a local business subject to local regulation and taxation." Mr. Justice Van Devanter in *Oliver Iron Mining Co. v. Lord,* 262 U. S. 172, 178. While this statement is in accord with accepted doctrine in this field, the case in question does present a situation in which the line between the local act of mining and the interstate shipment of the product is extremely shadowy. The purchase of goods for immediate shipment out of the state is a part of interstate commerce, and the facilities incident to such shipment are facilities of interstate commerce. American Express Co. v. Iowa, 196 U. S. 133 (1905); Pennsylvania Railroad Co. v. Clark Bros. Coal Mining Co., 238 U. S. 456 (1915); Pennsylvania Railroad Co. v. Sonman Shaft Coal Co., 242 U. S. 120 (1916); Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 (1921); Lemke v. Farmers Grain Co., 258 U. S. 50 (1922); Stafford v. Wallace, 258 U. S. 495 (1922); Flanagan v. Federal Coal Co., 267 U. S. 222 (1925); Shafer v. Farmers' Grain Co., 268 U. S. 189 (1925); cf. A. G. Spalding & Brothers v. Edwards, 262 U. S. 66 (1923); Superior Oil Co. v. Mississippi, 280 U. S. 390 (1930). That being true, all of the acts of loading and shipping pursuant to such purchase would seem to come within the same category. Then when a purchase is made of unmined coal at the open pit mines for immediate delivery on cars for shipment out of the state, it would logically seem that both the purchase and the loading would be parts of interstate commerce. Yet the same act that does the loading also constitutes the mining, and the latter, we have just seen, is held to be a local business. Something in addition to bare logic must be employed in a rational disposition of this type of case. The mere fact that the act of mining in such a case may be regarded as local for purposes of permitting a state to tax, does not necessarily mean that it may not be so related to or so far a part of a larger commercial undertaking, interstate in its nature, as to justify a species of federal regulation under the commerce clause. This situation will be dealt with in *infra* under the subject of state taxation. For an interesting case involving an application of the principles here discussed to a production tax on the production of natural gas transmitted directly from the wells to points outside the state, see Hope Natural Gas Co. v. Hall, 274 U. S. 284 (1927). However fine the line of distinction may be in such cases between what is interstate commerce and what is local, the holdings would not seem to stand as authority for such restrictive statutes as that of West Virginia. For another case sustaining a non-discriminatory mining tax, the incidence of which was alleged to fall on interstate commerce, see Heisler v. Thomas Colliery Co., 260 U. S. 245 (1921); cf. Missouri, Kansas & Texas Ry. Co. v. Meyer, 204 Fed. 140 (W. D. Okla. 1913). But see *State v. Cumberland & Pennsylvania Railroad Co.*, 40 Md. 22 (1874).

the use of natural gas to prevent waste, or prohibit the manufacture of articles (liquor and colored oleomargarine) intended for export, he saw no reason why West Virginia might not be permitted to prefer its own citizens in the consumption of natural gas produced within its borders. In the face of these cases, however, it appears that there are sufficient differences upon which to make a distinction and support the decision of the Court. In the case of placing an occupation tax upon iron mining no discrimination was imposed upon interstate commerce and the mere fact that in a particular instance the statute was applied to a case where substantially all of the ore was to be shipped out of the state would seem to be immaterial. Taxation is not the same thing as prohibition, particularly when the tax is non-discriminatory. The same absence of discrimination exists as to the gas conservation cases, and the majority opinion in the principal case as well as in those here referred to would seem to amply justify the distinction. In *Walls v. Midland Carbon Co.*, relied upon in this connection by Mr. Justice Holmes, rather stringent statutory restrictions upon the manner of making use of an important natural resource were sustained, no interference with interstate shipment being involved. The power to restrict the exportation of citrus fruits to preserve the commercial good name of the state was clearly based upon analogy to the power of a state to exclude articles unfit for human consumption and thus not legitimate articles of interstate commerce, and to the power to pass inspection and quarantine laws. The preservation of wild game for consumption within the state is sufficiently dealt with above. Manufacture, like mining, precedes and is not a part of interstate commerce in the commonly accepted sense. And while colored oleomargarine, like liquor, may be regarded as a legitimate article of interstate commerce when manufactured, the prohibition of its manufacture, for sufficient police reasons, is not equivalent to a restraint

84. *Supra* note 53.
85. The earlier cases of *Ohio Oil Co. v. Indiana*, *supra* note 48, and *Lindsey v. Natural Carbonic Gas Co.*, *supra* note 53, had merely sustained restrictions upon wasteful production. For a discussion of the Walls Case and the distinction between it and the earlier cases, see Williams, *op. cit. supra* note 53, at 239 et seq.
86. "Commerce succeeds to manufacture and is not a part of it." Mr. Chief Justice Fuller in *United States v. E. C. Knight Co.*, 156 U. S. 1, 12 (1895). Whether manufacture may be so closely related to interstate commerce in some cases, or so far an integral part of a larger commercial whole, as to permit of regulation at the hands of Congress is a matter not necessarily controlled by the doctrine of this case.
upon the shipment of an existing article of commerce. These cases do not question the proposition that it is beyond the power of a state to forbid or impede the exportation of goods once lawfully called into existence. The object of such statutes is not to prevent or restrict the carrying out of the state of recognized articles of commerce but to prevent the manufacture within the state of articles thought to be harmful.

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

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

C. Hydroelectric Power

Whether the courts will follow the analogy of the gas cases when they come to dealing with restrictions upon the exportation of hydroelectric energy from the state of its production, as they have in other types of cases, remains to

89. "If it be held that the term (interstate commerce) includes the regulation of all such manufactures as are intended to be the subject of (interstate) commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufacture, but also agriculture, horticulture, stockraising, domestic fisheries, mining—in short, every branch of human industry." Mr. Justice Lamar in Kidd v. Pearson, supra note 83, at 21.


91. 262 U. S. at 603.

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

93. In determining that the transmission of electric current across state lines is interstate commerce, and in dealing with problems in regard to rates, service and taxation, to be discussed infra, the courts have relied almost entirely on the analogy of the natural gas cases. See Public Utilities Commission of Rhode Island v. Attleboro Steam and Electric Co., 273 U. S. 83 (1927); Utah Power & Light Co. v. Pfost, 286 U. S. 165 (1932); South Carolina Power Co. v. South Carolina Tax Commission, 52 F. (2d) 515 (E. D. S. C. 1931), 60 F. (2d) 528 (E. D. S. C. 1932); Mill Creek Coal & Coke Co. v. Public Service Commission, 84 W. Va. 662, 100 S. E. 557 (1919).
be seen. Unless there is some fundamental difference not readily apparent in the nature of the commodity involved and the relation of the state thereto, or in the restriction imposed by the state, there would seem to be every reason to expect that the same result would be arrived at.

Only one state has undertaken to impose an absolute statutory prohibition upon the exportation of hydroelectric energy generated within its borders. Three others have sought to prefer their own inhabitants and restrict exportation to the surplus above local needs in a manner similar to the restrictions with respect to natural gas involved in Pennsylvania v. West Virginia, while in still other states public service commissions have from time to time promulgated orders more or less restrictive in effect. Several states have passed general water power statutes providing for controlling and regulating the development of the potential water power of their streams. Of these, some specifically assert all the water power resources of the state to be the property of the public for the benefit of all the people, others in more general terms have been given a substantially similar interpretation by the courts. Practically all such statutes either express or seem to imply the existence of a power on the part of the state to control development and disposition as it may see fit.

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

New Hampshire, by statute, imposes a similar prohibition except upon the special authorization of the public service commission of the state, with power in the commission to require the discontinuance of such exportation as authorized whenever the electric energy may be needed for use within the state. See also VA. CODE ANN. (1930) s. 3581 (1).

94. NEB. COMP. STAT. (1929) 46-502; N. H. PUB. LAWS (1924) c. 153, s. 16. See also VA. CODE ANN. (1930) s. 3581 (1).
95. "All streams within the state capable of developing hydraulic, electrical or other energy or power, shall be under the control and supervision of the state". W. VA. CODE ANN. (Barnes, 1923) c. 54B, s. 2; Acts 1913, c. 11, s. 1; Acts 1915, c. 17, s. 2.
96. For interpretation of this statute see Royal Glen Land & Lumber Co. v. Public Service Commission, 91 W. Va. 446, 448, 449, 113 S. E. 749 (1922).
97. ME. REV. STAT. (1930) c. 68, s. 1; Me. Laws 1909, c. 244, s. 1, 3.
state. In practice this is substantially the equivalent of the ordinary preference given to local needs. West Virginia, since 1913, and Wisconsin, since 1915, have had restrictive laws regulating the exportation of hydroelectric power. By an act of 1929 West Virginia provided for a more mild sort of preference in favor of local consumers. This act, however, has been declared unconstitutional as in violation of certain provisions of the state constitution, leaving in effect the more rigid act of 1915 by which the state public service commission is fully empowered to control the sale and distribution of hydroelectric energy to the extent of completely prohibiting its exportation from the state. A Wisconsin statute prohibits the exportation of hydroelectric energy by any grantee of a permit to generate such power, in such a way or to such an extent as to disable the grantee from furnishing adequate service at reasonable rates to consumers within the state, and authorizes the State Public Service Commission to declare null and void any or all contracts for such exportation in so far as they may be found to interfere with such service or rates.

These statutes may be sufficiently accurately characterized by saying that the one, that of Maine, is substantially a complete prohibition upon any exportation from the state of hydroelectric energy generated therein; while the statutes of New Hampshire, West Virginia and Wisconsin require a preference in favor of intrastate consumers and restrict exportation to the surplus. It is particularly worthy of note that in the last three states, not only are restrictions imposed upon the granting of permits for the generation of electrical energy and its transmission beyond state lines in deference to local demands, but authority is also placed in the appropriate commission to take care of future shortages of power or future increases in local needs by requiring the curtailment or entire discontinuance of exportation originally authorized. In the Wisconsin statute this latter power is specifically authorized to the extent of declaring null and void existing contracts for the sale and delivery of hydroelectric energy to consumers in other states. The other statutes, in

99. N. H. Laws 1929, c. 106. Except for the provision requiring discontinuance of exportation on order of the commission, the statute has been in effect since 1911. N. H. PUB. LAWS (1926) c. 240, s. 33.
100. W. Va. Acts 1929, c. 58, s. 6(f).
102. W. VA. CODE ANN. (Barnes, 1923) c. 54B, s. 15, Acts 1915, c. 17, s. 15. A somewhat less drastic restriction had been imposed by the 1913 statute. W. Va. Acts 1913, c. 11, s. 19.
103. WIS. STAT. (1931) s. 31.27; Laws 1915, c. 380; Laws 1917 c. 474, s. 27. By an amendment in 1929 each applicant for a permit is required to file with the commission a written agreement to the exercise of the power of the commission to declare contracts void. WIS. STAT. (1931) s. 31.095.

For other statutes conferring very broad powers upon state commissions, which might be subject to an interpretation allowing such commissions to require preference for local demands, see S. C. Acts 1932, No. 871, s. 2 (i) and (j); VT. GEN. LAWS (1917) ss. 5689, 5690. See also VA. ACTS (1932) c. 345.
104. Ibid. s. 31.27.
so far as they authorize the compulsory discontinuance of exportation, will, if complied with, equally effectively prevent the fulfillment of such contracts.\textsuperscript{105} In none of the statutes is there a provision specifically requiring that extensions of transmission lines shall be made within the state as new demands arise.\textsuperscript{106} If the courts should at any time interpret the statutory provisions as so requiring, or if such extension can be compelled under the general law of public utilities, the potentialities of the restrictive provisions are measurably increased.\textsuperscript{107}

Without special statutory authorization, several state commissions have undertaken to impose restrictions similar in effect to those embodied in the statutes just discussed. Apparently the earliest instance of this practice and at the same time the most drastic in effect, was an order of the State Board of Irrigation of Nebraska. This order granted a permit to one Kirk to appropriate the waters of the Niobrara River for power purposes, but subjoined thereto the condition that the power generated under and by virtue of the permit must not be transmitted or used beyond the confines of the State of Nebraska. Authority for the exercise of such power was alleged to be derived from the general provision of the statute asserting the water of every natural stream in the state to be the property of the public, and dedicated to the use of the people of the state.\textsuperscript{108}

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

The Public Service Commission of Vermont was apparently the first state commission to impose the requirement of a preference for local consumers

\textsuperscript{105} One state, without statutory provision, has attempted, through its commission, to reach a somewhat similar result by attaching to its approval of certain interchange contracts of local power companies with a company in another state the proviso that the commission should have the right at any time to terminate the contracts "when in its opinion public interest or convenience requires such termination." Re Commonwealth Edison Co., 6 Ill. C. C. R. 576 (1927); Re Central Illinois Public Service Co., 6 Ill. C. C. R. 880 (1927).

\textsuperscript{106} The nearest approach is the statute of New Hampshire which requires that "any public utility shall make, renew or extend any contract for the delivery of electrical energy to another utility upon such terms and conditions as the public service commission shall order to be for the public good". N. H. Laws 1929, c. 179. See also S. C. Acts 1932, No. 871, s. 2 (i) and (j). For an interpretation of the New Hampshire statute to indicate that all reasonable demands for electric service within the state, in whatever locality, are to be satisfied in preference to demands of extra-state consumers, see Re Grafton Power Co., 12 N. H. P. S. C. 194, 198, 199; P. U. R. 1929 E, 250 (1929); Re Grafton Power Co., 12 N. H. P. S. C. R. 379, 384; P. U. R. 1930 B, 346 (1929).

\textsuperscript{107} A Connecticut statute enacted in 1915 regulating the sale and distribution of electricity within the state has been interpreted by the Public Utilities Commission of that state to express a "policy to prohibit within the state the purchase, sale or distribution for power purposes of electricity generated outside the state". Re Grosvenordale Co., P. U. R. 1920 C, 144 (Conn. P. U. C. 1920), applying CONN. GEN. STAT. (1918) ss. 3902, 3904.

\textsuperscript{108} NEB. REV. STAT. (1913) s. 3370, supra note 94.
without statutory authorization. In granting the petition of the Colonial Power & Light Company, a Vermont corporation, to acquire the properties of certain other local power companies and of a New Hampshire company, the commission pointed out that the demand for electric current for power, heat, light and other purposes in the territory reached by the corporations in question at the time exceeded the ability of the corporations to supply with their existing facilities, and that such demands were on the increase. With that as its justification, and without any attempt to base its action upon statutory authorization, the commission conditioned the permit on the requirement that in the sale of electric current by the purchasing company, persons doing business in that state requiring electric energy for use therein "shall have first right to all electric energy developed by said corporation in Vermont upon demand made for the same." This condition was asserted to be a part of the contract between the state and the grantee of the permit to purchase, any violation of which should forfeit the right of the grantee to do business in the state. The effect of such commission orders is quite as restrictive as the statutory provisions for local preferences, though the generality of their application depends, apparently, upon the discretion of the commission in each particular case.

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

shape or form, a part of interstate commerce."

In view of the charter requirements mentioned above, the practical effect of this provision was that all exportation of energy was to be subordinated to local demands.

Perhaps the most interesting of the situations that have yet developed out of the activities of state commissions in attempting to control the distribution of electric energy generated by use of water power, is that of New Hampshire in the Bellows Falls Canal Company case. The exportation of power generated within the state was not directly involved, but the problem was very closely related thereto. The Canal Company, a Vermont utility, had for many years maintained a dam across the Connecticut River on the boundary between Vermont and New Hampshire. It sought to improve its power facilities, and in so doing to increase the height of its dam. This required the permission of the New Hampshire commission, as well as that of Vermont. Under the New Hampshire statute the commission was authorized to grant such permission only when it found it to be "for the public use and benefit."

Since the electricity was to be generated wholly within the state of Vermont, the statute authorizing the commission to control the exportation of current could not apply. Furthermore, the generating company did not propose to furnish electricity directly to New Hampshire, but only by means of delivery to utilities in Vermont and Massachusetts which in turn would transmit it to consumers in that state. The commission was accordingly of the opinion that it lacked authority to control any of the current generated at the dam, that New Hampshire would not necessarily get the benefit of any of the electricity resulting from the proposed increase, and that, therefore, it had no authority to grant the permit.

"To overcome this objection, the Bellows Falls Canal Company entered into an agreement and stipulation submitting itself to the jurisdiction of this commission as to the amount of electricity so generated that it should deliver in New Hampshire and as to the reasonableness of the terms upon which it should be delivered." This stipulation was made a part of the order of the commission approving the application, and asserted to be binding upon the successors and assigns of the Bellows Falls Canal Company.

In this manner the commission exerted a more far-reaching control over its water resources than seems to have been contemplated by even the most rigorous of the restrictive statutes. This is made particularly apparent in the opinion of the commission refusing, on the later application of the Bellows

112. N. H. PUB. LAWS (1926) c. 218, ss. 31-35.
Falls Company,\textsuperscript{115} to strike out or modify the principal provisions of this stipulation. The position of the commission was that unless it had full control of the power to be created by use of the natural resources of the state it could not find that it was for the "public use and benefit" to erect the dam, and would have no basis upon which it could grant to the company power to condemn New Hampshire lands. Prior to the stipulation here involved, the commission was not in a position to exert any control over the power being generated at the dam, half of which was within New Hampshire territory. By the new arrangement it successfully asserted full control over all the energy to be generated from its own water resources, though generated outside the state, to the extent of requiring all or any part of it to be delivered to consumers within the state, and at a rate controlled by itself.\textsuperscript{116}

The above discussion indicates the present status of limitations, statutory and otherwise,\textsuperscript{117} upon the exportation of hydroelectric energy beyond the confines of the state in which it is produced.

The purpose of these restrictive measures has no doubt been twofold; to insure for the inhabitants of the state an adequate power supply at a reasonable rate, and to encourage industries needing power to locate within the state. That they have effectively served either of these purposes seems open to serious doubt.\textsuperscript{118}

In no instance have the restrictive statutes been questioned as to their validity under the commerce clause of the federal Constitution, either in the courts or before the state commissions. Neither has any commission taken affirmative action to enforce the provisions of one of these statutes by

\textsuperscript{115} 11 N. H. P. S. C. R. 357 (1928).

\textsuperscript{116} For somewhat different situations in which state commissions have so exercised their control over local companies in the granting of permits to enter into contracts with foreign companies as to secure delivery of electric energy within the state from sources outside, see Re Central Illinois Public Service Co., 1 Ill. C. C. R. 165 (1921), and Re United Utilities Co., 2 Ill. C. C. R. 45 (1922).

\textsuperscript{117} For other commission orders bearing less directly upon the immediate problem, see Re Twin State Gas & Electric Co., 8 N. H. P. S. C. R. 378 (1922); Re Grafton Power Co., 11 N. H. P. S. C. R. 455, P. U. R. 1929 D, 555 (1928).

There may exist other commission orders imposing restrictions upon exportation of hydroelectric energy but none have been found by an examination of the commission reports available. According to information obtained by means of letters from the commissions in thirty-eight states, in response to letters of inquiry sent to all states, no such orders have been made.

\textsuperscript{118} See Nichols, \textit{Shall the States be Permitted to Export Surplus Power} (1929) 4 P. U. FORTNIGHTLY, 223; Corey, \textit{Keeping Water Power at Home: The Effect on the State} (1932) 9 P. U. FORTNIGHTLY 342.
requiring the discontinuance of extrastate delivery previously permitted, by avoiding contracts previously entered into, or by any other means.121

With a single exception, commission orders restricting exportation have likewise escaped the scrutiny of the courts. The first such order discussed herein, by which the Nebraska Board of Irrigation conditioned its grant upon a complete prohibition of exportation, was appealed to the state court. It was contended that such a prohibition was beyond the power of the board because it operated to interfere with interstate commerce. In sustaining the action of the board, the Supreme Court of Nebraska discussed at length the distinction between the power of a state over natural gas and over wild game, and took the position that the situation involved was analogous to the latter.124 The court did not discuss the nature of the property rights of the individual in the power produced, or the relation of the state thereto, but dealt with the matter precisely as if the water were being diverted outside the state.

"In this state", said Judge Sedgwick, "running water is publici juris. Its use belongs to the public and is controlled by the state in its sovereign capacity. . . . The state may reserve such a right of ownership and control of the beneficial use of the running waters of the streams as will enable it to prohibit the transmission or use thereof beyond the confines of the state."125

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

119. This provision of the New Hampshire statute (Laws 1929, c. 106, supra note 99) has never been invoked by the commission. Personal letter from the commission, March 26, 1935.

120. This provision in the Wisconsin statute (Stat. 1931 s. 31.27 supra note 103) has never been invoked by the commission. Personal letter from the commission, March 23, 1935.


123. The only natural gas case referred to was Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co., 155 Ind. 545, 57 N. E. 912 (1900).

124. The reasoning in Geer v. Connecticut, supra note 39, was thought to be controlling. Curiously enough, Hudson County Water Company v. McCarter, supra note 44, was not mentioned.

125. Supra note 122, at 631.
That the restrictive provisions here in question have operated to retard interstate development seems quite apparent. That when tested serious questions will arise as to their validity under the commerce clause seems not open to doubt.

1. Attempted Justification for Restrictive Measures

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

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

Any litigation involving this problem will undoubtedly present opposing contentions relying on analogy to the wild game and fresh water supply cases on the one hand, and to the natural gas cases on the other.

126. In Maine no company, except those so operating before 1909, exports any power. Letter from the commission, March 22, 1935. The state merely refuses to create a corporation or grant a franchise for the export of power. Yet Maine has hydro potentialities surpassed by only three other states. N. E. L. A. STATISTICAL BULL. No. 8 (July 1932). It is estimated that 60% of its potential power is undeveloped. See Corey, op. cit. supra note 118, at 344.

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

The situation in West Virginia has been described by Chairman Coffman of the Public Service Commission as follows: "West Virginia's experience in the matter of hydroelectric development has not been a happy one from the standpoint of securing the conservation of water power. The $8,000,000 New-Kanawha Power Company project is the sole project of any magnitude for which a license has been sought under the 1915 law.

"We depend very largely upon steam-electric power, on the distribution and transportation of which there are no restrictions.

"The law (1915) contained other provisions (in addition to that allowing the commission to control the sale and distribution of power to the extent of retaining all within the state) which were intended to retard development and they have done so. . . . Among such provisions were those requiring a licensee to be a domestic corporation, and that its securities should be approved by the state, and also a recapture provision very favorable to the state." Corey, op. cit. supra note 118, at 346, 347.

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

128. Hudson County Water Co. v. McCarter, supra note 44.
Neither, however, furnishes a complete analogy, or points the way with absolute assurance to the proper solution. As to the former, it is clear that no attempt is here involved to export the water itself, and therein may lie a difference of some significance. On the other hand the relation of the individual or corporation to the production of water power, and the relation of the state thereto, by virtue of its control over navigable streams, can hardly be said to present the identical problem involved in the case of natural gas.

a. Natural Resource Theory

With respect to the first basis of justification mentioned above, it may be at once suggested that a natural resource is not being exported. It seems entirely proper to assert that hydroelectric power is not a natural resource of the state in which it is generated. True, it is closely related to and dependent upon a natural resource, but as much could be said of scores of other commodities in everyday use. Hydroelectric power is generated or produced by the application of human ingenuity to forces existing in nature, but certainly is not itself a natural force. Mechanical devices, including turbines and generators, must be employed before electric power is produced. Water power operates the turbines, but that is the end of its function. The turbines in turn operate the generators by which the power is generated. The force of the flow of the river current, or the mechanical energy of falling water, is not transported, but by the application of human skill a distinct product is brought into being which, alone, becomes the subject of exportation from the state.\(^1\) The nature of electrical energy, once in existence, would seem to be the same whether produced from a hydro plant or a steam plant, yet it is hardly to be suggested that the product of the latter is a natural resource of the state merely because it is dependent upon an available natural water supply, or because other natural resources, such as coal, are essential to its production.

If the above analysis, which the courts seem to approve,\(^2\) is sound, it would seem that the prohibition of exportation cannot be justified on any theory of preserving a natural resource of the state for the benefit of its own inhabitants.

Even if hydroelectric energy could be considered a natural resource, or if its dependence upon the water power by which it is generated be so complete and its relation thereto so close that it is to be governed by the principles applicable to natural resources, it does not necessarily follow that the state of

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\(^1\) The courts have distinctly emphasized this conception of the nature of such power in cases involving the imposition of a tax upon its generation, and have likened generation to the manufacture of physical articles of trade later to be shipped in interstate commerce. See Utah Power & Light Co. v. Pfost, 286 U. S. 165, 179, 181 (1932); South Carolina Power Co. v. South Carolina Tax Commission, 52 F. (2d) 515 (E. D. S. C. 1931).

\(^2\) "It is well settled that electricity made by artificial means is a product of manufacture, and is personal property." Hetherington v. Camp Bird Mining, Leasing & Power Co., 70 Colo. 531, 533, 202 Pac. 1087 (1922) citing numerous cases.
its creation may compel its retention within its own borders. Mere reference
to the natural gas cases suffices to demonstrate that.

Most land bordering upon running streams, as elsewhere, is today in
private ownership. Where the common law system of riparian rights prevails,
the riparian owner has certain important rights to make use of the water and
of the force of its flow as it passes by or through his land. Subject to these
rights the state, for the protection of the interest of its inhabitants, exercises a
broad control over the diversion of waters from the streams, whether for use
within the state\textsuperscript{132} or without\textsuperscript{133}. The extent to which the state may exert its
control over the force of the flow of a stream is not, by any means, free from
doubt, despite the fact that state legislatures not infrequently seem to imply a
complete control. The riparian proprietor has, of course, no ownership of the
flowing water in a natural stream. He has only a right to take a reasonable
quantity thereof for ordinary domestic and industrial uses. He has in addition,
ordinarily, a right to make use of the flow of the current for power purposes
which is a valuable part of his property as riparian owner. As one writer
has stated it,

"the force of the flow of the current at any point depends
on the slope of the land through which it passes. Ordinarily the
natural characteristics of the land, including the advantages due to
its slope, belong to the owner of the land. While the state in its
sovereign capacity has a considerable power of control over the taking
of water from the stream, it does not follow that it has a like power of
control over the privilege of utilization of the force of the flow of the
water in the stream, for the slope of the land which produces the pow-
ner is a natural characteristic of the land itself and presumably belongs
to the land owner."\textsuperscript{134}

This attitude appears to be borne out by the authorities.\textsuperscript{135} The same writer
suggested, however, that if the force of the flow of the current is the property
of no one, and as a result its utilization may be said to be within the control
of the state for the benefit of all the people, perhaps the state may so far

\textsuperscript{132} Trenton v. New Jersey, 262 U. S. 182, 185 (1923).

\textsuperscript{133} Hudson County Water Co. v. McCarter, \textit{supra} note 44.

\textsuperscript{134} Simonton, \textit{op. cit. supra} note 66, at 5, 6, citing GOULD, WATERS (3d ed. 1900)
s. 204; FARNHAM, WATERS (1904) s. 471. See n. 10, p. 6 of same article for a brief
discussion of some tendency toward the development of a popular doctrine of complete
state control.

\textsuperscript{135} COULSON & FORBES, LAW OF WATERS (4th ed. 1924) 120; FARNHAM,
\textit{op. cit. supra} note 134, ss. 467, 871; GOULD, \textit{op. cit. supra} note 34, s. 206; LONG, LAW OF
IRRIGATION (2d ed. 1916) ss. 34, 63; Wiel, \textit{Origin and Comparative Development of the
Law of Watercourses} (1918) 6 CALIF. L. REV. 245, 342; Note, \textit{Extent of Detention or
Retardation of Water Incident to Riparian Rights} (1931) 70 A. L. R. 220. "The use of the
hydraulic effect of the stream for the generation of electric current is, of course, a legitimate
exercise of the riparian right. ... The essence of the riparian right to use water for power
is that the land owner is entitled to the benefit of the hydraulic effect of the natural flow
of the stream measured by its drop from the highest point to the lowest of his land..."
regulate hydroelectric development as to prohibit or restrict the exportation of energy beyond its borders. On that premise, the analogy to state control over wild game and running water was thought to be controlling. If, on the other hand, the right to utilize the force of the flow of the current for the production of power is a property right of the riparian owner, the opposite result was thought to be attainable. It is not proposed to enter here into any elaborate discussion of the problem relating to the nature of a riparian owner’s property rights in the flow of the current of a stream. Suffice it to say that the authorities cited above seem to indicate the existence of a substantial property right therein in most jurisdictions. Going on the basis of the latter assumption made above, the conclusion arrived at would appear to be entirely sound. The right of the riparian proprietor to utilize the water power would seem to be substantially equivalent to the right of a surface owner to reduce to possession oil or gas beneath his land. This is not to lose sight of the fact that the state in all cases has a control to protect the fresh water supply, the fish, and the right of navigation. But aside from these considerations, the power when generated would seem to become private property just as does the oil or gas when reduced to possession. It is definitely recognized as an article of interstate commerce. The conclusion would then seem to follow that a state can no more prohibit the exportation of such hydroelectric power, or enforce a preference for consumption within the state, than it can impose like restrictions in the case of natural gas heretofore discussed.

If, however, it is assumed that the force of the flow is not property of a riparian owner, is not the property of any one, does it necessarily follow that an opposite conclusion must be arrived at? There would at least seem to be a legitimate doubt. Upon this assumption, of course, the analogy to wild game

Seneca Consolidated Gold Mines Co. v. Great Western Power Company of California, 209 Cal. 206, 215, 219, 287 Pac. 93 (1930), and cases cited; Crum v. Mt. Shasta Power Corporation, 65 Cal. App. Dec. 791, 4 P. (2d) 564 (1931), and cases cited. "A riparian's right to the use of the flow of the stream passing through or by his land is a right inseparably annexed to the soil, not as an easement or appurtenance, but as a part and parcel of the land; such right being a property right, and entitled to protection as such, the same as private property rights generally." City of Fairbury v. Fairbury Mill & Elevator Co., 123 Neb. 588, 592, 243 N. W. 774 (1932); Dummer Power Co. v. International Paper Co., 81 N. H. 213, 124 Atl. 556 (1924). "The rule of law is familiar that each owner of land contiguous to a natural watercourse has a right, as owner of such land and as naturally connected with and incident to it, to the natural flow of the stream along his land and its descent, and all the force to be derived therefrom, for any domestic or hydraulic purpose to which he may decide to apply it." (Italics supplied). United Paper Board Co. v. Iroquois Pulp & Paper Co., 226 N. Y. 38, 44, 45, 123 N. E. 200 (1919); People v. New York & Ontario Power Co., 219 App. Div. 114, 118, 219 N. Y. S. 497 (1927); cf. Central Maine Power Co. v. Inhabitants of Town of Turner, 128 Me. 486, 148 Atl. 799 (1930). But cf. East Jersey Water Co. v. Board of Public Utility Commissioners, 98 N. J. L. 449, 119 Atl. 679 (1923); Nekoosa-Edwards Paper Co. v. Railroad Commission, 201 Wis. 40, 228 N. W. 144, 229 N. W. 631 (1930). Contra: Royal Glen Land & Lumber Co. v. Public Service Commission, 91 W. Va. 446, 113 S. E. 749 (1922).

136. Simonton, op. cit. supra note 66 at 6, 9.
or the fresh water supply becomes much more striking. In those cases the articles in question are not the property of any one in their natural state, and whether on the theory of proprietary interest or of mere governmental control for the protection of the interest of all its people, the state is permitted a control which the courts have not as yet evinced a purpose to disturb. In those cases a natural resource is being actually diverted outside the state. The flowing water of one of the streams of a state is proposed to be piped outside the state and sold to residents of another community. The state, under present decisions, may interfere to protect and preserve that supply of fresh water with which nature has endowed it, for the benefit of its own inhabitants. The necessity which justifies this exercise of the police power for the preservation of a resource so vital to the existence of a people is far different from any that could be conceived in relation to the resulting product of a hydroelectric plant. Also in the latter situation nothing found in a condition of nature is removed from the state. Its waterfall remains where nature placed it. No part of it is diverted to foreign territory. The water power from artificial dam or natural waterfall spends itself when it passes through the turbines and continues as it would had it not been harnessed. Only the resulting "manufactured" product emanating from the generators turned by the turbines is removed from the state. This product which is exported is clearly not something that can be said to be owned in common or by the public and reduced to possession with the consent of the state as is said of wild game or fresh water. It is an artificial product created by the ingenuity of man and becomes his private property when so produced, and, like other private property may, it would seem, be made the subject of interstate commerce without let or hindrance by the state.

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

If, however, the assumption of lack of private ownership of the force of the flow of the water's current may be thought to lead necessarily to the conclusion that the state can control exportation, it must be by virtue of the second theory heretofore mentioned upon the basis of which a result is attempted to be justified. Does this assumed absence of private ownership lead to the conclusion that the state's control is such that it may permit or refuse to allow the development of water power as it sees fit, and in consequence may impose a condition of non-exportation?
On the basis of what has gone before, a word might, not inappropriately, at this point, be directed to such statutory provisions as that of New Hampshire requiring the discontinuance of export previously allowed when the state commission finds that the public good requires, or that of Wisconsin permitting preexisting contracts for export to be declared void. Let it be assumed that a corporation has been chartered or granted a franchise to generate and transmit hydroelectric power with no restrictions upon exportation. After it has entered into contracts and begun the transmission of power to consumers both within and without the state, the state of production attempts to require that its exportation be discontinued in either manner suggested. This would appear to raise a problem substantially the same as that involved in the gas cases and to require a similar solution. Such a corporation would be lawfully engaged in interstate commerce by transmitting a commodity of its own private ownership to consumers in another state. It is not believed that there is any element in this situation which will justify a differentiation from the natural gas cases heretofore dealt with. In so far as the provisions for the cancellation of contracts or the compulsory discontinuance of exportation are made terms of the charter or franchise which the corporation must agree to in advance, the situation becomes again that of granting a permit upon condition.

b. Grants upon Condition

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

137. N. H. Laws 1929, c. 106.
138. WIS. STAT. (1931) ss. 31.27, 31.095.
139. Wisconsin has attempted to exert its control upon this basis. WIS. STAT. (1931) ss. 30.01 (2), 31.04, 31.06. As interpreted by the state courts, the practical result is that all streams that would have power sites of any consequence are included. Nekoosa-Edwards Paper Co. v. Railroad Commission, supra note 135.
into the state to do an interstate business and seeking the eminent domain power in connection therewith. Some states, notably West Virginia and Wisconsin, restrict the granting of dam permits and the power of eminent domain for the condemnation of dam sites and of property for transmission lines to domestic corporations. Since the state is under no duty or obligation to create corporations, but may do so or not at its discretion, the added power to impose conditions upon the privilege of being born as a corporation is brought into operation. Whatever may be true as to the first of these three situations mentioned above, it is obvious that as to the last two—permitting obstructions in navigable streams and granting the power of eminent domain—privileges are involved which the state may grant or withhold. May it condition its grant upon the requirement that no power be exported from the state, or that exportation be limited to the surplus above local demands, present and future?

If it may be assumed that the above discussion is sound; that hydroelectric power is not a natural resource but a “manufactured” product and private property in which the state has no such interest as it has been held to have in wild game or fresh water; and that in consequence a right to transmit in interstate commerce is protected by the federal Constitution beyond the power of the state to directly interfere with; then it would seem that the attempts of the state to avoid this consequence by granting a permit on conditions restrictive of interstate commerce would present substantially the problem of unconstitutional conditions. It is not proposed to discuss at length this problem which has been elaborately dealt with by other writers.

140. See Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 12 (1877); Western Union Telegraph Co. v. Ann Arbor Railroad Co., 178 U. S. 239, 243 (1900); Western Union Telegraph Co. v. Pennsylvania Railroad Co., 195 U. S. 540, 563, 569, 574 (1904); Postal Telegraph Cable Co. v. Southern Railway Co., 89 Fed. 190, 191 (W. D. N. C. 1898); Postal Telegraph Cable Co. v. Cleveland, Cincinnati, Chicago & St. Louis Railway Co., 94 Fed. 234, 237 (C. C. N. D. Ohio 1899); 1 NICHOLS, EMINENT DOMAIN (2d ed. 1917) s. 35. This is not to say that a state may prevent a corporation engaged in interstate commerce from exercising the power of eminent domain within its borders if such corporation is created by Congress or has the power of eminent domain conferred upon it by Congress. 1 LEWIS, EMINENT DOMAIN (3d ed. 1909) s. 374; 1 NICHOLS, op. cit. supra, s. 35; cf. Pensacola Telegraph Co. v. Western Union Telegraph Co., supra, at 12; Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 181, 186 (1888); California v. Central Pacific Railroad Co., 127 U. S. 1, 39 (1888).

141. W. VA. CODE ANN. (Barnes, 1923) c. 54B, ss. 3, 15.

142. WIS. STAT. (1931) ss. 31.01, 31.04, 31.05, 31.15, 31.16.

143. Some state constitutions, notably those of Arkansas and Nebraska, have for many years forbidden the granting of the power of eminent domain to foreign corporations. ARK. CONST. (1874) Art. 12, s. 11 (all corporations); NEB. CONST. (1875) Art. 11, s. 8 (railroad corporations).

144. Merrill, Unconstitutional Conditions (1929) 77 U. OF PA. L. REV. 879; Note, Modern Developments of the Doctrine of Unconstitutional Conditions (1929) 42 HARV. L. REV. 676; Oppenheim, Unconstitutional Conditions and State Power (1927) 26 MICH. L. REV. 176; HENDERSON, POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW (1918) c. 8; 1 WILLOUGHBY, CONSTITUTIONAL
Suffice it to say at this point that, prior to the development of the doctrine here in question, it was generally considered that where a state had a right at its discretion to grant or withhold a privilege, it might impose such conditions upon the grantee of such privileges as it should see fit.145 The present doctrine developed in connection with the power of a state to exclude foreign corporations, and having the power to exclude at will, to admit upon conditions. Attempts by the state to limit access of foreign corporations to the federal courts,146 to interfere with or burden their conduct of interstate commerce,147 and to tax their property in other jurisdictions148 led to the establishment of the doctrine by the Supreme Court.149 Briefly stated, it denies to a state the power to impose as a condition of admission to do business the relinquishment of a constitutional right, or to set up as a basis of expulsion the refusal to assume a burden against which the federal Constitution affords protection. The doctrine has not been wholly restricted in its application to conditions that impinge upon the division of powers between the federal government and the states, such as restricting access to the federal courts or burdening interstate commerce, or that affect the division of powers among the states as in extraterritorial taxation.150 Neither has it been applied solely

LAW OF THE UNITED STATES (2d ed. 1929) 206, 213. For a discussion of the doctrine as applied to the present problem, see ELSBRE, INTERSTATE TRANSMISSION OF ELECTRIC POWER (1931) 44-56.

145 Sec, e. g. Paul v. Virginia, 8 Wall. 168 (1868); Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 181 (1888).


147. Western Union Telegraph Co. v. Kansas, 216 U. S. 1 (1910); Pullman Co. v. Kansas, 216 U. S. 56 (1910); Ludwig v. Western Union Telegraph Co., 216 U. S. 146 (1910); Looney v. Crane, 245 U. S. 178 (1917); International Paper Co. v. Massachusetts, 246 U. S. 135 (1918); Locomobile Company of America v. Massachusetts, 246 U. S. 146 (1918).

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

148. Cases cited supra note 147.

149. For early cases in which the Court asserted in general terms its opposition to the imposition of unconstitutional conditions, see La Fayette Insurance Co. v. French, 18 How. 404, 407 (1855); Ducat v. Chicago, 10 Wall. 410, 415 (1870); St. Clair v. Cox, 106 U. S. 350, 356 (1882); Philadelphia Fire Association v. New York, 119 U. S. 110, 120 (1886).

150. Frost Trucking Co. v. Railroad Commission of California, 271 U. S. 583 (1926), involved the application of the due process clause of the Fourteenth Amendment to protect a partnership from being compelled to assume the status of a common carrier within the state in which it was formed and was doing business (to be discussed infra). Hanover Fire Insurance Co. v. Carr, 272 U. S. 494 (1926), applied the doctrine to protect from discriminatory taxation a foreign corporation doing only local business in the state, with no question of extraterritorial taxation being involved.
in the case of foreign corporations.\textsuperscript{151} In so far, however, as the creation of domestic corporations is concerned, the doctrine has never been applied to prevent the state from exacting as the price of being born the assumption of burdens affecting interstate commerce and property outside the state.\textsuperscript{152} Whether any justification exists for this difference seems at least open to serious doubt. Suppose a corporation is created, or a domestic corporation is authorized, to erect a dam in a navigable stream and to exercise the power of eminent domain in acquiring sites and building transmission lines. Suppose further that these grants are made subject to the proviso that the public service commission of the state may, at its discretion, require the retention of all power for use within the state. After the corporation has developed its plant, built its transmission lines, and entered upon the transmission of power to outside consumers, the state commission attempts to enforce the proviso that its exportation be discontinued. As heretofore suggested, if such an attempt were made where no requirement had been set up as a condition of the grant, there seems no reason to believe that the Court should not hold it beyond the state's power as an undue interference with the conduct of interstate commerce. The fact that the corporation in question had the obligations of a public utility within the state would not save the situation, as it did not in the \textit{West Virginia} natural gas case.\textsuperscript{153} If this were a foreign corporation, the condition here imposed, which would entirely destroy the interstate business, would appear to fall within the doctrine of the Court which invalidates a condition for the payment of taxes so levied as to create a burden upon interstate commerce.\textsuperscript{154} The fact that the condition is imposed upon the grant of permission to build a dam in a navigable stream, or of authority to exercise the power of eminent domain, rather than upon the mere right to do business in the state in connection with which the doctrine has been developed, would not seem to be material. The power of the state to refuse one grant is as complete as it is with respect to the others. If the court were to arrive at that conclusion in the case of the foreign corporation, as it is believed it should, there would appear to be great difficulty in sufficiently differentiating the case of the domestic corporation to justify an opposite result.

That the Court is not likely to permit a direct discrimination against interstate commerce in the grant of the power of eminent domain seems quite evident from its decision in \textit{Oklahoma v. Kansas Natural Gas Co}. It was there attempted to prevent the exportation of natural gas by denying the power

\textsuperscript{151} Frost Trucking Co. v. Railroad Commission, \textit{supra} note 150.

\textsuperscript{152} Railroad Co. v. Maryland, 21 Wall. 456 (1875); Ashley v. Ryan, 153 U. S. 436 (1864); Kansas City, Memphis & Birmingham Railroad Co. v. Stiles, 242 U. S. 111 (1916). Only the last of these cases, however, has been decided since the doctrine of unconstitutional conditions may be said to have been established by the decision of the Western Union and Pullman Co. cases in 1910, \textit{supra} note 147.

\textsuperscript{153} Pennsylvania v. West Virginia, \textit{supra} note 67.

\textsuperscript{154} Cases cited \textit{supra} note 147.
of eminent domain or the privilege of using the highways for building the necessary pipe lines. At the same time such grants were freely made to companies restricting their enterprise within the confines of the state. This attempt, however, was frustrated by the Supreme Court. It recognized natural gas as a legitimate article of interstate commerce and asserted that "no state by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against or directly regulate interstate commerce, or the right to carry it on." There is no reason to believe that the attitude of the Court would be any different where the matter involved is the erection of transmission lines for the exportation of hydroelectric power.

The most recent case to expound in extenso the doctrine of the invalidity of unconstitutional conditions applied it to the case of a partnership operating solely in intrastate commerce, and carried it beyond its previous application. A statute of California, construed to require the assumption of the status of common carrier as a condition of permission to use the highways of the state as a carrier for hire, was held invalid. Here was involved none of the features which predominated in the earlier cases referred to above. But since it would have been violative of due process to compel a private carrier to assume the status of a common carrier by affirmative action, the attempt to bring about the same result by making that a condition of the grant of a privilege which, it was assumed, the state might withhold was not permitted. The opinion in that case might well be interpreted to mean that all rights protected by the Constitution are to be placed beyond the bargaining power of the states and brought within the scope of the doctrine of unconstitutional conditions. After reviewing the prior cases in which the doctrine had been applied, Mr. Justice Sutherland, speaking for the Court, said: "The principle, that a state is without power to impose an unconstitutional requirement as a condition for granting a privilege, is broader than the applications thus far made of it. . . . Acts generally lawful may become unlawful when done to accomplish an unlawful end. . . . 'The states cannot use their most characteristic powers to reach unconstitutional results'."}

155. 221 U. S. at 261. See also Haskell v. Cowham, 187 Fed. 403 (C. C. A. 8th, 1911). But see Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 29 N. E. 1062 (1891); Note (1911) 35 L. R. A. N. S. 1193, 1196; Note (1924) 32 A. L. R. 331, 334.

156. Frost Trucking Co. v. Railroad Commission, supra note 150. For other cases affirming the doctrine, see Sioux Remedy Co. v. Cope, 235 U. S. 197 (1914); Western Union Telegraph Co. v. Foster, 247 U. S. 105 (1918); Board of Public Utility Commissioners v. Ynchausti & Co., 251 U. S. 401 (1920); Missouri ex rel. Burnes National Bank v. Duncan, 265 U. S. 17 (1917); Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426 (1926); Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389 (1928); Anglo-Chilean Nitrate Sales Corporation v. Alabama, 288 U. S. 373 (1933).


158. 271 U. S. at 598, 599.
At least one writer has suggested that this case carries the doctrine too far, and that it should be restricted to the type of cases in connection with which it had its development. That it should be applied only to cases "bound up with the division of powers among the states, and between the states and the central government," such as the free conduct of interstate commerce, liberty of access to the national courts, and freedom of each state from the effects of extraterritorial legislation by the others. As to constitutional guarantees set up primarily for the benefit of the individual, such as the guarantees of the due process and equal protection clauses, he would deny the application of the doctrine. 159 What the attitude of the Supreme Court toward such a suggestion may be remains to be seen. Adherence to it would require the reversal of the Frost case 160 and perhaps others. 161 It would not, however, affect one way or the other the case of exportation of hydroelectric power. If held to be within the broader doctrine of the Frost case, it would likewise be within the more restricted formula, since it makes its claim on the basis of interstate commerce, and that is the special province of the federal government.

One other case 162 in this connection merits special consideration, though it does not purport to involve the doctrine of unconstitutional conditions, and no cases which apply the doctrine were mentioned by the Court in its decision. It does, however, affect the hydroelectric power problem. It brings in question the recapture provision of Wisconsin's water power statute, 163 requiring as a condition of a permit to erect or maintain a dam in a navigable stream an advance agreement that the state may, after a stated period of time, acquire the property at what the Court admitted or assumed may be less than its fair value. It is worthy of note that the state legislature inserted in this section the proviso, "if the state shall have the constitutional power," and that the state supreme court upheld the statute by an even division. Apparently no such doubts enshrouded the matter before the United States Supreme Court, affirmation being without dissent. The Wisconsin trial court took the position that the right of the riparian owner to utilize the water power of a navigable river by the maintenance of a dam is subordinate to the "plenary power of the

159. Merrill, op. cit. supra note 144, at 882 et seq.
160. Frost Trucking Co. v. Railroad Commission, supra note 150.
161. For example, Hanover Fire Insurance Co. v. Carr, supra note 150; cf. Power Manufacturing Co. v. Saunders, 274 U. S. 490 (1927); Quaker City Cab Co. v. Pennsylvania, supra note 156. See also cases cited by Merrill, op. cit. supra note 144, at 887, 888, notes 32-39.
163. "That the State of Wisconsin, if it shall have the constitutional power, . . . on not less than one year's notice, at any time after the expiration of thirty years after the permit becomes effective, may acquire all of the property of the grantee used and useful under the permit . . . by paying therefor, the cost of reproduction in their existing condition of all dams, works, buildings, or other structures, or equipment, . . . as determined by the commission, . . . and . . . the applicant waives all right to any further compensation." (Italics supplied). WIS. STAT. (1931) s. 31.09 (3).
state to regulate the use or obstruction of navigable waters; that the state may forbid all obstruction by dam or otherwise; hence, the right of the riparian owner to develop water power by the construction of the dam remains inchoate until the state has given its consent." With this there would seem to be no legitimate basis for quarrel. The question arises with respect to the further provision quoted by Mr. Justice Stone with apparently complete approval.

"If the legislature may wholly refuse permission to erect a dam or other structure in the navigable waters of the state, it follows that it may grant such permission upon such terms as it shall determine will best protect the interests of the public. The legislature could impose the condition that the dam should be removed when it obstructed navigation or that it should be removed at the end of a definite period of time, for example, 30 years." Even with this, the only quarrel would be with an interpretation of "such terms as it shall determine will best protect the interests of the public" that would permit the commission to require the relinquishment of a constitutional right. Certainly a requirement of removal when the dam proved an obstruction to navigation would be quite proper. Mr. Justice Stone leaves no doubt as to the interpretation of the above quotation when he asserts in his closing sentence that, "compliance with section 31.09 (of the Wisconsin statute) is the price which plaintiffs must pay to secure the right to maintain their dam."

The theory of the Supreme Court in the case of United States v. Chandler-Dunbar Water Power Co., that there is no property right in a dam maintained under a permit which can be asserted against a public need for purposes of navigation, and that removal of such dam may be required without compensation, falls short of justification for the decision here in question. No purpose to remove an obstruction to navigation is involved. The mere fact that the dam is to be maintained merely at sufferance, in the sense that its removal may be required at any time on the determination that it obstructs navigation, does not mean that it would not be valuable property, protected against every other sort of invasion. When the state seeks, not its removal, but is acquisition for a public use, the principle upon which a requirement of "just compensation" can be dispensed with is by no means clear. If such a plant were developed under a permit without condition, it seems quite obvious that the "just compensation" requirement implicit in the due process clause of the Fourteenth Amendment would apply to any attempt on the part of the state to acquire the property for public use. When its surrender for less than the compensation thus constitutionally required is imposed as the price of a
permit, it appears to differ from the constitutional conditions heretofore dealt with by the Court in no essential particular. If that be true, then assume that the applicant filed the agreement and received the permit. Would the state be permitted to enforce it? Decisions prior to the Fox River case and culminating in the Frost decision would logically seem to require a negative reply.

The reason for Mr. Justice Stone's complete silence with respect to this matter is not readily apparent. Whether the Court intended to depart from the doctrine of the Frost case is not clear. Logically the two cases would be difficult to reconcile. However, the application of such constitutional principles is not solely a matter of logic. It is rather a matter of judgment, and as a matter of judgment the Court may well have felt that a distinction can be made between the privilege of using the highways of a state in common with the rest of the public, and the privilege of damming up a navigable stream for the sole use of the grantee of the privilege. In view of the important nature of the state's interest in so controlling its navigable waters as to safeguard the welfare and convenience of its people, more vital it would seem than the exclusion of foreign corporations, and the relatively mild invasion of an individual right (something less than an assurance of "just compensation"), the Court may very well have concluded, in the exercise of its judgment upon considerations of policy, that the price involved was one that the company might not unconstitutionally be compelled to pay for the privilege it sought. Such a determination would not necessarily do violence to prior decisions, but would merely indicate that the Court regards the doctrine of unconstitutional conditions as a flexible one capable of adjustment to the peculiar circumstances of particular cases.

The Wisconsin recapture provision above dealt with is contained in the same statute with the provision heretofore discussed requiring a preliminary agreement to the power of the commission to cancel contracts for the exportation of hydroelectric current. When that provision comes to be tested, no doubt the Fox River case will furnish strong precedent for sustaining its

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

168. WIS. STAT. (1931) ss. 31.27, 31.095, supra note 103.
validity. If, however, the view should be accepted that a distinction should be made between conditions that are related to the working of our federal system of government on the one hand, and those which affect only individual rights on the other, and that the doctrine of unconstitutional conditions should be restricted in its application to the former, then a different result may well be arrived at. The conduct of interstate commerce is clearly involved, and interstate commerce as clearly falls in the former category. No specific indication has yet come from the Court that such a distinction is to be applied. But the decided cases do furnish a very definite indication of the Court’s attitude toward the protection of interstate commerce. Perhaps the Fox River case cannot be distinguished logically from the situation where the export of power in interstate commerce is involved. But the Court is not always controlled by logic. “Commerce among the several states is a practical conception,”¹⁶⁹ not to be controlled by analogies that fail to take into account the nature of the condition that is being imposed. The Supreme Court, from the beginning of our federal system, has been very solicitous about the protection of interstate commerce. As a matter of fact, the doctrine of unconstitutional conditions owes its development, in no small measure, to the solicitude of the Court for the protection of interstate commerce from encroachment at the hands of the states. True, the doctrine had much of its early growth in the line of cases dealing with access by foreign corporations to the federal courts.¹⁷⁰ But one need only turn to the cases intervening between the Prewitt¹⁷¹ case in 1906 upholding a state statute authorizing the expulsion of a foreign corporation for taking a case into the federal courts, and the Terral¹⁷² case in 1922 overruling it, to see the part played by interstate commerce in this development.¹⁷³ The fact, then, that the Court in the Fox River case had allowed a state to bargain with respect to a condition that appears to be unconstitutional, but in which only the interests of the other party to the bargain are involved, does not necessarily mean that it will allow the same sort of bargaining when the conduct of interstate commerce is at stake. The privilege sought in the two cases is the same, but the conditions imposed are vastly different. It is the condition in each case that is the most significant feature.

2. Conclusion as to Validity

What the ultimate fate of state restrictions upon the exportation of hydroelectric power is to be, is, of course, still a matter of no little uncertainty. The states feel that this is a matter of vital importance to them in the conservation of a natural resource for the benefit of their own inhabitants. To what extent other motives have entered in, one can only conjecture.

¹⁷⁰. Cases cited supra note 146.
Foreign power corporations are sometimes viewed as despoilers of the state's scenic beauty, preying upon the resources of the state for their own financial profit to the later possible disadvantage of the community. If one approach the matter from this point of view it is entirely possible to arrive at the conclusion that the states should be allowed to exercise a broad power for the protection of local interests. If another starting point be employed a different conclusion may well follow. This is the sort of matter, however, that should not be disposed of on the basis of a priori conceptions of doctrinal law, or a mere logical analysis of past decisions; it calls for the application of sound judgment and broad judicial statesmanship. Possibly the present writer has unconsciously adhered too closely to a point of view that interstate commerce in what is fast becoming a commodity of first importance ought not to be subjected to restrictions and prohibitions at the hands of the states. As a matter of national policy, however, such restrictions certainly are highly undesirable. What was formerly a matter of local concern only, is no longer so. It must be recognized that here is involved a national problem of vast and growing importance. Its real significance is only realized when inquiry is pursued far enough to see the enormous wealth invested in electric power and its production, the completeness with which the industry disregards state lines, and the closeness with which it touches individuals and communities in their everyday life, both domestic and industrial. When it is realized that the farm, the factory, the mine, the mill, the home, the transportation system, et cetera, all are coming to be more or less intimately dependent upon the production of electric power, and its distribution over a national network more extensive than our railroads, it must be admitted that the problem here involved is not local but national in its significance and, as a part of the new epoch it has so greatly helped to create, should not be controlled in its ultimate solution by any partial analogies to court decisions of another era.

(To be concluded)

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173. Herndon v. Chicago, Rock Island & Pacific Railway Co., Harrison v. St. Louis & San Francisco Railway Co., and Donald v. Philadelphia & Reading Coal & Iron Co., all supra note 146. In each of these cases the corporation involved was engaged in interstate commerce. The effect of that fact is especially discussed in the Harrison case. Even more important for the later development of the doctrine were the strictly interstate commerce cases, also decided in this intervening period. Western Union Telegraph Co. v. Kansas, Pullman Co. v. Kansas, and Ludwig v. Western Union Telegraph Co., all supra note 147.

174. Supra note 31.

175. "Even a lawyer is prepared to admit that functionally the transmission of electric energy ought not to be dependent upon the law of game birds in Connecticut or of shrimp in Louisiana." Book Review (1931) 41 YALE L. J. 645.