Cornell Law Review

Volume 32
Issue 3 *March 1947*

Article 2

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RECENT FEDERAL REGULATION OF THE PETROLEUM PIPE LINE AS A COMMON CARRIER

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Jurisdiction Under the Interstate Commerce Act

Regulation of the interstate petroleum pipe line as a common carrier under the Interstate Commerce Act has had as its major purpose the achievement of competition among shippers in the petroleum industry. It is the object of this survey to examine the recent attempts at regulation to see if this purpose has been achieved[1] and to set forth the legal and economic factors entering into the problem of regulation.

The groups that favor petroleum pipe line regulation to maintain competition are the consumers of refined petroleum products, the independent refiners of crude oil, the independent jobbers of refined petroleum products, the independent service station dealers, the competitive carriers of petroleum,

[1]It might well be the objective of a study to appraise the economic merits of competitive organization of the oil industry as compared to monopolistic organization under government control,—backgrounded against the national welfare and the national defense. Although theoretically the petroleum industry has been organized on a competitive basis since the Standard Oil Trust was dissolved in 1911, actually it appears to be monopolistically controlled by 20 major oil companies. A study made for the Temporary National Economic Committee concludes that there is a high degree of cooperation among the major companies, the effect being about the same as if one company were in control of the industry. In 1938 the majors controlled about 70 per cent of the proven crude oil reserves, produced about 52 per cent of the crude oil, refined 85 per cent of the crude oil, owned 89 per cent of crude oil trunk pipe lines, 87 per cent of the oil tankers, and 73 per cent of the bulk gasoline plants. Control of transportation facilities enables them to control the crude oil markets, uniform prices being posted in the producing fields. The majors account for 85 per cent of the domestic sales of gasoline and over 96 per cent of the gasoline pipe lines. The markets for gasoline are divided with one major oil company exercising price leadership in a marketing territory. Basing point price systems are used to stabilize prices. The majors jointly engage in gasoline price cutting wars to drive independents out of a given territory. They generally place the burden of retail price wars on service station lessees, who operate company owned stations on a commission basis and buy the gasoline from the majors at rigid tank car prices. Losses suffered by the majors in their marketing divisions are more than covered by high profits made in their pipe line divisions. *See Temporary National Economic Committee,* Monograph No. 39, *Control of the Petroleum Industry by Major Oil Companies* (1941). Nearly one billion dollars of new refining capacity—a 20 per cent increase in over-all refining capacity—was constructed during the war. Eighteen majors own 70 per cent and operate 80 per cent of these new facilities. These privately-owned facilities are now fully paid for out of wartime profits and contractual allowances, and are completely amortized. About 85 per cent of the investment was in refineries employing the catalytic cracking process, which makes possible the production of a higher quality of gasoline at less cost than other refinery processes for regular gasoline. The majors therefore have a more dominant position than before the war. *Economic Concentration and World War II, Report of the Smaller War Plants Corporation,* SEN. DOC. No. 206, 169, 79th Cong., 2d Sess. (1946).

and the independent crude oil producers.[2] On the other hand, the major oil companies, which own almost all of the petroleum pipe lines,[3] seek to maintain their competitive advantage over the smaller independent refining companies and oppose this regulation.

The function of the pipe line in the organization of the oil industry is chiefly to serve the large oil companies[4] as an integral operation in the transformation of a raw material into a finished product ready for the market. It has been a highly successful adjunct of the large scale oil refineries in reaching out to bring to the refinery an adequate supply of crude oil[5] and to take to the markets the refined oil products. Conversely, the large oil refineries are necessary to the economic existence of the trunk pipe lines.[6] There are several reasons for this dependency. In the first place, the petroleum pipe lines are essentially one product, one way carriers. They require a large investment of capital and the fixed charges on this investment make necessary a large and steady volume of business to permit low unit costs. Also, the large initial investment and the risk that attaches to the investment because of shifting sources of supply and markets make the large corporate enterprise engaged in the oil refining business especially suited to the undertaking of pipe line ventures. Furthermore, coordination of transportation with the extraction, manufacturing, and marketing of oil by a unified business management results in savings in operating costs.[7]

In consideration of the economic interdependence of the large refineries and the trunk pipe lines, it would appear impracticable to require the pipe lines to serve shippers in the capacity of common carriers. This approach to

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[2]Petroleum Rail Shippers Association v. Alton and Southern R.R. *et al.*, 243 I. C. C. 589 (1941).

[3]Part 14-A, *Hearings before the Temporary National Economic Committee*, 7723, 7729 (1939). On Jan. 1, 1938, 14 of the 20 major oil companies in the United States owned 89 per cent of all crude oil pipe line mileage on which reports to the Interstate Commerce Commission are given. On the same date, 17 major oil companies owned 96.1 per cent of the total gasoline pipe line mileage in the United States, as reported to the Temporary National Economic Committee. See note 1 *supra*.

[4]Pogue, *Economics of the Petroleum Industry*. Part 14, *Hearings before the Temporary National Economic Committee*, 7457, 7475 (1939).

[5]The need for reaching out for oil is evidenced by the fact that of the crude oil requirements of eastern refineries, 85 per cent comes from fields west of the Mississippi River. Reduced Pipe Line Rates and Gathering Charges, 243 I. C. C. 115, 119 (1940).

[6]To serve the refineries there were in existence in 1939 more than 112,000 miles of trunk and gathering lines with a construction cost exceeding one billion dollars. *Id.* at 120.

[7]Pogue, *Economics of Conservation and Proration in the Petroleum Industry*. Part 14, *Hearings before the Temporary National Economic Committee*, 7438 (1939). BEARD, REGULATION OF PIPE LINES AS COMMON CARRIERS (1941) 161. It appears that economies in the integration of transportation with manufacturing are more evident than in the integration of extraction and marketing with manufacturing and transportation.

regulation of the petroleum pipe lines has been taken by the Federal Government, but it has not achieved the intended result, since most of the pipe lines serve only their shipper owners.[8] It might be more appropriate to regulate the oil industry as a whole, pipe lines being considered as one phase of the business of supplying markets with petroleum products. In the regulation of water and artificial gas companies, the pipe line is considered an integral part of the business of supplying utilities.[9] Under the Natural Gas Act,[10] the Federal Government regulates the transmission and sale at wholesale of natural gas in interstate commerce separately from the production and gathering of gas, which are left to state regulation. This separation in control, however, is due more to legal barriers[11] which have prevented the states from adequately regulating the interstate operations of the natural gas companies than to differentiation as to economic functions. The natural gas pipe lines are regulated under Federal law as parts of vertical utilities and not as public transportation agencies, as are the oil pipe lines. Furthermore, the greatest conservation of oil and capital resources would seem to result from a comprehensive regulation of the whole oil industry.[12] According to Professor Thompson, the enlargement of interstate commerce powers by recent Supreme Court decisions has cleared the way for the Federal Government to step in and regulate the entire oil industry in the interest of conservation, and the failure of two important oil producing states to join the Interstate Oil Compact plan[13] for conserving oil resources presents an

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[8]Of 37 pipe lines answering a questionnaire of the Interstate Commerce Commission, 10 served none but their oil company owners, 20 served one to six non-affiliated shippers, and seven served from 10 to 37 such shippers. Reduced Pipe Line Rates and Gathering Charges, 243 I. C. C. 115, 121 (1940). Also, a study made by the Independent Petroleum Association of America showed that 10 major companies averaged transporting for companies having no interest in the pipe line only 8.73 per cent of the total oil transported. *Temporary National Economic Committee,* Monograph No. 39, *Control of the Petroleum Industry by Major Oil Companies,* 23 (1941). The questionnaire of the Temporary National Economic Committee to major oil companies requesting information as to the extent to which their pipe lines transported petroleum for others than the owners indicated that probably less than 10 per cent of the crude oil and a very small per cent of the gasoline was carried for others. This small quantity moved for others was mostly for other major oil companies. Part 14-A, *Hearings before the Temporary National Economic Committee,* 7724, 7728 (1939).

[9]BEARD, *loc. cit. supra* note 7.

[10]52 STAT. 821 (1938), 15 U. S. C. § 717 (1940).

[11]Note (1942) 27 CORNELL L. Q. 399.

[12]Conservation of oil may be defined as the avoidance of waste in its recovery or use. The amount of refined petroleum products recovered depends upon the process of refining and varies with the type of refinery. The importance of conserving capital in the petroleum industry is evidenced by an estimated capital investment of 15 billions of dollars at the end of 1939, an amount exceeded only by the investment in agriculture, railroads, and public utilities. *See Temporary National Economic Committee,* Monograph No. 39, *Control of the Petroleum Industry by Major Oil Companies,* 1 (1941).

[13]The Interstate Oil Compact plan of conservation is one of controlling the production

excuse for doing so.[14] In view of the decision of the Supreme Court in *Nebbia* v. *New York*,[15] in which state regulation of the milk industry as to prices was held not to deprive a person of his property without due process of law, regulation of the entire oil industry in the public interest would surely be held to be constitutional. The recent experience of the nation's being caught in a war emergency without adequate oil transportation facilities, requiring the construction of the "Big Inch" pipe line of twenty-four inch diameter and the "Little Big Inch" pipe line of twenty inch diameter to solve this problem, is additional reason for looking at pipe line transportation as part of a national problem of insuring an adequate supply of petroleum at all times.[16] Any regulatory action taken towards the pipe line as a com-

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of crude oil according to market demand. State administrative agencies are established by state laws to prorate permitted production among producing units. An Interstate Oil Compact Commission coordinates the state programs but has no authority over production in any state. Because some states have no proration laws, the major oil companies can obtain crude oil from their holdings in these states to make up for restrictions in output from their wells in the states that have proration laws. Independent refiners with sources of oil only in states that have proration programs, such as the state of Texas, can get crude oil only in quantities sufficient to operate their plants at partial capacity. With fixed costs constituting a high proportion of total costs, their unit costs of production are high and they are at a disadvantage in competing with the majors. *See Temporary National Economic Committee,* Monograph No. 39, *Control of the Petroleum Industry by Major Oil Companies,* 14 (1941). *Also,* Part 14, *Hearings before the Temporary National Economic Committee,* 7135, 7600, 7620 (1939). The Temporary National Economic Committee questionnaire to oil companies showed that in 1926 the major companies operated their refineries at 81 per cent of capacity while "all other" companies operated at 62 per cent and that in 1937 the major companies operated at 85 per cent of capacity compared with only 49 per cent by "all other" companies. Part 14-A, *Hearings before the Temporary National Economic Committee,* 7735 (1939).

[14]Thompson, *Recent Steps in Government Regulation of Business* (1942) 28 CORNELL L. Q. 1, 13.

[15]291 U. S. 502, 54 Sup. Ct. 505, 89 A. L. R. 1469, 1495 (1934).

[16]*Government Owned Pipe Lines, Report of the Surplus Property Administration to the Congress,* (January 4, 1946) 6.

The "Big Inch" project consists of a main line extending from Longview, Texas, in the East Texas Oil Field, to the New York-Philadelphia refinery area; a feeder system in the Longview area; connections with industry lines serving the West Texas and Southwest Texas oil fields; and an intermediate terminal at Norris City, Illinois. It is 1,340 miles long and cost $78,500,000. It started operations July, 1943, having been constructed in 350 days. Up to August 31, 1945, Big Inch had moved 260,700,000 barrels of crude oil.

The "Little Big Inch" originates at Beaumont, Texas, in the Texas Gulf Coast refinery area and extends for 1,475 miles to the New York area. From Little Rock, Arkansas, it is laid on the same right-of-way and parallels the Big-Inch line. It also has an intermediate terminal at Norris City, Illinois, including extensive storage facilities. It was built in 225 days and cost $67,300,000. It began delivering gasoline in March, 1944, and during its period of operation it transported approximately 107,000,000 barrels of petroleum products. This description is from WORLD PETROLEUM (June, 1945) which adds that the two pipe lines saved the people of the United States sufficient amounts when compared with railroad rates to pay the entire cost of building and operating the systems.

mon carrier should recognize the importance to the nation of the pipe line as a low cost means of transportation and as a quick and dependable means of supplying a vital product to the armed forces in event of war.

The petroleum pipe lines were placed in the category of common carriers by the Hepburn Amendment to the Interstate Commerce Act of 1906 for the purpose of regulating rates and service.[17] The extension of the regulatory powers of the Interstate Commerce Commission to include pipe lines had the immediate objective of eliminating the monopoly power of the Standard Oil Company in the petroleum industry.[18] The Hepburn Act also brought pipe lines under the scope of the Elkins Act, making it a misdemeanor to give or to receive rebates or to depart from published rates by any device whatsoever.[19] The purpose of this action was to prevent preferences that obstructed competition. Although the petroleum pipe lines have been regulated by Congress with the broad objective of promoting competition in the oil industry, the method taken has been to regulate this phase of the industry as a public utility, the modern concept of which is controlled monopoly.[20]

The constitutionality of the Hepburn Amendment to the Interstate Commerce Act as applied to interstate petroleum pipe lines was sustained by the United States Supreme Court in 1914.[21] The Court first considered application of the Act to the pipe lines owned by the Standard Oil Company, which through monopoly power compelled producers to sell to them their oil before it was transported over the pipe lines. Since these pipe lines were common carriers in substance, it was held to be within the due process of law clause of the Fifth Amendment to require them by statute to be common carriers in form.[22] However, the Uncle Sam Oil Company, in transporting oil by pipe line from its own wells in Oklahoma to its refinery in Kansas, was considered not to be engaged in transportation within the meaning of the act, "the transportation being merely an incident to use at the end".[23] Justice Holmes, writing for the Court, said that the same fact that determines "transportation" under the Act also determines "commerce", that is, the fact of "beginning in purchase and ending in sale".[24] The *Uncle Sam Company* decision constitutes an exception to the application of the Act "to any corpo-

[17]41 STAT. 474 (1920), 49 U. S. C. § 1 (1) (1940).
[18]2 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1931) 59, 96.
[19]34 STAT. 587 (1906), 49 U. S. C. § 41 (1940).
[20]Note (1920) 33 HARV. L. REV. 576. The author of this note points out that modern public utility regulation possesses the dual aspect of regulated monopoly and regulated competition.
[21]The Pipe Line Cases, 234 U. S. 548, 34 Sup. Ct. 956 (1914).
[22]*Id.* at 561, 34 Sup. Ct. at 959.
[23]*Id.* at 562, 34 Sup. Ct. at 959.
[24]*Id.* at 560, 34 Sup. Ct. at 958.

ration or any person or persons engaged in the transportation of oil . . . by means of pipe lines".[25]

In a concurring opinion, Chief Justice White disagreed with the Court's ruling that the Uncle Sam Oil Company was not engaged in transportation in interstate commerce.[26] He concurred in the *Uncle Sam Oil Company* decision for the reason that he believed the statute unconstitutional as a violation of the due process clause of the Fifth Amendment, if applied to this company. The interpretation given by Holmes to "commerce" under the statute as involving transactions of purchase and sale is more limited than that made by Chief Justice Marshall in *Gibbons* v. *Ogden*.[27] In his opinion in that case, Justice Marshall included every species of intercourse between states as commerce, irrespective of buying and selling. Since Justice Marshall's famous decision, the Supreme Court has ruled in a number of cases that activities carried on across state lines constituted interstate commerce, although they involved no transactions of purchase and sale.[28] In a recent decision[29] upholding the Federal power to regulate fire insurance contracts of companies carrying on interstate business, the Supreme Court has taken a broad view of interstate commerce, "Not only . . . may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and *though they do not utilize common carriers* or concern the flow of anything more tangible than electrons and information". (Italics added.)[30]

Since the decision in *The Pipe Line Cases,* there have been two decisions of the Supreme Court as to the jurisdiction of the Interstate Commerce Commission over petroleum pipe lines.[31] In the *Valvoline* case, the Valvoline Oil Company had sought to enjoin and annul an order of the Interstate

[25]*Id.* at 557, 34 Sup. Ct. at 957; 34 STAT. 584 (1906), 49 U. S. C. § 1 (1) (1940).

[26]*Id.* at 562, 34 Sup. Ct. at 959.

[27]9 Wheat. 1 (U. S. 1824). *See* CORWIN, THE COMMERCE POWER VERSUS STATES RIGHTS (1936) 6.

[28]Railroad Company v. Husen, 95 U. S. 465, 470 (1877), where the driving or conveying of cattle across state lines was held to be interstate commerce; Covington and C. Bridge Co. v. Kentucky, 154 U. S. 204, 218, 14 Sup. Ct. 1087, 1092 (1894), holding the activity of people passing and repassing over a bridge between two states to be interstate commerce; Adair v. United States, 208 U. S. 161, 177, 28 Sup. Ct. 277, 281 (1908); International Textbook Co. v. Pigg, 217 U. S. 91, 107, 30 Sup. Ct. 481, 485 (1910), in which teaching by correspondence through the mails was held to be interstate commerce.

[29]In referring to Marshall's interpretation of interstate commerce, the Court said, "No decision of this Court has ever questioned this as too comprehensive a description of the subject matter of the Commerce clause." United States v. South-Eastern Underwriters Association *et al.*, 322 U. S. 533, 557, 64 Sup. Ct. 1162, 1178 (1944).

[30]*Id.* at 549, 64 Sup. Ct. at 1171.

[31]Valvoline Oil Co. v. United States, 308 U. S. 141, 60 Sup. Ct. 160 (1939). Champlin Refining Co. v. United States *et al.*, — U. S. —, 67 Sup. Ct. 1 (1946). This case was appealed from Federal District Court, 59 F. Supp. 978 (W. D. Okla. 1945).

Commerce Commission requiring it to file certain maps, charts and schedules of its pipe line properties for valuation purposes on the ground that it was not a common carrier pipe line subject to jurisdiction of the Commission.[32] The issue was whether or not the company's pipe line that was gathering oil from 9,020 wells in Pennsylvania, West Virginia and Ohio and transporting it across state lines to the company's two refineries in Pennsylvania was a private pipe line and not intended to be regulated by the Hepburn Amendment to the Interstate Commerce Act. The Court distinguished the Valvoline Company pipe line from the Uncle Sam Oil Company pipe line on the ground that the oil was not obtained from the wells of the owner-shipper but from the wells of many producers and held the company subject to regulation by the Commission. By implication, the Court left intact the *Uncle Sam Company* principle that a purely private pipe line is excepted from the Act.

This approval of the *Uncle Sam Company* ruling seems inconsistent with the Court's interpretation, in the same opinion, of the wording of the Interstate Commerce Act as amended by the Transportation Act of 1920.[33] After reviewing the legislative history of this Amendment as applied to pipe lines, the Court interpreted the term "common carrier" to apply to *all* pipe line companies and not to be modified by a subsequent clause referring to "common carriers for hire".[34]

There was considered the further question of whether or not the Valvoline Company was engaged in interstate commerce, since it only bought oil and did not sell it. The company sold surplus oil to other refineries but it was careful to include as surplus oil only that bought within the same state as the refinery to which it was sold. The Court did not discuss the question but simply concluded that there was no doubt about its being engaged in interstate commerce.[35] The essence of the case was the existence of a monopoly situation that needed public regulation.[36] By means of its extensive

[32]The Valvoline Company pipe line was held by the Interstate Commerce Commission to be a common carrier engaged in interstate commerce and subject to the Interstate Commerce Act. Petition of the Valvoline Co. in the Matter of the Valuation of Its Pipe Lines, 47 Val. Rep. 534 (1937) and 48 Val. Rep. 10 (1938).

[33]41 STAT. 474 (1920), 49 U. S. C. § 1 (1940).

[34]Valvoline Oil Co. v. United States, 308 U. S. 141, 146, 60 Sup. Ct. 160, 162 (1939). *See* note 79 *infra.*

[35]*Id.* at 144, 60 Sup. Ct. at 161.

[36]"The practice of compelling producers to sell at the well before admitting their oil to the lines was widely used as a means of monopolizing the product before the Hepburn Amendment in 1906. Whether the oil so owned and transported was ultimately used by the carrier in its own operations or sold to others was in this connection immaterial. Certainly one would find a public interest in the sole means of transporting the commodity from thousands of wells for thousands of producers. This was covered by the

system of gathering lines, the Valvoline Company was in a position to control the price of crude oil at the wells unless it was required by regulation to permit local producers to use its trunk pipe line as a common carrier. Thus, in holding Valvoline subject to the jurisdiction of the Interstate Commerce Commission, the Court was consistent with the purpose of the Hepburn Amendment to the Interstate Commerce Act as applied to petroleum pipe lines to enforce competition in the petroleum industry. But in approving the *Uncle Sam Company* ruling, the Court was inconsistent with its interpretation of the wording of the Act and the evident intent of Congress in passing the Act.[37]

The recent *Champlin Refining Company* case also involved the pipe line as an instrument of monopoly power. In June, 1944, Champlin brought suit in a Federal District Court to enjoin the enforcement of the order of the Interstate Commerce Commission to file with the Commission information for use in the valuation of the company's gasoline pipe line properties. The Commission had ruled that the pipe line of Champlin was a common carrier subject to the provisions of the Interstate Commerce Act.[38] The Federal District Court upheld the Commission's ruling.[39] The case was appealed by Champlin to the United States Supreme Court. A decision of the Supreme Court, November 18, 1946, upheld the ruling of the Commission and the decree of the District Court.[40]

Pipe Line decision." *Id.* at 144-5, 60 Sup. Ct. at 162. The company contended that it had no monopoly over the outlet for the oil produced. However, according to testimony taken by the Interstate Commerce Commission, in the event the Valvoline Co. should refuse to accept the oil, the producers could receive service from other pipe lines serving as common carriers only if they were able to tender at least five barrels of oil per day per mile of pipe line extension necessary to make the connection. The average run of oil from all the wells served by the Valvoline Co. was but a little over a barrel per day per mile of pipe line extension, so this requirement operated to deprive these producers of another pipe line outlet for their oil. Petition of the Valvoline Oil Company in the Matter of the Valuation of Its Pipe Lines, 48 Val. Rep. 10, 12 (1938). The Interstate Commerce Commission did not contend that the Valvoline Company had a monopoly over the outlet of oil but that the pipe line was properly subject to regulation because of the widespread public interest in the Company's operations. *Id.* at 15.

[37] 2 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1931) 97, n. 185. "While some doubt was expressed as to the constitutional validity of embracing *all* pipe lines in interstate commerce, there was complete agreement in the legislative debate that this was the intent of the amendment." *Id.* at 101, n. 200. *See also* In the Matter of Pipe Lines, 24 I. C. C. 1, 4-6 (1912), where the Interstate Commerce Commission held all pipe lines subject to its jurisdiction; Prairie Oil and Gas Co. v. United States, 204 Fed. 798 (1913), where the Commerce Court held the Hepburn Act unconstitutional as to pipe lines.

[38] Champlin Refining Co., Valuation of Pipe Line, 49 Val. Rep. 463, 467 (1942), *id.* at 542, 548 (1944).

[39] Champlin Refining Co. v. United States, 59 F. Supp. 978 (W. D. Okla. 1945).

[40] Champlin Refining Co. v. United States *et al.* 329 U. S. 29, 67 Sup. Ct. 1 (1946).
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The pipe line in question was used for transporting gasoline from the refinery of the Champlin Refining Company at Enid, Oklahoma, to terminal points at Hutchinson, Kansas, Superior, Nebraska, and Rock Rapids, Iowa.[41] The line is of six inch pipe, 516 miles in length, lying in five states. Deliveries were made by means of truck or railroad tank car from storage tanks at the terminal points to the bulk plants[42] of jobbers and to 248 company owned bulk plants, which served 316 company-owned retail service stations and other local dealers. Champlin carried only gasoline that it owned; it had never held itself out nor been asked to serve as a carrier for others; there were no facilities for putting any petroleum products into the line other than at the Enid refinery.

On the basis of these facts, Champlin contended that it was operating as a private carrier and consequently was not subject to the jurisdiction of the Interstate Commerce Commission.[43] No tariff stating transportation charges had been filed with the Interstate Commerce Commission or other regulatory body. The Interstate Commerce Commission claimed jurisdiction on the ground that pipe line companies transporting oil from one state to another were declared common carriers by the Interstate Commerce Act.[44] On the theory that Champlin was engaged in transportation for the public in carrying gasoline to market, the Commission considered the interpretations of the Act by the Supreme Court in *The Pipe Line Cases* and the *Valvoline* case applicable to it.[45] On the other hand, Champlin contended that its operations were unlike those of the Standard Oil Company and the Valvoline Oil Company, because it was not purchasing oil from the public before carrying

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[41]Champlin Refining Co., Valuation of Pipe Line, 49 Val. Rep. 463, 464 (1942).

[42]A bulk plant is a storage station, consisting of one or more tanks and a loading rack, and usually a warehouse, located within trucking distance of the retail outlets.

[43]The pipe line had been constructed by the Cimarron Valley Pipe Line Company, a wholly owned subsidiary of Champlin chartered as a common carrier and possessing the power of eminent domain, but it had been sold to Champlin before operations began so that Champlin could operate it as a private products line separate from the common carrier properties. Condemnation suits in connection with acquisition of a right of way had been instituted but were dismissed and satisfactory settlements made with the land owners. Champlin Refining Co., Valuation of Pipe Line, 49 Val. Rep. 463, 465 (1942). Although the power of eminent domain had not been exercised, undoubtedly its possession by Champlin facilitated the settlements with the contesting land owners. The Supreme Court has ruled that the exercise of the right of eminent domain by a pipe line company is to be taken as one indication of common carrier status. Producers Transportation Co. v. R. R. Comm., 251 U. S. 228, 231, 40 Sup. Ct. 131, 133 (1920). Where common carrier benefits are realized through possession of a privilege, regulation would seem to be justified as fully as when the benefits are received directly through exercise of the privilege.

[44]Champlin Refining Co., Valuation of Pipe Line, 49 Val. Rep. 542, 545 (1944).

[45]*Id.* at 548.

it but was operating its pipe line as a plant facility in connection with its refining operations.[46]

Pricing policies of Champlin were taken by the Commission as indicative that the pipe line was operated actually, although not technically, as a common carrier for hire, as were the pipe lines of Standard and Valvoline.[47] Gasoline was sold to jobbers at the terminal points at prices determined by taking the spot, or f.o.b. price of gasoline at Enid and adding a differential equal to the through railroad rates from Enid to the final destination and subtracting the charges borne by the purchaser for the short haul transportation from the pipe line terminal to the purchaser's place of business. Departures from the prices arrived at by this formula were made when necessary to meet competition.[48] The effect of these transactions upon jobbers was the same as if they had bought the gasoline at the refinery and had transported it by rail common carrier to the destination. In sustaining the valuation order of the Interstate Commerce Commission, the District Court employed reasoning similar to that of Justice Holmes in *The Pipe Line Cases* and stated, ". . . the effect on the public is the same as if title passed to the purchaser at the refinery. The purpose of the broad coverage of the Act was to make it impossible for pipe line carriers to escape its terms upon such technicalities."[49]

In the opinion rendered by Justice Jackson, the Supreme Court did not set forth the operations of Champlin as tantamount to those of a common carrier, as did the Interstate Commerce Commission and the District Court. However, the Court ruled "that Champlin's operation is transportation within the meaning of the Act and that the statute supports the Commission's order to furnish information,"[50] since "the controlling fact under the statute is transporting commodities from state to state by pipe line."[51] Because Champlin was operating "to put its finished product in the market in interstate commerce at the greatest economic advantage"[52] and was pricing its product so as to include a separate charge equal to rail freight rates to cover its transportation by pipe line,[53] the Court considered the operations of Champlin significantly different from those of the Uncle Sam Oil Company.

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[46]*Id.* at 545.
[47]*Id.* at 543 and 548.
[48]Champlin Refining Co., Valuation of Pipe Line, 49 Val. Rep. 463, 466 (1942); *see* notes 75 and 77 *infra.*
[49]Champlin Refining Co. v. United States, 59 F. Supp. 978, 981 (W. D. Okla. 1945).
[50]Champlin Refining Co. v. United States *et al.*, 329 U. S. 29, 67 Sup. Ct. 1, 3 (1946).
[51]*Ibid.*
[52]*Ibid.*
[53]*Ibid.*

While differentiating the operations of Champlin from those of the Uncle Sam Oil Company, the Court was not willing to say that Champlin could be held to the obligations of a "conventional common carrier" under the Act.[54] This question "is too premature and hypothetical to warrant consideration on this record."[55] It was considered that Congress had the constitutional power under the interstate commerce clause to authorize the Commission to require either a private carrier or a common carrier to furnish "information as to facilities being used in interstate marketing of its product."[56] Consequently, the Court did not find it necessary to rule on whether Champlin was a common carrier for all purposes under the Act. Thus, the ruling of the Court is that Champlin may be classified as a common carrier for the purposes of obtaining information to value its pipe line properties, and that it may or may not be so classified for other purposes. In a dissenting opinion, a minority of four justices took the view that Champlin was not a common carrier under the Act,[57] and that to subject it to the Act for purposes of valuation was to subject it to other requirements of the Act, such as to "provide equal and reasonable transportation to all carriers" and to "file a schedule of rates."[58] In a petition for a rehearing of the case before the Supreme Court, Champlin objects to the ruling of the Court on the ground that it is an erroneous interpretation of Section 19a of the Act, which requires the Commission to "investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this chapter,"[59] the words "this chapter" being considered to include the entire Interstate Commerce Act.[60] Champlin complains that the Court is directing it to do an impossible thing, "viz., retain our status as a private carrier, . . . , and at the same time file a 'common carrier' valuation report and adopt the common carrier System of Uniform Accounts as prescribed by the Interstate Commerce Commission."[61] The Court does not require Champlin to remain a private carrier. Champlin is simply not required to be a common carrier. The argument advanced by the Court minority and reiterated by Champlin in its petition for a rehearing of the case that a pipe line must be held to be a common carrier before it can be required to submit

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[54]*Id.* at 4.
[55]*Ibid.*
[56]*Ibid.*
[57]*Id.* at 6.
[58]*Ibid.*
[59]37 STAT. 701 (1913), 49 U. S. C. § 19a (1940); *see* note 115, *infra.*
[60]Petition of Appellant for Rehearing, p. 23, 24, Champlin Refining Co. v. United States *et al.*, 329 U. S. 29, 67 Sup. Ct. 1 (1946).
[61]*Id.* at 3.

information for its valuation as a common carrier seems valid. In sidestepping the fundamental question of whether gasoline pipe lines carrying gasoline for their owners to distant markets can be regulated as common carriers to achieve competition among shippers in the petroleum industry, the Court seems not to have met the legal and economic issues presented by the case.

In holding that Champlin is not a proper subject of regulation under the Interstate Commerce Act the opinion of the Supreme Court minority does not recognize the economic realities of the case. It found no important difference in Champlin's operations and those of the Uncle Sam Oil Company. "Each carries its own oil for the same ultimate purpose—to reach the market."[62] How much was charged by Champlin for its gasoline and how the charge was calculated were considered to have no bearing upon the question of whether or not Champlin was a common carrier. "Naturally some transportation cost must be added to the refinery price for deliveries elsewhere."[63] These words indicate a willingness to sacrifice fact to form. In charging prices equal to the costs to competitors of getting gasoline into the markets by an inferior means of transportation Champlin demonstrates the ability to command in the market the buying of its gasoline shipped by pipe line. But the Court minority finds no intent to counteract such power over markets for gasoline since "the evil sought to be remedied was the mastery of oil through control of the gathering facilities"[64] at the time the Hepburn Amendment to the Interstate Commerce Act was passed. Also, in its petition for a rehearing of its case before the Supreme Court,[65]

[62]Champlin Refining Co. v. United States *et al.*, — U. S. —, 67 Sup. Ct. 1, 5 (1946).
[63]*Id.* at 6.
[64]*Id.* at 5.
[65]The petition of Champlin Refining Co. for a rehearing rests principally upon (a) the analogy to the *Uncle Sam Oil Co.* case, (b) that interstate commerce in this transportation ends when the gasoline comes to rest in storage tanks at terminal points, (c) that there is no public interest in the interstate transmission, as the transactions with the public take place after the interstate commerce has thus ended, and finally (d) that the movement of the gasoline here is like the railroad carrying coal for the coal company from its mine in Pennsylvania to its processing plant in Ohio, whereby the subsequent carriage of the coal to market in Ohio was held not to come under the Interstate Commerce Act. Pennsylvania R.R. v. Public Utilities Comm. of Ohio, 298 U. S. 170, 56 Sup. Ct. 687 (1936).

Since jurisdiction over petroleum pipe lines seems to depend upon dealing with the public in interstate commerce, continuity of movement would be a matter of importance in determining whether interstate operations in petroleum are of such a character as to bring pipe lines under the Interstate Commerce Act. In that connection it may be observed that many of the sales and deliveries in the *Champlin* case were pursuant to yearly contracts or were spot sales on arrival of the product at the terminals, and terminal storage was merely to facilitate delivery to customers hence directly related to transactions with the public in interstate commerce. On the other hand, in both the

Champlin gives considerable emphasis to the similar argument that Congress could not have intended to regulate gasoline pipe lines, because gasoline pipe lines were not in use at that time and were first used to transport gasoline from refinery to market in 1930. To accept this line of reasoning is to preclude that flexibility in the administration of a public utility law needed to meet changing economic conditions and to deny the evident foresight of the law makers in inserting the words "or other commodity" in the paragraph describing the pipe line uses subject to the Act.

Economic reality compels the conclusion that the operations of Champlin affected the public in the same way as the operations of the Standard Oil Company and the Valvoline Oil Company. Standard and Valvoline could set the prices for crude oil in the fields and could compel producers to sell oil to them at those prices, because they had control of the only effective means of transportation. Consequently, the Supreme Court ruled that these pipe lines were in substance common carriers.[66] Similarly, control of the only effective means of transporting gasoline into certain areas gave to Champlin the power to control the price of gasoline in markets and to compel the public to deal with it. Although rail transportation was available, it did not present to jobbers an effective means of getting gasoline. The cost of shipping gasoline by rail is more than twice that of shipping by pipe line.[67] This difference in cost afforded to Champlin the ability to cut its wholesale and retail prices for gasoline so as to reduce greatly, if not to eliminate, in certain areas the competition of non-integrated refiners, who shipped in gasoline by rail and truck. Jobbers and dealers in gasoline were as much compelled to buy from Champlin as producers were to sell to Standard and Valvoline. Champlin endeavored to keep its prices at a maximum, which

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Uncle Sam case and the *Pennsylvania Railroad* case the continuity of movement of the oil and the coal was broken by a processing stage before there were sales to the public, hence analogy to the operations of the Champlin Co. here is lacking.

[66]The Pipe Line Cases, 234 U. S. 548, 561, 34 Sup. Ct. 956, 959 (1914); Valvoline Oil Company v. United States, 308 U. S. 141, 145, 60 Sup. Ct. 160, 162 (1939). Where an oil company bought only a small part of the crude oil produced in fields tributary to the pipe line which it operates and there was competition in the purchase of this oil with a number of other oil pipe lines, the Supreme Court of California held the pipe line not to be a common carrier or engaged in transporting oil for the public. Associated Pipe Line Co. v. Railroad Commission, 176 Cal. 518, 169 Pac. 62, L. R. A. 1918C, 849, 855 (1917).

[67]Pogue, *Economics of the Petroleum Industry*. Part 14, *Hearings before the Temporary National Economic Committee*, 7457 (1939). "Comparative costs per ton-mile are approximately 8.3 mills by rail, 3.2 mills by pipe line, and 1.25 mills by tank vessel." *Id.* at 7476. Because "the average cost of pipe line transportation probably does not exceed 4 mills per ton-mile, which contrasts with an average cost of movement by rail of approximately 8 mills per ton-mile," Mr. Pogue concludes that "no natural competition can persist between oil pipe lines and the railroads." *Id.* at 7474.

was approximately what it cost jobbers to obtain gasoline from non-integrated Oklahoma refiners by rail, but it lowered prices when necessary and to the extent necessary to get business. A competitive market depends upon the presence of a large number of sellers operating under similar cost conditions. Only then can buyers force a seller to price his products in close proximity to his costs.[68] The large amount of capital required to build pipe lines prevents their employment by small refining companies.[69] These companies might conceivably have competed with Champlin on the basis of refinery costs,[70] but they could compete on the basis of transportation cost only if Champlin were required to make its pipe line facilities available to them at reasonable rates.

That Champlin succeeded by means of its pipe line in obtaining considerable monopoly power in markets over a vast area is indicated by statements in Champlin's brief before the Supreme Court.[71] After the construction of its pipe line in 1935, it was able to increase its business from a very low volume to a point where, during the first six months of 1941, its sales in the states of Colorado, Kansas, Nebraska, Iowa, Minnesota, and South Dakota amounted to 3.5 per cent of the whole business of the petroleum industry in these states. In obtaining this volume of business, Champlin charged prices based on competitors' prices at the jobbers' places of business, which were necessarily high enough to compensate for rail freight rates. That its proportion of the total business was a large amount for one company is indicated by the fact that Champlin was one of the eight or nine largest

[68]Clark, Social Control of Business (1939) 126, 136, 139.

[69]The total investment in Champlin's pipe line and appurtenant facilities was $3,189,028. Champlin Refining Co., Valuation of Pipe Line, 49 Val. Rep. 463, 464 (1942). The total investment in gasoline pipe lines by the end of 1938 was $44,000,000. This represents ownership by 17 major oil companies and Champlin. The largest gasoline pipe line investment was that of the Great Lakes Pipe Line Co., $17,966,709. This pipe line was jointly owned by 8 major oil companies. *See* Part 14-A, *Hearings Before the Temporary National Economic Committee,* 7728, 7729 (1939). Testimony taken by that Committee indicates that ownership of trunk pipe lines is within the reach of the ordinary independent operator only if he pools his resources with other operators. *Digest of Petroleum Industry Hearings before Temporary National Economic Committee,* American Petroleum Institute, 40 (1942).

[70]According to Pogue, small refineries can be constructed with the same physical efficiency as large ones, but "the natural economic advantage of large-scale operations in areas tributary to concentrated markets has tended to develop refining on a mass-production basis." Thus, it appears that the chief need of the small independent refiner is to attain an efficient means of reaching the markets. In 1938, there were 104 refinery plants with 78.7 per cent of the operating capacity of the country and 327 plants with 21.3 per cent of the capacity. Part 14, *Hearings before the Temporary National Economic Committee,* 7457 (1939).

[71]Brief for Appellant, p. 5, Champlin Refining Co. v. United States *et al.,* — U. S. —, 66 Sup. Ct. 88, 173 (1945).

suppliers of gasoline in these six states, and the principle major oil company doing business in these states in 1938 did only 16.5 per cent of the total business in that year.[72] Also, the percentage of business done by Champlin throughout the six states does not demonstrate its greater competitive advantage in more limited market areas near its pipe line terminals within those states. Trade connections established by Champlin throughout this area before 1935 help account for its great increase in business.[73] Some of the increase may be explained as the regaining of former business lost to major oil companies that had extended into these states gasoline pipe lines and crude oil pipe lines to serve refineries newly located there.[74] But the major oil companies were favorably situated to retain their business because of their pipe lines and strategic refinery locations. They had the same policy as Champlin of basing prices on refinery prices and adding freight charges from Group Three (Oklahoma, generally from Tulsa).[75] These uniform price policies might be the result of the operation of the principle of monopolistic competition that where only a few large sellers are operating in a market each seller tends to determine his price policy according to what he believes the effect will be upon rival sellers.[76] Again, this might be the result of collusive agreements among the large sellers.[77] The absence of price competition among the major sellers leads

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[72]The Standard Oil Co. of Indiana was the principal major oil company operating in these six states in 1938. Of a total consumption of 50,326,381 barrels of gasoline in these states in 1938 it sold 8,303,815 barrels, or 16.5 per cent. The Stanolind Pipe Line Co., owned by Standard Oil Co. of Indiana, runs a trunk crude oil pipe line from Wyoming east across Nebraska and Kansas to near Kansas City, where it is connected to a trunk crude oil pipe line running from Oklahoma to Kansas City and to Chicago. *See* Minnelusa Oil Corp. *et al.* v. Continental Pipe Line Co. *et al., loc. cit. infra* note 161.

Computations made from data in Part 14-A, *Hearings before the Temporary National Economic Committee,* Tables 38a and 38b, 7814-7817 (1939), show that other major oil companies, operating in these states, ranked in order of gasoline sold in 1938, were: Phillips Petroleum Co., 9.8%; Consolidated Oil Corp., 7.5%; Socony Vacuum Co., 7%; Texas Corp., 6.4%; Skelly, 6%; Continental Oil Co., 5.6%; Shell Union Oil Corp., 3.9%; Cities Service, 2.7%.

[73]Champlin Refining Co., Valuation of Pipe Line, 49 Val. Rep. 463, 464 (1942).

[74]*Ibid.*

[75]Both Champlin and the major oil companies used basing point price systems, determining their prices in the markets according to the spot market price of gasoline at Tulsa, Oklahoma, as shown in the Chicago Journal of Commerce, plus freight charges from Oklahoma to destination. *See* Champlin Refining Co., Valuation of Pipe Line, 49 Val. Rep. 463, 466 (1942); Part 14-A, *Hearings before the Temporary National Economic Committee,* Appendix VI (1939); United States v. Socony Vacuum Oil Co., Inc., *et al.,* 310 U. S. 150, 192, 194, 60 Sup. Ct. 811, 830, 831 (1940); *see* note 77 *infra.*

[76]CLARK, SOCIAL CONTROL OF BUSINESS (1939) 134; CHAMBERLAIN, THE THEORY OF MONOPOLISTIC COMPETITION (1946) 46-50.

[77]In the Madison Oil case, fourteen major oil companies were indicted and convicted of engaging in collusive agreements, in violation of the Sherman Anti-Trust Law, to establish uniform tank car prices of gasoline to jobbers in the Middle West. United

to the conclusion that Champlin increased its business at the expense of the small, independent refiners who shipped gasoline from Oklahoma by rail and truck. Thus, it appears evident that Champlin had considerable monopoly power in markets covering a vast area and was operating, in substance, if not in form, as a common carrier, as were Standard and Valvoline.

Irrespective of the fact that Champlin used its pipe line to serve the public directly and the Uncle Sam Oil Company did not, the wording of the Interstate Commerce Act as amended by the Transportation Act of 1920 defining the term "common carrier" to "include all pipe line companies"[78] is sufficient basis for bringing both Champlin and a company operating as did the Uncle Sam Oil Company under the Act. In both the *Valvoline* and the *Champlin* cases, the Supreme Court interpreted the words of the Act to bring all interstate pipe lines under the jurisdiction of the Commission.[79] Yet, in both cases the Court deliberated the proposition of the appellants that the pipe line in question did not come under the Act because it was in the category

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States v. Socony Vacuum Oil Co., Inc., *et al.*, 23 F. Supp. 937 (W. D. Wis. 1938). These convictions were upheld by the Supreme Court in United States v. Socony Vacuum Oil Co., Inc., *et al.*, 310 U. S. 150, 60 Sup. Ct. 811 (1940). The method taken to control prices to jobbers in the Middle West was to control the Mid-Continent spot market prices for gasoline through an informal gentlemen's agreement among the majors to buy the distress gasoline of about 17 independent refiners in the Mid-Continent area,—gasoline for which these refiners had no regular outlets and insufficient storage capacity and which, therefore, had to be sold for whatever price it would bring. Standard Oil Company (Indiana) was known as the price leader throughout the Midwestern area. "Its posted retail price in any given place in the Midwestern area was determined by computing the Mid-Continent spot market price and adding thereto the tank car freight rate from the Mid-Continent field, taxes and 5½ cents. The 5½ cents was the equivalent of the customary 2 cents jobber margin and 3½ cents service station margin. In this manner the retail price structure throughout the Midwestern area during the indictment period was based in the main on Mid-Continent spot market quotations, or as stated by one of the witnesses for the defendants, the spot market was a 'peg to hang the price structure on'." *Id.* at 192, 60 Sup. Ct. at 830.

[78]41 STAT. 474 (1920), 49 U. S. C. § 1 (1940).

[79]In the *Valvoline* case, the Court stated, "Section 1 (3) defines common carrier to include 'all pipe line companies.' If this definition is not limited by the subsequent clause 'engaged . . . as common carriers for hire,' *extended consideration of these characteristics of a private carrier is unnecessary as the language of the definition is decisive.*" (Italics added.) As to the clause, "engaged as common carriers for hire," the Court stated, "As now written the section brings railroads under the Act by means of the last clause of subsection (3) only. This clause is a conjunctive and not a modifier. *It does not affect the generality of the first clause as to pipe line companies.*" (Italics added.) Valvoline Oil Co. v. United States, 308 U. S. 141, 144, 145, 60 Sup. Ct. 160, 162 (1939).

In the *Champlin* case, the Court stated, "Admittedly Champlin is not a common carrier in the sense of the common law carrier for hire. However, the Act does not stop at this but goes on to say that its use of the term 'common carrier' is to include all pipe line companies—a meaningless addition if it thereby included only what the term without more always had included." The interpretation in the *Valvoline* case of the words of the Act is accepted in footnote 4 of the *Champlin* opinion. Champlin Refining Co. v. United States *et al.*, — U. S. —, 67 Sup. Ct. 1, 2-3, n. 4 (1946).

of the Uncle Sam Oil Company. As mentioned earlier, Justice Holmes excepted the Uncle Sam Company from the coverage of the Hepburn Amendment to the Interstate Commerce Act because he did not believe it engaged either in interstate commerce or transportation under the Act.[80] His view of interstate commerce does not correspond with that generally taken by the Court, and his interpretation of "transportation" does not correspond with the evident intent of the legislation[81] or with the Court's interpretation in the *Valvoline* case of the words "common carrier." When the case of Champlin was before the District Court, the Court advanced the opinion that Justice Holmes had excluded the Uncle Sam Oil Company from the jurisdiction of the Act because it was a private carrier[82] in operation at the time the Hepburn Amendment to the Interstate Commerce Act was passed and to have classified it as a common carrier would have been arbitrary and in contravention of the due process clause of the Fifth Amendment.[83] Inasmuch as Champlin began operations after the statute was passed and Justice Holmes had upheld the applicability of the statute to future pipe lines,[84] this Court could see no legal objection to the regulation of Champlin, even though it be considered a purely private carrier. But the statute makes no distinction between "existing" pipe lines and "future" pipe lines.[85] Therefore, it is illogical to make its applicability depend upon the time a carrier began operations.

Economic change in the employment of crude oil pipe lines presents a realistic argument to the Court for no longer accepting the principle of the *Uncle Sam Company* decision. During the early period in the development of the oil industry refineries were located in or near the oil fields.[86] A pipe line supplying a refinery from private wells in nearby oil fields could be of little use to anyone other than the owner of that refinery. The tendency in recent years has been for the large oil companies to locate refineries near concentrated markets and to bring oil to the refineries by crude oil pipe lines. Mass markets permitted large refinery installations to be operated at

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80*See* note 25 *supra*.

81*See* 2 SHARFMAN, *loc. cit. supra* note 37.

82*See* 4 WILLISTON, CONTRACTS (Williston and Thompson, Rev. ed. 1936) § 1071. A private carrier is here defined as one "who carries its own products or products in which it has a property interest."

83Champlin Refining Co. v. United States, 59 F. Supp. 978, 981 (W. D. Okla. 1945).

84The Pipe Line Cases, 234 U. S. 548, 560, 34 Sup. Ct. 956, 958 (1914).

85Before the Supreme Court decision in the *Pipe Line Cases*, a well-known legal periodical carried an article stating the opinion that the Hepburn Act was unconstitutional because it applied to purely private pipe lines already in existence. Note (1912) 26 HARV. L. REV. 631.

86Pogue, *Economics of the Petroleum Industry*, Part 14, *Hearings before the Temporary National Economic Committee*, 7457 (1939). *See* note 70 *supra*.

full capacity and economies of mass production to be realized. The pipe lines reduced transportation costs, and the refineries were made less dependent upon particular oil fields. Conceivably, a large oil company could carry to its refinery through its pipe line crude oil obtained solely from its own wells. In not buying the oil from the public before transporting it, it would be operating analogously to the Uncle Sam Oil Company, and would not be a common carrier according to the Court's ruling. But competition requires that independent refiners be able to locate in the concentrated markets and obtain crude oil by means of pipe lines. Legislation sought to achieve a competitive condition in the oil industry by requiring the major oil companies to permit other shippers use of their lines.[87] In view of the purpose of the legislation, the questionable basis for the ruling of Justice Holmes in the *Uncle Sam Oil Company* case, and the variance of the ruling of Justice Holmes with recent Court interpretations of the wording of the Interstate Commerce Act, the Supreme Court should accord to the Interstate Commerce Commission unequivocal jurisdiction over all interstate pipe lines, regardless of whether or not they are employed in serving the public directly. This move would correspond to economic change that has taken place since the *Uncle Sam Company* case was decided.

If the Interstate Commerce Commission is to prosecute the mandate of Congress to make pipe lines instruments of competition in the petroleum industry, ambiguities surrounding its jurisdiction must be removed. The decision of the Supreme Court in the *Champlin* case leaves important jurisdictional questions unsettled. Can a gasoline pipe line owned and operated by an integrated oil company and used to carry gasoline from the company's refinery to markets in other states be required to serve equally and at reasonable charges all shippers of gasoline who wish to avail themselves of it and who can satisfy reasonable requirements as to its use? Can the same requirements be made of a crude oil pipe line owned and operated by an integrated oil company and used to carry crude oil interstate from the company oil wells to its refinery located in a *distant* market? Confused handling of questions of jurisdiction by the Supreme Court seems to require action by Congress to clear up the muddle. Inasmuch as the Natural Gas Act of 1938,[88] which regulates the transmission of natural gas across state lines and its sale for resale, has been upheld as constitutional by the Supreme Court,[89] further legislation placing all interstate pipe line operations undis-

[87]*See* 2 SHARFMAN, *loc. cit. supra* note 18 and note 37.
[88]52 STAT. 821 (1938), 15 U. S. C. § 717 (1940).
[89]Illinois Natural Gas Co. v. Central Illinois Public Service Co. *et al.*, 314 U. S. 498, 62 Sup. Ct. 384 (1942).

putably under the jurisdiction of the Interstate Commerce Commission should be within the power of Congress to enact. Indeed the existence of tbat power seems to be conceded by all the justices in the *Champlin* case.

Regulation by the Interstate Commerce Commission

The Interstate Commerce Commission construes broadly its jurisdiction over interstate pipe lines. The assumption of jurisdiction by the Commission over the pipe line operations of the Valvoline Oil Company and the Champlin Oil Company illustrate the broad view of its jurisdiction.[90] The Commission has recognized the principle set forth by the Supreme Court in the *Uncle Sam Oil Company* case that purely private pipe line operations are not subject to its jurisdiction.[91] A recent ruling, however, indicates application in reverse of the principle set forth by the Supreme Court that a pipe line should be considered a common carrier under the Interstate Commerce Act when its operations are common carriage in substance but not in form.[92] In this case, a pipe line that was in substance a purely private carrier was designated a common carrier because one aspect of its operations took that *form*. A line only .56 miles in length, built by a shipper of crude oil and serving purely to connect the owner's refinery with a trunk pipe line operated by another refining company, was held to be a common carrier pipe line within the Interstate Commerce Act because the shipper-owner had concurred in the published rates covering jointly the haul over the trunk line and the connecting line. This was done in spite of evidence that the shipper had constructed the line as his only means of obtaining use of the trunk pipe line facilities and had joined in the published rates under economic duress.[93] One commissioner, in a dissenting opinion, objected to this classification of the connecting line as a common carrier, comparing this line to side tracks and spur tracks built by shippers of railroads for their own private convenience.[94]

That the connecting line is engaged in interstate commerce would seem to follow from Supreme Court decisions[95] in which belt railroad lines per-

[90]Petition of the Valvoline Oil Company in the Matter of Valuation of Its Pipe Lines, 47 Val. Rep. 534 (1937) and 48 Val. Rep. 10 (1938); Champlin Refining Co. Valuation, 49 Val. Rep. 463, 467, 542, 548 (1942).

[91]Gulf Pipe Line Co., 47 Val. Rep. 752, 755 (1938); Petition of the Valvoline Oil Company in the Matter of Valuation of Its Pipe Lines, 47 Val. Rep. 534, 538 (1937); 48 Val. Rep. 10, 14 (1938).

[92]Minnelusa Oil Corp. *et al.* v. Continental Pipe Line Co. *et al.*, 258 I. C. C. 41 (1944).

[93]*Id.* at 45.

[94]See Commissioner Alldredge's opinion, dissenting in part, *id.* at 62.

[95]United States v. Union Stockyard Co., 226 U. S. 286, 33 Sup. Ct. 83 (1912); United States v. California, 297 U. S. 175, 56 Sup. Ct. 421 (1936). *See also* Illinois Natural

forming switching operations in connection with railroad terminals were held to be engaged in interstate commerce because, in serving trunk railroad lines carrying goods across state lines, they furnished a necessary link in the chain of commerce. That the connecting pipe line is a common carrier, as were the terminal railroads, does not follow from these decisions, however. The pipe line served only the shipper-owner while the terminal railroads served all shippers using the trunk line railroads. The Supreme Court has ruled that common carrier status may result not only from what a carrier does[96] but from the right of the public to demand use of its facilities.[97] Where a common carrier railroad extended a spur track, as required by a public service commission, and exercised the power of eminent domain in acquiring the right of way, the Supreme Court held the track to be a part of the public carrier system, although it served only a single shipper and the initial cost was borne by the shipper though subject to reimbursement by others who might subsequently make use of it.[98] But in the case of the oil pipe line, the shipper made the connection between the trunk pipe line and his storage tanks and not the company operating the common carrier trunk pipe line. There is no evidence that a right of way was obtained by exercise of a right of eminent domain. The oil company operating the trunk pipe line refused to build the connecting line,[99] and required the shipper not only to build it but to join in published rates covering its operations as if it were a part of the common carrier system. Since the shipper was not using the line to furnish a service to the public and never intended anyone but himself to use the line, it is difficult to see how the public may have any right to demand use of it as a common carrier unless the wording of the Interstate Commerce Act be interpreted to mean that all pipe line companies engaged in interstate commerce are common carriers.[100]

Joint rates covering the transportation of two carriers are allowable only

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Gas Co. v. Central Illinois Service Co. *et al.*, 314 U. S. 498, 509, 62 Sup. Ct. 384, 388 (1942). Here, a natural gas company operating pipe lines wholly within a state and obtaining its supply of gas in continuous streams from sources outside of the State was held to come within the jurisdiction of the Federal Power Commission under the Natural Gas Act of 1938, since the activities of the company materially affected the volume of gas moving in interstate commerce.

[96]United States v. California, 297 U. S. 175, 181, 56 Sup. Ct. 421, 422 (1936).

[97]Tap Line Cases, 234 U. S. 1, 24, 34 Sup. Ct. 741, 746 (1914).

[98]Union Lime Co. v. Chicago & Northwestern Ry., 233 U. S. 211, 34 Sup. Ct. 522 (1914).

[99]Minnelusa Oil Corp. *et al.* v. Continental Pipe Line Co. *et al.*, 258 I. C. C. 41, 45 (1944).

[100]The United States Supreme Court refused to consider a pipe line carrying oil across state lines a common carrier in the *Uncle Sam Oil Company* decision. The Pipe Line Cases, 234 U. S. 548, 562, 34 Sup. Ct. 956, 959 (1914). See note 24 *supra*.

if both carriers are common carriers[101] and should not be taken as evidence that the participants are common carriers. A division of rates between a common carrier and a shipper who is bringing his product over his private line to the transportation line of the common carrier has been held equivalent to allowing rebates to such a shipper.[102] In the case of railroads, the duty of the public carrier railroad to serve the public is fulfilled when such carrier delivers and accepts cars at some exchange track just clear of the main track.[103] Service furnished by a shipper beyond that point for his own convenience is an industrial service for which he is not entitled to compensation from the carrier.[104] Analogously, where the trunk pipe line companies are not required by the Commission to extend service to shippers for a certain distance from the line as are railroad companies[105] and shippers make these connections for their own private benefit, there is no justification for the common carrier company charging rates covering this service and paying the shipper a share of these charges for performing this service when he is not otherwise a common carrier by pipe line.[106] Such joint rate arrangements present an opportunity for favoritism to be bestowed on certain shippers and increase the power of the integrated company to place independent shippers at a competitive disadvantage. According to the law applying to railroads, these arrangements are illegal and should not be countenanced by the Commission.

The powers of the Interstate Commerce Commission over pipe lines under the Hepburn Act have been exercised less than its powers over any other type of carrier subject to its jurisdiction.[107] Up to 1939, there had been but one complaint dealt with by the Commission relating to rates and services of oil pipe lines.[108] The general lack of complaint on the part of shippers may be explained largely by the fact that the users of pipe lines are almost

[101]Tap Line Cases, 234 U. S. 1, 28, 34 Sup. Ct. 741, 748 (1914).

[102]*Id.* at 23, 34 Sup. Ct. at 747; 2 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1931) 151.

[103]Note (1914) 27 HARV. L. REV. 579.

[104]General Electric Co. v. New York Central & Hudson River R.R. Co., 14 I. C. C. 237 (1908); New York Central & Hudson River R.R. v. General Electric Co., 219 N. Y. 227, 114 N. E. 115, 1 A. L. R. 1417, 1425 (1916); Solvay Process Co. v. Delaware, Lackawanna & Western R.R., 14 I. C. C. 246 (1908).

[105]Tap Line Cases, 23 I. C. C. 277, 294 (1912). Here the Commission laid down the rule that a line carrier has the obligation to extend service to any lumber mill within 3 miles of the line carrier. It would seem advisable to have a similar policy in the case of pipe lines.

[106]Tap Line Cases, 234 U. S. 1, 28, 34 Sup. Ct. 741, 748 (1914).

[107]2 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1931) 96.

[108]Thompson, *Recent Steps in Governmental Regulation of Business* (1942) 28 CORNELL L. Q. 1, 14. Temporary National Economic Committee, Monograph No. 39, Control of the Petroleum Industry by Major Oil Companies, 23 (1940).

exclusively the owners.[109] Another consideration is that it is very costly for independent shippers to bring cases before the Interstate Commerce Commission. The Commission's hands-off policy may be explained by the rapid and generally satisfactory expansion of the industry due to the tremendous increase in use of petroleum products.[110]

Since 1939, the Commission has taken regulatory action over rates and service in three cases to relieve monopolistic situations created through ownership of pipe lines by the major oil companies. As already pointed out, the economic superiority of the pipe line over other means of transporting petroleum long distances by land routes affords great competitive advantage to an oil company controlling a pipe line. However, if independent oil companies can demand service of these pipe lines as common carriers under the Hepburn Act, this advantage is lessened. In spite of common carrier status, the integrated oil companies[111] have been able to maintain their competitive advantage by charging rates greatly in excess of cost of service and by imposing burdensome service requirements upon small shippers. The chief example of the latter is the high minimum requirement placed on quantities tendered for shipment.[112]

The *Reduced Pipe Line Rates and Gathering Charges* case[113] resulted from an investigation made of crude oil pipe lines by the Interstate Commerce Commission. This investigation of thirty-seven pipe line companies carrying crude oil from the Southwest to Texas port cities and to Midwestern refinery points showed that these companies actually were not giving common carrier service as intended by law.[114] To bring about a wider use of the service, the Commission ordered each pipe line carrier to lower its rates so that it would not earn over eight per cent on the valuation placed by the Commission on its investment.[115]

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[109]Reduced Pipe Line Rates and Gathering Charges, 243 I. C. C. 115, 121 (1940). In *Hearings before the Temporary National Committee*, Part 14, PETROLEUM INDUSTRY, 7385, Mr. K. A. Crowley, an attorney for independent oil companies, testified, ". . . many small shippers can't contest an unfair rate for a lot of reasons. One is money—the expense; and the other is that he doesn't dare get into a controversy with the major company because there is not one independent that can't be squeezed and thrown out of business somewhere if they get down on him."

[110]Thompson, *Recent Steps in Governmental Regulation of Business* (1942) 28 CORNELL L. Q. 1, 14.

[111]The term "integrated oil companies" is used in this paper to mean a refining company owning a pipe line and using it to obtain crude oil or to market refined petroleum products. See note 7 *supra*.

[112]Note, *Public Control of Petroleum Pipe Lines* (1942) 51 YALE L. J. 1338, 1340.

[113]243 I. C. C. 115 (1940).

[114]*Id.* at 121.

[115]*Id.* at 144. Section 19a of the INTERSTATE COMMERCE ACT directs the Interstate Commerce Commission to investigate, ascertain, and report the value of all property

The return was deemed adequate in view of the fact that high returns had been earned by the companies, enabling them in the years 1929 to 1938 to return in dividends to their owners the entire original investment in the pipe lines and to accumulate depreciation reserves through charges to operations that largely amortized their investment.[116] These profits over and above adequate depreciation allowances were considered to nullify the argument of the pipe line companies that a high return was necessary to compensate for high industrial risks. The companies contended that their pipe lines were plant facilities and that consequently pipe line profits could not be distinguished from profits of all other operations, but the Commission was not deflected from its purpose of regulating the returns to the pipe lines as such.[117]

The Commission declined to regulate the rates "en masse as a class" because "the pipe lines are less truly competitive with each other than is the case with any of the other agencies of transport subject to our jurisdiction".[118] One Commissioner, in a dissenting opinion,[119] criticized the regulation of pipe line rates from the standpoint of each company's earnings. He insisted that it would result in each pipe line that carried oil from the mid-continent oil field to a common destination point, such as Chicago, having a rate different from the others and, in consequence, traffic would move over the line having the lowest rate, creating a need for a further lowering of the rates of this line. The approach to rate-making taken by the Commission in this case differs from that taken in regulating the rates of railroads, where competition is allowed for.[120] Since pipe lines are required by law to be public transportation agencies, affording to shippers the opportunity of shipping by any one of several pipe lines, theoretically the Commissioner's argu-

owned or used by every common carrier subject to the provisions of the Act; 37 STAT. 701 (1913), 49 U. S. C. § 19a (1940). For a detailed account of the methods used in arriving at pipe line property values, see Atlantic Refining Company Valuation, Appendix 4, 47 Val. Rep. 541, 584 (1937). The Commission made no valuation of the pipe lines until 1934, when it decided to initiate valuation proceedings. The valuations are published in special reports. See Prewitt, *The Operation and Regulation of Crude Oil and Gasoline Pipe Lines* (1942) 56 Q. J. ECON. 177, 204.

116Between Jan. 1, 1929 and June 30, 1938, the Stanolind Pipe Line Co. paid dividends of 111% of its investment in addition to charging against operations depreciation amounting to 60% of its investment. The Company with the lowest earning had been able to pay dividends ranging from 4.5% to 12% per annum on its outstanding capital stock in addition to making charges to operations for depreciation aggregating more than 62% of its total investment. Reduced Pipe Line Rates and Gathering Charges, 243 I. C. C. 115, 131 (1940).

117*Id.* at 141.

118*Id.* at 144.

119See dissenting opinion of Commissioner Mahaffie, *id.* at 145.

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ment is a valid objection to this method of setting rates. However, the pipe lines of the integrated oil companies do not actually compete with each other for traffic, so this method of setting rates is both practicable and equitable. It constitutes recognition by the Commission of the soundness of approaching regulation of petroleum pipe lines from the vertical point of view, monopolies, as compared to the horizontal point of view of competing common carriers, such as railroads. The fact that the pipe lines carry only one commodity also causes their rate problem to be different from that of the railroads. If rates for transporting petroleum were set from the standpoint of the rates of other pipe lines, they might be too high or too low from the standpoint of a fair rate of return on the investment of individual pipe lines. In the case of the railroads, the rates on specific commodities can be set to allow for competition, while the average of all rates can be maintained at a level to maintain a fair rate of return on investment.

After considering evidence as to the intermingling of crude oil shipments of varying quality and grade, the Commission decided that an excessive degree of contamination would not result from limiting the minimum tender required by the pipe lines of shippers to ten thousand barrels per shipment.[121] The previous requirements had ranged from five hundred barrels to one hundred thousand barrels. A former decision was cited as a precedent for limiting the required tender to ten thousand barrels.[122] The danger of contamination in the shipment of the different grades of crude oil was not considered as great as it was later considered where different types and grades of refined petroleum were being shipped.[123] Although no conclusion can be drawn as to the effect of such a minimum tender requirement upon the ability of the independent refineries to make use of pipe line transportation, it is certain that the very existence of this requirement places the competitive advantage with the large oil companies.[124]

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[121]Reduced Pipe Line Rates and Gathering Charges, 243 I. C. C. 115, 136 (1940).

[122]Brundred Brothers v. Prairie Pipe Line Co., 68 I. C. C. 458 (1922).

[123]Petroleum Rail Shippers Association v. Alton and Southern Railroad *et al.*, 243 I. C. C. 589 (1941). See note 157 *infra.*

[124]Independent shippers may pool their shipments in order to have a sufficient quantity of oil to meet the required tender, but one great disadvantage of this plan is that it is difficult to find individuals who wish to ship to the same destination. See Prewitt, *The Operation and Regulation of Crude Oil and Gasoline Pipe Lines* (1942) 56 Q. J. ECON. 177, 184. In order to handle large shipments of oil, the small refinery must carry an investment in large storage facilities in addition to the investment in the oil. See Note, *Public Control of Petroleum Pipe Lines* (1942) 51 YALE L. J. 1338, 1343. Since the Interstate Commerce Commission allows the pipe line company to include in its investment for rate making purposes the investment in storage facilities reasonably necessary to common carrier operations, there would seem to be no good reason why the pipe line should not be required to furnish storage facilities to small shippers for

In the case of *Petroleum Rail Shippers Association* v. *Alton and Southern Railroad et al.,*[125] independent oil refineries in the mid-continent field complained that they were being crowded out of the gasoline market in various Midwestern and North Central States. The reason, they alleged, was the charging of high and discriminatory rates by both the pipe lines and the railroads. They contended that they were losing this market to the large integrated oil companies, who charged the same rates over their pipe lines to terminal points as the railroads charged, and who received back a large part of these charges as dividends on stock owned in the pipe lines. These high dividend returns were alleged to be rebates and enabled the integrated oil companies to make price concessions and other concessions to jobbers and retailers of gasoline and to gain control over the marketing outlets.

After considering the evidence of the independent companies concerning the market, the Commission found that the decrease in their sales was not entirely due to the competitive advantage of the companies owning pipe lines.[126] Refineries in the destination territory were getting some of the lost business. There was no movement of gasoline by pipe line to these markets until 1931.[127] Since that time, the amount of gasoline moving by pipe line increased, and in 1939 it was 16.9 per cent of the gasoline consumption in the destination states.[128] However, before the development of gasoline pipe lines, there had been a great increase in the refinery capacity in the destination states, as compared to the territory of origin. This fact was due to the movement for many years of crude oil by the pipe lines of major oil companies to serve refineries located at the market and to the more recent development of new wells being opened in Illinois and Michigan.

However, much of the difficulty experienced by the independent shippers in competing in the Midwest markets was attributed by the Commission

the accumulation of oil in quantities necessary to meet the required tenders. *See* Atlantic Pipe Line Co. Valuation, 47 Val. Rep. 541, 545-548 (1937); Gulf Pipe Line Co. Valuation, 47 Val. Rep. 752, 754, 756-757 (1938); Texas Pipe Line Co., 48 Val. Rep. 249, 251-252 (1938); Magnolia Pipe Line Co., 48 Val. Rep. 775, 778 (1939). Reasonable storage facilities at the terminal points would also seem necessary, since consignees may not be prepared to accept delivery of the quantities of oil shipped. Pipe line tariffs generally provide that crude oil will not be accepted for shipment unless provision is made for immediate acceptance in the consignee's tanks at destination. *See* Prewitt, *supra,* at 186. The tariffs of the Humble Pipe Line Co. provide for free storage for five days at or near destination, with demurrage charges on oil tendered for delivery but remaining undelivered after the expiration of the free time. Humble Pipe Line Co. Valuation, 48 Val. Rep. 208, 212 (1938).

[125] 243 I. C. C. 589 (1941).

[126] *Id.* at 594, 599.

[127] The process of electric welding was applied to pipe lines about that time and permitted their use for transportation of gasoline; *id.* at 600. See note 65 *supra.*

[128] *Id.* at 602.

to high rail rates.[129] It was discovered that when the railroads increased their rates in 1938, their revenues from oil shipments greatly decreased. Therefore, while the usual rule is for rates to be set so that traffic will move, here the rates had been set so that traffic didn't move.[130] Consequently, the Commission ordered substantial reductions in the rail rates on the ground that the value of the service of hauling petroleum by rail had greatly decreased.[131] However, the Commission rejected the argument of the complainants that the rail rates should be lowered to the point of equality with the ultimate costs of pipe line transportation to the integrated oil companies after dividends from the subsidiary pipe line companies had been considered.[132] Thus, although the Commission may lower rates to meet changing competitive conditions, it may not lower them to the point of abandoning the principle of allowing charges sufficient to cover the operating costs of supplying the service plus a fair rate of return on capital invested.[133]

The Commission also recommended[134] that the railroads study carefully the proposal of the independent oil companies that multiple car rates be established to meet the competition of pipe lines. Multiple car shipments in blocks of twenty-five carloads moving intact from one consignor at one point of origin to one consignee at one point of destination would present to the railroads the principal economy[135] of less handling of cars in terminals.[136] However, such movements would necessitate additional freight train miles due to the necessity of maintaining train schedules regardless of large variations in the tonnage of petroleum shipped, the inability of many scheduled trains to handle a shipment of petroleum as great as twenty-five cars, and back-hauling resulting from more of the petroleum traffic being sent through to terminal points under multiple car rates.[137] Some of these objections would be overcome if the shipments were permitted to move at the operating convenience of the carrier, *i.e.* in restricted service,[138] instead of required to move on a definite schedule, *i.e.* in preferred service. Restricted service

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[129] *Id.* at 618.
[130] *Id.* at 639.
[131] *Id.* at 665.
[132] *Id.* at 639.
[133] See concurring opinion of Chairman Eastman, *id.* at 665.
[134] *Id.* at 655.
[135] Other economies would result from direct shipment to destination with fewer stops and less time required in shipment,—one bill of lading, one collection of charges for freight, and one entry on the way bill. See 3-B SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1936) 396, n. 141, 407.
[136] Petroleum Rail Shippers Association v. Alton & Southern Railroad, 243 I. C. C. 589, 651, 652 (1941).
[137] *Id.* at 648-650.
[138] *Id.* at 652-654.

would allow a reservoir of freight to be built up permitting the most economical loading of trains, the moving of traffic in drag service with savings in the use of locomotives of lower power rating, and the reduction in overtime hours carrying penalty rates of pay.

From the standpoint of the petroleum shipper, multiple car shipments in restricted service present the disadvantages of requiring a greater investment in tank cars and in storage facilities.[139] The oil companies make most of their shipments in leased private tank cars,[140] and the additional time of a car in transit would add to their costs of leasing cars. Where the tank car is detained by the shipper an unreasonable length of time in loading and unloading, the carrier may make a reasonable demurrage charge to compensate for the use of the car and of the track which the car occupies.[141] Even though the shipper provides his own cars, the carrier still may make a reasonable demurrage charge when the car is in the service of the railroad.[142] Also, the shipper would find it necessary to increase his investment in storage facilities at the points of origin and destination. To the extent that these factors caused an increase in the shipper's costs, the economy of the multiple car rate would be lessened.

In general, the Commission has not allowed lower rates on multiple car

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[139]*Id.* at 654. The United States Supreme Court has ruled that under the Interstate Commerce Act, the Interstate Commerce Commission does not have the power to require the railroad companies to furnish tank cars to shippers, where no question of discrimination is involved, the duty to furnish such cars, if it exists, being enforceable in the courts, and not by the Commission. United States v. Pennsylvania R.R., 242 U. S. 208, 37 Sup. Ct. 95 (1916). The cases passing directly on the question have held that tank cars are an exception to the general rule that a railroad must furnish suitable facilities to carry goods which it assumes to transport. This exception is based on the extraordinary requirement that special cars be used to carry each type of oil, making it uneconomical for the carrier to provide such cars, on the custom for such cars to be provided by private owners, and on the provision in the published tariffs of the carriers for carrying oil that carriers assume no obligation to furnish tank cars. St. Louis & S. F. R.R. v. State, 76 Okla. 60, 184 Pac. 442, 7 A. L. R. 140, 143 (1919); Chicago, R. I. & P. R.R. v. Lawton Refining Co., 253 Fed. 705 (C. C. A. 8th, 1918). See also In the Matter of Private Cars, 50 I. C. C. 652, where the Commission made inquiry into the rules, regulations and practices governing the operation of private cars on the railroads of the country. This investigation of the Commission constitutes the basis for the ruling of the Courts.

[140]*Ibid.*

[141]Brandeis, J. in Turner, Dennis & Lowry Lumber Co. v. Chicago, Milwaukee & St. Paul R.R., 271 U. S. 259, 262, 46 Sup. Ct. 530, 531 (1926). It is the duty of the shipper to load and unload carload freight. 4 WILLISTON, CONTRACTS (Williston & Thompson, Rev. ed., 1936) §§ 1099A, 1099C.

[142]For a resumé of the law of demurrage applicable to interstate railroads, see 4 WILLISTON, CONTRACTS (Williston & Thompson, Rev. ed., 1936) §§ 1099A, 1099C. Under Interstate Commerce Commission Uniform Demurrage Code private cars while in railroad service, whether on carrier's or private tracks, are subject to the demurrage rules the same as cars of railroad ownership.

shipments than on single car shipments.[143] The wholesale principle that the purchaser of large quantities of goods should pay less than the purchaser of small quantities has generally been disapproved in the transportation field, on the ground that lower rates on large quantity shipments give the large shipper a preference over the small shipper.[144] The principle is predicated upon the social desirability of maintaining an economy in which the little concern can compete with the big concern.[145]

Although the Interstate Commerce Commission has rejected as illegal the wholesale theory of rate making, it very early allowed a differential in rates between carload shipments and less than carload shipments of petroleum[146] because of marked differences in cost between the two modes of shipment.[147] This was done in spite of the complaint of a considerable number of small oil companies. This departure from the theory of equal rates to all users assumes that the carload shipment is a unit of service of a size that the majority of shippers are prepared to make.[148] The Commission has not generally required carload rates, however, and has very cautiously allowed them.[149]

The objection to multiple car rates does not apply where they are needed to meet the competition of pipe lines, since the pipe lines carry the petroleum of large shippers and not the railroads. The principle of allowing the railroads to charge mutiple car rates to meet the competition of other modes of transportation has been recognized and applied by the Commission in the case of water transportation where the unit of transportation was equivalent to a number of carloads.[150] Although there is precedence for multiple car

[143]Molasses from New Orleans, La. to Peoria and Pekin, Ill., 235 I. C. C. 485, 495-498 (1939). Here the principal Commission cases disapproving of multiple car rates are discussed. Multiple car rates on shipments of cattle, grain, cotton, and logs have been disapproved. See 3-B SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1936) 407. For application of the same rule in state regulation of railroads, see Public Service Comm. v. State *ex rel.* Great Northern Ry., 118 Wash. 629, 634, 204 Pac. 791, 793, 25 A. L. R. 186, 192 (1922).

[144]Robinson, *Business Enterprise and the Public Utility's Duty to Serve Without Discrimination* (1928) 13 MINN. L. REV. 104. See also Burlington C. R. & N. R. Co. v. Northwestern Fuel Co., 31 Fed. 652 (C. C. D. Minn. 1887).

[145]*Ibid.* See also, concurring opinion of Chairman Eastman in Molasses from New Orleans, La. to Peoria and Pekin, Ill., 235 I. C. C. 485, 502 (1939).

[146]Scofield v. Lake Shore & Michigan R.R., 2 I. C. C. 67 (1888). *See* 3-B SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1936) 407.

[147]Interstate Commerce Comm. v. Delaware, Lackawanna & Western R.R., 220 U. S. 235, 240, 31 Sup. Ct. 392, 394 (1911) extended this to express and freight forwarders' shipments.

[148]3-B SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1936) 398.

[149]*Ibid.*

[150]Molasses from New Orleans, La. to Peoria and Pekin, Ill., 235 I. C. C. 485, 487 (1939). In transporting blackstrap molasses up the Mississippi River, the Solvents Corporation operated tank barges whose capacity was equivalent to 25 tank cars.

rates on shipments of gasoline from the Southwest to the Midwest market the evidence of advantages and disadvantages to the railroads of receiving train load shipments was considered by the Commission not to be sufficient to justify the adoption of such rates.[151]

The Commission substantially reduced the rates charged by the two pipe line companies carrying gasoline from the mid-continent area to the Middle West.[152] It found the rates unreasonable from the standpoint of allowing a fair return on the fair value of the investment. Since the two companies had average earnings between 1933-1938 of about thirty per cent of the investment in their property less depreciation, the rates were clearly excessive. Business risks resulting from a diminishing supply of crude oil in the Southwest, competition of truck and water transportation, and discovery of new sources of crude oil within the destination territory were all allowed for in the setting of rates to yield a return of ten per cent on the investment in the pipe lines as determined by the Commission.[153] However, if past performance be taken as a standard, the rates set by the Commission would permit a higher return than ten per cent of the investment.[154]

The Commission found no undue preference or prejudice to exist in rates charged for pipe line transportation by the pipe lines and for rail transportation by the railroads, since these rates were charged on hauls by different carriers.[155] The practice of the pipe lines of charging proportional rates on shipments to points of destination that could be reached only by rail from the terminals of the pipe lines, so as to make the cost of shipping over the part pipe line and part rail route equal to the cost of shipping over the through rail route, was not objected to in principle. Railroads had been permitted to set rates in a similar fashion to meet competition. However, these rates were ordered eliminated, because there would be no purpose in retaining them at the much lower pipe line rates. Since the purpose of pipe line regulation is to promote competition among shippers of petroleum, the

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[151]Petroleum Rail Shippers Association v. Alton & Southern R.R., 243 I. C. C. 589, 654 (1941).

[152]*Id.* at 665. For example, the previous rate to Kansas City of 19.48 cents per 100 lbs. was reduced to 10 cents. The two pipe lines were the Great Lakes pipe line, serving eight major refining companies, and the Phillips pipe line serving the Phillips Petroleum Co. These were the two longest gasoline trunk pipe lines in the United States in 1940. In 1939, gasoline transported by these two lines to Indiana, Illinois, Michigan, Wisconsin, Minnesota, North Dakota, South Dakota, Nebraska, Iowa, and Missouri was 16.9 per cent of the total consumption in these states. *Id.* at 601.

[153]Petroleum Rail Shippers Ass'n v. Alton and Southern R.R. *et al.*, 243 I. C. C. 589, 662 (1941).

[154]*Id.* at 663.

[155]*Id.* at 640.

proportional rate should not be countenanced by the Commission. It enables uniform prices to be quoted on gasoline to bulk buyers. It serves solely to benefit the integrated company and reduces competition between integrated companies as well as between the integrated company and the independent.[156]

In setting reasonable minimum tender requirements on pipe line shipments, the Commission recognized the importance of large tenders in preventing inefficiency due to the frequent shifting from one tank to another and in preventing contamination of product through the mixing of different grades of gasoline.[157] For regular shipments, the existing minimum tender requirement of twenty-five thousand barrels was upheld. However, for shipments made subject to delayed service,[158] a minimum tender of five thousand barrels was held sufficient.

Although the Commission granted relief to the independent companies by lowering rates and changing the tender requirements, it refused to take action to eliminate certain alleged unfair marketing practices of the integrated companies on the ground that the Federal Trade Commission was the proper tribunal before which to bring these complaints. These practices were the trading of gasoline on a barter basis by the integrated companies to eliminate transporting gasoline by rail to points off the route of one company's pipe line but on the route of the other company's pipe line, local price cutting, and concessions to service stations.[159] The trading of gasoline by the major companies permits a company to place gasoline in a market distant from its pipe line at a cost much lower than that of the independent oil company that must pay the published rate of the pipe line or the rate for shipment by rail.

[156]One writer states that the proportional rate "enables those who ship by pipe line to quote a price to distributors at points distant from the pipe line terminal in such a way that the rail shipper has no advantage. The proportional rate structure also enables the user of the pipe line to enter a market area that might otherwise be closed to him. Since the gasoline lines are used almost exclusively by the large integrated companies, the proportional rate is an effective means of limiting competition among the integrated companies, or between the integrated companies and the independents." *See* Prewitt, *The Operation and Regulation of Crude Oil and Gasoline Pipe Lines* (1942) 56 Q. J. Econ. 177, 193.

[157]Petroleum Rail Shippers Association v. Alton and Southern R.R., *et al.*, 243 I. C. C. 589, 657 (1941). See note 123 *supra*.

[158]Delayed service would enable the accumulation of large enough quantities of a given type of gasoline to permit economical transportation. *Id.* at 638. The pipe line is allowed by the Interstate Commerce Commission to include in its investment for rate-making purposes, the investment in storage facilities reasonably necessary to carry on common carrier operations but it is not required to furnish these facilities. See note 124 *supra.*

[159]Some of these concessions were: low rental charges to service station lessees, the subleasing of service stations at rental charges much lower than the rental paid in the original lease of the station by the oil company, excessive commissions to agents to be passed on to dealers, and valuable free advertising displays furnished to retailers.

This practice amounts to the hauling of gasoline by the major oil companies for each other and the charging of discriminatory rates. The impotency of the Commission to stop this practice, which has the same effect as the unlawful charging of discriminatory rates, exemplifies the ineffectiveness of a regulatory approach that seeks to counteract monopoly by controlling only one of the closely related phases of the monopolist's business.

The action of the Commission in this case in lowering the rates of the railroads and the pipe lines cannot be considered a solution of the problem of competing with the integrated oil companies that confronted the independent companies. The maximum rates for rail transportation to the terminal points of the pipe lines were set much higher than the maximum rates for pipe line transportation to the same peints. Many of the independents were located several hundred miles from the pipe lines and could not readily make connections with them. Also, where they could reach the pipe lines of the integrated companies, the independent shippers had the expense of erecting storage tanks at both the point of origin and point of destination. The pipe line rates allowed were still high enough to allow the integrated company a considerable advantage over an independent shipper who might use the line, since they permitted the integrated company to employ its capital at the favorable return of ten per cent of investment after all operating costs were covered. There was still the difficulty to the small shipper of meeting a minimum tender requirement.

In the case of *Minnelusa Oil Corporation et al.* v. *Continental Pipe Line Company et al.*,[160] an independent producer of crude oil and an independent refiner complained to the Commission that rates charged for transportation over pipe lines owned and operated by refining companies that were affiliated with the Standard Oil Company of Indiana were unreasonable and discriminatory. The rates complained of were for carrying crude oil westward from fields in Wyoming to the refinery of the independent company, the Wasatch Oil Refining Company, located just outside of Salt Lake City. The integrated company, Utah Oil Refining Company, had its refinery at Salt Lake City, also. It was alleged that the pipe line company that was owned by the Utah Oil Refining Company was giving rebates and discriminating between shippers in charging excessively high rates and returning part of the charges as dividends to its owner.

A comparison of the rates charged by this pipe line company with rates charged by pipe line companies affiliated with it and carrying crude oil east-

[160]258 I. C. C. 41 (1944).

ward from the same field showed these rates to be exceptionally high.[161] The Commission ordered the rates lowered so that a rate of return of eight per cent on the investment would be earned in addition to the operating costs.[162] In passing on the propriety of the operating costs of the pipe line company from the standpoint of reasonable rates, the Commission disallowed excess profits taxes for the reason that they were abnormal and temporary[163] but allowed income taxes because they had been classified by the Supreme Court as an operating expense to be covered in setting reasonable rates.[164] The Commission justified the eight per cent return on investment as an adequate reward for the risks that were being borne for the reasons that there was good evidence of a remaining life of twenty to twenty-five years for the crude oil fields served by the pipe line, that affiliation of the principal shipper and large owner of crude oil reserves with the pipe line company assured to the pipe line company a demand for its services, that the depreciation rates would amortize the investment in the pipe line in twenty-five years, and that profits in the past exceeded one half the amount of the investment and were in addition to adequate depreciation allowances.[165] The Commission justified its allowance of a return here lower than the return of ten per cent allowed previously on investment in gasoline pipe lines on the ground that there are greater hazards and risks involved in gasoline pipe line ventures.[166] No allowance was made in the rate of return for operating conditions that were due to the geographical location of the pipe line, since operating costs reflected these conditions and were separately allowed for.

The Commission held that the high rates being charged were a violation of the provisions of the Act prohibiting special rates and rebates, undue preferences or prejudices, and the charging of other than published rates,[167]

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[161]The line going west passed over higher altitude than the line going east and in doing so had to contend with lower temperatures which increased the viscosity of the oil and the pumping costs. Also, the smaller diameter of the pipe line west as compared with the line east increased the cost of pumping. These operating differences could not fully account for the rate difference, however. *Id.* at 46.

[162]In Reduced Pipe Line Rates and Gathering Charges Case, 243 I. C. C. 115 (1940) the Commission also had allowed an eight per cent return on the valuation of crude oil pipe lines.

[163]*Id.* at 48.

[164]Galveston Electric Co. v. City of Galveston, 258 U. S. 388, 42 Sup. Ct. 351 (1922); Georgia Railway & Power Co. v. Railroad Comm. of Georgia, 262 U. S. 625, 43 Sup. Ct. 680 (1923).

[165]Minnelusa Oil Corp. *et al.* v. Continental Pipe Line Co. *et al.*, 258 I. C. C. 41, 52 (1944).

[166]*Id.* at 56.

[167]24 STAT. 379 (1887), 49 U. S. C. § 2 (1940); 24 STAT. 380 (1887), 49 U. S. C. § 3 (1940); 34 STAT. 587 (1906), 49 U. S. C. § 6 (7) (1940).

but found the new rates at much lower levels to eliminate these objections.[168] In holding these charges to be discriminatory, the Commission necessarily looked through the legal fiction of the two corporate entities, that of the pipe line corporation and of the shipper-owner refining company. The question of the shipper's right to damages because of these discriminatory rates was then considered. Since the independent refining company had concurred in the publication of joint rates covering the haul from the oil fields over the integrated oil company's trunk line and its own connecting line, it was held to be a tortfeasor up to the time of filing its complaint and, consequently, to he estopped from maintaining an action for damages under rates it was itself instrumental in imposing.[169] However, damages were allowed the independent shipper because of excessive rates paid to the integrated oil company for shipments of oil made after the time of filing its complaint. The independent oil company submitted testimony seeking to prove losses suffered through the shrinking of its sales price to meet the competition of the integrated oil company, but more adequate proof was found necessary to sustain an award of damages on this account.[170]

This action in awarding damages because of discrimination in rates should encourage other independent oil companies shipping over the pipe lines of the integrated oil companies to seek similar redress. However, in allowing a return on pipe line investment as high as eight per cent, the Commission is still permitting the integrated oil company to receive a substantial amount of the charges paid for pipe line transportation as dividends on stock ownership in the pipe lines and thereby to maintain a competitive advantage over the independent shipper.

Regulation Through the Elkins Act

Another approach to regulation of the common carrier petroleum pipe line is through the Elkins Act, which makes it a criminal offense for a person or corporation, whether carrier or shipper, knowingly to allow or to receive rebates or concessions or to depart in any way from the published tariff.[171] Under this Act, anyone guilty of accepting a rebate shall, in addition to fines imposed, forfeit to the United States three times the amount of money so received in the six months period prior to commencement of court action by the Attorney General of the United States.[172] Also, injunctive proceed-

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[168] Minnelusa Oil Corp. *et al.* v. Continental Pipe Line Co. *et al.*, 258 I. C. C. 41, 58 (1944).
[169] *Id.* at 60.
[170] *Id.* at 58.
[171] 32 STAT. 847 (1903), 49 U. S. C. § 41 (1) (1940).
[172] 34 STAT. 588 (1906), 49 U. S. C. § 41 (3) (1940).

ings may be instituted in a Federal District Court by either the Interstate Commerce Commission or the Attorney General of the United States to enforce the published tariffs.[173]

In 1940, the United States brought suit against twenty major oil companies and fifty-nine pipe line companies to enjoin further violation of the Elkins Act[174] and that section of the Interstate Commerce Act forbidding rebates.[175] Action was brought also to recover triple the amount of rebates paid the oil company owners, as provided in the Elkins Act.[176] The result of this suit was a consent decree.[177] The main provisions of this decree was to limit dividends that could be paid a shipper-owner during any one year to seven per cent of the shipper-owner's share of the valuation of the common carrier's property. The base investment on which dividends could be paid could not be increased by accumulation of surplus. The uses to which any accumulation of surplus could be put were restricted to those serving operating needs and to retiring debts incurred in acquiring pipe line property. The objective of the United States in this decree was clearly to bring about a lowering of pipe line rates by removing the opportunity to obtain large rebates in the form of dividends. According to one writer, this decree is not likely to bring about a lowering of rates, since the amount of savings to the oil companies resulting from lower charges made by their affiliated pipe lines would be offset by the decrease in sales revenues resulting from increased competition of small refining companies making use of the pipe lines at the lower rates.[178] Also, the parent oil company stands to get back those rate payments which have contributed to the surplus of the pipe line company, if the property of the subsidiary pipe line company is eventually sold.

Although the Supreme Court was not called to rule on whether or not these companies were violating the Elkins Act,[179] recent decisions indicate a

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[173]32 STAT. 848 (1903), 49 U. S. C. § 43 (1940).

[174]32 STAT. 847 (1903), 49 U. S. C. § 41 (1940).

[175]41 STAT. 483 (1920), 49 U. S. C. § 6 (7) (1940).

[176]United States v. Phillips Petroleum Co. *et al.*, 36 F. Supp. 480 (D. C. Del. 1941) decided a question of venue. It held that the civil action under the Elkins Act could be brought in either the state of incorporation or in the state where the transportation from which the rebates resulted took place.

[177]United States v. Atlantic Refining Co. *et al.*, Civil Action 14060 (D. C. D. C. 1941) (unreported). For a full discussion of this decree, see Note (1942) 51 YALE L. J. 1338, 1348. Also, *Two Pipe Lines for Sale* (Jan. 1945) 31 FORTUNE 129. Here it is stated that the Anti-Trust Division of the Department of Justice made it clear at the time of the consent decree that it was possible that the suit against the pipe lines would be revived after the war.

[178]Note (1942) 51 YALE L. J. 1338, 1351.

[179]In its corporate report, Oct. 19, 1940, The Phillips Petroleum Co. argued that it

tendency of the Court to interpret the Act broadly to bring about equal treatment of shippers. In *Baltimore & Ohio Railroad Company et al.* v. *United States et al.*,[180] interstate rail carriers at the Port of New York were furnishing commercial warehouse space to shippers and charging less than cost, the warehouses being operated in some instances by subsidiary companies of the railroads. The Court ruled that this was a violation of the Elkins Act prohibiting rebates. The fact that the shipper paid the fair or market value of the warehouse services was held immaterial;[181] it was enough that the carrier was absorbing losses on its warehouse operations by means of income from carrier operations.[182] Likewise, in absorbing losses on marketing operations by means of profits on pipe line operations, it might be reasoned that the integrated oil companies accord themselves preferential treatment as shippers and thereby violate the Act. Again, in *Union Pacific Railroad Company et al.* v. *United States et al.*,[183] the Elkins Act was broadly interpreted by the majority of the Court. It was held to extend to concessions granted by the City of Kansas City, Kansas, to induce wholesale produce dealers to move their places of business from across the river in Kansas City, Missouri, to the new city owned market located at the terminal of the Union Pacific Railroad in Kansas City, Kansas. The market had been promoted by the Union Pacific Railroad in order to increase the volume of its traffic. The majority of the Court[184] ruled that the words of the Act forbidding "any persons, person or corporation" offering concessions "in respect to transportation"[185] extended to third parties, in this case a municipality. Much attention was given to the fact that the "railroad was the leading and dominant influence in the entire transaction."[186]

In an early case involving the Elkins Act, the Supreme Court gave broad

is not violating the Elkins Act in receiving dividends from its subsidiary pipe line company or in shipping its own oil at cost, which is less that the published rate, through a department, because these operating methods had been practiced ever since pipe lines were made common carriers in 1906. See note 193 *infra*.

180 305 U. S. 507, 59 Sup. Ct. 284 (1939).

181 *Id.* at 523, 59 Sup. Ct. at 290.

182 A similar view has been taken by the Supreme Court in holding that rates below cost for shipping particular commodities were arbitrary and could not be justified simply because the losses were made up in making charges correspondingly higher above cost for shipping other commodities. Northern Pacific R.R. v. North Dakota, 236 U. S. 585, 35 Sup. Ct. 429 (1915); Ann Arbor R.R. v. United States, 281 U. S. 658, 50 Sup. Ct. 444 (1930).

183 313 U. S. 451, 61 Sup. Ct. 1064 (1941).

184 Three justices dissented on the ground that the Elkins Act was not intended to forbid inducements by third parties made to prospective shippers of a railroad to get them to locate in the city and to use the railroad.

185 *Id.* at 462, 61 Sup. Ct. at 1072.

186 *Id.* at 467, 61 Sup. Ct. at 1074.

interpretation[187] to the words of the Act forbidding the carrier to remit by any device any portion of the rate. The device need not be fraudulent but may include "all means and methods" by which preference is granted.[188] According to one writer,[189] stock ownership would be such a device when part of a plan to permit the owner to ship his product at cost while other shippers pay the published rate. Shortly after the Elkins Act was passed, the United States brought a successful suit to enjoin the payment of rebates in the guise of freight procurement fees to a dummy corporation set up by the Pabst Brewing Company to operate its refrigerator cars.[190] There was definite evidence that the subsidiary transit company had been organized to defeat the Elkins Act, so the District Court disregarded the separate corporate entities of the two companies and looked at them as an association of individuals. But here the relationship between the parent company and the subsidiary company must be distinguished from that between the oil companies and their pipe lines because of its fraudulent character.

In order to be guilty of crime under the Elkins Act, a carrier or shipper must knowingly violate it.[191] Ignorance that a concession is a violation of the Act has been held to be no excuse for violation.[192] Yet where a shipper was led by the Interstate Commerce Commission to believe that the rates, which were published with the concession shown, were legal, the word "knowingly" was given exculpating effect.[193] Since the pipe line companies publish their tariffs with the Interstate Commerce Commission and the fact of their ownership by the oil companies is known to the Commission, it may be argued that the oil companies are not guilty of a crime in receiving rebates from the published tariffs in the form of dividends.

Separation of the pipe lines from ownership by the oil companies has been proposed.[194] It is contended that the major oil companies that own the

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[187]Armour Packing Co. v. United States, 209 U. S. 56, 28 Sup. Ct. 428 (1908).

[188]*Id.* at 71, 28 Sup. Ct. at 431.

[189]Black, *Oil Pipe Line Divorcement by Litigation and Legislation* (1940) 25 CORNELL L. Q. 510.

[190]United States v. Milwaukee Refrigeration Transit Co., 142 Fed. 247 (C. C. E. D. Wis. 1905).

[191]32 STAT. 847 (1903), 49 U. S. C. § 41 (1940).

[192]Armour Packing Co. v. United States, 209 U. S. 56, 28 Sup. Ct. 428 (1908).

[193]Lehigh Coal and Navigation Co. v. United States, 250 U. S. 556, 565, 40 Sup. Ct. 24, 26 (1919).

[194]President Roosevelt recommended divorcement of the pipe lines from their oil company owners in his message to Congress in 1933. See *Hearings before the Temporary National Economic Committee,* Part XIV, PETROLEUM INDUSTRY (1940) 7378. Chairman Lea of the Interstate and Foreign Commerce Committee of the House introduced H. R. 4862, 1st Session of 76th Congress, to apply the Commodities Clause to oil and gas. *Id.* at 7655, 7656.

pipe lines will maintain their powerful hold on the petroleum markets until this action is taken. One writer believes there is existing power under the Interstate Commerce Act and the Elkins Act to achieve this divorcement by litigation.[195] Another authority holds that inasmuch as the Hepburn Amendment, which brought the pipe lines within the Interstate Commerce Act, also introduced the Commodities Clause and applied it to the railroads and not to the pipe lines, Congress has adopted a policy of permitting oil company ownership of the pipe lines. Therefore, legislation, instead of litigation, is the proper avenue of reform.[196]

Some indication of the likely success of divorcement by litigation under the Elkins Act may be found in the enforcement of the Commodities Clause[197] of the Interstate Commerce Act, which applies to railroads affiliated with shippers. In the early decisions, the Supreme Court held that entire ownership of stock in a producing company[198] by a railroad would not, in itself, violate the Clause, but that identity of management[199] of the two companies would serve to bring them under it. Identity of management also was held to cause violation of the Clause when achieved by a common holding company.[200] In a more recent case involving a common holding company, where the holding company was externally disassociated[201] from its common carrier subsidiary and its producing company shipper subsidiaries, the majority of the Supreme Court refused to uphold application of the Clause.[202] How-

[195]*See* Black, *Oil Pipe Line Divorcement by Litigation and Legislation* (1940) 25 CORNELL L. Q. 510. The litigation argument is based on the case of New York, New Haven & Hartford R.R. v. Interstate Commerce Commission, 200 U. S. 361, 26 Sup. Ct. 272 (1906). Also, the author of this article contends that divorcement of the oil pipe lines from the integrated oil companies could be accomplished through enforcement of the anti-trust laws. *See* Note (1942) 51 YALE L. J. 1338, 1350, n. 72; *Two Pipe Lines for Sale* (Jan. 1945) 31 FORTUNE 125, 129 for comment on suit brought by the Anti-Trust Division of the Department of Justice under the Sherman Act to force the integrated oil companies to divest themselves of their pipe lines, United States v. American Petroleum Institute, Civil Action 8524 (D. C. D. C. 1940). At the suggestion of the Office of Production Management, the suit was dropped so as not to interfere with the war effort.

[196]*See* Thompson, *Recent Steps in Governmental Regulation of Business* (1942) 28 CORNELL L. Q. 1.

[197]34 STAT. 585 (1906), 49 U. S. C. § 1 (8) (1940). This Clause prohibits a railroad carrying, except for its own use, commodities which it may own or in which it may have an interest, direct or indirect. It was aimed at divorcement of the railroads from coal companies.

[198]United States v. Delaware and Hudson Co., 213 U. S. 366, 29 Sup. Ct. 527 (1909).

[199]United States v. Lehigh Valley R.R., 220 U. S. 257, 31 Sup. Ct. 387 (1911).

[200]United States v. Reading Co., 253 U. S. 26, 40 Sup. Ct. 425 (1920).

[201]This external dissociation was achieved by having no common directors or officers, separate accounting systems, and separate ownership of operating facilities.

[202]United States v. Elgin, Joliet and Eastern Ry., 298 U. S. 492, 56 Sup. Ct. 841 (1936). *See* Note (1937) 22 CORNELL L. Q. 427 for discussion of this case.

ever, evidence of managerial control of the subsidiaries by the holding company caused Justices Brandeis, Cardozo and Stone to dissent on the ground that there was no real separation of interests. In view of the economic interdependence of pipe line and refinery operations, the rapid development of pipe lines by integrated oil companies, and their importance in the whole transportation system, it seems unlikely that the Supreme Court would read into the Elkins Act a commodities clause pertaining to pipe lines and enforce this implied commodities clause more strictly than it has the statutory Commodities Clause which pertains to railroads.

Conclusions

Where a few large firms in an industry through employment of superior instruments of production have been able to attain great economic advantage over small rival firms, there is a tendency away from competition. Profits from the employment of superior methods of production may be used in other areas where no advantage in efficiency exists to reduce competition there. Thus, the movement towards monopoly is intensified. The petroleum industry appears to be moving down this road. In this industry, the pipe line provides a highly efficient means of long distance, overland transportation. Its employment is limited to large firms that can raise the large amount of capital needed and can employ it efficiently. The fixed nature of its costs, the specialization in its use, and the technical character of its operations make its economic success dependent upon large volume transportation of a relatively uniform product. These requirements have been met through combining its operations with those of a large oil refining plant. This economic union of manufacturing and transportation processes in one business unit has put the small independent refiner at a tremendous disadvantage in placing his product in the principal markets. By employing profits resulting from low cost pipe line operations to recoup losses resulting from marketing operations, the integrated oil companies have been able to reduce competition in the marketing area where no similar advantage in efficiency over rival marketing firms exists.

Federal regulation has sought to divert the pipe lines from their exclusive employment by the integrated oil companies to the use of independent shippers of petroleum by requiring them to be operated as common carriers. So far, regulation has not brought this transformation about. Jurisdiction necessary to place regulation of the pipe lines into full operation has not been granted by the Supreme Court. The Interstate Commerce Commission has not yet been accorded complete common carrier jurisdiction over gasoline pipe lines that carry gasoline solely for the refiner-owner to distant markets. An interstate crude oil pipe line running to a refinery of the shipper-owner and carrying only oil that has been pumped from his wells has been excluded specifically from the jurisdiction of the Commission. In order to carry out the intent of Congress to make the interstate pipe lines available to independent companies the Interstate Commerce Commission should be given complete jurisdiction over all interstate pipe lines. A clear cut solution of this problem may require Congressional action.

Where the Commission has regulated the pipe lines of integrated companies, the rates were set at a level to leave the integrated companies a considerable advantage over the independent companies. The Commission has a mandate from Congress "to regulate to the end of developing, coordinating, and preserving a national transportation system,"[203] so it is not apt to reduce rates further for fear of discouraging development of pipe lines. Furthermore, the independent companies are at a disadvantage in using these pipe lines of the integrated companies because they must make costly investment in connections with the pipe lines and in storage facilities necessary to meet minimum tender requirements allowed to the pipe lines by the Commission. Innovations in railroading might enable freight rates to be lowered on a basis of multiple car shipments and afford relief to the independent shippers. However, unless the cost of carrying petroleum in trainload shipments can be found to be much lower than the present costs of transporting these quantities of oil in carload shipments, rail rates cannot be lowered to the level of pipe line rates, since existing law requires that the rates established be adequate from the standpoint of costs.[204]

A divorcement of the pipe lines from ownership by the large refining companies might result in more widespread competition. However, the large integrated refiners still would be able to use these lines more favorably than the small independent refiners. Divorcement under the Elkins Act is of doubtful legality. Direct action by Congress would seem to be required, if this objective is desired. But would new pipe line companies separated from the oil companies assume the risk of developing new lines as have the oil companies? Would these companies provide a pipe line system adequate to meet the needs of the national economy and the national defense? In event of another war, would the Federal government be required to build pipe line facilities on a much greater scale than it did in World War II?

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[203]54 STAT. 899, 49 U. S. C. preamble preceding § 1 (1940).

[204]Petroleum Rail Shippers' Association v. Alton & Southern R.R., 243 I. C. C. 589, 639 (1941).

The Federal government could take over the job of supplying new pipe line facilities. It could assume the necessary risk and provide the nation with adequate facilities in event of war. Also, if these lines were operated by the government on a cost basis, small independent shippers could be given an effective outlet for their petroleum. Government operation of the "Big Inch" and "Little Big Inch" lines[205] could serve to bring about greater com-

[205]In a report to Congress, January 4, 1946, the Surplus Property Administrator recommended that the "Big Inch" and "Little Big Inch" lines be disposed of to private interests to be operated as *true* common carriers of petroleum at rates based on the cost of service plus a reasonable return on investment. However, "if all efforts to dispose of the lines to private industry should fail," government operations on a full cost basis should be considered. In order that the lines be available for service of the armed forces in event of another national emergency, it was recommended that a recapture clause be included in a sales contract with a private purchaser. (The Army-Navy Petroleum Board found that the government owned pipe lines were vitally necessary in case of another war.) Government Owned Pipe Lines, Report of the Surplus Property Administration (Jan. 4, 1946), 27-28.

The Administrator also stated that the two lines could be operated competitively, in carrying petroleum to the Eastern seaboard market, with other means of transportation. It was estimated that the "Big Inch" could carry oil to the East Coast at a cost of 17.1 cents per barrel when operated at full capacity, as compared to a cost of 32.6 cents per barrel for transportation by tanker. When operated at two-thirds capacity, the pipe line cost would be 21.8 cents. A conversion of the line from an electrically operated pumping system to a Diesel operated system would result in a one cent saving per barrel at full capacity operation. *Id.* at 14.

The "Little Big Inch" is in a less favorable cost position. For full capacity operation, the estimated cost is 21.7 cents per barrel as compared to tanker cost of 20.2 cents per barrel. For two-thirds capacity operation, the estimated cost is 28.2 cents. If used at capacity and converted to Diesel power, "it might be competitive" on the basis of cost. *Id.* at 15.

The Administrator pointed out that the lines certainly would be competitive at the prevailing rates of private pipe lines and tankers. "In addition, they would act as stabilizers of excessive rates by other means of transport, thereby permanently reducing the cost of distribution to shippers who do not possess their own facilities." *Id.* at 16.

Government operation of these two pipe lines on a cost basis should be a powerful force in causing a lowering of pipe line rates and in promoting competition in the oil industry. *Cf.* 2 LYON, ABRAMSON, and ASSOCIATES, GOVERNMENT AND ECONOMIC LIFE (1940) 743 as to the effect of T.V.A. on rates.

After the two pipe lines were advertised for sale and the bidding opened on June 8, 1946, sixteen bids were submitted. Eleven of the bids were for using the lines in petroleum transport and the other five were for using them in natural gas transmission. None of the bids was made by a major oil company. On Nov. 19, War Assets Administrator Littlejohn announced that he had rejected all sixteen bids. See Hassett, *Those Troublesome "Inch" Pipe Lines* (Dec. 1946) 38 PUBLIC UTILITIES FORTNIGHTLY 796 and *Two Pipe Lines for Sale* (Jan. 1945) 31 FORTUNE 125, 142 for a discussion of the disposal question.

The two pipe lines were converted to natural gas during the coal strike crisis in November, 1946, and they were leased to the Tennessee Gas and Transmission Co. for a period of 120 days. From December 1, 1946, the company operated them under the direction of the Department of Interior. Hassett, *loc. cit. supra* at 207.

Inasmuch as these pipe lines have been converted to carrying natural gas, the peril of a coal strike is apt to continue, and the public is apt to demand a continuation of natural gas service after having experienced its advantages over coal. There is little likelihood that the competitive problems of the petroleum industry will find a solution petition in the Eastern and Midwestern markets among the petroleum shippers of the Southwest.

In similar situations, the Federal government has resorted to regulation according to the public utility approach. This approach assumes a tendency to monopoly and imposes restrictions to prevent the injurious exercise of monopoly power. The success of this type of regulation as applied to other industries in the past is debatable.[206] Its effectiveness depends to a high degree upon the agency entrusted with the duties of regulation. While the monopolistic nature of the functions of transportation and manufacturing in the petroleum industry points to their regulation along public utility lines, the competitive nature of the functions of extraction and marketing seems to preclude this same approach to regulating the whole oil industry. A dismemberment of the oil companies to bring about a separation of monopolistic and competitive functions may be required to make possible the operation of different forms of public control of the whole petroleum industry.

Any governmental policy taken towards the petroleum pipe line should recognize the economic advantages of integrating it with the process of refining oil, the tendency to monopoly resulting from the size of the capital investment and its great superiority over other transportation means, the necessity of permitting more widespread public participation in the economic gains resulting from its employment, and the importance of its efficient utilization and continued development to the economic prosperity and military defense of the nation.

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in the near future by government operation of the "Big Inch" and "Little Big Inch" pipe lines.

[206]Professor H. M. Gray believes that the public utility concept has failed "to protect consumers from the aggressions of monopolists" and "has ended as a device to protect property." See Gray, *The Passing of the Public Utility Concept* (1942) READINGS IN THE SOCIAL CONTROL OF INDUSTRY 294. Professor B. W. Lewis believes that "the record of public utility regulation generally since 1907 is neither impressive, nor yet too disheartening." See 2 LYON, ABRAMSON, and ASSOCIATES, GOVERNMENT AND ECONOMIC LIFE (1940) 744.