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FEDERAL AND STATE CONTROL OF NATURAL RESOURCES

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Federalism, a complicating factor in many areas of governmental concern, poses unique problems in efforts of the states and the Federal Government to maximize the satisfaction of human wants from natural resources. These problems take on added significance in view of indications of growing governmental activity in response to the pressures upon our natural resource base of an expanding economy, a rising population trend, and increasing preparations for national defense during what may be a very long period of international tension and war. Decisions must be made determining the manner in which new responsibilities will be shared by our levels of government. An important consideration is the extent to which the range of such decisions may be circumscribed by provisions of the United States Constitution. This paper will survey current developments having a bearing upon this consideration, with special reference to river basin development and problems relating to petroleum and natural gas.

Soil, water, minerals, natural vegetation and wildlife constitute an essential base of economic activity and at the same time impose physical limitations upon it.[1] While these resources often come to the modern consumer in processed forms which tend to obscure their natural origin, the inescapable fact is that all of the physical objects of man's material well-being are either natural resources or derived from natural resources. If physical standards of living are to be raised, or even maintained at present levels, advances will be necessary in science, technology, economic and social organization, and government to enlarge man's capacity to utilize existing resources.

Particularization of the responsibility of government is difficult. Specific goals may be as varied and as numerous as the ends of government. Prominent traditional objectives are: (1) to assure the availability of a sufficient quantity of resources to meet present and anticipated needs of this and future generations; (2) to channel resources to the most beneficial uses; (3) to allocate opportunities to produce and develop resources among private

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1. The role of natural resources in our economy is described in RENNE, LAND ECONOMICS (1947). See also DEWHURST, AMERICA'S NEEDS AND RESOURCES c. 23 (1947).

enterprisers on an equitable basis; (4) to encourage an equitable distribution of the beneficial use of resources among consumers; and (5) to promote harmonious relationships between natural resources development and other endeavors and interests of society. Neither the federal nor state level has an exclusive claim to any of these general objectives.[2] This dualism raises two problems of major proportions. One is the task of balancing local, regional and national interests in the formulation of natural resources policy; the other is the creation of effective administrative machinery. Natural resources are not evenly distributed throughout the country and there is often a strong feeling in the areas where they are located that they should serve primarily local interests. On the other hand, disregard of some natural resources problems for state lines seriously limits state efforts to administer policy.

The role of government and the adjustment of federal-state relations can best be examined in the context of particular resources problems. Attention will first be given to the development of river basins.

RIVER BASIN DEVELOPMENT

It is now generally recognized, and strongly emphasized by the recent report of the President's Water Resources Policy Commission,[3] that plans for the development of our key resource—water—must embrace the entire river basin. From the standpoint of engineering, the physical interrelations of the basin as a whole must be taken into consideration. However, the task of managing the rivers of the nation involves much more than applying scientific knowledge to development. The competing demands of people that rivers serve various and conflicting interests call for governmental authority to harmonize the interests of all. Farmers, industries and cities seek adequate supplies of water, and also may desire to use rivers to carry away wastes. Energy requirements of the region may dictate utilization of rivers

2. See the analysis in Hunt, *Federal and State Control of Land: A Synopsis,* in MCDOUGAL AND HABER, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT 70 (1948).

3. The President's Water Resources Policy Commission, established July 3, 1950, was instructed to prepare a report including recommendations as to "Federal responsibility for and participation in the development, utilization, and conservation of water resources, including related land uses and other public purposes to the extent that they are directly concerned with water resources." Exec. Order No. 10095, 15 FED. REG. 17 (1950). Later in 1950, the commission submitted three volumes: Vol. 1, A WATER POLICY FOR THE AMERICAN PEOPLE, which is the report of recommendations; Vol. 2, TEN RIVERS IN AMERICA'S FUTURE, which contains the details of several river basin studies; and Vol. 3, WATER RESOURCES LAW, which surveys the legal aspects of federal participation in water resources development. The need for comprehensive multiple-purpose river basin devlopment is stressed throughout these reports. See especially Vol. 1, c. 43. The same need was recognized by the Hoover Commisision. COMMISSION OF ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REORGANIZATION OF THE DEPARTMENT OF THE INTERIOR 36-37, 61-71 (1949); TASK FORCE REPORT ON NATURAL RESOURCES 16-39 (1949). See also White, *National Executive Organization for Water Resources,* 44 AM. POL. SCI. REV. 593, 595 (1950).

for the production of hydroelectric power. There are also demands that the ravages of floods be checked, that rivers serve transportation needs and afford opportunities for recreation. Attempts to achieve these objectives may be thwarted by destructive land uses in the basin which fill the rivers with silt. A program of development may create new problems. Inadequate planning may cause the destruction of fish and wildlife, the creation of breeding grounds for insects, and drainage difficulties.

The unity of the problems of river basins is not matched by a unity in governmental authority over the major river basins of the nation, which cut across state lines. The necessary powers are divided between state and federal governments and are not coordinated internally at either level. Primary responsibility has been assumed by the Federal Government, which is acting through more than twenty agencies and spending huge sums.[4] Its activities are not confined to data collection, surveys, research and the furnishing of financial and technical assistance to state and local government. It is the major builder of the large improvements such as dams, reservoirs, canals and hydroelectric plants, which it may operate and maintain. The Federal Government regulates the construction by others of improvements within rivers subject to federal jurisdiction. A host of other related powers are also exercised at the federal level. Predominantly within the present sphere of state action are the important activities of land-use control and water rights determination, but even these sometimes come within federal control. The creation of satisfactory governmental machinery for development of most river basins has not yet been achieved. Current proposals urge greater cooperation among states, integration of administration of federal policy, and better coordination of federal programs with state and regional programs.[5]

Interstate cooperation.—River basin development would seem to be an especially appropriate subject for joint state action. Yet, the achievements in this direction have been disappointing. Several river compacts have been created[6] and other arrangements have been attempted, but the scope of such

4. An informative chart of major federal activities in the field appears in White, *supra* note 3, at 596. The statutory bases for these functions are summarized in WATER RESOURCES LAW (1950) (*supra* note 3).

5. See generally the reports of the President's Water Resources Policy Commission and the Hoover Commission, *supra* note 3. See also Cooke; *Plain Talk About a Missouri Valley Authority,* 32 IOWA L. REV. 367 (1947); Greenleaf, *What Kind of a "Valley Authority"?* 32 IOWA L. REV. 339 (1947); Lepawsky, *Water Resources and American Federalism,* 44 AM. POL. SCI. REV. 631 (1950); McKinley, *The Valley Authority and Its Alternatives,* 44 AM. POL. SCI. REV. 607 (1950); Pritchett, *The Transplantability of the TVA,* 32 IOWA L. REV. 327 (1947); Note, 56 YALE L.J. 276 (1947).

6. General surveys of the use of this device appear in ZIMMERMAN AND WENDELL, THE INTERSTATE COMPACT SINCE 1925 (1951); COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 27-52 (1948); Dodd, *Interstate Compacts,* 70 U.S.L. REV. 557 (1936); Dodd, *Interstate Compacts—Recent Developments,* 73 U.S.L. REV. 75 (1939); Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Inter-*

efforts is invariably restricted to a few specific problems. The sole concern of many compacts is the apportionment of water in interstate streams.[7] There is no instance of cooperation of river basin states in a comprehensive program capable of dealing effectively with all of the significant interrelated problems of the basin.[8] Even as to such fragmentary approaches, the reluctance of states to make substantial concessions often results in protracted and fruitless negotiations.[9] After the terms of a compact are finally agreed upon by the negotiators, and approved by the legislatures of the states involved and by Congress, the program runs the risk of being wrecked by the holding of a court in any of the participating states that the compact is invalid because in conflict with the law of that state.[10] Fortunately, this threat is now reduced, as a result of the recent decision of the Supreme Court in *West Virginia* ex rel. *Dyer v. Sims*.[11]

The *Dyer* case arose out of the Ohio River Valley Water Sanitation Compact,[12] which was entered into by eight states and approved by Congress for the purpose of controlling pollution in the Ohio River system. The compact provided that it was to be administered by the Ohio River Valley Water Sanitation Commission, composed of three members from each state and three representing the United States. The Commission was authorized to require treatment of sewage and industrial wastes discharged into streams. It could issue orders, after notice and hearing, which would be enforceable in state and federal courts. Upon refusal of the auditor of West Virginia to issue a warrant for the payment of money appropriated by the West Virginia Legislature to aid financing of the program, the West Virginia members of the Commission instituted a mandamus proceeding in the Supreme Court of Appeals of West Virginia. That court denied relief on the ground that the act of the West Virginia Legislature binding that state to participation was invalid because it (1) delegated police power of the state to other states and the Federal Government, and (2) violated a debt limitation of the state constitution.[13]

The Supreme Court's decision to reverse and remand was unanimous, but two justices wrote separate concurring opinions and another concurred without writing an opinion. Mr. Justice Frankfurter spoke for the Court.

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state Adjustments, 34 YALE L.J. 685 (1925); Ireland, *Recent Developments in the Use of Interstate Compacts*, 21 DICTA 77 (1944).

7. See Friedrich, *The Settlement of Disputes Between States Concerning Rights to the Waters of Interstate Streams*, 32 IOWA L. REV. 244 (1947).

8. See criticism in Note, 56 YALE L.J. 276, 289-95 (1947).

9. The Colorado River Compact of 1922 was finally ratified by Arizona in 1944, but the controversy between that state and California over division of the water still rages. Notes, 38 CALIF. L. REV. 696 (1950), 2 STAN. L. REV. 334 (1950).

10. Note, 23 IOWA L. REV. 618, 629 (1938).

11. 71 Sup. Ct. 557 (1951).

12. 54 STAT. 752 (1940), 33 U.S.C.A. § 567a (Supp. 1950).

13. State *ex rel.* Dyer v. Sims, 58 S.E.2d 766 (W. Va. 1950).

He took the position that the United States Supreme Court is free to place its own interpretations upon the constitution of a state, as well as other state laws, when the validity of a compact is in issue. He then disposed of the case by concluding that the Supreme Court of Appeals of West Virginia was mistaken in its view that the compact was repugnant to the West Virginia Constitution. Mr. Justice Jackson preferred to base the decision on a theory of estoppel, while Mr. Justice Reed would give effect to the compact by virtue of the supremacy clause.

It is not surprising that the Court had difficulty in agreeing upon a theory. The compact clause does not contain the solution within its terms, nor do the few decided cases involving this clause present a fully developed doctrine of its nature and scope. The Constitution simply provides that "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State. . . ."[14] The arrangement of these words suggests that the clause was intended as a check upon state action which might infringe upon national interests, rather than as a positive instrument for the achievement of national policy through interstate agreements. On the other hand, there are indications that the framers were aware that the interstate agreement had been a useful device for the handling of various problems of less than national scope, such as the fixing of state boundaries, and they may well have desired to preserve it.[15] The subsequent policy of Congress of encouraging the states to enter into compacts on a variety of subjects indicates that there is substance in the assumption that national interests may be served by facilitating such agreements.

The Court relied primarily upon two prior decisions: *Kentucky v. Indiana*[16] and *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*[17] The former was an original action brought by Kentucky to compel Indiana to perform a contract to build a bridge authorized by Congress. The Court entered a decree for Kentucky although Indiana alleged that in an action pending in an Indiana court citizens and taxpayers of Indiana were challenging the contract as unauthorized and void. The compact clause was not mentioned in the opinion in that case, which stressed the point that in a controversy between states conclusive effect need not be given to decisions of courts of the litigants. Nor was the *Hinderlider* case squarely in point. Colorado and New Mexico had entered into a compact which determined their respective shares in the La Plata River. An owner of water rights in Colorado sought an injunction to restrain Colorado officials from diverting water pursuant to the terms of the compact. The decision of the Supreme

14. U.S. CONST. Art. I, § 10, cl. 3.
15. Frankfurter and Landis, *supra* note 6 at 694, 695.
16. 281 U.S. 163, 50 Sup. Ct. 275, 74 L. Ed. 784 (1930).
17. 304 U.S. 92, 58 Sup. Ct. 803, 82 L. Ed. 1202 (1938).

Court of Colorado[18] that the compact was invalid because it impaired private property rights protected by the Colorado constitution was reversed. Two theories were articulated by Mr. Justice Brandeis for the Court: (1) since Colorado's rights in the interstate stream were qualified by rights of New Mexico, even before formation of the compact, Colorado could award no greater right; and (2) since the apportionment of interstate waters is a function of the Supreme Court, it may exercise that function by giving effect to a compact entered into by the states. This decision was not obviously applicable to compacts concerning matters other than allocation of the waters of interstate streams. Nor would it necessarily govern where the state is alleged to lack authority to enter into the compact. There was also a disturbing dictum suggesting that a contrary result might have been reached had there been "in the proceedings leading up to the Compact or in its application, some vitiating infirmity."[19]

In view of this condition of the authorities, *West Virginia* ex rel. *Dyer v. Sims* is a significant contribution to the development of the law of interstate compacts. It is now established that a compact cannot be rendered ineffective by a state court decision that the compact is in conflict with state law, even if that law bears upon the capacity of the state to enter into the compact and is embodied in the state constitution, unless the Supreme Court of the United States agrees that there is a conflict.

The theory of Mr. Justice Reed that a compact should be given effect by virtue of the supremacy clause would, of course, be more comforting to the states. His opinion does not reveal clearly the route by which a compact acquires the sanction of the supremacy clause. There would seem to be three possibilities: the compact is a treaty, an act of Congress or a unique species of "Laws of the United States" made pursuant to the Constitution. Both the first and last possibilities might be open to the objection that they would make compacts immune from subsequent acts of Congress and thus become means of endangering national interests. Existing law appears to deny that effect to compacts.[20]

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18. Hinderlinder v. La Plata River & Cherry Creek Ditch Co., 101 Colo. 73, 70 P.2d 849 (1937).

19. Hinderlider v. La Plata River and Cherry Creek Ditch Co., 304 U.S. 163, 108, 58 Sup. Ct. 803, 82 L. Ed. 1202 (1938).

20. Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421, 15 L. Ed. 435 (1855); Note, 23 IOWA L. REV. 618, 632 (1938). A related question is whether a compact may become effective without the consent of Congress. The Court has indicated that compacts involving local matters and not encroaching upon federal powers may dispense with that requirement. Wharton v. Wise, 153 U.S. 155, 14 Sup. Ct. 783, 38 L. Ed. 669 (1894); Virginia v. Tennessee, 148 U.S. 503, 520, 13 Sup. Ct. 728, 37 L. Ed. 537 (1893). See Dunbar, *Interstate Compacts and Congressional Consent*, 36 VA. L. REV. 753 (1950). Congress on occasion has exercised its right to withhold consent. See Routt, *Interstate Compacts and Administrative Cooperation*, 207 ANNALS 93, 100 (1940). Also, the President has vetoed congressional approval. See Friedrich, *supra* note 7 at 270.

Federal powers.—The inability of the states to handle the task unassisted is not the only justification for the paramount role of the Federal Government in river basin development. The President's Water Resources Policy Commission stresses the importance of national interests at stake.[21] It warns that the "availability of fresh water may soon become a limiting factor in the expansion not only of the Nation's arid and semi-arid regions, but also of our entire civilization." Water resources are interrelated with many major responsibilities of the Federal Government. For example, federal agricultural policies are relevant to a determination of the extent to which water should be diverted to reclaim arid land, and of the extent to which reclamation costs should be borne by government rather than those directly benefited.[22] Some river development programs may have an immediate impact upon interests far removed from the basin. A striking illustration is the St. Lawrence Project, which has elicited support and opposition from widely separated areas throughout the eastern half of the country.[23]

Significantly, the President's Water Resources Policy Commission did not recommend that any new powers of significance be conferred upon the Federal Government. Apparently of the opinion that the Federal Government now possesses sufficient powers, it urged only that they be effectively integrated for national and regional planning.[24] The Commission did not commit itself to any particular type of river basin agency, such as the TVA. It suggested that in the absence of such federal agency reorganization as was proposed by the Hoover Commission, Congress should set up separate river basin commissions to coordinate the activities of federal agencies and cooperate with advisory state boards.[25]

There is no longer doubt that the Constitution sanctions comprehensive planning and development of the nation's river basins by the Federal Government.[26] The navigation power of Congress, now exercisable to achieve nonnavigational objectives on streams navigable only in a fictional sense, is perhaps alone sufficient.[27] Even the minimal qualifications of that power

21. A WATER POLICY FOR THE AMERICAN PEOPLE 17 (1950) (*supra* note 3).
22. *Id.* at 13, 14.
23. TWENTIETH CENTURY FUND, ELECTRIC POWER AND GOVERNMENT POLICY 571, 572 (1948).
24. See summary of recommendations, A WATER POLICY FOR THE AMERICAN PEOPLE 1-18 (1950).
25. *Id.* at 10, 11.
26. Constitutional considerations are canvassed in WATER RESOURCES LAW 5-72 (1950).
27. The navigation power was vitalized in a line of decisions climaxed by United States v. Appalachian Electric Power Co., 311 U.S. 377, 61 Sup. Ct. 291, 85 L. Ed. 243 (1940) and Oklahoma v. Atkinson Co., 313 U.S. 508, 61 Sup. Ct. 1050, 85 L. Ed. 1487 (1941). The former, upholding the Federal Power Commission's licensing authority over a private hydroelectric plant on a stream which was navigable only in the sense that it could be made suitable for waterway traffic by reasonable improvements, enlarged not only the concept of navigability, but also the permissible range of objectives under this power. The *Atkinson* case approved federal construction of a

might be avoided by reliance upon the general power over commerce, so vastly expanded in recent years,[28] rather than upon its navigation component. The Court has recently announced that the separate power to tax and appropriate for general welfare is alone adequate basis for the promotion of reclamation, irrigation and other internal improvements by Congress and that it is no longer necessary to invoke the navigation power for this purpose.[29] In addition to these powers of general application, other constitutional provisions may be marshalled in support of federal action in particular situations. Federal control of international streams and waters serving Indian lands may come within the treaty power.[30] The war and property powers have been called upon for added sanction of federal production and distribution of hydroelectric power.[31]

The most recent cases have involved specific implementations of the broad power of Congress. Some of them have grown out of exercise of the federal power of eminent domain. The creation of reservoirs and other major improvements may require that existing highways, railroads, bridges and even entire towns be relocated. It is clear that conflicting local interests must give way. Oklahoma was unable to prevent federal condemnation for construction of a reservoir although rich agricultural and oil lands, some of them state owned, would be flooded and tax revenues lost.[32] The requirement that condemnation be for a public purpose has not been a serious

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multiple-purpose dam on a nonnavigable portion of a tributary of the Mississippi River, although the anticipated benefits to navigation on the lower reaches of the tributary would be "intangible" and the effects upon Mississippi River floods "somewhat conjectural." In subsequent cases, the lower federal courts have easily brought federal action within the navigation power. Montana Power Co. v. FPC, 185 F.2d 491 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 947 (1951); Georgia Power Co. v. FPC, 152 F.2d 908 (5th Cir. 1946); Wisconsin Public Service Corp. v. FPC, 147 F.2d 743 (7th Cir. 1945); Pennsylvania Water & Power Co. v. FPC, 123 F.2d 155 (D.C. Cir. 1941). See Gatchell, *Jurisdictional Problems Under the Federal Water Power Act of 1920*, 14 GEO. WASH. L. REV. 42 (1945); Silverstein, *Legal Concept of Navigability v. Navigability in Fact*, 19 ROCKY MT. L. REV. 49 (1946); Note, 50 YALE L.J. 134 (1940).

28. The development is traced in Stern, *The Commerce Clause and the National Economy*, 59 HARV. L. REV. 645 & 883 (1946); and see Stern, *The Problems of Yesteryear—Commerce and Due Process*, 4 VAND. L. REV. 446, 460 *et seq.* (1951).

29. United States v. Gerlach Live Stock Co., 339 U.S. 725, 738, 70 Sup. Ct. 955, 94 L. Ed. 1231 (1950).

30. Tulee v. Washington, 315 U.S. 681, 62 Sup. Ct. 862, 86 L. Ed. 1115 (1942); Winters v. United States, 207 U.S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340 (1908); United States v. Winans, 198 U.S. 371, 25 Sup. Ct. 662, 49 L. Ed. 1089 (1905); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136 (1899). See Freed, *Treaty with Mexico Relating to the Utilization of the Waters of Certain Rivers*, 17 ROCKY MT. L. REV. 251 (1945).

31. United States v. San Francisco, 310 U.S. 16, 60 Sup. Ct. 749, 84 L. Ed. 1050 (1940); Ashwander v. TVA, 297 U.S. 288, 56 Sup. Ct. 466, 80 L. Ed. 688 (1936); Tennessee Electric Power Co. v. TVA, 21 F. Supp. 947 (D.C. Tenn. 1938). See Potamkin, *Public Power and the Federal Government*, 30 NEB. L. REV. 375 (1951).

32. Oklahoma v. Atkinson Co., 313 U.S. 508, 61 Sup. Ct. 1050, 85 L. Ed. 1487 (1941); *accord*, Yalobusha County v. Crawford, 165 F.2d 867 (5th Cir. 1948). The same result was reached when the condemned land not only was owned by a municipality, but was also being devoted to important municipal purposes. United States v. Carmack, 329 U.S. 230, 67 Sup. Ct. 252, 91 L. Ed. 209 (1946).

obstacle. A decision by the TVA that instead of relocating a flooded highway it would adopt the less expensive alternative of acquiring the sparsely inhabited area previously served by the highway was upheld.[33]

The extent to which the Federal Government must compensate property losses due to its operations is also of current significance. By virtue of the commerce power, the Federal Government is deemed to have a navigation servitude which enables it to remove obstructions to navigation without making compensation.[34] This immunity also extends to destruction of property, tangible and intangible, in navigable streams, even though such property does not obstruct navigation.[35] The theory is that titles in such property are qualified by the federal servitude. The trend appears to be in the direction of narrow confinement of the servitude. In *United States v. Kansas City Life Ins. Co.*,[36] the Court gave new life to the earlier view,[37] thought by some to have been discarded,[38] that the servitude does not extend to nonnavigable tributaries. This decision seems certain to increase substantially the cost of river improvements, especially insofar as it will require that condemned riparian lands on nonnavigable streams be appraised at their speculative value as prospective sites for power development. The rationale of the opinion may also lead to compulsory compensation of landowners riparian to navigable streams when they suffer losses of the character involved in this case—*i.e.*, impairment of the agricultural value of land outside the stream by subsurface percolation of impounded water. The Court appears to view the servitude as being confined to property located in the bed of the stream (below ordinary high-water mark) rather than as a privilege to raise the water to the highwater mark without liability for the consequences.

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33. United States *ex rel.* TVA v. Welch, 327 U.S. 546, 66 Sup. Ct. 715, 90 L. Ed. 843 (1946). Condemnation in connection with a federal reclamation project was held to be for a public use although the project would serve private as well as public lands. Burley v. United States, 179 Fed. 1 (9th Cir. 1910).

34. See United States v. Kansas City Life Ins. Co., 339 U.S. 799, 804-09, 70 Sup. Ct. 885, 94 L. Ed. 1277 (1950).

35. United States v. Chicago, M.S.P. & P.R.R., 312 U.S. 592, 61 Sup. Ct. 772, 85 L. Ed. 1064 (1941); Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 33 Sup. Ct. 679, 57 L. Ed. 1083 (1913). It has been asserted that the servitude belongs exclusively to the Federal Government. Grand River Dam Authority v. Grand Hydro, 335 U.S. 359, 375, 69 Sup. Ct. 114, 93 L. Ed. 64 (1948) (dissenting opinion). But see 1 NICHOLS, EMINENT DOMAIN, § 139 (2d ed. 1917). It is certain that if state agencies exercising state eminent domain powers are denied the servitude by state courts, the Supreme Court will not invoke it in their behalf, even though they are licensees of the Federal Power Commission. Grand River Dam Authority v. Grand-Hydro, *supra*. The practical effect of denial of the servitude in this case was to increase the condemnation award by more than $600,000.

36. 339 U.S. 799, 70 Sup. Ct. 885, 94 L. Ed. 1277 (1950). See Note, 4 VAND. L. REV. 673, 674-76 (1951).

37. Laid down in United States v. Cress, 243 U.S. 316, 37 Sup. Ct. 380, 61 L. Ed. 746 (1917).

38. See dissenting opinion by Mr. Justice Douglas, United States v. Kansas City Life Ins. Co., 339 U.S. 799, 812-14, 70 Sup. Ct. 885, 94 L. Ed. 1277 (1950); Frank, *The United States Supreme Court: 1949-50*, 18 U. OF CHI. L. REV. 1, 15-18 (1950).

There is much uncertainty concerning application of the servitude to certain kinds of water rights. In several situations, the servitude has been invoked to permit uncompensated impairment of water rights, such as loss of access to navigable waters,[39] loss of the value of land on navigable streams as a site for power development,[40] and loss of the use of the fall of water for power production.[41] In the course of deciding these cases, the Supreme Court made the broad statement "that the running water in a great navigable stream is capable of private ownership is inconveivable."[42] Moreover, the requirement that the Government's activity be related to a navigational purpose apparently has no more vitality when the issue is whether the Government must pay for property losses caused by water development than it has when the authority to act is in question. This was clearly the import of *United States v. Commodore Park*,[43] which denied compensation to a riparian whose right of access had been destroyed by the partial filling in of a navigable arm of a bay for the purpose of enlarging the shore facilities of a naval seaplane base. In view of these cases, it seemed, at least until *United States v. Gerlach Livestock Co.*,[44] that the federal servitude would apply to irrigation rights affected by reclamation projects. Doubt was engendered by Justice Jackson's opinion for the Court in that case, which involved claims for loss of irrigation rights due to the damming up of a stream above the claimants in connection with the Central Valley Project of California. While the constitutional issue was avoided by concluding that Congress had manifested an intent to pay for water rights impaired by the project, Mr. Justice Jackson stated that the question of constitutional law was an open one. Mr. Justice Douglas, concurring in part and dissenting in part, categorically asserted that the claimants were not entitled to compensation because "there are no private property rights in the waters of a navigable river."[45]

The issue may never be decided. The *Gerlach* opinion appears to be broad enough to require payment for irrigation rights curtailed by any project under the Reclamation Act.[46] A similar result might be reached as to flood control and navigation projects entrusted to the supervision of the

39. United States v. Commodore Park, 324 U.S. 386, 65 Sup. Ct. 803, 89 L. Ed. 1017 (1945); Scranton v. Wheeler, 179 U.S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126 (1900).

40. United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063 (1913).

41. United States v. Willow River Power Co., 324 U.S. 499, 65 Sup. Ct. 761, 89 L. Ed. 1101 (1945).

42. United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 69, 33 Sup. Ct. 667, 57 L. Ed. 1063 (1913).

43. 324 U.S. 386, 65 Sup. Ct. 803, 89 L. Ed. 1017 (1945). The only navigation purpose disclosed by the facts related to the origin of the fill materials, which had been dredged from the bay in a deepening operation. But see United States v. River Rouge Co., 269 U.S. 411, 419, 46 Sup. Ct. 144, 70 L. Ed. 339 (1926).

44. 339 U.S. 725, 70 Sup. Ct. 955, 94 L. Ed. 1231 (1950).

45. *Id.* at 756.

46. 32 STAT. 390 (1902), *as amended*, 43 U.S.C.A. § 372 (Supp. 1950).

Army Engineers by the Flood Control Act of 1944.[47] The importance of irrigation rights in the western states, as well as the seeming unfairness of cutting off such rights in order to create new ones of a similar type in other persons, may lead to a decision requiring compensation if the constitutional question is ever presented. However, riparian rights of access and rights to the power of running streams may be fully as valuable to their owners as irrigation rights. A re-examination by the Court of the servitude doctrine in its entirety might result in confinement of the doctrine to the function of facilitating the removal of physical obstructions to navigation.

Another important power exercised by the Federal Government in river development is its control over the construction by others, including private parties and state governments, of dams and other structures in waters within federal jurisdiction. Those seeking to make such construction must obtain the prior approval of the Chief of Engineers and the Secretary of the Army.[48] Hydroelectric projects must be licensed by the Federal Power Commission, which may require that the project be adapted to a comprehensive plan for improving the waterway for beneficial public uses.[49] The Commission is directed not to issue a license if in its opinion the United States should undertake the development.[50] Even where licenses are issued, the door is kept open for future public development by reservation to the United States of the right to take over the projects upon license termination by paying a price which in most instances would be less than a condemnation award.[51] These licensing powers override similar powers in state regulatory bodies.[52] As an example of the broad interpretation accorded this FPC power, the statutory provision that each applicant for a license submit to the Commission "satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States" relating to certain matters was construed as not requiring observance of state laws or regulations which are inconsistent with federal requirements.[53] Similarly, the exemption from the Act's provisions of permits or other authority "heretofore given by law" was deemed to apply only to prior federal permits and not to prior state permits.[54]

47. 58 STAT. 887 (1944).
48. 30 STAT. 1151 (1899), *as amended,* 33 U.S.C.A. § 401 (Supp. 1950).
49. 41 STAT. 1058 (1920), *as amended,* 16 U.S.C.A. § 803 (a) (Supp. 1950).
50. 41 STAT. 1067 (1920), *as amended,* 16 U.S.C.A. § 800 (b) (Supp. 1950).
51. 41 STAT. 1071 (1920), *as amended,* 16 U.S.C.A. § 807 (Supp. 1950).
52. United States v. Appalachian Electric Power Co., 311 U.S. 377, 61 Sup. Ct. 291, 85 L. Ed. 243 (1940).
53. First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152, 66 Sup. Ct. 906, 90 L. Ed. 1143 (1946). For further developments in this case, see Iowa v. FPC, 178 F.2d 421 (8th Cir. 1949).
54. Wisconsin Public Service Corp. v. FPC, 147 F.2d 743 (7th Cir. 1945); Niagara Falls Power Co. v. FPC, 137 F.2d 787 (2d Cir. 1943).

The Federal Government leaves to the states, for the most part, the functions of allocating water, determining water rights and controlling land use. The important question is whether it can continue to do so without endangering federal programs. It would be strange if the broad authority of Congress over river basin development were held not to embrace such functions. In view of congressional policy, the Supreme Court has not found it necessary to pass authoritatively on contentions that the power is nonexistent.[55] While state dominion over water rights has gone unchallenged generally, there have been some federal instrusions. Diversions by appropriators which threatened to impair navigability or deprive Indians of water guaranteed by treaty with the United States have been enjoined.[56] Also, the Supreme Court has stepped in to settle disputes involving water rights in interstate streams, and applied a "federal common law" in so doing.[57] The growing point of federal control over water distribution is in the execution of contracts disposing of water made available by federal projects. In connection with flood control and navigation projects, the Secretary of the Army is authorized to make contracts for the disposition of surplus waters on such terms as he may deem reasonable.[58] Reclamation law authorizes the Secretary of the Interior to enter into contracts to furnish water to irrigation districts, municipalities and others.[59] One type of contract entered into with irrigation districts provides for the ultimate acquisition of water rights in the project's waters by users after repayment to the Government of the reimbursable costs of the project. Another type confers no water rights and provides simply for the purchase of water by irrigators. The latter type

55. See Kansas v. Colorado, 206 U.S. 46, 85-95, 27 Sup. Ct. 655, 51 L. Ed. 956 (1907); Bannister, *The Question of Federal Disposition of State Waters in the Priority States;* 28 HARV. L. REV. 270 (1915). The federal government did not take advantage of whatever opportunity was afforded it as distributor of most of the land of the western states to create a system of water law. See California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 55 Sup. Ct. 725, 79 L. Ed. 1356 (1935); WATER RESOURCES LAW 32-42 (1950) (*supra* note 3).

56. Tulee v. Washington, 315 U.S. 681, 62 Sup. Ct. 862, 86 L. Ed. 1115 (1942); Winters v. United States, 207 U.S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340 (1908); United States v. Winans, 198 U.S. 371, 25 Sup. Ct. 662, 49 L. Ed. 1089 (1905); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136 (1899).

57. See Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110, 58 Sup. Ct. 803, 82 L. Ed. 1202 (1938). However, whenever the United States as intervenor in such suits has asserted a proprietary title in the waters or a right to control their disposition, it has been unsuccessful. Nebraska v. Wyoming, 325 U.S. 589, 65 Sup. Ct. 1332, 89 L. Ed. 1815 (1945); Kansas v. Colorado, 206 U.S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956 (1907). Both cases involved nonnavigable streams. In Nebraska v. Wyoming, *supra,* the Court did not pass on the merits of the claim of the United States. For a summary of theories advanced in that case, see HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 420-30 (1942). The proprietary interest of the United States was also asserted in vain by the Secretary of the Interior for the purpose of requiring joinder of the United States in a suit brought by reclamation project users against the Secretary. Ickes v. Fox, 300 U.S. 82, 57 Sup. Ct. 412, 81 L. Ed. 525 (1937).

58. 58 STAT. 890 (1944), *as amended,* 33 U.S.C.A. § 708 (Supp. 1950).

59. 53 STAT. 1193 (1939), 43 U.S.C.A. § 485h (Supp. 1950).

affords flexibility appropriate for multiple purpose projects and is preferred by the Bureau of Reclamation, but is opposed by irrigators.[60] Both types of contracts are subject to the Bureau's policies of discouraging land speculation and encouraging family-size farms.[61] Thus, although the Bureau adheres to the practice of obtaining appropriations under state laws for waters utilized by its projects, in deference to the statutory mandate that it proceed in conformity with state laws,[62] it is obvious that it plays a very substantial role in creating water rights and in determining the size of holdings of agriculture lands. Its constitutional authority to do so has not been challenged. Presumably, such functions would be held to be within the power of the Federal Government to dispose of government property.[63]

As to control of land use, regulatory measures at the state level include rural land-use zoning and controls of grazing and timber cutting practices.[64] Although the Federal Government has played a significant role in promoting soil conservation, enforcement has been left to the states, which have generally been content with voluntary programs.[65] However, there are a few instances of direct federal regulation of activities on privately owned lands. Acts of Congress prohibiting the building of fires on private lands near public forests and the erection of fences on private lands enclosing federal lands have been upheld as justifiable attempts to protect federal property.[66] Since 1893, Congress has provided for the regulation of all hydraulic mining in the Sacramento and San Joaquin watersheds of California for the purpose of preserving the purity of stream waters.[67] This act was held to be within the navigation power of Congress.[68] In some instances, land is purchased in

60. See the report of a Committee of the California legislature, WATER PROBLEMS OF CALIFORNIA 11-76 (1949); Maass, *Administering the CVP*, 38 CALIF. L. REV. 666, 671-74 (1950); Note, 38 CALIF. L. REV. 748 (1950).

61. Irrigable lands held in private ownership by one owner in excess of 160 acres are not entitled to receive water until the owner agrees to sell the excess land at prices not exceeding the maximum set by the Secretary of the Interior. 44 STAT. 649 (1926), 43 U.S.C.A. § 423e (Supp. 1950). This regulation has stirred up much controversy. A WATER POLICY FOR THE AMERICAN PEOPLE 170-71 (1950) (*supra* note 3); DE ROOS, THE THIRSTY LAND c. 7 (1948); Taylor, *The 160-Acre Limitation and the Water Resources Commission*, 3 W. POL. Q. 435 (1950); Note, 38 CALIF. L. REV. 728 (1950).

62. See statement of Bureau policy in United States v. Gerlach Live Stock Co., 339 U.S. 725, 740, n.15, 70 Sup. Ct. 955, 94 L. Ed. 1231 (1950).

63. *Cf.* United States v. Hanson, 167 Fed. 881 (9th Cir. 1909). See WATER RESOURCES LAW 43-46 (1950) (*supra* note 3).

64. State efforts to cope with rural land use problems are summarized in McDOUGAL AND HABER, *op. cit. supra* note 2 at 1065-70.

65. Ferguson, *Nation-Wide Erosion Control: Soil Conservation Districts and the Power of Land-Use Regulation*, 34 IOWA L. REV. 166 (1949); Note, 50 YALE L.J. 1056 (1941).

66. United States v. Alford, 274 U.S. 264, 47 Sup. Ct. 597, 71 L. Ed. 1040 (1927); Camfield v. United States, 167 U.S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260 (1897).

67. 27 STAT. 507 (1893), 33 U.S.C.A. § 661 (Supp. 1950).

68. North Bloomfield Gravel Min. Co. v. United States, 88 Fed. 664 (9th Cir. 1898).

order to subject it to scientific management, but wide application of this technique is obviously impossible.[69]

An ideal program for integrated river basin development would require that the basin agency be empowered to determine water rights and regulate land uses. Settlement of interstate disputes, now clumsily handled by Supreme Court decision or compact, would be facilitated. Obstacles to multiple-purpose planning posed by state water laws could be avoided.[70] However, it is most unlikely that Congress will vest comprehensive powers over these matters in federal agencies.[71] Nor does it appear that the states and the Federal Government will pool the necessary powers in regional agencies.[72] There are, of course, many ways in which pressure can be applied to induce favorable state action in connection with particular projects. Thus, California was persuaded to restrict its use of the waters of the Colorado River by the conditional withholding by Congress of the benefits of the Boulder Canyon Project Act.[73] Similarly, certain benefits of flood control and navigation projects may be extended to private lands only on condition that suitable local laws imposing permanent restrictions on the use of land be enacted or that restrictive covenants be executed by landowners.[74] However, recalcitrant states may effectively frustrate national policies in many ways. Their legislatures may refuse to enact necessary enabling legislation, their courts may invalidate cooperate enactments, and their administrative officials may withhold needed facilitative action.[75]

Summary.—The Constitution is not an obstacle to the creation of governmental arrangements which would permit effective comprehensive devel-

69. The Weeks Act authorizes the Secretary of Agriculture to acquire cut-over or denuded lands within watersheds of navigable streams in aid of navigation or in promoting timber growth. 36 STAT. 962 (1911), *as amended,* 16 U.S.C.A. § 515 (Supp. 1950). There is recent judicial reiteration that land acquisition under this act solely for the purpose of promoting timber growth is not unconstitutional. See Young v. Anderson, 160 F.2d 225, 226 (D.C. Cir. 1947), *cert. denied,* 321 U.S. 824 (1947).

70. WATER RESOURCES LAW 538 (1950). One example of such an impediment is the failure of state laws to recognize maintenance of wildlife as a beneficial water use. When projects destroy the natural habitat of waterfowl, extensive crop damage from wildfowl depredation may result. Losses of this type are described in A WATER POLICY FOR THE AMERICAN PEOPLE 261 (1950).

71. Recently proposed "valley authority" bills seem to do no more than integrate various federal powers already being exercised. See S. 1160, 81st Cong., 1st Sess. §§ 2(c)(d), 7(a), 15 (1949) (Missouri Valley Authority); S. 1645, 81st Cong., 1st Sess. §§ 7(c), 10(a) (1949) (Columbia Valley Administration). See statement of Senator Magnuson, *Hearings before Committee on Public Works on S. 1645,* 81st Cong., 1st Sess. 49 (1949).

72. This was recommended in Note, 56 YALE L.J. 276 (1947).

73. 45 STAT. 1057 (1928), 43 U.S.C.A. § 617 (Supp. 1950).

74. 49 STAT. 1570 § 3 (1936), *as amended,* 33 U.S.C.A. § 701c (Supp. 1950).

75. A state hydroelectric agency recently argued before the FPC that the state attorney general would refuse to approve its bonds if it were required to obtain an FPC license. Brief for Declarant, p. 9, in the Matter of Brazos River Conservation and Reclamation District, FPC Docket No. E-6258 (1950). The power of California irrigation districts to enter into contracts with the Bureau of Reclamation is discussed in Note, 38 CALIF. L. REV. 748 (1950).

opment of river basins. Congress could probably assume the entire responsibility if it desired. The states have barely begun to take advantage of the broad range of action allowed them by the compact clause. Federal-state cooperation, the approach now being taken, can be much improved by administrative reform at both levels and by development of more effective techniques of cooperation.

Ownership of Minerals in the Marginal Seas

Unlike river basin development, which is characterized by public development with the Federal Government in the dominant role, the production and distribution of mineral energy resources are largely functions of private entrepreneurs operating within a framework of laws created in the main by the state. Federal law is even used to buttress state policies in this area, examples being the Connally Act[76] and the market estimates of the Bureau of Mines of the Department of the Interior, which are vital supports of state regulation of oil production through prorationing.[77] There are exceptions to state dominance, of course, the most important being the control of atomic energy. A significant shift in the balance of control over the mineral energy resources occurred during the past five years as a result of suits brought by the United States against California, Louisiana and Texas to determine ownership of land beneath the waters off the coasts of those states. The decree in each case was that the United States possesses "paramount rights in, and full dominion over, the lands, minerals and other things" under the waters below the low-water mark.[78]

The California case was the first to reach the Supreme Court. California sought to persuade the Court to extend to the marginal sea the well established doctrine that the title to beds of inland navigable waters within their boundaries remained in the thirteen original states and that states subsequently admitted acquired title to the same extent by virtue of the equal footing clause in their admission acts. The Court disposed of this argument by concluding that the thirteen original states had no title to coastal land below the low-water mark. The doctrine that nations possess dominion over a three-mile limit off their coasts was deemed to have become established sometime after formation of the Union. In addition to this rationalization, the Court emphasized that the issue before it was not an ordinary title dispute, but rather called for a determination of which level of government should control the exploitation of the resources in the marginal seas. This

76. 49 Stat. 30 (1935), *as amended,* 15 U.S.C.A. § 715 (1948).
77. Rostow, A National Policy for the Oil Industry pt. II (1948).
78. United States v. Texas, 339 U.S. 707, 70 Sup. Ct. 918, 94 L. Ed. 1221 (1950); United States v. Louisiana, 339 U.S. 699, 70 Sup. Ct. 914, 94 L. Ed. 1216 (1950); United States v. California, 332 U.S. 19, 67 Sup. Ct. 1658, 91 L. Ed. 1889 (1947).

function, in the opinion of the Court, is bound up with federal responsibilities for the maintenance of peace and world commerce.

The Louisiana case was clearly governed by *United States v. California,* but the Texas case raised questions which seem not to have been answered satisfactorily. Texas' theory, in brief, was that the Republic of Texas during its existence between 1836 and 1845 acquired a proprietary interest in lands under the Gulf of Mexico within a marginal belt and that this interest did not pass to the United States when Texas entered the Union. The Court was willing to assume that the Republic of Texas had the claimed interest, but deemed it to have passed to the United States upon Texas' admission. The vehicle for this transfer was the equal footing clause of the Joint Resolution of December 29, 1845.[79] This marked the first time the equal footing clause was given the effect of subtracting from a state's proprietary interests in order to reduce the new state to the same level as the others. Moreover, the Joint Resolution containing the equal footing clause was merely a formal admission act, which was not submitted to Texas for agreement. It is to be distinguished from the Joint Resolution of March 1, 1845,[80] upon which both governments agreed; this resolution did not contain an equal footing clause. In its original opinion, the Court mistakenly referred to the Joint Resolution of March 1, 1845, as containing an equal footing clause. This mistake it corrected by simply amending its opinion so that it would refer to the equal footing clause in the Joint Resolution of December 29, 1845.[81] No attempt was made to justify the drastic effect which was thus accorded a formal, unilateral enactment. Had the case not gone off on the equal footing clause, Texas might have been allowed to present evidence intended to prove that the provision in the resolution agreed upon which reserved to Texas "all the vacant and unappropriated lands lying within its limits" embraced the submerged lands in dispute. However, there is language in the opinion suggesting that ownership of the lands under the marginal sea passed as an incident of the transfer of sovereignty, without the assistance of an equal footing clause and regardless of the terms of the annexation agreement.[82]

There is little point in elaborating further the arguments involved in these cases.[83] This area of litigation appears to be closed. It is not likely that any other state could advance a stronger case than Texas has done.

79. 9 STAT. 108 (1845).
80. 5 STAT. 797 (1845). See Defendant's Petition for Rehearing Directed to the Court's Amended Opinion, United States v. Texas, 339 U.S. 707, 70 Sup. Ct. 918, 94 L. Ed. 1221 (1950).
81. 340 U.S. 848 (Oct. 16, 1950).
82. United States v. Texas, 339 U.S. 707, 718, 70 Sup. Ct. 918, 94 L. Ed. 1221 (1950).
83. See Clark, *National Sovereignty and Dominion over Lands Underlying the Ocean,* 27 TEXAS L. REV. 140 (1948); Hardwicke, Illig & Patterson, *The Constitution and the Continental Shelf,* 26 TEXAS L. REV. 398 (1948); Note, 56 YALE L.J. 356 (1947).

The tidelands cases are referred to here because they presented in the setting of a title dispute broader issues of state and federal control of natural resources. Ownership of resources by government is not an end in itself. It is a means through which policies of government may be achieved. Such considerations were uppermost in the considerations of the Court.

PRODUCTION AND DISTRIBUTION OF NATURAL GAS

Perhaps the most significant phenomenon today in the national pattern of consumption of mineral energy resources is the growing dependence upon natural gas. With marked postwar acceleration, long-distance transmission lines are multiplying and pushing into new markets to serve an eager demand for this fuel, which is cheaper than other fuels and for many uses superior.[84] There is serious concern that this trend will lead to premature depletion of natural gas reserves, dislocation of enterprises supplying competing fuels, and deterioration of the economies of regions now producing natural gas.[85] These considerations foreshadow further developments in the evolution of state and federal regulation of the natural gas industry.

The present division of control between the states and the Federal Government is far from satisfactory. Although the production, transportation and distribution of natural gas are physically integrated so that gas moves continuously by pipeline from the field to the burner tip of the consumer, neither level of government has complete control over the entire process. Producing states sought to prevent wasteful production methods and consuming states endeavored by rate regulation to protect consumers against exorbitant charges. But it became apparent that the inability of the states to control prices which distributing companies paid to interstate pipelines seriously hampered state regulation of consumer rates.[86] In the Natural Gas Act of 1938,[87] Congress met this situation by attempting to place

84. FPC (SMITH-WIMBERLY), NATURAL GAS INVESTIGATION 242-47 (1948).

85. Such considerations prompted the exhaustive investigation of the natural gas industry commenced in 1945 by the Federal Power Commission. FPC, Docket No. G-580, Natural Gas Investigation. Due to disagreement among the Commissioners as to the conclusions to be drawn from this investigation, two separate reports were issued: FPC (OLDS-DRAPER), NATURAL GAS INVESTIGATION (1948) and FPC, (SMITH-WIMBERLY), NATURAL GAS INVESTIGATION (1948). See also BLACHLY AND OATMAN, NATURAL GAS AND THE PUBLIC INTEREST (1947).

86. In Missouri v. Kansas Natural Gas Co., 265 U.S. 298, 44 Sup. Ct. 544, 68 L. Ed. 1027, (1924), state regulation of sales of gas from an interstate pipeline to local distributing companies was held invalid as a direct burden on interstate commerce. The impact of this decision was especially severe in view of the unique rate-making methods employed by the states for natural gas. See Note, 59 YALE L.J. 1468, 1474-78 (1950). Related cases are reviewed in Howard, *Gas and Electricity in Interstate Commerce,* 18 MINN L. REV. 611 (1934); Powell, Note, *Physics and Law,* 58 HARV. L. REV. 1070 (1945).

87. 52 STAT. 821 (1938), *as amended,* 15 U.S.C.A. § 717 (1948). Section 1(b) of the Act provides that the act "shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use,

the troublesome middle segment of interstate transportation under the authority of the Federal Power Commission and to leave the production and distribution ends to state control.

Judicial construction of this act has been dominated by the assumption that Congress intended only to fill the gap which the states could not regulate.[88] Constitutional doctrine was thus afforded an opportunity to play an important role in the interpretation of the Natural Gas Act.

The recent case of *Federal Power Commission v. East Ohio Gas Co.,* [89] is illustrative of the trouble caused by this experiment with dual regulation. East Ohio, engaged exclusively in the business of distributing natural gas to consumers in several Ohio communities, purchases gas from interstate pipelines which deliver it to the main lines of East Ohio, from whence it moves to the distribution systems of various localities and ultimately to the burner tips of consumers. The Act clearly gives the FPC authority to regulate the sales from interstate pipelines to East Ohio, and denies it authority to regulate sales by East Ohio to consumers. But the FPC contended, and the Supreme Court agreed, that the company was subject to its jurisdiction for some purposes, in this case for the purpose of obtaining information about the company's affairs by requiring it to adopt certain accounting practices and file reports. This result was reached on the theory that East Ohio was "engaged in the transportation of natural gas in interstate commerce" and hence was subject to regulation as a "natural gas company."[90] The Act's exclusion of "the local distribution of natural gas" and the "facilities used for such distribution" was deemed to refer to the distribution systems within local communities and not to the main lines leading to such localities. Mr. Justice Jackson, joined by Mr. Justice Frankfurter, dissented, declaring that the intent of Congress was merely to supplement state regulation by filling the gap which the states were powerless to control, and that the State of Ohio not only had the power to regulate East Ohio's affairs on a comprehensive scale before and after 1938, but had done so.

Mr. Justice Black, for the majority, accepted the gap-filling theory of Congressional intent, but measured the gap by reference to pre-1938 decisions.[91] These he regarded as excluding interstate gas from state regulation

and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

88. See Panhandle Eastern Pipe Line Co. v. Public Service Comm'n, 332 U.S. 507, 516, 68 Sup. Ct. 190, 92 L. Ed. 128 (1947), holding that the act did not preclude regulation by Indiana of sales by an interstate pipeline directly to Indiana industrial consumers. See Note, 23 IND. L.J. 71 (1947).

89. 338 U.S. 464, 70 Sup. Ct. 266, 94 L. Ed. 268 (1950).

90. See Section 1 (b) of the act, 15 U.S.C.A. § 717(b), quoted, note 87, *supra.*

91. East Ohio Gas Co. v. Tax Comm'n, 283 U.S. 465, 51 Sup. Ct. 499, 75 L. Ed. 1171 (1931); Public Utilities Comm'n, v. Attleboro Steam & Electric Co., 273 U.S. 83, 47 Sup.

until it had reached the mains of local communities. The majority did not deny that a state might today, in the absence of federal action, regulate the transmission of gas in East Ohio's main lines before it reaches local distribution systems,[92] but this consideration was deemed immaterial in ascertaining the intent of Congress. Mr. Justice Jackson, citing *United States v. South-Eastern Underwriters Ass'n,* [93] said the Court was departing from an established principle that "Congress does not intend to freeze its legislation within current judicial decisions in the absence of evidence which makes such intention unmistakable."[94] Of course, the effect of application of that principle in the *South-Eastern Underwriters* case was to broaden federal legislation, while here it would accomplish the reverse. In view of the trend toward removal of commerce clause shackles on state action, acceptance of this view of Mr. Justice Jackson might drastically weaken many federal programs. It is supposed that the policy behind the trend toward greater state freedom is to prevent use of the commerce clause as a refuge from government regulation, not to favor state over federal action.

The majority opinion sheds no light on the nature of the considerations which prompted the FPC to assert jurisdiction over East Ohio. It may have been the purpose of the FPC to affect indirectly the rate-making methods of the state agency.[95] But it is possible that the FPC regarded jurisdiction over East Ohio as essential to the accomplishment of objectives not directly relating to rates, such as conservation.[96] The national interest in the distribution of natural gas is not confined to the reasonableness of prices paid by consumers. Every "natural gas company" is required by the Act to obtain a certificate of public convenience and necessity from the FPC at the outset of its operation and also when it extends its facilities.[97] In passing upon applications for such certificates, the FPC has considered conservation aspects, such as the effect of the proposed extension upon the reserves of particular fields, the consequences for the coal and rail

Ct. 294, 71 L. Ed. 549 (1927); Missouri v. Kansas Natural Gas Co., 265 U.S. 298, 44 Sup. Ct. 544, 68 L. Ed. 1027 (1924); Public Utilities Comm'n v. Landon, 249 U.S. 236, 39 Sup. Ct. 268, 63 L. Ed. 577 (1919). The cases relied upon by the majority to establish the narrow limits of state power were conceded to be relevant only in their language. There was no case squarely in point. Mr. Justice Jackson found contrary implications in other cases. Lone Star Gas Co. v. Texas, 304 U.S. 224, 58 Sup. Ct. 883, 82 L. Ed. 1306 (1938); State Tax Comm'n v. Interstate Natural Gas Co., 284 U.S. 41, 52 Sup. Ct. 62, 76 L. Ed. 156 (1931). Both sides claimed support in legislative history.

92. *See* Panhandle Eastern Pipe Line Co. v. Public Service Comm'n, 332 U.S. 507, 512, 68 Sup. Ct. 190, 92 L. Ed. 128 (1947); Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498, 504, 62 Sup. Ct. 384, 86 L. Ed. 371 (1942).

93. 322 U.S. 533, 64 Sup. Ct. 1162, 88 L. Ed. 1440 (1944).

94. FPC v. East Ohio Gas Co., 338 U.S. 464, 480, 70 Sup. Ct. 266, 94 L. Ed. 268 (1950).

95. See Mr. Justice Jackson's dissenting opinion, *id.* at 489.

96. Note, 64 HARV. L. REV. 464, 471 (1951).

97. 52 STAT. 824 (1938), 56 STAT. 83 (1942), 15 U.S.C.A. § 717f (1948).

industries, and the nature of the uses to which the gas will be put.[98] The gap-measuring approach to construction, which focuses upon the legal power of the states to regulate rates, seems unrealistic against this background of broader problems of nationwide scope with which the FPC is dealing.

The reach of FPC jurisdiction toward the production end of the interstate movement of natural gas has also been difficult to define. Congress' withdrawal of the "production or gathering of natural gas" from control of the FPC was held by a divided Court not to prevent the FPC from including within the rate base of a pipeline or natural gas company its production and gathering properties.[99] But when a pipeline transferred certain undeveloped leases to an affiliate in an apparent effort to frustrate FPC rate-making methods, the Court held that the FPC lacked jurisdiction to pass upon the propriety of such transfers.[100] Leases, said the Court, are an "essential part of production."[101] The dissenters would have restricted the exception in the act of "production or gathering" to physical acts such as the drilling of wells, removing the gas, and directing it into pipelines. This decision is consistent with the gap-filling theory of Congressional intent only in a narrow sense. The state where the leases are located would have constitutional power to regulate their transfer, but there is no reason to suppose that it would exercise that power for the benefit of consumers in other states, and it is certain that the latter would be powerless to act.

The most controversial question in this area, still unanswered by the Court, is whether the FPC can regulate sales in the field by producers to interstate pipelines. Just as state regulation of consumer rates was deemed unworkable without control over sales by interstate pipelines to distributors, so effective FPC regulation of sales by interstate pipelines is thought by some to require FPC control over field prices.[102] Until recent years, there was no apparent need for ceilings on such prices as there were other factors which tended to keep them low.[103] Unlike the oil producer, who might use alternative modes of transportation, the gas producer could transport his commodity to market only by pipeline. Since the pipeline companies frequently were also engaged in production and

98. Wheat, *Administration by the Federal Power Commission of the Certificate Provisions of the Natural Gas Act*, 14 GEO. WASH. L. REV. 194 (1945).

99. Colorado Interstate Gas Co. v. FPC, 324 U.S. 581, 65 Sup. Ct. 829, 89 L. Ed. 1206 (1945).

100. FPC v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 69 Sup. Ct. 1251, 93 L. Ed. 1499 (1949).

101. *Id.* at 505.

102. See *Hearings before Subcommittee on Interstate Commerce on S. 1498*, 81st Cong., 1st Sess. (1949). The problem is thoroughly discussed in Note, 59 YALE L.J. 1468 (1950).

103. FPC (SMITH-WIMBERLY), NATURAL GAS INVESTIGATION pt. 5. (1948).

could satisfy from their own production all or most of the requirements of their pipeline customers, the producer who did not own a pipeline (an "independent") was at a bargaining disadvantage in contracting for the sale of his gas to pipeline companies. Contracts typically were for long terms at low prices. But with the expansion of market demand and the recent entry into the pipeline business of companies which are not also engaged in production, the demand for gas produced by independents is increasing.[104] It is possible that the independents, many of whom are major oil companies, are exploiting this situation through the exertion of monopolistic power.[105] Whatever the causes may be, the current trend in field prices is sharply upward.

So far, the FPC has not attempted to fix field prices. Whether it would do so has been uncertain ever since 1940, when the Commission declined to regulate sales of independents on the ground that it lacked authority, but left open the possibility that it might alter its policy in the future.[106] Resolution of the issue by Congress was stymied by the President's veto of the Kerr Bill, which would have made it clear that FPC jurisdiction does not cover this subject.

If the FPC should decide to regulate field prices, its action could reasonably be upheld as an exercise of its regulatory power over sales "in interstate commerce . . . for resale."[109] The activities of production and gathering could properly be regarded as having preceded the sales by producers to the pipelines. The Court has already lent support to this theory in a case approving FPC regulation of sales in the field by a producer who delivered the gas in his own pipeline to the purchasers, who were interstate pipelines.[110] Chief Justice Vinson stated for a unanimous Court that "By the time the sales are consummated, nothing further in the gathering process remains to be done."[111] He also indicated that FPC jurisdiction would attach even to sales deemed to take place during the course of production and gathering unless such sales "are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions."[112] It is improbable that federal regulation of field prices would substantially interfere with the traditional types of

104. See *Hearings, supra* note 102, at 220 *et seq.*
105. *Ibid.*
106. *In re* Columbian Fuel Corp., 2 F.P.C. 200 (1940).
107. H.R. Doc. No. 555, 81st Cong., 2d Sess. (1950).
108. S. 1498, 81st Cong., 1st Sess. (1950).
109. See note 87, *supra,* for text of the jurisdictional section of the statute.
110. Interstate Natural Gas Co. v. FPC, 331 U.S. 682, 67 Sup. Ct. 1482, 91 L. Ed. 1742 (1947).
111. *Id.* at 692.
112. *Id.* at 690.

state regulation of production. However, two states have recently begun to fix minimum field prices for gas.[113] These programs obviously might conflict with the setting of maximum field prices by the FPC. Since this type of regulation was unknown when the Natural Gas Act was enacted, it would be absurd to assume that Congress had any specific intent on the subject one way or the other. But the evil at which the act was primarily aimed—the inability of the states to secure reasonable rates for consumers of gas originating outside the state—is persuasive that Congress did not intend that the Commission's powers be so narrowly confined by restrictive interpretation that it would be unable to fill the void in state power.

While federal policy on field price regulation awaits clarification, state regulation was recently approved by the Court in *Cities Service Gas Co. v. Peerless Oil & Gas Co.*[114] The Oklahoma Corporation Commission issued orders (1) setting a minimum wellhead price of 7 cents per thousand cubic feet on all gas taken from the Oklahoma portion of the Guymon-Hugoton Field and (2) directing Cities Service, an interstate pipeline company (and also a producer) to take gas ratably from Peerless, a producer, at the price fixed for the field. These orders were upheld over objections that they denied due process and equal protection, and unduly burdened and discriminated against interstate commerce.

Ratable-take regulations, requiring producers who own pipelines to purchase gas from other producers in proportion to their interests in the common source, are designed to afford an outlet to the producer who owns no pipeline and who therefore must forego marketing his gas unless he can sell to a pipeline. The validity of such regulations was placed in doubt by the holding in *Thompson v. Consolidated Gas Utilities Corp.*[115] that a gas proration order denied substantive due process because its effect was solely to force a sharing of markets, it not having been established that the order would prevent either waste or drainage from wells having no pipeline outlets. The question came up again in 1948, but was not decided.[116] Significantly, the ratable-take order in the *Peerless* case was not challenged, except insofar as it set a minimum price. If the legality of ratable-take regulation is assumed, price-fixing for the purpose of implementing the

113. Price regulation by Kansas was upheld in Kansas-Nebraska Natural Gas Co. v. State Corporation Commission, 169 Kan. 722, 222 P.2d 704 (1950); similar action by Oklahoma was sustained in Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 71 Sup. Ct. 215 (1950). See Holloway, *State Regulations of Minimum Field Gas Prices*, 4 OKLA. L. REV. 69 (1951).

114. 340 U.S. 179, 71 Sup. Ct. 215 (1950).

115. 300 U.S. 55, 57 Sup. Ct. 364, 81 L. Ed. 510 (1937).

116. Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 68 Sup. Ct. 972, 92 L. Ed. 1212 (1948). Lack of finality in the decree of the court below prevented a decision on the merits. The problem is discussed at length by Mr. Justice Rutledge, dissenting (joined by Black, Murphy and Burton), who would have upheld the order. *Id.* at 74.

ratable-take order should also be valid. But the minimum price set by the Oklahoma Corporation Commission went further. It was made applicable to all gas taken from the field.

The Court thought that the due process and equal protection requirements were satisfied in that the Commission's finding that existing low field prices were resulting in "economic waste and conducive to physical waste" was sustained by "ample evidence." Although about 90 percent of Guymon-Hugoton's production is ultimately consumed outside Oklahoma, the order was not deemed to burden unduly or discriminate against interstate commerce since the regulation applied to all gas taken from the field, was related to the state's interest in conservation of its natural resources, and did not have a substantial adverse effect upon national interests. The Court seems to have been of the opinion that a sufficient connection between the order and conservation was established by testimony before the Commission to the effect that "low prices make enforcement of conservation more difficult, retard exploration and development, . . . result in abandonment of wells long before all recoverable gas has been extracted. . . . contribute to an uneconomic rate of depletion and economic waste of gas by promoting 'inferior' uses."[117]

The conservation basis of the Oklahoma order seems weak. It is generally believed that state regulations, other than price control, have effectively prevented serious wastes in gas production, with the exception of gas produced as an incident of oil production.[118] The latter, termed casinghead gas, is often burned or allowed to escape into the air. It is possible that operators of oil wells might be induced to capture this gas if its price were sufficiently high to compensate their efforts. If, however, the testimony before the Commission that "low prices make enforcement of conservation more difficult" had reference to the waste of casinghead gas, that testimony was irrelevant because the Guymon-Hugoton Field is a gas field, not an oil field.[119] Had the Commission's order been statewide in its scope, it might be arguable that it would stimulate exploration for new fields, but it is difficult to see how an order restricted to the Guymon-Hugoton Field, which was already proved, could have that effect. Stimulation of development of proved fields might have an adverse effect upon conservation by causing rapid depletion of the state's reserves of natural gas. If the Commission were seriously interested in conserving gas by discouraging "inferior" uses, such as the use of gas to produce steam when coal is available, it is unlikely

117. Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 182, 71 Sup. Ct. 215 (1950).

118. FPC (SMITH-WIMBERLY), NATURAL GAS INVESTIGATION 150-54 (1948).

119. The characteristics and problems of the Guymon-Hugoton Field are discussed in CONSERVATION OF OIL & GAS 403-08 (1948), published by the Section of Mineral Law of the American Bar Association.

that it would have relied upon an obviously ineffective means. The Court, in support of its view that the order would not harm national interests, expressed the opinion that the small increase in wellhead price caused by the order would have only slight effect upon the domestic delivered price, but that some "industrial consumers, who get bargain rates on gas for 'inferior' uses, may suffer."[120] It is not apparent why the latter group of consumers would suffer more than the former. Industrial consumers are able to get bargain rates largely because domestic consumption is seasonal and pipeline companies seek an outlet for surplus gas when domestic consumption falls off.[121] If industrial users should refuse to absorb the slight increase due to Oklahoma's pricing order, which is unlikely, pipeline companies would probably shift the entire price advance to domestic consumers rather than give up their surplus outlets.

In the past, when states desired to regulate end uses of gas, they resorted to the direct approach of simply prohibiting the disfavored uses.[122] Such restrictions, however, have not been given an extrastate application. Does the Court's approval of the indirect regulation of end uses through price control mean that the state could stop the flow of gas through pipelines which dispose of gas to consumers in other states for inferior uses? An affirmative answer would be in conflict with *Baldwin v. Seeling, Inc.*,[123] holding that New York could not prohibit sales of milk in New York which had been purchased from producers in other states at prices below the minimum set by New York.

In a companion case, *Phillips Petroleum Co. v. Oklahoma*,[124] the conservation justification is even more transparent. Phillips obtains gas from its own wells located on lands on which it owns leases and transports this gas through its own pipelines to a plant in Texas, where the liquid hydrocarbons are removed. These are either used or sold, and the residue gas is sold to pipelines. Inasmuch as Phillips was not purchasing gas in the field but was transporting only gas from its own wells, it sought to have the field price order made inapplicable to itself or clarified. The Commission refused to change the order on the ground that Phillips had no standing to complain since it was realizing the minimum price from its ultimate disposition of the extracted liquids and the residue gas. On appeal, Phillips relied upon due process and equal protection arguments, but did not urge that the

120. Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 187, 71 Sup. Ct. 215 (1950).

121. FPC (SMITH-WIMBERLY), NATURAL GAS INVESTIGATION 254 (1948).

122. A Texas statute prohibiting use of sweet gas for the manufacture of carbon black was upheld in Henderson Co. v. Thompson, 300 U.S. 258, 57 Sup. Ct. 447, 81 L. Ed. 632 (1937).

123. 294 U.S. 511, 55 Sup. Ct. 497, 79 L. Ed. 1032 (1935).

124. 340 U.S. 190, 71 Sup. Ct. 221 (1950).

commerce clause was violated. The Commission was upheld. Normally, it is the purchaser who is coerced by a minimum price regulation. Here the regulation's impact is upon the seller, who must realize the designated price. Is one to believe that the self-interest of producers would not be sufficient incentive to obtain the highest possible price? How would Oklahoma enforce its order if Phillips' purchasers in Texas refused to pay a price which would meet the requirements of the order? Assuming the order would have an effect upon prices realized by Phillips, in what way would conservation be promoted? The Court generalizes as follows: "the connection between realized price and conservation applies to all production in the field, whether owners purchase from others or not, and whether they own pipelines or not. In a field which constitutes a common reservoir of gas, the Commission must be able to regulate the operations of all producers or there is little point in regulating any."[125] Regulations designed to achieve optimum utilization of oil and gas reservoirs through application of scientific knowledge, such as compulsory unitization, are no doubt most effective if they cover the entire reservoir, but it is difficult to see why that would be true of price control. If the Court was thinking of the effect of price-fixing upon end uses, it is a sufficient answer that the Commission's order as applied to Phillips lumps together prices received for the processed gas and its by-products, and thus does not necessarily control the price at which the processed gas commences its pipeline journey to consumers.

There is much more substance in the Commission's findings that prevailing prices were resulting in financial loss to producers, royalty owners and the State of Oklahoma, which levies a gross production tax and also owns royalties. The Court did not say whether the price order, if based only upon these factors, could withstand objections on constitutional grounds. Since *Nebbia v. New York*[126] and later cases on price-fixing,[127] the absence of a conservation justification should not render regulation of field prices of natural gas invalid for lack of due process. It is less certain that state action designed solely to transfer money from natural gas consumers in many states to persons having a financial interest in production in the regulating state should not be an undue burden upon interstate commerce. Early attempts by gas producing states to restrict interstate production of gas were invalidated in *Pennsylvania v. West Virginia*[128] and *Oklahoma v.*

125. *Id.* at 192. It would be impossible for Oklahoma to regulate the entire Hugoton Field, since it extends into Texas and Kansas. Texas does not fix prices in its portion of the field.

126. 291 U.S. 502, 54 Sup. Ct. 505, 78 L. Ed. 940 (1934).

127. Olsen v. Western Reference & Bond Ass'n, 313 U.S. 236, 61 Sup. Ct. 862, 85 L. Ed. 1305 (1941); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 Sup. Ct. 907, 84 L. Ed. 1263 (1940); United States v. Rock Royal Co-op., 307 U.S. 533, 59 Sup. Ct. 993, 83 L. Ed. 1446 (1939).

128. 262 U.S. 553, 43 Sup. Ct. 658, 67 L. Ed. 1117 (1923).

Kansas Natural Gas Co.[129] These cases are apparently still authoritative, in view of recent decisions striking down similar state and municipal efforts with respect to milk.[130] Greater tolerance has been shown toward state regulation which merely affects the prices people pay for commodities, as long as there is no discrimination among consumers, although the bulk of the consumers are in other states, and although price increases may restrict consumption by some consumers just as effectively as direct curtailment of exportation. In 1932, the Court upheld state prorationing of oil production, which indirectly fixes prices, in an opinion which stressed conservation and the now discredited doctrine that mining is not commerce.[131] Administration of oil proration was later approved in the *Rowan & Nichols* cases, but the commerce clause issue was not raised there.[132] However, since the commerce clause does not prevent California from increasing the price of raisins to consumers throughout the country by means of marketing controls intended to aid producers,[133] it seems that oil and gas producing states should be able to take similar action, without relying upon a conservation justification. The need for "stabilization" of the raisin industry was an adequate substitute for conservation. As good a showing of similar need in the oil and gas industries could probably be made. *Parker v. Brown*[134] may be distinguishable on the ground that the United States Department of Agriculture had aided the California program, while the Federal Power Commission has done nothing to encourage minimum pricing of gas by the states. But Justice Clark's opinion in the *Peerless* case,[135] citing *Parker v. Brown* with approval and without qualification, indicates that it is not to be so confined.

Summary.—The Court has manifested a disposition in recent decisions to sanction new extensions of regulation over the natural gas industry, whether by the Federal Power Commission or by state agencies. Price-fixing by the producing states is valid, at least for the present. Should the FPC assert jurisdiction over field prices, the Court would be confronted

129. 221 U.S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716 (1911). See Howard, *Gas and Electricity in Interstate Commerce,* 18 MINN. L. REV. 611 (1934); Hardman, *The Right of a State to Restrain the Exportation of its Natural Resources,* 26 W. VA. L.Q. 1 (1919); Note, 64 HARV. L. REV. 642 (1951).

130. Dean Milk Co. v. City of Madison, 340 U.S. 349, 71 Sup. Ct. 295 (1951); Hood & Sons v. Du Mond, 336 U.S. 525, 69 Sup. Ct. 657, 93 L. Ed. 865 (1949), 3 VAND. L. REV. 114.

131. Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 52 Sup. Ct. 559, 76 L. Ed. 1062 (1932).

132. Railroad Commission v. Rowan & Nichols Oil Co., 310 U.S. 573 60 Sup. Ct. 1021, 84 L. Ed. 1368 (1940); Railroad Commission v. Rowan & Nichols Oil Co., 311 U.S. 570, 61 Sup. Ct. 343, 85 L. Ed. 358 (1941). See ROSTOW, A NATIONAL POLICY FOR THE OIL INDUSTRY 38 (1948).

133. Parker v. Brown, 317 U.S. 341, 63 U.S. 307, 87 L. Ed. 315 (1943).

134. *Ibid.*

135. Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 186, 188, 71 Sup. Ct. 215 (1950). *But see* Hood & Sons v. Du Mond, 336 U. S. 525, 537, 69 Sup. Ct. 657, 93 L. Ed. 865 (1949).

with a difficult problem of statutory interpretation. In seeking to ascertain the intent of Congress in 1938, the Court would act knowing that the intent of Congress in 1950 was clearly manifested, though frustrated by veto. In the absence of federal price control of gas, the rationale of the *Peerless* opinion leaves open the possibility that prices set by the state might be deemed to burden commerce unduly if too high. Preservation by the states of their most vital interests may be beyond their authority. Thus, the producing states of the Southwest, which now furnish the bulk of the gas marketed in the country, are probably powerless to take the drastic action needed to protect their long-range industrialization programs from being jeopardized by the piping of more and more gas to the Northeast.[136] Satisfactory adjustment of the interests of producing and consuming areas may be possible only through comprehensive federal action.

CONCLUSION

The purpose of this survey was to examine federal-state relations in the control of natural resources in the context of selected problems of current significance. It was not intended to lay a basis for broad generalization. However, it should be observed that, while the issue has been presented in many different ways, the Supreme Court in the cases discussed has nearly always endcavored to facilitate a political, or legislative solution. The Court would not permit the auditor of the State of West Virginia, or its courts, to frustrate plans laid by the legislatures of eight states and approved by Congress. It placed in the lap of Congress the final determination of the disposition of minerals in coastal waters. In effect, the Court told consumers of natural gas to look to Congress, or possibly to the Federal Power Commission, for protection against price fixing by the producing states. No serious restrictions have been imposed upon Congress. When Congress has spoken, though sometimes not clearly, the Court has usually given its words a meaning which would not hamstring the federal program. In such cases, inconsistent state programs have had to give way. An unusually difficult problem was handed the Court in the Natural Gas Act. Congress' intent that federal action be restricted to the gap which the states could not fill had to be reconciled with Congress' intent that federal action be effective within its proper sphere. In the main, emphasis has been given the latter.

136. The gravity of the problem is stressed in FPC (OLDS-DRAPER), NATURAL GAS INVESTIGATION 64-101 (1948).