

### Constitutional Law—State Control of Interstate Commerce in Natural Gas (Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm., 71 Sup. Ct. 777 (1951))

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and in some cases simply not applied.<sup>24</sup>

The principal case, on cursory examination, appears to be the final step in the *whittling* process. However, in view of the reliance placed on the particular facts involved,<sup>25</sup> it is submitted that this is but another judicial refusal to apply the public policy rule where there is no compelling reason to do so. As stated by the court, "... [Wisconsin] has no real feeling of antagonism against wrongful death suits in general. To the contrary, a forum is regularly provided for cases of this nature. . . ." <sup>26</sup> The soundness of this logic is patent. To prevent undue subjugation of state sovereignty to national accord, the public policy rule should be kept alive for the exceptional case that demands its application. But needless application of the rule can lead only to the subversion of justice, and, perhaps, to the abrogation of the rule itself.



CONSTITUTIONAL LAW — STATE CONTROL OF INTERSTATE COMMERCE IN NATURAL GAS.—Appellant embarked upon a program of direct sales to industrial consumers in Michigan. A contract for such was negotiated with Ford Motor Co. which already was being supplied by a Michigan public utility which in turn received its supply of natural gas from appellant. The sales were admittedly interstate commerce. The question presented was whether or not the State of Michigan could order appellant to cease and desist from making such sales and deliveries until such time as it should first have obtained a certificate of public convenience and necessity from the Michigan Public Service Commission to perform such services. *Held*, affirmed. The sales, though in interstate commerce, were essentially local in character, and, therefore, in the absence of a federal regulation, subject to state control. *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm.*, 71 Sup. Ct. 777 (1951).

The permissible extent of the states' right to regulate industries and goods in interstate commerce has long been a perplexing problem. Nevertheless, certain first principles are clear. The generally accepted test was first set forth in the famed *Cooley* case.<sup>1</sup> There

<sup>24</sup> *Bagley v. Small*, 92 N. H. 107, 26 A. 2d 23 (1942); *Richardson v. Pacific Power and Light Co.*, 11 Wash. 2d 288, 118 P. 2d 985 (1941).

<sup>25</sup> "... the present case is not one lacking a close relationship with the state. For not only were appellant, the decedent and the individual defendant all residents of Wisconsin when this suit was brought, but also appellant was appointed administrator and the corporate defendant was created under Wisconsin laws. . . . Wisconsin may well be the only jurisdiction in which service could be had as an original matter on the insurance company defendant." *Hughes v. Fetter*, 71 Sup. Ct. 980, 983 (1951).

<sup>26</sup> *Hughes v. Fetter*, *supra* note 25 at 982.

<sup>1</sup> *Cooley v. Port Wardens of Philadelphia*, 12 How. 299 (U. S. 1851).

was established the doctrine that, when the interests involved are national in scope and the need is for uniformity, the power of Congress is exclusive; but when the interests and needs are purely local and Congress has not acted, the state power is concurrent. That the Supreme Court is the final arbiter of state action was established in the *Southern Pacific* case.<sup>2</sup> In the same case a new broad and comprehensive test for determining the validity of state action was set forth. The application of this "relative weights" test to any given situation was henceforth to call for a consideration of all the facts and circumstances involved to determine whether or not the interests affected were peculiarly local or whether the national interest in unrestricted freedom of commerce across state lines was adversely affected.<sup>3</sup> Finally, it is also clear that Congress may empower states to pass and enforce laws otherwise invalid.<sup>4</sup> This doctrine of congressional consent has evidenced itself in the cases of whiskey,<sup>5</sup> oleomargarine,<sup>6</sup> and convict-made goods<sup>7</sup> by "divesting" these goods of their interstate character, and in the case of insurance<sup>8</sup> by a declaration of national policy. But one problem remains. What is the permissible extent of state regulation where Congress has acted only partially—when it has only partially occupied a field, without expressly consenting to state regulation of the part unoccupied? May the consent of Congress to state regulation be inferred from its silence or unexpressed intent?

Such a situation was created by the enactment of the Natural Gas Act.<sup>9</sup> By this Act Congress declared its purpose as follows:

The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, 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.<sup>10</sup>

Thus Congress did not undertake to occupy and control the entire natural gas industry. It did not in so many words, however,

<sup>2</sup> *Southern Pacific Co. v. Angona*, 325 U. S. 761 (1945).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Id.* at 769. For excellent discussion, see Dowling, *Interstate Commerce and State Power—Revised Version*, 47 COL. L. REV. 547 (1947).

<sup>5</sup> 26 STAT. 313 (1890), 27 U. S. C. § 121 (1946) [Wilson Act—sustained by the Court in *In re Rahrer*, 140 U. S. 545 (1891)]; 37 STAT. 699 (1913), 27 U. S. C. § 122 (1946) [Webb-Kenyon Act—sustained by the Court in *Clark Distilling Co. v. Western Md. Ry.*, 242 U. S. 311 (1917)].

<sup>6</sup> 32 STAT. 193 (1902), 21 U. S. C. § 25 (1946) [sustained in *United States v. Green*, 137 Fed. 179 (N. D. N. Y. 1905)].

<sup>7</sup> 45 STAT. 1084 (1929), 49 U. S. C. § 60 (1946) (Hawes-Cooper Act—sustained by the Court in *Whitfield v. Ohio*, 297 U. S. 431 (1936)).

<sup>8</sup> 59 STAT. 33 (1945), 15 U. S. C. §§ 1011-1015 (1946) [McCarran Act—see *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408 (1946)].

<sup>9</sup> 52 STAT. 821 (1938), 15 U. S. C. § 717 *et seq.* (1946).

<sup>10</sup> 52 STAT. 821 (1938), 15 U. S. C. § 717(1)(b) (1946).

grant to the states the power to regulate all other aspects not taken under federal regulation. In short, there was no "divestment" as in the cases of whiskey, oleomargarine, and convict-made goods, *supra*. Many companies therefore sought to find refuge in a twilight zone between state and federal regulation. Direct sales to consumers across state lines were admittedly interstate in nature, but had been excluded by the terms of the Act from federal regulation. There certainly appeared to be a phase of the industry free from regulation.

The problem presented was twofold. Did Congress by this exemption intend to deliver direct sales to state control? If not, were the local interests so vital as to permit state regulation in an area not controlled by the federal government? Both of these questions were answered in the affirmative in *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*.<sup>11</sup> The case involved state regulation of the rates charged on direct sales to ultimate consumers. It previously had been held that sales of natural gas in interstate commerce made directly to consumers by an interstate carrier were subject to state regulation on rates.<sup>12</sup> But the Court did not rely on that alone. It was held that Congress intended by the Natural Gas Act to leave to the states the authority to regulate rates in sales to industrial consumers. It was stated that the reference to what was *not* covered by the Act was deliberate and not inadvertent. There was no purpose in the Act to cut down the regulatory power of the state. On the contrary, it was said that perhaps its primary purpose was to aid and strengthen the effectiveness of state legislation. ". . . Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority."<sup>13</sup> In short, Congress had not occupied the entire field; but had entered into a scheme of "cooperative action" regulating those areas over which the state had no power,<sup>14</sup> and left to the states control over local interests within the *Cooley* doctrine, *supra*. It was pointed out, however, that "State power to regulate interstate commerce, wherever it exists, is not the power to destroy it, unless Congress has expressly so provided."<sup>15</sup> This seemed to define the limit of state regulatory power.

The Natural Gas Act was also likened to the McCarran Act which defined the power of the states over interstate phases of insurance. The analogy seems not too sound, however. There, the regulatory power was expressly granted to the states, whereas in the

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<sup>11</sup> 332 U. S. 507 (1947).

<sup>12</sup> *Pennsylvania Gas Co. v. Public Service Comm.*, 252 U. S. 23 (1920).

<sup>13</sup> *Panhandle Eastern Pipe Line Co. v. Public Service Comm. of Indiana*, 332 U. S. 507, 520 (1947).

<sup>14</sup> See *Public Utilities Comm. v. Attleboro Steam and Electric Co.*, 273 U. S. 83 (1927); *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298 (1924).

<sup>15</sup> *Panhandle Eastern Pipe Line Co. v. Public Service Comm. of Indiana*, 332 U. S. 507, 523 (1947).

Natural Gas Act such a grant is at best an implication. The decision, however, did serve to close the attractive gap envisioned by the industry, at least as far as rates were concerned.

A far more startling and comprehensive doctrine has been stated by the Court in the instant case. Much more was concerned here than the right to regulate the rates charged for the sales—the very right to make the sales was at stake.

The Court, nevertheless, upheld the right of the state to require appellant to first obtain such certificate. It was held that sales to local consumers are essentially local in aspect and therefore subject to state regulation; indeed, that such state regulation was required in the public interest. All of the essential holdings of the first case discussed were upheld. As to the contention that the jurisdiction sought was the power to *prohibit* interstate commerce, the Court answered that the result was "regulation, not absolute prohibition."<sup>16</sup> It was conceded, however, that the end result would be prohibition of "particular" direct sales.

"There are no opposing directives and hence no necessity for us to resolve any conflicting claims as between state and federal regulation."<sup>17</sup> With this one sentence, the opinion dismissed a point very forcibly made in the dissent. Justice Frankfurter pointed out the possibility of conflict between state and federal directives. The Act grants to the Federal Government the sole right to grant or deny certificates of authority to transport natural gas in interstate commerce. Therefore, a state certificate authorizing an interstate sale would be meaningless if the Federal Government denied a certificate for transportation, and vice versa. It is apparent that in event of such conflict, the federal authority would prevail. Therefore, it would also seem that a state statute giving rise to such conflict could be found to be constitutionally objectionable.

That the decision is sound and, from a practical point of view, desirable is beyond question. As pointed out, however, ". . . the principle is not to be reduced to the appeal of the particular instance in which it is invoked."<sup>18</sup> The premise upon which both of the decisions construing the Natural Gas Act were based, is being weakened by over-extension. That rates could be regulated by the state had been established before the passage of the Act. Indeed, the Court most emphatically pointed out that the power to regulate was not the power to destroy. The basis of the decision, nevertheless, was that Congress could by silence or, at best, by implication authorize state regulation of interstate commerce. This in itself was a tenuous extension of the doctrine of congressional consent. The instant decision, based on the same premise, seems to go too far. To

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<sup>16</sup> *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm.*, 71 Sup. Ct. 777, 781 (1951).

<sup>17</sup> *Ibid.*

<sup>18</sup> *Id.* at 783 (dissent).

permit a state to prohibit sales, even though only particular sales, in order to carry out its own local economic policies seems clearly contrary to the general line of authority. If such is the intent of Congress, and the Court has said that it is, it could far better be accomplished by divesting these direct sales of their interstate character as in the case of whiskey and oleomargarine, or by a declaration of national policy as in the case of insurance.



DECEDENT ESTATES—VALID TOTTEN TRUST TAKES PRECEDENCE OVER WIFE'S RIGHT OF ELECTION.—Fifteen months before his death, decedent, then living apart from plaintiff, established four "Totten trusts" in favor of his granddaughter. He made no withdrawals, and, testimony indicated, he had told people on several occasions that he wanted the child to have his bank books. Plaintiff, executrix and sole beneficiary of a will executed in 1939, sought to include these accounts in the estate, claiming them illusory since decedent retained full dominion over them. The Appellate Division modified a judgment for plaintiff. *Held*, affirmed. Real, not merely colorable or pretended, Totten trusts are completely valid transfers, with legally fixed effects even as against Section 18 of the Decedent Estate Law. In *re Halpern's Estate*, 303 N. Y. 33, 100 N. E. 2d 120 (1951).

Totten trusts, defined as deposits "... by one person of his own money, in his own name as trustee for another . . .", have been recognized as valid in New York since 1904.<sup>1</sup> These trusts are tentative in nature, and become absolute only in one of two ways:<sup>2</sup> upon some unequivocal act or declaration by the depositor during his lifetime;<sup>3</sup> or upon the depositor's death, before that of the beneficiary, without any prior act or declaration of disaffirmance.<sup>4</sup> Death without such disaffirmance gives rise to a rebuttable presumption of an absolute trust as to the balance remaining in the account at the depositor's death.<sup>5</sup> During the settlor's life there is no such presumption based

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<sup>1</sup> *Matter of Totten*, 179 N. Y. 112, 125, 71 N. E. 748, 752 (1904). See discussion of these trusts in 1 SCOTT, *THE LAW OF TRUSTS* 360 (1939).

<sup>2</sup> *Cf. Tierney v. Fitzpatrick*, 122 App. Div. 623, 625, 107 N. Y. Supp. 527, 528 (1st Dep't 1907), *rev'd on other grounds*, 195 N. Y. 433, 88 N. E. 750 (1909).

<sup>3</sup> *Accord*, *Thomas v. Brevoort Savings Bank of Brooklyn*, 275 App. Div. 724 (2d Dep't 1949).

<sup>4</sup> *Matter of Clark*, 149 Misc. 374, 268 N. Y. Supp. 253 (Surr. Ct. 1933); *accord*, *Matter of Rasmussen*, 147 Misc. 564, 264 N. Y. Supp. 231 (Surr. Ct. 1933); *cf. Garlick v. Garlick*, 53 N. Y. S. 2d 321 (Sup. Ct. 1945); 20 *FORD. L. REV.* 105, 106 (1951).

<sup>5</sup> The presumption "... is in reality not a presumption at all, but merely a factual inference which is subject to rebuttal either by any competent evidence or by a stronger inference." *Matter of Reich*, 146 Misc. 616, 620, 262 N. Y. Supp. 623, 628 (Surr. Ct. 1933).