Outer Continental Shelf Oil Pipelines Under the Interstate Commerce Act

Edwin I. Malet
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INTRODUCTION

In recent years, the offshore domain has become an important source of domestic crude oil. The United States Geological Survey (USGS) has estimated that 292 million barrels of oil were produced from Outer Continental Shelf (OCS) leases in 1978 and, by 1990, production will be in the range of 580 million to 600 million barrels, depending on price.¹ Although barges and other watercraft will have a minor role in the movement of this oil to shore, oil pipelines will be the most common means of transportation.² Indeed, there are already a large number of offshore pipelines. On the Gulf Coast, map-makers compare the established system of offshore pipelines to "spaghetti soup." On the California coast, there also are established pipelines running to shore from offshore platforms.³ Further, the Department of Energy expects that oil pipelines soon will be extended to new production sites on the OCS adjacent to Alaska and in the Atlantic.⁴

In general, offshore pipelines raise competitive concerns similar to those raised by their onshore counterparts.⁵ The offshore oil pipeline

¹. U.S. DEP'T OF ENERGY, FEDERAL LEASING AND OUTER CONTINENTAL SHELF ENERGY PRODUCTION GOALS x (June 1979) [hereinafter cited as DOE PRODUCTION GOALS REPORT].
³. DOE PRODUCTION GOALS REPORT, supra note 1, at 158-62.
⁴. Id.
business is characterized by (1) economies of scale, (2) high barriers to entry because of large investment requirements and restrictive permitting regulations, and (3) ownership and operation by integrated oil companies. The economic concerns may be viewed as two-fold. First, an offshore oil pipeline operator may exercise its market power as a means of imposing unreasonably high transportation rates in order to collect monopolistic profits. Second, an offshore oil pipeline operator with production or refinery interests may selectively deny access (or impose unreasonable terms and conditions of access) in order to obtain a competitive advantage in an upstream or downstream market. In essence, a pipeline operator—offshore or onshore—may exercise the power of a "bottleneck monopoly."6

Long before the OCS was annexed by the United States and long before the first well was drilled in land underlying the seas, the potential for anticompetitive oil pipeline conduct led Congress to subject oil pipelines to federal economic regulation as common carriers under the Interstate Commerce Act (ICA).7 Under the ICA, oil pipeline companies are required, *inter alia,* to charge just and reasonable rates,8 to provide transportation upon reasonable request,9 to engage in just and reasonable practices,10 and to treat those who use their services without discrimination.11 Until 1977, the ICA was administered by the Interstate Commerce Commission (ICC). Since 1977, the ICA has been administered by the Federal Energy Regulatory Commission (FERC) to the extent it affects oil pipelines.12 Recently, there have been moves

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6. For a discussion of the "bottleneck monopoly," or "essential facility" principle, see Byars v. Bluff City News Co., 609 F.2d 843 (6th Cir. 1979) and Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977).

7. Under the Hepburn Act, ch. 3591, 34 Stat. 584 (1906) (now codified at 49 U.S.C. § 3(a) (1976)), oil pipeline companies were declared common carriers within the meaning of the Interstate Commerce Act, which also governed other transportation modes.


in Congress to modify this regulatory scheme. However, at present, the scheme remains in effect and there appears to be little support for total deregulation of the oil pipeline industry. Moreover, no one

the DOE Act, 42 U.S.C. § 7155 (Supp. III 1979). Responsibilities under the latter were delegated to FERC by the Secretary of Energy on the date that the DOE Act became effective. Delegations and Assignments of Certain Matters by the Secretary of Energy, 42 Fed. Reg. 55,637 (1977).

13. There were three bills introduced during the 97th Congress for the purpose of “deregulating” the oil pipeline industry. H.R. 4488, 97th Cong., 1st Sess. (1981) (by Synar and Corcoran); S. 1626, 97th Cong., 1st Sess. (1981) (by Nicklas, Wallop, and Murkowski); H.R. 6815, 97th Cong., 2d Sess. (1982) (by Breaux, Fields, Clausen, Anderson, and Shuster). As introduced, each of these bills sought to remove FERC’s jurisdiction over oil pipeline rates, while preserving various common carrier duties established under the ICA. H.R. 4488 and S. 1626 excepted the Trans-Alaska Pipeline System from the general principle of rate deregulation. H.R. 4488, § 4(b); S. 1626, § 4(b). Neither FERC, the Department of Energy, nor the Department of Justice has supported any of the bills wholeheartedly, although each has expressed the tentative opinion that much of the oil pipeline industry should be properly deregulated. See Hearing on S. 1626 Before the Senate Comm. on Commerce, Science and Transportation, 97th Cong., 2d Sess. 8, 92, 97 (1982) [hereinafter cited as Hearing on S. 1626] (testimony of L. Coburn (DOE), W. Baxter (DOJ), and R. Means (FERC)). See also Hearing on H.R. 4488 Before the Subcomm. on Fossil and Synthetic Fuels of the House Comm. on Energy and Commerce, 97th Cong., 2d Sess. (1982) [hereinafter cited as Hearing on H.R. 4488] (testimony of L. Coburn (DOE), W. Baxter (DOJ), and C. Butler (FERC)). It appears that the agencies intend to develop their own oil pipeline deregulation bill, to be introduced during the next legislative session, and that provisions will be included for regulation of those pipelines which have monopoly power and for total deregulation, including “common carrier” duties, of those which have no monopoly power.

14. The oil pipeline industry argues that the industry is competitive because of competition, actual and potential, from other pipelines and from water-borne transportation and trucks. Hearing on S. 1626, supra note 13, at 111 & 118 (testimony of D. Taylor and E. Mitchell). The refiners and marketers of petroleum products, operating in the markets upstream and downstream from the pipeline and dependent on their transportation services, contest that assertion. Id. at 122 & 126 (testimony of L. Kamm and J. Blum). Although the Department of Justice, the Department of Energy, and FERC have supported deregulation of oil pipelines to the extent that monopoly power is not “significant,” they have yet to put forward a workable definition of monopoly power or an efficient procedure for determining whether it exists. Hearing on S. 1626, supra note 13. It appears that the Trans-Alaska Pipeline System at least would be one which FERC would characterize as a monopoly. Id. at 97 (testimony of R. Means). Testimony of a shipper representative, however, suggested that other oil pipelines also have monopoly power, raising the question of how extensive the deregulation proposed by the administration may be. Id. at 146 (testimony of W. Putnam). What has become clear is that there is no accepted methodology for defining monopoly power in the pipeline industry. See generally J. HANSEN, supra note 5, at 7 (methodology for determining oil pipeline market power discussed). Hansen states: “Economic analysis of oil pipelines is in a considerably more primitive state than that of most other regulated (or even unregulated) industries. Little or no work has been done in the . . . areas of definition of the market, cost functions, pricing behavior, or market concentration.” Id. He states that the principal mistake generally made in analyzing
has argued that OCS pipelines are fundamentally different in their economic characteristics than their onshore counterparts. Rather, there is reason to believe that offshore pipelines create greater competitive dangers.\textsuperscript{15}

Congress apparently recognized the anticompetitive potential and need for regulation of OCS pipelines when it passed the Outer Continental Shelf Lands Act of 1953 (OCSLA).\textsuperscript{16} The primary purpose of the OCSLA was to annex the OCS, resolve competing federal and state claims to OCS resources, and provide a scheme for leasing OCS development rights.\textsuperscript{17} In addition, section 5 of the OCSLA provided that oil pipeline rights-of-way on the OCS should contain an express provision that the pipeline operator transport or purchase without discrimination and authorized the ICC (and now FERC as the ICC's successor) to prorate capacity in OCS pipelines as necessary.\textsuperscript{18} In 1978, the OCSLA was amended\textsuperscript{19} to provide for use of OCS pipelines according to "competitive principles,"\textsuperscript{20} one of "which is "open and non-discriminatory access," and to authorize FERC in some instances to order expansion of pipeline capacity.\textsuperscript{21} FERC also was given authority to exempt, upon application, certain gathering lines from non-discriminatory access requirements.\textsuperscript{22}

While the OCSLA and the ICA seem to be of kindred spirit as regards the regulation of OCS oil pipelines, neither the OCSLA nor its 1978 amendments specifically mentioned the ICA. Such specific

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\textsuperscript{15} Competition in the oil pipeline industry is to define the market as a national one. Hansen's view is that the market must be defined individually and locally, with reference to particular pipelines in service areas. Further, he notes that at least four types of oil pipeline markets exist: (1) the market in which crude is gathered from producers, (2) the market in which crude is distributed to refiners and marketers, (3) the market in which products are gathered from refiners, and (4) the market in which products are delivered to distributors. \textit{Id.} at 62-106.

mention does not seem to have been necessary given that the OCSLA explicitly extended all the laws of the United States to the OCS. However, arguably at least, it is unclear whether the OCSLA was intended to supplement the ICA or to replace it. In fact, at least two authors have concluded that offshore pipelines are not subject to the requirements of the ICA. No court has yet addressed the issue.

Toward showing that many oil pipelines on the OCS are subject to the ICA, this article discusses whether the OCSLA, by implication, repealed the ICA and whether the OCSLA is intended as the exclusive regulatory scheme for OCS oil pipelines. Arguably, neither the language of the OCSLA nor its legislative history reveal the clear manifestation of congressional intent that is the prerequisite of such a repeal. Further, there is no apparent reason why the two statutory schemes cannot be harmonized. Accordingly, the ICA should apply to the OCS.

That the ICA applies to the OCS, however, does not in itself determine that all OCS oil pipelines are subject to the ICA's regulatory requirements. The ICA contains internal jurisdictional limitations: it only applies to "common carriers for hire" engaged in "transportation" in interstate commerce. Whether particular oil pipeline practices, transactions, and facilities are covered by the ICA thus requires consideration of the numerous cases which have attempted to distinguish common carriage from private carriage, transportation from other commercial activity, and interstate from intrastate movement. This article discusses all these subjects, with particular emphasis on OCS oil pipeline transportation.

**EFFECT OF THE OCSLA ON THE ICA**

The OCSLA does not specifically mention the ICA. Accordingly, any repeal of the ICA's provisions must be inferred, and evidence of repeal must be shown by something other than Congress's express language. Repeal of regulatory schemes by implication is not unprecedented, especially in the antitrust area, where economy-wide pro-competitive principles may conflict with the regulatory principles administered by an independent agency for purposes of a particular industry. Indeed, the OCSLA itself has been held to repeal and

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24. See *infra* notes 26-67 and accompanying text.
25. See *infra* notes 77-236 and accompanying text.
displace other regulatory statutes. In California v. Kleppe,27 the Ninth Circuit stated that the Environmental Protection Agency (EPA) had no jurisdiction to enforce the Clean Air Act as to facilities located on the OCS. Although the court found no express provision of the OCSLA which precluded EPA jurisdiction, it found that the statute did give explicit authority to the Department of Interior "to promulgate air quality regulations for the OCS," that the "plain meaning provides no suggestion that such authority is to be shared," and that "simultaneous jurisdiction by the EPA over the OCS would impair or frustrate" the Department of Interior's authority.28 The fundamental rule, however, is that repeal by implication is not favored29 and harmonization of potentially conflicting statutes is preferred.30

Nevertheless, two well-settled categories of repeal by implication are

(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But in either case, the intention of the legislature to repeal must be clear and manifest ....31

In Gordon v. New York Stock Exchange,28 the Court stated that an implied repeal of the antitrust laws required a "plain repugnancy" between those laws and a subsequently enacted regulatory scheme and that repeal should only be implied "to make the Act work ... and only to the minimum extent necessary." In United States v. National Association of Securities Dealers, Inc.,29 implied repeal of the antitrust laws was based on the Court's view that the securities laws established a "pervasive regulatory scheme" for the transaction in question.

Whether Congress, by enacting the OCSLA, demonstrated a clear intent to supersede the ICA with respect to OCS pipelines or created a scheme under the OCSLA at irreconcilable odds with the ICA is considered below. However, one should begin by noting that the OCSLA states clearly that all laws of the United States, with the

27. 604 F.2d 1187 (9th Cir. 1979).
28. Id. at 1193.
32. 422 U.S. 659, 682-83 (1975).
33. 422 U.S. 694 (1975).
sole exception of those relating to the administration of mineral leases, are extended to the OCS.44 Further, although the OCSLA expressly deals with the application of particular laws, it also states that specific application of particular laws "shall not give rise to any inference that the application . . . of any other provision of law is not intended."38 Similarly, the 1978 amendment to the OCSLA, which provided for the operation of oil pipelines according to competitive principles,39 stated that "nothing in this subsection shall be deemed to limit, abridge, or modify any authority of the United States under any pro-
vision of law with respect to pipelines on or across the outer Con-
tinental Shelf."37 Congress obviously attended to the matter of which laws it intended to repeal and which it intended to continue. In this context, the lack of an express repeal or limitation on the ICA's applicability reinforces the strong presumption of survival that would otherwise exist.

Statutory Inferences

An argument that Congress intended to repeal the ICA so far as it might apply to OCS oil pipelines must rely primarily on section 4(a)(1) of the OCSLA,38 which states that "mineral leases on the outer Continental Shelf shall be maintained or issued only under the provi-
sions of this subchapter." Arguably, oil pipeline operation on the OCS falls within the scope of this proviso. If it does, a strong inference would be created that Congress intended that the OCSLA should be the exclusive statutory regime for regulating OCS oil pipelines.

The question is whether "mineral lease" covers and includes oil pipelines. As adopted in 1953, "mineral lease" was defined by the OCSLA to include "any form of authorization for the exploration for, or development or removal of deposits of oil, gas, or other minerals."39 The definition, while it covered "removal," did not cover "transportation." "Removal" conceivably could include some movement. But comparison with section 4(a)(1) of the OCSLA would imply that the exclusion of transportation from the definition of mineral lease was purposeful. In that section, the laws of the United States were extended

to the OCS "for the purpose of exploring for, developing, removing and transporting" its resources.40 Under the principle of *expressio unius est exclusio alterius,*41 the omission of transportation from the definition of mineral lease might be viewed as intentional. The ICA regulates transportation, not mining, and would not be excluded from application to the OCS under the mineral lease proviso.

It also might be argued that section 5 of the OCSLA has established a "pervasive regulatory scheme" for OCS oil pipelines, or that FERC regulation under the ICA would create a potential for inconsistent and conflicting governmental commands. However, examination and comparison of the two statutes—the OCSLA and the ICA—undermines these arguments. Under the OCSLA, the Secretary of Interior has the power to grant rights-of-way for purposes of pipeline transportation and, in that regard, may impose conditions on the operation and use of those rights-of-way.42 Among the duties of oil and gas pipelines granted such rights-of-way is that they "transport or purchase without discrimination" from producers in the vicinity.43 This power is not inconsistent with FERC's jurisdiction under the ICA. FERC has no certification authority under the ICA.44 The various pro-

40. 43 U.S.C. § 1333(a)(1) (emphasis added). In 1978, the definitions in the OCSLA were amended in Pub. L. No. 95-372, § 201, 92 Stat. 632. One modification was to substitute the term "production" for "removal" in the definition of lease. In addition, production was defined to include, *inter alia,* "transfer of minerals to shore." The purpose of these amendments was unrelated to the issue of whether OCS transportation would be subject to the exclusive regulation of the Department of Interior. See H. Rep. No. 590, 95th Cong., 2d Sess. 126, 1978 U.S. CODE CONG. & AD. NEWS 532. There is no explanation of the production definition in the House Conference Report. See H. Conf. Rep. No. 372, 95th Cong., 2d Sess. 79, 1978 U.S. CODE CONG. & AD. NEWS 1677-78. Nevertheless, these changes increase the ambiguity of Congress's original intent.

41. The express mention of certain things implicitly excludes others not mentioned. See C.B. NUTTING, CASES AND MATERIALS ON LEGISLATION 471-77 (1969).

42. 43 U.S.C. § 1334(e)-(f). The OCSLA of 1953 included a paragraph which was essentially the same as the current paragraph (e). See Act of Aug. 7, 1953, ch. 345, § 5(c), 67 Stat. 464. The 1978 amendments, Pub. L. No. 95-372, § 204, 92 Stat. 636, resulted in the movement of paragraph (e) to its current codification at paragraph (e). Paragraph (f) was added in 1978 and had no predecessor in the OCSLA of 1953.

43. 43 U.S.C. § 1334(e).

44. *Cf.* 49 U.S.C. §§ 10901-10934 (Supp. III 1979) (ICC certification and licensing authority for motor carriers and railroads); 15 U.S.C. § 717f(c)(1) (1976) (FERC certification of natural gas transportation facilities). Conceivably, FERC jurisdiction over initial construction of OCS oil pipelines could lead to a conflict with the Department of Interior's jurisdiction. However, FERC has no such jurisdiction over oil pipelines under the ICA. Furthermore, the possibility of conflict with the Secretary of Interior has not precluded FERC's exercise of jurisdiction under the Natural Gas Act (NGA) over OCS transportation. See Tenneco Oil Co., 2 F.E.R.C. ¶ 61,247, reh'g denied, 3 F.E.R.C. ¶ 61,257 (1978); Texaco, Inc., 59 F.P.C. 706, modified, 59 F.P.C. 1158 (1977); Gulf Oil
visions of the ICA prohibiting discrimination have the same pro-
competitive economic goal as the OCSLA duty to transport or pur-
chase without discrimination. Whether alternative standards might
evolve is speculative and unlikely. Significantly, the OCSLA provides
for the involvement of FERC in a number of governmental decisions
concerning OCS oil pipeline operation, thus establishing the basis for
a high degree of institutional coordination.

Arguably, the Secretary of Interior's jurisdiction over pipelines
used for the transportation of oil on the OCS is not any greater than
his authority to issue rights-of-way. The Secretary's power to ad-
minister the OCSLA and prescribe "such rules and regulations as may
be necessary" relates only to leasing activity. In contrast, the
authority to prorate pipeline capacity is vested in FERC, as is the
authority to order expansion of capacity in certain pipelines. FERC
also has the authority to exempt certain OCS oil pipelines from the
"open and non-discriminatory access" principle in section 5(f), which
is otherwise binding on all OCS oil pipelines. This scheme is hardly
"repugnant" to FERC's jurisdiction, which is permeated with concern
for nondiscrimination and access. Given the provisions for FERC con-
sultation, the potential for inconsistent governmental action seems
remote. Rather, these provisions seem to represent a conscious con-
gressional attempt to assure harmonious enforcement of the two
statutes.

Corps., 59 F.P.C. 1230, reh'g denied, 1 F.E.R.C. ¶ 61,089 (1977); Sea Robin Pipeline Co.,
57 F.P.C. 898, reh'g denied, 58 F.P.C. 2821 (1977); Mobil Oil Corp., 54 F.P.C. 1049 (1975),
remanded for consideration of other issues sub nom. Public Serv. Comm'n v. Federal
Energy Regulatory Comm'n, 575 F.2d 892 (D.C. Cir. 1978); Chandeleur Pipe Line Co.,
Comm'n v. Federal Power Comm'n, 436 F.2d 904 (D.C. Cir. 1970); United Gas Pipeline
Co., 30 F.P.C. 560, affirmed as to other issues sub nom. Louisiana Pub. Serv. Comm'n
3158 (1976) (certificate not required for gas transported in solution with oil from OCS
to shore).

(1976) (prohibiting undue or unreasonable prejudice or disadvantage). The Natural Gas
Act also prohibits discrimination in the operation of natural gas pipelines, 15 U.S.C.
§ 717b (1976); 15 U.S.C. § 717c (1976), but FERC nevertheless has treated OCS transpor-
tation as jurisdictional. See note 44, supra.

46. FERC is authorized to determine the "proportionate amounts" which producers
may deliver to the pipeline, 43 U.S.C. § 1334(e), to order expansion of pipelines in
some areas, 43 U.S.C. § 1334(f)(1)(B), to exempt certain pipelines from regulation accord-
ing to "competitive principles," 43 U.S.C. § 1334(f)(3), and to consult regarding specific
conditions of the pipeline permits, licenses, easements, and rights-of-way issued under
the authority of the Secretary of Interior, 43 U.S.C. § 1334(f)(3).

47. 43 U.S.C. § 1334(a).


Legislative History

Those writers who have argued that the ICA was not intended to apply to the OCS have relied heavily on the legislative history of the OCSLA and on comments made by Congressmen in unrelated proceedings. Congressional intent on point, however, is ambiguous. To the extent such intent can be discerned, it tends to indicate congressional belief that the ICA would apply to all OCS oil pipelines because, under existing law, such pipelines would be treated as interstate. This view might have been mistaken, as it relied on a legal definition of territory that may have been inappropriate for section 1(3) of the ICA. However, Congress's reliance on mistaken advice would not undermine its actual intent.

The question of whether the OCSLA, then a bill before the Senate Committee on Interior and Insular Affairs, should specifically declare OCS oil pipelines to be common carriers was first raised by the late Senator Huey Long. An amendment was prepared, based on the Mineral Lands Act, which would have empowered the Secretary of Interior to order an OCS pipeline "to be operated and maintained as a common carrier ... to the same extent that the [ICA] would apply if the pipeline extends from one State to another State." If that language had been adopted and incorporated into the bill that eventually became law, there would be no doubt today that all OCS oil pipelines are subject to FERC jurisdiction. The Justice Department supported the proposed language, stating that otherwise, "gas lines would apparently be interstate within the terms of the Natural Gas Act without specific provision; but oil pipelines would not be, within the terms of the Interstate Commerce Act." The Department added, "[F]or certainty, specific provision should be made for the applicability of both acts." The Interior Department, however, advised the Com-

50. See Mogel, supra note 23, at 473.
51. See infra notes 176-196 and accompanying text.
52. A Bill to Provide for the Jurisdiction of the United States over the Submerged Lands of the Outer Continental Shelf, and to Authorize the Secretary of the Interior to Lease such Lands for Certain Purposes, S. 1901, 83d Cong., 1st Sess. (1953).
53. The Outer Continental Shelf Act, Hearings on S. 1901 Before the Senate Comm. on Interior, 83d Cong., 1st Sess. 61 (1953) [hereinafter cited as 1953 Hearings].
55. 1953 Hearings, supra note 53, at 524, 547.
57. Id. at 40.
committee that the amendment was not necessary. The Secretary of Interior explained that pipelines exercising rights-of-way granted by the Department of the Interior should be required to transport or purchase without discrimination oil or natural gas produced from the submerged lands of the outer Continental Shelf in the vicinity of the pipelines in such proportionate amounts as the Federal Power Commission, in the case of gas, and the Interstate Commerce Commission, in the case of oil, may after a full hearing with due notice thereof to the interested parties, determine to be reasonable.

The Secretary stated that the condition would be "substantially the same as one contained in section 28 [of the Mineral Lands Act] except that the Federal Power and Interstate Commerce Commissions are respectively substituted for the Secretary of Interior." He continued, "[S]ince all the oil and gas produced in the outer Continental Shelf will come from Federal lands the additional 'common carrier' obligation imposed by section 28 does not appear to be needed . . . ." The Secretary of Interior's reasoning appears to have been founded on the premise that pipeline transportation of oil on federal lands and from federal lands to shore would be viewed as interstate. Under section 1(c) of the ICA, all oil pipeline transportation within a federal territory or between a federal territory and a state is subject to the ICA. Since the ICA declares all oil pipelines to be common carriers, further declaration to that effect in the OCSLA would have been superfluous. However, the Secretary of Interior's premise that the OCS was a territory under the ICA might have been incorrect, as the Department of Justice apparently contended. Nevertheless, the Committee adopted the Interior Department's approach, stating that it vested the ICC with the "necessary authority." The final language reported by the Committee vested the ICC with authority to determine the "proportionate amounts" of oil which ship-

59. Id.
60. Id.
61. Id.
62. 49 U.S.C. § 1(c) (1976). See infra notes 176-196 and accompanying text, discussing the issue of whether transportation to, from, and within a territory is subject to the ICA.
64. See infra notes 176-196 and accompanying text.
pers would be allowed to ship, but it did not expressly declare that
OCS oil pipelines were common carriers, nor did it mention the applica-
bility of the ICA. No change was made by the conference committee
and the House managers, stating only that the ICC was "authorized
to determine the conditions of such transportation," did not clarify
Congress's intent.

Taken independently of the statutory language, the legislative
history is mildly supportive of the proposition that pipelines on the
OCS and from the OCS to shore were viewed by Congress as "in-
terstate." Apparently, the committee considering the bill relied on
the Interior Department's advice to this effect. Had the conference
committee intended that the ICC's authority was limited to determine
"proportionate amounts," it might have stated as much, rather than
its much broader formulation that the ICC had the power "to deter-
mine the conditions of transportation."

In any case, the very ambiguity of the legislative history subverts
its alleged analytical function, i.e., to explain an ambiguous statute
and provide a clear manifestation of congressional intent that would
support a holding of implied repeal. In contrast, the OCSLA explicitly
extends all laws of the United States to the OCS and disclaims any
intent to repeal any of those laws, except those that govern mineral
leases.

Confusion Due to Department of Interior's Permitting Practices

Arguably, based on the preceding analysis, Congress did not repeal
the ICA when it enacted the OCSLA and the ICA is applicable to
the OCS as law of the United States that was extended to the OCS
by the OCSLA. It is important, however, to distinguish between two
wholly different issues: (1) whether the ICA applies to the OCS, and
(2) whether substantive provisions of the ICA apply to all OCS oil
pipelines. The ICA's own limitations may exclude certain OCS oil
pipeline activity from FERC's jurisdiction. These limitations, however,
are the same as those which apply to onshore oil pipeline
transportation.

Failure to observe the distinction between the above two issues
is probably responsible for some of the confusion that has attended
the ICA responsibilities of companies operating OCS oil pipelines.
However, the subsequent legislative history of the OCSLA and the

66. *Id.* at 18.
68. See *infra* notes 176-236 and accompanying text.
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public positions which have been announced by the responsible federal agencies are consistent with the view that the ICA applies to at least some OCS oil pipelines and, therefore, with the theory that the ICA was not repealed by the enactment of the OCSLA. 69

The Department of Interior, through the United States Geological Survey (USGS) and the Bureau of Land Management (BLM), is known to have advised several pipeline companies operating on the OCS that ICA tariffs were required. Moreover, a number of companies have accepted the view that the ICA applies to at least some OCS oil pipelines. As of September 1982, there were at least 28 effective tariffs on file at FERC covering OCS oil pipeline transportation. 70

A second source of confusion over the question of whether the Interior Department’s jurisdiction under the OCSLA preempted and excluded the jurisdiction of the ICC and FERC derived from defects in the Interior Department’s program for permitting OCS pipelines. 71

Specifically, until 1978, the USGS would grant easements for pipeline purposes under section 4(a) of the OCSLA, i.e., the provisions which

69. Congressman John Seiberling, for instance, while proposing that the OCSLA be amended to vest FERC with ICA jurisdiction over all OCS oil pipelines, recognized that the ICA already applied to some. He stated: “The Interstate Commerce Act’s definition of ‘interstate’ does not cover a pipeline from the OCS to a point onshore unless that pipeline is an integral part of an interstate system beginning at that point onshore.” 124 CONG. REC. 1626 (1978). Similarly, the former chairman of FERC, Charles Curtis, in response to a General Accounting Office report which had criticized the failure of the ICC and FERC to exercise jurisdiction over OCS oil pipelines, stated, “OCS oil pipelines transporting oil in interstate commerce are carriers and thereby are prohibited by statute from entering into discriminatory practices.” Letter from Charles B. Curtis, Chairman, FERC, to Jack Brooks, Chairman, House Comm. on Government Operations (March 15, 1979). The General Accounting Office (GAO) report is contained in a letter from J. Dexter Peach, Director, General Accounting Office, to Charles D. Curtis, Chairman, FERC (Jan. 12, 1979) [hereinafter cited as the Peach Letter]. The letter stated in part:

We found that FERC has not aggressively carried out its responsibilities for enforcing nondiscriminatory access to OCS pipelines. FERC has made no formal attempt to inventory the OCS pipelines which might have been subject to its enforcement responsibility and only has reacted to company complaints or other filings in exercising its enforcement authority.

Id. at 3. Thus it appeared that GAO was also of the opinion that FERC was authorized to regulate OCS pipelines.


71. This regulatory problem has been discussed thoroughly in other sources and will only be summarized here. See R. Levy, supra note 5, at 23-40; Peach Letter, supra note 69.

give the Interior Department broad authority to regulate mineral leases. Apparently, the USGS could use its section 5(a) authority to allow some pipeline construction and operation, namely, those which had a production function immediately related to extracting minerals from the OCS and reducing them to the lease operator's possession. As a matter of practice, however, the USGS used this authority to permit substantial pipelines that spanned a number of leases and carried oil for several shippers. Thus it became unnecessary for a lease operator to obtain from the BLM a pipeline right-of-way under section 5(e) of the OCSLA. This loophole was closed in 1980 by the promulgation of regulations circumscribing the use of section 5(a).

The clarification of the respective roles of the USGS and the BLM in permitting OCS pipelines supplemented the clarifying effect of the 1978 amendments to the OCSLA. The amendments declared that all OCS pipelines were to be operated according to the principle of non-discriminatory access, and gave FERC exclusive authority to exempt OCS pipelines from that requirement. Any confusion that existed as to the "exclusive jurisdiction" of the Interior Department over OCS pipelines should have been squelched by these actions.

JURISDICTIONAL REQUIREMENTS OF THE ICA

If the OCSLA did not repeal the ICA with respect to OCS oil pipelines, one must look to the jurisdictional provisions of the ICA to determine whether particular OCS oil pipelines are within its scope. These jurisdictional provisions are contained in section 1 of the ICA. In short, only oil pipelines engaged in interstate transportation as common carriers are subject to regulation under the ICA. Many pipelines on the OCS probably will meet this test.

Common Carrier Requirement of ICA

In Propeller Niagara v. Cordes, rendered in 1858, Justice Clifford stated:

Most of the rules of law prescribing the duties of a carrier for hire, and regulating the manner of their exercise, have existed for centuries, and they cannot be modified or relaxed except by the interposition of the legislative power of the Constitution. Time
and experience have shown their value and demonstrated their utility and justice, and they ought and cannot be changed by the judiciary. 79

As is evident from Justice Clifford's detailed discussion elsewhere in the opinion, the law of common carriers dealt primarily with the duties of transportation companies—then mostly companies handling ships, railroads, and animal-powered overland vehicles—as insurers of the shipments in their custody. 80 In the course of his dissertation, Justice Clifford defined "common carrier":

A common carrier is one who undertakes for hire to transport the goods of those who choose to employ him from place to place. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey. 81

Several years later, the Court emphasized that whether a firm is a common carrier is an issue of fact to be determined by looking to the business in which it is engaged. In Liverpool & Great Western Steam Co. v. Phenix Insurance Co., 82 the Supreme Court stated: "A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests. Even if the extent of these responsibilities is restricted by law or contract, the nature of his business makes him a common carrier still." 83 The Court also distinguished a "common carrier" from a "private carrier":

A common carrier for hire may become a private carrier, or a bailee for hire, when, as a matter of accomodation or special engagement, he undertakes to carry something which is not his business to carry. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier is a corporation created for the purpose of carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of that character. 84

Beginning in the late nineteenth century, the common carrier concept became the basis for federal regulation of certain businesses. Under the Interstate Commerce Act, enacted in 1887, the rates and

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79. Id. at 25.
80. Id. at 22-29.
81. Id. at 22.
82. 129 U.S. 397 (1889).
83. Id. at 440.
84. Id.
practices of interstate railroads and ships were required to be just and reasonable and the Interstate Commerce Commission was empowered to scrutinize their activities. Since then, similar regulatory schemes have been imposed on shipping companies, telephone and telegraph companies, trucking and busing companies, airline companies, and various other businesses. Further, the regulation of common carriers under statute has been expanded to include, for example, route regulation, public reporting responsibilities, accounting requirements, and regulation of mergers and/or intercompany agreements.

The advent of public interest regulation of common carriers at the federal level complicated the legal determination of common carrier status. For instance, the transplant of the common carrier concept from private law to public law required that due process and other constitutional considerations be factored into the analysis of whether a particular company or activity could be regulated as a common carrier. It also became necessary to examine congressional intent to determine whether particular facilities and services were contemplated and covered by the statutory delegation of administrative power. Thus the new use of an established legal concept disturbed

91. In general, common carriers have been required to acquire a certificate of public convenience to operate over particular routes. See, e.g., 49 U.S.C. § 10901 (Supp. III 1979) (railroads and motor carriers); 49 U.S.C. § 1371 (1976) (air carriers).
95. See the cases cited in notes 105 & 115, infra.
96. See, e.g., United States v. Southwestern Cable Co., 392 U.S. 157, 169 n.29 (1968) (cable television companies not common carriers within the meaning of the Federal
what to Justice Clifford had been a settled definition.\textsuperscript{97}

Nevertheless, the common law notion that a common carrier is one who invites others to use its transportation service has remained elemental. The Civil Aeronautics Board (CAB) determined common carrier status by inquiring whether a firm is "engaged as a regular business in offering air transportation to the general public in the commercial market."\textsuperscript{98} Similarly, the ICC's test of jurisdictional status "includes the common law concept of a 'holding out' to transport the property or person of anyone who might elect to use the service."\textsuperscript{99} In \textit{National Association of Regulatory Utility Commissions (NARUC) v. Federal Communications Commission},\textsuperscript{100} the District of Columbia Circuit reviewed the history of the term "common carrier," acknowledging its transmutation from a private law concept to a basis for public regulation. The court concluded:

Whether the common carrier concept is invoked to support strict tort liability or as a justifying basis for regulation, it appears that the critical point is the quasi-public character of the activity involved. . . . What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier undertakes to carry for all people indifferently.\textsuperscript{101}

Explaining the necessity and policy basis for the "holding out" test, the court stated:

\begin{quote}
Communications Act); United States \textit{v.} Radio Corp. of Am., 358 U.S. 334, 348-49 (1959) (radio broadcasting not within definition of common carriers under Federal Communications Act). The task of identifying statutory common carriers and common carrier facilities has been made more difficult by circular statutory definitions. \textit{E.g.}, 47 U.S.C. \textsection\textsection 153(h) (1976). \textit{See} Federal Communications Comm'n \textit{v.} Midwest Video Corp., 440 U.S. 689, 701 n.10 (1979) (FCC decisions would be instructive in determining scope of definition of common carrier as including persons engaged as common carriers for hire).
\end{quote}

\begin{quote}
\textsuperscript{97} For example, in 1962, in \textit{Las Vegas Hacienda Inc. \textit{v.} Civil Aeronautics Bd.}, 298 F.2d 430 (9th Cir. 1962), in determining whether a particular air service was a common carrier subject to regulation by the Civil Aeronautics Board, the Ninth Circuit stated:

\begin{quote}
It is not surprising that the numerous decisions defining the terms are somewhat less than harmonious. The fact is that these precedents leave a considerable area of choice which the Board necessarily exercises in applying the broad definition of the statute to particular carriers to determine whether they are subject to regulation.
\end{quote}
\textit{Id.} at 433.
\end{quote}

\begin{quote}
\textsuperscript{98} \textit{Id.} at 434.
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\textsuperscript{100} 525 F.2d 630 (D.C. Cir.), \textit{cert. denied}, 425 U.S. 992 (1976).
\end{quote}

\begin{quote}
\textsuperscript{101} 525 F.2d at 641.
\end{quote}
The common carrier concept appears to have developed as a sort of *quid pro quo* whereby a carrier was made to bear a special burden of care, in exchange for the privilege of soliciting the public's business. . . . The characteristic of holding oneself out to serve indiscriminately appears to be an essential element, if one is to draw a coherent line between common and private carriers. The cases made clear both that common carriers need not serve the whole public, and that private carriers may serve a significant clientele, apart from the carrier himself. Since given private and common carriers may therefore be indistinguishable in terms of the clientele actually served, it is difficult to envision a sensible line between them which does not turn on the manner and terms by which they approach and deal with their customers. The common law requirement of holding oneself out to serve the public indiscriminately draws such a logical and sensible line between the two types of carriers. 102

There is a troublesome aspect to the court's focus in *NARUC* on "the manner and terms by which [transportation companies] approach and deal with their customers." Consider, for instance, Justice Day's opinion in the *Tap Line Cases*: 103 "It is the right of the public to use the road's facilities and to demand service of it rather than the extent of its business which is the real criterion determinative of its [common carrier] characteristics." 104 Several of the federal statutes regulating common carriers were motivated in part by congressional desire to change the way in which the industry dealt with users and potential users of its services. As a legislative remedy for companies viewed as "natural monopolies," Congress sought to decree that certain companies deal with the public as common carriers rather than as wholly proprietary businesses. Left to their own devices, such companies might not view themselves as common carriers and probably would not offer the nondiscriminatory access to services that has been deemed the essential characteristic of common carrier operation. In short, if one inquired as to the "manner and terms" of these firms' voluntary customer treatment in the absence of regulation, one would not find the classic common carrier. Further, unless the scope of the regulatory scheme reached beyond those who voluntarily behaved as common carriers, the basic regulatory purpose would be frustrated by companies which avoided regulation merely by structuring their dealings with customers as private, non-transportation transactions.

102. *Id.* at 641-42.
103. 234 U.S. 1 (1914).
104. *Id.* at 24.
To the extent that courts have upheld the application of regulatory statutes to such "involuntary" common carriers, they have had to depart from the traditional "holding out" test and rely on alternative bases for regulation. Further, they have been compelled to consider whether under the fifth amendment, the statute, or the particular application of the statute has resulted in an improper conversion of a private business to a common carrier. Perhaps in no area is this paradigm more evident than in oil pipelines.

In 1906, by enactment of the Hepburn Act, Congress extended the ICA to oil pipelines. Consequently, section 1(1)(b) of the ICA states that the ICA applies to common carriers engaged in interstate transportation of oil by pipeline. "Common carrier" is defined under section 1(3) to include "all pipeline companies." As discussed below, the Supreme Court has considered on several occasions the issue of whether section 1(3) means what it says or, instead, excludes certain pipeline companies who are not engaged in the common carrier business.

The leading decision in the area is the Pipe Line Cases, a consolidation of several cases in which the ICC had ordered certain oil pipeline companies to file tariffs. The companies, including Standard Oil and others, had refused to file tariffs and submit to the jurisdiction of the ICC on the grounds that they were not common carriers and that the ICA was unconstitutional to the extent it converted them to common carriers. Justice Holmes, writing for the Court, responded that the "evident purpose" of the Hepburn Act had been to extend the ICA to pipelines that "although not technically common carriers, yet were carrying all oil offered, if only the offerors would sell at their price." Justice Holmes explicitly rejected the companies' argu-

105. See Federal Communications Comm'n v. Midwest Video Corp., 440 U.S. 689 (1979) (FCC could not promulgate rules effectively converting cable television company to common carrier); Florida Power & Light Co. v. Federal Energy Regulatory Comm'n, 660 F.2d 668 (5th Cir. 1981) (FERC could not order electric utility to wheel electricity, effectively converting utility to common carrier).
106. Ch. 3591, 34 Stat. 584 (1906).
108. 49 U.S.C. § 1(3).
109. Until the most recent of these cases, United States v. Champlin Ref. Co., 341 U.S. 290 (1951), the law clearly seemed to be that any exception was narrow, including only companies which carried their own production through their own pipelines to their own points of distribution. Champlin introduced considerable uncertainty by suggesting that pipeline companies might be common carriers for some purposes under the ICA, but not for others. See infra notes 125-130 and accompanying text.
110. 234 U.S. 548 (1914).
111. Id. at 560.
ment that they were not engaged as common carriers because they transacted their business as purchases and sales and thus had title to all oil in their lines. The Court stated that Congress "may require those who are common carriers in substance to become so in form.""'

The cases that followed the Pine Line Cases thus looked to whether a pipeline company was a common carrier in substance. However, the Pipe Line Cases also drew an exception to the "all pipeline companies" principle. Among the several companies and fact situations before the Court in the Pipe Line Cases, the Court found one company which was not a common carrier in substance. The Uncle Sam Oil Company, according to the Court, was "simply drawing oil from its own wells across a state line to its own refinery, for its own use, . . . the transportation being merely incident to its use at the end." Justice Holmes decided that Congress certainly could not have intended that such movement would be viewed as transportation.'

Justice Holmes finessed the fifth amendment argument in the Pipe Line Cases by distinguishing the Uncle Sam Oil Company as not engaged in transportation within the meaning of the ICA. In Producers Transportation Co. v. Railroad Commission, however, the Court spoke more directly to the issue, indicating that the fifth amendment still had implications for the scope of valid oil pipeline regulation. In Producers Transportation, the pipeline company resisted public utility regulation by the state of California on the ground that it was a private carrier, not a common carrier. In dicta, the Court stated:

It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use the state could not by mere legislative fiat . . . convert it into a public utility or make its owner a common carrier for that would be taking private property without just compensation . . . ."'

The Court did not amplify what it meant by "strictly private contracts," but it went on to hold that the pipeline had in fact been "devoted to public use" and that California had not offended due pro-

112. Id.
113. Id. at 561.
114. Id. at 562.
115. Id. Chief Justice White disagreed with Holmes' theory for exempting the Uncle Sam Oil Company. 234 U.S. at 562-63 (White, C.J., concurring). White maintained that the fifth amendment precluded application of the ICA to a "purely private business."
116. 251 U.S. 228 (1920).
117. Id. at 230-31.
cess by regulating it. In so holding, the Court relied on the fact that the company’s charter authorized it to transport for any person, that it had exercised a right of eminent domain in obtaining its right-of-way, and that “looking through the maze of contracts . . . it was apparent that the company did in truth carry oil for all producers seeking its service, in other words, for the public.”

In 1939, in Valvoline Oil Co. v. United States, the Court resumed its strict interpretation of the phrase “all pipeline companies” and rejected the argument that legislative revisions in the language of section 1, including the addition of the phrase “engaged . . . as common carriers for hire” in section 1(3), had modified the phrase “all pipeline companies.” The Court also rejected the argument that Valvoline’s use of all its pipeline oil at its own refinery brought it within the Uncle Sam doctrine, stating that “the purchase from many sources and subsequent carriage” determined the applicability of the ICA to Valvoline. The same result was reached in Champlin Refining Co. v. United States, involving a products pipeline, even though Champlin was the sole owner of its pipeline oil, had never transported, offered to transport, or was asked to transport oil for others, had no direct connections with any common carrier, and had published no tariffs. The Court stated:

The controlling fact under the statute is transporting commodities from state to state by pipe line. 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 fact that the oil was intended for the interstate market and that the facilities would affect interstate commerce was sufficient basis for the Court’s holding that the ICA applied.

118. Id. at 232.
119. 308 U.S. 141 (1939).
120. Id. at 144-45.
121. Id. at 146.
122. 329 U.S. 29 (1946).
123. Id. at 33-34.
124. Four justices dissented in Champlin, criticizing the majority’s suggestion that a company might be a common carrier for purposes of section 1 in 19a of the ICA (requiring valuation reports), while not for other sections. The dissent wrote: “The definition of § 1 flows not only into § 19a but also into various other sections. Once an enterprise is found to be included in § 1, the Interstate Commerce Act subjects it to § 19a and other provisions dealing with common carriers ‘subject to’ the act . . . .” Id. at 39 (Reed, J., dissenting).
In *Champlin*, as in *Valvoline*, the case arose as an appeal from an ICC order that the pipeline company file valuation data. Several years later, Champlin was again before the Supreme Court, but this time, Champlin was contesting an ICC order that it file periodic and special reports under section 20 of the ICA, maintain its accounts according to ICC rules, and publish and file tariffs under section 6 of the ICA. The Court upheld the order under section 20, indicating that the information obtained contributed to the reliability of the ICC's data base and, in and of itself, was not a prohibited conversion of a private carrier to public use. Section 6, however, was viewed differently: "[I]t would be strange to support that Congress . . . intended that the Commission should make common carriers for hire out of private pipe lines whose services were unused, unsought after, and unneeded by independent producers, and whose presence fosters competition in markets heavily blanketed by large 'majors.'" The Court appeared to be impressed that common carrier transportation was readily available to shippers in Champlin's market area and Champlin's capacity was less than 2% of the market's capacity.

*Champlin II* is the Supreme Court's most recent statement on the applicability of the ICA to interstate oil pipelines, and a synthesis of it and the prior cases should be viewed as prevailing law. Harmonizing *Champlin II* with prior cases, there appear to be at least two, and possibly three, "classes" of interstate oil pipeline companies under the ICA. One class is the so-called "Uncle Sam" company, carrying only its own crude oil from its own wells to its own refinery, with transportation only incidental to its end use. Such a company may be entirely exempt from ICA regulation. On the other hand, an argument might be made that Uncle Sam companies, per *Champlin II*, are subject to reporting requirements like those in section 19 and 20, in which case the Uncle Sam class merges with the *Champlin* class, discussed below. However, the *Pipe Line Cases* opinion demonstrates that this latter interpretation is incorrect. The Court, in the *Pipe Line Cases*, clearly indicated that an Uncle Sam company would be exempt on the basis of statutory construction, not on the basis of the fifth amendment, even if due process may have been Chief Justice White's concern.

129. 341 U.S. at 296-97.
130. Id. at 298.
131. See the *Pipe Line Cases*, 234 U.S. at 562-63 (White, C.J., concurring).
The second category is the "Champlin" company which is subject to reporting requirements under the ICA. On the basis of the fifth amendment, such a company would not be subject to the ICA's rate regulation requirements and probably would not be subject to its service obligations (such as the duty not to discriminate among shippers). Like an Uncle Sam company, a Champlin company transports only its own oil between its own terminals and offers no service to others. However, because it is engaged in the transportation of petroleum products, as opposed to crude, the interstate significance of its activities validates the application of the ICA to the extent that no conversion of property is affected. In general, OCS pipelines are not used to move refined products. Thus, to the extent the Champlin company represents a different class than the Uncle Sam company, it is irrelevant for the purposes of this article.

The third category includes all other companies, to whom the full repertoire of ICA duties apply. The theoretical basis for regulation of these companies is that they have been devoted to public use, which, as to an individual company, could be supported by a showing that the company transports oil for others, has offered its services to others, or has received requests for service from others. Use of quasi-governmental powers, such as eminent domain, or expressions of purpose to carry oil for others also would support a finding that a pipeline company was a "common carrier in substance." Evidence of monopoly power, under Champlin IT's dicta, also might support application of the ICA. The type of contract used by the company probably is unimportant, although the Court, in Producers, referred to contracts "strictly private" in nature.

A large number of oil pipeline operations on the OCS probably will fall within the Uncle Sam class, at least so long as the pipeline companies are not engaged in the transportation of oil for other producers. However, many OCS pipelines, even if they are not voluntarily "held out" for the use of others, can be viewed as "common carriers in substance." Significantly, the OCSLA, under which the pipeline companies have been granted their OCS pipeline rights-of-way and easements, requires that nondiscriminatory access be granted to other producers. In that sense, they are subject to public use and subject to treatment as common carriers under the ICA upon request for access. What remains unclear is the scope of the "safe harbor" that is afforded by the dicta in Producers Transportation to the effect that a common carrier status may not attach to a pipeline
company operating through "strictly private contracts." The harbor probably should not be deemed safe at all. The spirit of the cases, including Producers Transportation, is to look behind the technicalities of style and draftsmanship. Whether oil entering the pipeline is produced by someone other than the pipeline's operator is likely to be viewed as the primary index of common carrier status.

Transportation

Congressional power to regulate interstate commerce is "broad and sweeping." The Supreme Court has held that the scope of congressional power under the commerce clause "is simply whether the activity sought to be regulated [is] 'commerce which concerns more States than one' and has a real and substantial relation to the national interest." Alternatively, commerce may be regulated by Congress if it has a "substantial economic effect" upon interstate commerce. In either case, whether under the "effect" test or the "interest" test, the commerce clause has been held to authorize "not only the regulation of interstate commerce itself, but all measures 'necessary and proper' to that end, including the regulation of commerce that is purely intrastate." Further, the concept of commerce has been held to include not only business practices but also legislation concerning the public health, safety, morals, or welfare. Under its power to regulate commerce, Congress has enacted legislation specifically governing agriculture, manufacturing, mining, wholesaling, retailing, banking, mass media, and many other lines of commerce. Congress has passed economy-wide legislation concerning labor relations, securities transactions, pollution, competition, and trade practices, all under its commerce clause power. Thus, it is easy to appreciate the distinction drawn between interstate commerce and interstate transportation. Transportation concerns movement. Commerce may include movement, but it also may refer to activities which are not immediately related to movement, although occurring before, during, or after movement.

More difficult to understand is that interstate commerce was not always conceived so broadly. In the nineteenth century, when a national economy was less a reality than an ambition, interstate commerce was tantamount to the activities and transactions of a few shipping, railroad, canal, and turnpike companies. "Transportation" and "commerce" were for many purposes synonymous. Only in the twentieth century did a distinction evolve. Thus, as is explained below, although dubbed the Interstate Commerce Act, the ICA applies to interstate transportation—alternatively, to transportation in interstate commerce—but certainly not to the entire sphere of interstate commerce. Thus the modern determination of whether a particular transaction or facility falls within the ICA scope generally is not an issue of congressional power, but an issue of statutory meaning and congressional intent.

The term "transportation," for purposes of the ICA's application to oil pipelines, is defined in section 1(3)(a):

The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. 139

Obviously, much of this definition is not applicable to transportation by pipeline, reflecting the application of the ICA to railroads and other transportation modes. Stripped of this surplusage, the definition would cover simply "all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, . . . delivery, and transfer in transit, . . . storage, and handling of property transported" or, even more succinctly, "all instrumentalities and facilities of shipment or carriage," as the definition was originally enacted in 1887. 140 Note, however, that the additional language, most of which was added by the Hepburn Act of 1906, was construed by the Supreme Court to modify the common law rule that certain activities performed by common carriers might not be treated as "transportation." In Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Dettlebach, 141 the Court referred to the expanded definition of transportation:

141. 239 U.S. 588 (1916).
From this and other provisions of the Hepburn Act it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the single term "transportation" and subjected to the provisions of the Act respecting reasonable rates and the like.  

Courts frequently have acknowledged the broad definition of transportation intended by Congress. For instance, transportation has been held to mean "the entire body of services provided by common carriers incident to the carriage itself." Significantly, however, this broad definition has not been treated as carte blanche authority to regulate the rates and service conditions of each and every transportation business that has come to the attention of the ICC. In 1915, a lower court observed that the more elaborate definition of transportation which resulted from the 1906 amendment did not substantively broaden its meaning and did not impose a requirement on a common carrier to acquire and furnish facilities which it did not otherwise voluntarily possess and provide. Later, in 1931, the Supreme Court, in *Kansas City Southern Ry. Co. v. United States,* stated: "There is no doubt that common carriers subject to the Interstate Commerce Act may have activities which lie outside the performance of their duties as common carriers and are not subject to the provisions of the Act." The Court held, however, that a carrier "dealing with transportation that is subject to the Act cannot escape its statutory obligations by calling itself a private carrier . . . ."  

In the context of these cases, several concepts surfaced in the definition of transportation under the ICA. A number of decisions focused on possession as the determinative test of transportation's beginning and end. Possession—generally a readily determinable

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142. *Id.* at 594.
145. 282 U.S. 760 (1931).
146. *Id.* at 764.
147. *Id.*
148. In *United States v. Baltimore & Ohio R.R.*, 231 U.S. 274 (1913), the Court held that transportation began at "the moment of time when [the shippers] physically deliver[ed] their sugar to the defendants [the railroad]," citing that as the point where
fact—provided a simple means for resolving many problems concerning the dimensions of "transportation." However, possession could not resolve situations where accessorial movement or some other transportation service was performed by a business entity legally separate from "the carrier," but perhaps related by contract, agency, or common ownership. To meet such problems, the Court determined whether custody could be inferred from control. In *Ellis v. Interstate Commerce Commission*, decided in 1915, the Court carefully recognized that a company which merely owned transportation facilities could not be treated as a jurisdictional carrier unless it exercised "control over motive power or over the movement of the cars that it" furnished. After *Ellis*, subsidiary terminal companies were held to be jurisdictional carriers, as was a company performing stock yard services as a contract agent of a railroad.

Nevertheless, neither the test of possession nor the test of control met the notion expressed in *Kansas City Southern* that a common carrier might itself engage in nontransportation services. In this regard, the opinions in the area contain a consistent undercurrent of reference to the performance of services in a common carrier "capacity" and to the inception of a shipper-carrier "relationship." For instance, in *Ellis*, the appellant owned various railroad cars, but it was involved primarily in the manufacture and leasing of these cars to railroad companies and was not directly engaged in furnishing transportation upon request. The Court held that the appellant was a nonjurisdictional carrier because "the only relation that [was] subject to the Commission [was] that between the railroads and the shippers." Similarly, in *United States v. Baltimore & Ohio Railroad Co.*, a sugar refinery, in order to use the long-haul services of the Baltimore & Ohio Railroad, used its own facilities to move its own sugar a relatively short distance to the railroad facilities. The Court found that the "purely accessorial" movement under consideration was

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risk of loss was transferred. *Id.* at 292. In *Pennsylvania R.R. v. Public Utils. Comm'n of Ohio*, 298 U.S. 170 (1936), the Court held that transportation under section 1(3) began when shipments were delivered into the possession of a common carrier.

149. 237 U.S. 434 (1915).
150. *Id.* at 443. In *Southern Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498 (1911), a terminal company under the same holding company as a common carrier already had been held to be a jurisdictional carrier.
154. *Id.* at 443.
155. 231 U.S. 274 (1913).
not transportation within the meaning of the ICA because "the real
and actual relation" of the company performing the tugboat move-
ment to the company performing the rail movement was not "that
of shippers."\textsuperscript{156}

The logical effect of these inquiries into "relationship" and "capa-
city" was to tie the definition of transportation to the determina-
tion of common carrier status. Thus, on facts similar to Baltimore & Ohio,
the Second Circuit later referred to the "relation as carriers" and
decided that transportation included only those services which a car-
rier was "bound to furnish."\textsuperscript{157} In addition, the Fourth Circuit
announced a definition of transportation which consolidated the various
lines of thinking,\textsuperscript{158} stating that transportation under section 1(3)
of the ICA "has uniformly been construed to mean service rendered
while a shipment is in the custody and control of the carrier or ser-
vice which the carrier is legally obligated to perform."\textsuperscript{159}

The definition of transportation had come full circle. Congress had
expanded the scope of "transportation" to bring various services and
facilities of common carriers within the nondiscrimination, access, and
publication requirements of the ICA. Its purpose had been to bring
various facilities and services within the ambit of those facilities and
services which the carrier should be legally obligated to provide.\textsuperscript{160}

The open-ended tests of "capacity," "relationship," and "legal obliga-
tion," however, returned the analysis to the original problem.

As a practical matter, the determination of whether a particular
facility or the performance of a particular service is transportation
and thus subject to regulation under the ICA has been resolved on
a case-by-case basis by the ICC.\textsuperscript{161} Thus, for example, the Supreme

\textsuperscript{156} Id. at 292.
\textsuperscript{157} Pennsylvania Ry. Co. v. M. McGirr's Sons Co., 287 F. 334, 336-37 (2d Cir. 1922),
cert. denied, 262 U.S. 743 (1923).
\textsuperscript{158} Walling v. Baltimore Steam Packet Co., 144 F.2d 130 (4th Cir. 1944).
\textsuperscript{159} Id. at 134.
\textsuperscript{160} See supra notes 141-142 and accompanying text.
\textsuperscript{161} The definition of transportation has been held to be an issue particularly within
"the competence and expertise" of the ICC. National Trailer Convoy, Inc. v. United
Pennsylvania R.R., 80 F.2d 100, 101 (2d Cir. 1935), the Second Circuit recognized that
the characterization of services as transportation "is not purely a question of law,
but it involves the determination of a fact." In Merchants' Warehouse Co. v. United
States, 44 F.2d 379, 384 (E.D. Pa. 1931), aff'd, 283 U.S. 501 (1931), the issue was held
a question of fact. Both Aron and Merchants' Warehouse acknowledged that the ICC's
determinations on the question should not be overturned unless arbitrary or unsup-
ported by evidence.
Court, citing "usage and physical conditions" at the point of unloading, has affirmed the ICC's holding that the unloading of livestock after transportation is a transportation service within the meaning of the ICA, and the Court has upheld the ICC's determination that the movement of cars within a terminal yard is not a transportation service to the extent that the movement exceeds the "ordinary operating convenience" of the carrier. In addition, one finds consistent references to concepts such as "plant facility," "trade services," and "accessorial services" in order to distinguish transportation from nontransportation. The use of each of these concepts involves detailed inquiries into the history and circumstances of the particular services and facilities under consideration. Review of these decisions discloses that the courts have given little guidance to practitioners in defining transportation for purposes other than the railroad industry.

Finally, an important perspective on the administrative and judicial gloss which has been applied to the ICA's definition of transportation is provided by examining the procedural context of the relevant jurisprudence. In general, the ICC and the courts have defined transportation in the context of shipper-initiated claims that "allowances," i.e., rate discounts, were due because the shipper was performing some service which the carrier would otherwise have been obligated to perform. Baltimore & Ohio, wherein a sugar refinery used its own facilities to move its own sugar to the railroad facilities, may be considered a case typical of this genre. The refiner claimed that the movement was part of the service which the railroad was obligated to perform and therefore an allowance was due. The case was decided against the refiner, however, on the grounds that the

163. Id.
railroad had never by practice or tariff held itself out to carry from the refiner’s location, deemed outside the tariff’s described “lighterage district.”\textsuperscript{167} The refiner’s movement was “purely accessorial.”\textsuperscript{168}

Arguably, much different considerations apply in matters where the issue is not whether a shipper should be entitled to a discount from a carrier’s rates, but whether a particular activity, accessorial or otherwise, should be subject to tariff and provided on reasonable and nondiscriminatory terms. Obviously, a company may be engaged in transportation even if its activity does not fall within the scope of another transportation company’s tariff. Courts have recognized that a transportation company may be a carrier in relation to some, while a shipper in relation to others.\textsuperscript{169} Insofar as a fundamental purpose of the ICA is to provide for effective access to common carrier facilities, it would seem a perversion of congressional intent to exclude facilities from rate and service regulation because they are “purely accessorial.” Indeed, to the extent such facilities are under the control of a common carrier or its affiliate and to the extent the facilities are either a necessary component of effective access or unavoidable and integral to the whole transportation service, the policy basis for regulation seems particularly strong.

Because of widespread integration in the oil industry and because the definition of transportation ultimately must depend on fact-specific inquiries, the concept of transportation as defined under the ICA provides particularly difficult problems with respect to oil pipelines. Justice Holmes’ “Uncle Sam” distinction\textsuperscript{170} seems to exclude from the concept of transportation certain crude oil pipelines owned and operated by producers for the exclusive movement of their own production. The Supreme Court has not expanded the scope of the Uncle Sam exemption, while the lower courts, the ICC, and FERC have not addressed the issues. Nevertheless, it arguably is unclear whether or under what circumstances the business of “gathering,” \textit{i.e.}, the collection of production from several wells or several producers, might be considered a transportation service subject to regulation under the ICA.\textsuperscript{171}

\textsuperscript{167} Id. at 286.
\textsuperscript{168} Id. at 287.
\textsuperscript{170} See supra notes 110-115 and accompanying text.
\textsuperscript{171} Under the Natural Gas Act, “production or gathering” is explicitly exempted from FERC’s jurisdiction. 15 U.S.C. § 717(b) (1976). Since Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, reh’g denied, 348 U.S. 851 (1954), in which the Supreme Court upheld the regulation of wellhead gas prices under the Natural Gas Act, the scope
bimations thereof and may involve storage in tanks, or processing to remove gas, sediment, and/or water, which is associated with crude as it is produced from the well. Whether the services and facilities of gathering under particular circumstances may be subject to regulation is complicated by the fact that an integrated oil company often will be engaged in production operations in the same fields which it serves by pipeline and may consider gathering services, at least for its own operations (and perhaps for operations in which it is engaged as a joint venturer or involved as a working interest), as part of production. Indeed, most, if not all, offshore oil movement might be characterized as gathering.\textsuperscript{172}

of the gathering exemption has been especially problematic. See, e.g., Shell Oil Co. v. Federal Energy Regulatory Comm'n, 566 F.2d 536 (5th Cir. 1978), aff'd, 440 U.S. 192 (1979) (rejecting FERC's imposition of a prudent operator standard on gas producers). However, it is clear that the exemption remains viable. See United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392 (1965) (distinguishing the "physical activities, processes and facilities" of production and gathering from sales by producers). In Northern Natural Gas Co. v. State Corp. Comm'n of Kansas, 372 U.S. 84, 90, \textit{reh'g denied}, 372 U.S. 960 (1963), the Court attempted to define the scope of the exemption, indicating that "production or gathering" was "narrowly confined to the physical acts of drawing the gas from the earth and preparing it for first stages of distribution." Accord Federal Power Comm'n v. Corporation Comm'n of Okla., 362 F. Supp. 522, 536 (W.D. Okla. 1973), aff'd, 415 U.S. 961 (1974). See also Public Serv. Comm'n of Ky. v. Federal Energy Regulatory Comm'n, 610 F.2d 439, 444 (6th Cir. 1979) (production and gathering consists only of "extraction and collection" of natural gas). FERC recently discussed the "production and gathering" exemption in Superior Oil Co., 13 F.E.R.C. \textsuperscript{\#} 61.218 (1980). Three distinct tests were recognized. One is the "behind the plant" test, which operates to exclude from jurisdiction pipeline facilities located upstream from a gas processing plant. Second, where there is no plant, a test looks to the point where gas from several wells is delivered into a "single line," holding any prior movement to be gathering. Finally, there is a "primary function" test, which considers "all the circumstances," including the actual business activities of the pipeline operator. Presumably, the primary function test, which is inclusive of the two other tests, and is the most flexible of the three, is the one which FERC intends to use. In Superior, it was found that the facilities in question were gathering facilities regardless of which test was chosen.

\textsuperscript{172} Query how deeply into the "production" operations the "transportation" responsibilities of a common carrier oil pipeline company may extend? Similarly, at the downstream end of the crude transportation system is a market of petroleum refiners, brokers, storage terminals, and the like, including "affiliates" of the pipelines, each with unique interests in the quantity and quality of crude that they might receive from any given pipeline. After refining, various petroleum products may be moved further by pipeline and finally distributed to a diffuse and sundry population of affiliates, franchises, wholesalers, retailers, consumers, and other entities in diverse postures of organizational or contractual relationship with the "pipeline company," by using pipelines, tankers, trucks, tanks, warehouses, and other facilities of movement, storage, and packaging. How deeply the definition of "transportation" may go into the services and facilities of "refining" or "product distribution" is also unclear.
Because of the integrated nature of the oil industry, the use of "custody" or "control" as a means of defining transportation by pipeline frequently will be unworkable. The use of these concepts could justify regulation of the entirety of an integrated oil company's activities, from the wellhead to the final consumer sale. However commendable, this result is probably inconsistent with legislative intent. On the other hand, the "legally obligated to perform" test provides no basis for determining whether particular activities and facilities should be tariffed and regulated, unless an integrated oil company's own characterizations of its operations, as stated in its tariffs, are accepted as the governing standard of its common carrier obligations. The "common carrier in substance" principle established in the *Pipe Line Cases* demands that courts look beyond such formalities. Similarly, whether a shipper-carrier "relationship" has arisen or an activity is performed in a shipper or carrier "capacity" provides no objective guidance without some underlying notion of the difference between transportation and nontransportation businesses. In essence, these "tests" are more an expression of the result than a means of getting there. In the final analysis, only the "plant facility" and "trade services" concepts seem to point in the right direction by focusing on industrial function and historical practice. These "tests," however, being highly fact-specific, have not been elaborated on in the context of the oil industry so as to provide practical guidance. At best, they provide a starting point for further analysis.

*Interstate*

Another prong in the ICA jurisdiction test is whether the common carrier transportation service is "interstate." Indeed, a literal reading of *Champlin I* indicates that interstate pipeline movement is the "controlling fact." Thus protracted argument as to whether a business entity operating a pipeline facility is a common carrier or whether a particular movement is transportation may be unnecessary.

There are two bases for concluding that OCS oil pipeline movements are interstate within the meaning of section 1(3) of the ICA. Arguably, the OCS is a "territory," and thus, since the ICA applies to all transportation within a territory and all transportation between territories and states, all transportation to, from, or within the OCS is expressly within the scope of section 1(3). The legislative

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173. As noted above, characterization of an activity as "accessorial," far from being a reason to exclude it from regulation, seems to be an important reason to consider regulation and by no means indicates that transportation is not involved.

174. See *supra* notes 122-124: and accompanying text.
history of the OCSLA tends to indicate that Congress, when it enacted the OCSLA, understood that the OCS would be so treated. However, it is presently unclear whether Congress's understanding was correct.

Alternatively, OCS oil pipeline movement arguably forms part of another larger movement and is properly tacked to it in determining whether the movement is interstate. Thus, a determination must be made as to whether the facts and circumstances of particular oil pipeline movements constitute part of a "continuous" interstate movement. Unlike the question of whether the OCS is a territory, the determination of whether OCS oil pipeline transportation is part of a continuous interstate movement requires a highly factual inquiry.

The OCS as a Territory under Section 1(3) of the ICA

The OCSLA is explicit in regard to the status Congress intended to attach to the OCS. The OCS is to be treated as "an area of exclusive Federal jurisdiction located within a State." Thus, since it is obvious that the OCS is neither a state, a foreign country, nor the District of Columbia, the material question with regard to whether OCS transportation is covered by section 1(c) might be stated as whether "an area of exclusive Federal jurisdiction located within a state" is the legal equivalent of a "territory" as that term is used in section 1(c) of the ICA.

"Territory" must be defined contextually because it may be synonymous with "area" or "place." When used technically, territory generally is viewed as referring to an area or place having an internal political organization and, in that way, distinguished from other tracts of federal land. Some authorities, however, draw a distinction between "organized" and "unorganized" territories. An organized territory would be a "political unit," while the federally-owned public domain with no separate government might be viewed as an unor-

175. See supra notes 50-67 and accompanying text.
177. 49 U.S.C. § 1(c).
179. 86 C.J.S. Territories § 1 (1954).
ganized territory or an area of exclusive federal jurisdiction.\textsuperscript{182} In \textit{United States v. Standard Oil Co. of California},\textsuperscript{183} the Supreme Court stated that an organized territory “is one in which a civil government has been established by an Organic Act of Congress.”

Clearly, the OCS is not an organized territory. In \textit{Interstate Commerce Commission v. United States ex rel. Humboldt Steamship Co.},\textsuperscript{184} the Supreme Court decided that Alaska, which had not yet been granted statehood, was an organized territory. The Court was persuaded in part by a federal statute entitled “An act providing a civil government for Alaska,” which declared that the territory would constitute a “civil and judicial district, the government of which [was to] be organized and administered as [thereinafter] provided.”\textsuperscript{185} In \textit{New York ex rel. Kopel v. Bengham},\textsuperscript{186} Puerto Rico was treated as an organized territory in part because it had a separate legislature under a territorial governor and other officers appointed by the President and Senate of the United States.

Nevertheless, whether the OCS is an organized or unorganized territory may not be the material issue in determining whether the OCS falls within the meaning of section 1 of the ICA. Although in \textit{Humboldt Steamship} the Court found that Alaska was an organized territory and was a territory under the ICA, the Court did not hold that the term as used in the ICA only included organized territories. Since \textit{Humboldt Steamship}, the Court has adopted a more liberal test for construing the statutory use of the term “territory.” For example, in \textit{Puerto Rico v. Shell Co.},\textsuperscript{187} the Court stated that whether Puerto Rico should be treated as a territory depended upon “the character and aim of the act” and might vary from one statute to the next. In \textit{Shell}, the issue was whether an organized but “unincorporated” territory was covered by section 3 of the Sherman Act. Concluding that Congress had “intended by the Sherman Act to exert all the power it possessed in respect of the subject matter,” the Court held that “territory” had been used “in its most comprehensive sense, as

\begin{footnotesize}
\begin{enumerate}
\item[182.] \textit{In re Lane}, 135 U.S. 443, 446-48 (1890). In \textit{Lane}, the Court construed the statutory use of the term “territory” so as not to include every area over which the United States had “exclusive jurisdiction.” Instead the court construed “territory” as only including “certain regions of the country [which had] been erected into civil governments.” \textit{Id.} at 447.
\item[183.] 404 U.S. 558, 559 n.2 (1972).
\item[184.] 224 U.S. 474 (1912).
\item[185.] \textit{Id.} at 482.
\item[186.] 211 U.S. 468 (1909).
\item[187.] 302 U.S. 253, 258 (1937).
\end{enumerate}
\end{footnotesize}
embracing all organized territories." Subsequently, in *United States v. Standard Oil Co. of California*, the Court applied the reasoning of *Shell* and concluded that the Sherman Act reached the unorganized territory of Samoa, i.e., "seven small islands in the South Pacific" governed by the Secretary of Interior.

Section 1(b) of the ICA is comparable to that section of the Sherman Act under consideration in *Standard Oil*, and Congress arguably intended to exercise the full extent of its constitutional powers over transportation when the ICA was enacted. The Court has held that the ICA should not be construed so as to preserve any powers of the states. Moreover, treatment of the OCS as a territory under the ICA would be consistent with the holdings of the lower courts, FERC, and the Federal Power Commission (FPC) regarding the Natural Gas Act, under which OCS gas transportation has been treated as jurisdictional. There are, however, no cases which treat the issue of whether mere transportation in the federal public domain or from the federal public domain into a state is covered by section 1 of the ICA. Further, it is not clear that *Standard Oil* represents a complete abandonment of the "organized territory" principle. Obviously, there is no question that Congress can regulate transportation on federal land and thus on the OCS. However, one must recognize that this power derives primarily from the Constitution’s property clause, not necessarily from the commerce clause.

It is questionable whether Congress intended that the total federal public domain should be treated as a territory under the ICA. The Justice Department advised Congress that the ICA might not be ap-

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188. *Id.* at 259. Pursuant to the Puerto Rican Federal Relations Act, 64 Stat. 319, enacted in 1951, Puerto Rico has adopted its own constitution and is treated as a state for purposes of federal law. The First Circuit has concluded that Puerto Rico is no longer to be treated as a territory for purposes of the Sherman Act because of this change in status. Cordova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank N.A., 649 F.2d 36 (1st Cir. 1981).


190. *Id.* at 559-60.


192. *See* cases cited in note 44, *supra*.

193. *See* generally 48 U.S.C. §§ 1661(b)-1666 (1976), concerning statutory treatment of Samoa. In most respects, Samoa is treated like other United States territories, and clearly it more closely approximates the popular notion of a territory, so far as it has an indigenous population, is located on land, etc. On the other hand, note that the statute governing Samoa amounts to little more than an extension of United States jurisdiction and in that respect is comparable to the OCSLA.

194. U.S. CONST. art. IV, § 3, cl. 2.

applicable to the OCS, apparently because it took the view that the OCS might not be a territory under the ICA.\textsuperscript{196} Congress did not rely on this advice, choosing instead to rely on the Department of Interior's advice that specific declaration of ICA applicability was "unnecessary." It is unclear whether the Interior Department's view was that the OCS would be an ICA territory or that OCS pipelines should not be subject to ICA regulation. The former theory seems more likely and preferable.

\textit{Continuous Interstate Transportation}

Even if the OCS is not a territory under the ICA, some transportation on the OCS still may be interstate transportation within the meaning of the ICA. Without detailing the particular circumstances of each oil pipeline located on the OCS, it should be evident that substantial quantities of oil produced from the OCS eventually are transported, in one form or another, to locations beyond the state immediately adjacent to the site of OCS production.\textsuperscript{197} More than a

\textsuperscript{196} See \textit{supra} notes 56-57 and accompanying text.

\textsuperscript{197} A typical journey might be as follows: After several undisturbed millennia in a porous rock formation underneath the Gulf of Mexico, a mixture of crude oil, natural gas, salt water, and sediment is drawn into a drilled well and, through it, to a wellhead located some distance from a production platform. The untreated oil mixture is moved to the platform through a pipe and there combined with untreated oil from other wells and run through a separator to reduce the dissolved gas in the oil mixture. After separation and perhaps after passage through another pipe to another offshore platform, the salt water and sediment is removed and the clean crude oil passes through a meter into yet another pipe or series of pipes. These pipes carry the oil, along with oil from other fields injected along the way, across the offshore boundary between Louisiana and federal domain, onshore through a terminal, several pumping stations and a tank farm, and then to a refinery located in St. Louis. At the refinery the crude oil is changed into a number of petroleum products, including gasoline destined by truck for Cincinnati, jet fuel destined by pipe for Chicago, and diesel destined by rail for Memphis. Thereafter, the products are injected as fuel into the respective modes of transportation—automobile, jet, and truck—and carried long distances before combustion resolves them into carbon dioxide, sulfur dioxide, and other additions to the atmosphere.

In the course of transportation, ownership of oil produced from the OCS changes hands several times. In the ground, it is part of the public domain and subject to the royalty interest of the United States government. The oil is reduced to possession at the wellhead by a lessee, \textit{e.g.}, a production subsidiary of a multinational company incorporated in Delaware, operating on behalf of a joint venture made up of several companies, each having the legal right to take its portion of the production in kind. Several of the joint venturers may exercise this right, but through several exchange agreements, one refining company may obtain the right to delivery of all the production from the well or at least an equivalent volume subject to adjustment for changes in quality resulting from mixture with other oil shipments. It is unnecessary to discuss
century ago, the Supreme Court, in \textit{The Daniel Ball},\textsuperscript{198} considered whether a steamer working the navigable waters of Michigan was subject to federal legislation. It held:

So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress.\textsuperscript{199}

\textit{The Daniel Ball}, however, might not resolve for a modern court the question of whether the transportation of oil produced from the OCS should be viewed as interstate. That the oil movement originated under the Gulf of Mexico and ended when the oil was consumed by a jet passing over Utah would not establish that transportation between those points or that the pipeline facilities and pipeline companies involved in that transportation were subject to the ICA or the jurisdiction of FERC. Since \textit{The Daniel Ball}, courts have become more concerned with details of itinerary.

In general, whether transportation is interstate is determined by examining its "essential character."\textsuperscript{200} Generally, the courts have refused to link "essential character" to any one factor, stating instead that the "whole group of facts" must be considered.\textsuperscript{201} Review of the cases, however, reveals that certain factors are especially important. In particular, the original shipper's intent as to final destination,\textsuperscript{202}

\textsuperscript{198} 77 U.S. (10 Wall.) 557 (1870).
\textsuperscript{199} Id. at 565.
\textsuperscript{201} Atlantic Coast Line R.R. v. Standard Oil Co. of Ky., 275 U.S. 257, 269 (1927).
\textsuperscript{202} There is authority to the effect that clear evidence of shipper intent is controlling, at least on the issue of whether interstate rates apply. In Baltimore & Ohio S.W. R.R. v. Settle, 260 U.S. 166, 171 (1922), the Court stated:

[N]either through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment...; and when the intention with which a shipment is made is in issue, the presence, or absence,
the terms of the transportation contract between shipper and carrier,\textsuperscript{203} and the nature and purpose of any interruptions in movement,\textsuperscript{204} whether for purposes of storage,\textsuperscript{205} for purposes of processing and manufacture,\textsuperscript{206} or for purposes of finding a market,\textsuperscript{207} are typically considered. In this manner, courts have sought to determine whether of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of traffic.

Nevertheless, on several occasions, the Court found that shipper intent was not controlling. \textit{See} Southern Pac. Co. v. Arizona, 249 U.S. 472, 477 (1919); Bacon v. Illinois, 227 U.S. 504, 515-16 (1913); Gulf, Colo. \& Sante Fe Ry. v. Texas, 204 U.S. 403, 414 (1907). In light of these cases, the better rule may be that shipper intent dominates only if it is communicated to a carrier who knowingly participates in the through movement. \textit{See} Sprout v. City of South Bend, 277 U.S. 163, 168 (1928) (destination intended by passenger on interstate bus was communicated to carrier and determined character of transportation). In this sense, the analysis of shipper intent may merge with the analysis of the shipper-carrier contract. \textit{See} note 203, \textit{infra}.

203. In \textit{Gulf, Colo. \& Sante Fe Ry. v. Texas}, 204 U.S. 403 (1907), the Court relied heavily on the nature of the transportation service described in the transportation contract, stating that the carrier "ought to be able to depend upon the contract." \textit{Id.} at 414. Recently, the Ninth Circuit testified as to the vitality of \textit{Gulf, Colorado}. Southern Pac. Transp. Co. v. Interstate Commerce Comm'n, 565 F.2d 615 (9th Cir. 1977). However, despite \textit{Gulf, Colorado} the Supreme Court frequently has looked past the terms of the transportation contract and other formal characterizations of the transportation service prepared by the shipper and carrier. \textit{See}, e.g., Baltimore \& Ohio S.W. R.R. v. Settle, 260 U.S. 166, 171 (1922); Baer Bros. Mercantile v. Denver \& Rio Grande R.R., 233 U.S. 479, 490 (1914); Chicago, Milwaukee \& St. Paul Ry. v. Iowa, 233 U.S. 334, 343 (1914); United States v. Union Stock Yard \& Transit Co., 226 U.S. 286, 304 (1912); Railroad Comm'n v. Worthington, 225 U.S. 101, 109-10 (1912); Southern Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 526 (1911).


transportation between interstate points has been "continuous."

Movements within a state, to and from points of "interrupted" interstate movement, have been deemed intrastate.

Applying this analysis of "continuity" to transportation of oil on the OCS, transportation from point to point on the OCS, even if not itself "interstate," evidently should be viewed as interstate if, when examined in the context of its larger journey, it is part of a continuous interstate movement. Similarly, transportation from the offshore federal domain into the immediately adjacent state, even if not itself an interstate movement, might be an interstate movement if it is properly tacked to subsequent movements. The critical determination is whether the movement is "interrupted" (as that term has been defined by the courts) before movement into the next state. Stated somewhat differently, the question is where does the interstate movement begin and where does it end.

The Supreme Court's first attempt after The Daniel Ball to specify the point of interstate transportation's beginning was in Coe v. Errol. There the Court decided that certain preparatory movements within a state would not amount to interstate transportation: "Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, [a shipment's] destination is not fixed and certain." So far as Coe established a rule based on the point of delivery to a common carrier, it remains a simple and attractive focus for the Court's analyses of interstate movement. However, where a shipment is "actually launched" before delivery to a common carrier, Coe points toward a determination as to when and where the destination of the shipment became "fixed and certain." Coe did not say that all shipper movements within a state are merely intrastate. Furthermore, a shipment's final destination might not become fixed until after delivery to a carrier. For example, fungible commodities like oil might be carried "downstream" in the course of a "staging"


211. Id. at 528.

process involving processing, storage, manufacture, and distribution. While most, if not all, of the original shipment predictably would move beyond the bounds of the original state, identifying the destination of a particular unit at the time of initial movement would be highly problematic.

The Supreme Court confronted this problem in 1913 in *Texas & New Orleans Railroad v. Sabine Tram Co.*\(^{213}\) and *Louisiana Railroad Commission v. Texas & Pacific Railway.*\(^{214}\) In both cases, lumber was shipped to intrastate terminals, apparently without specification as to eventual destination. At the terminals, there was some delay before shipment to out-of-state destinations. No manufacturing or processing was performed at either terminal. The issue was whether interstate or intrastate rates should apply to the movements to the terminal. Observing that most of the lumber was eventually exported, the Court decided that the essential character of the movements to the point of export was interstate. Later, however, in *Arkadelphia Milling Co. v. St. Louis Southwestern Railway*,\(^{215}\) the Court was confronted with an intervening saw mill in an otherwise similar fact situation. It decided that the strong probability of out-of-state movement was not enough:

It is not merely that there was no continuous movement from the forest to the points without the State, but that when the rough material left the woods it was not intended that it should be transported out of the state, or elsewhere beyond the mill, until it had been subjected to a manufacturing process that materially changed its character, utility, and value. The raw material came to rest at the mill, and after the product was manufactured it remained stored there for an indefinite period—manufacture and storage occupying five months on the average—for the purpose of finding a market. Where it would eventually be sold no one knew. And the fact that previous experience indicated that 95 per cent of it must be marketed outside of the State, so that this entered into the purpose of the parties when shipping the rough material to the mill, did not alter the character of the latter movement.\(^{216}\)

The circumstances of the lumber industry in *Arkadelphia* are suffi-
ciently analogous to those of the oil industry to conclude that an intra-
state movement to a refinery probably would not be tacked to an
interstate movement of products from the refinery to points further
downstream. However, in *Arkadelphia*, the Court was not consider-
ing a movement that was orchestrated by a single integrated com-
pany, as it might find in the case of an oil movement. Under the right
circumstances, interstate movement may end with indefinite storage,
reconsignment, division of the shipment, or some processing less than
refining.217 There is support for the notion that interstate movement
ends upon delivery to a company engaged purely in intrastate distribu-
tion to final customers.218 Nevertheless, there is considerable distance
between *Arkadelphia* and *Texas & Pacific*, and subsequent cases rein-
force the notion that movements in preparation for interstate move-
ment may be tacked to those movements, even where there is some
delay or taint in continuity. For example, in *Champlain Realty Co.
v. Town of Brattleboro*,219 the Court held that a “log boom,” i.e., a device
which delayed the downriver flow of logs for purposes of safety and
control, did not interrupt the interstate movement.220 Similarly, in
*Hughes Brothers Timber v. Minnesota,*221 the Court found that a switch
in transportation modes, together with accompanying delays, did not
destroy the interstate flow of the transportation.222 In other cases,
storage, processing, and division of shipment have been overlooked
where other factors have weighed in favor of finding continuous
movement.223 Particularly in cases involving pipelines and the com-
mingling of fungible shipments, the Courts’ emphasis has been on the

217. See generally cases cited in notes 204-207, supra.
218. Atlantic Coast Line R.R. v. Standard Oil Co. of Ky., 275 U.S. 257 (1927); Missouri
v. Kansas Natural Gas Co., 265 U.S. 298 (1924); Public Utils. Comm’n v. Landon, 249
U.S. 236 (1919); Northville Dock Pipeline Corp. & Consolidated Petroleum Terminal,
Inc., 14 F.E.R.C. 61,111 (1981); Jet Fuel by Pipeline within the State of Idaho, 311
220. *Id.* at 373. The Court stated that the log boom was not “an entrepot or depot,”
and was not “used by the owner for any beneficial purpose of his own except to facilitate
the safe delivery of the wood . . . on their final journey already begun.” *Id.*
221. 272 U.S. 469 (1926).
222. *Id.* at 475. The Court stated: “Both parties intended interstate shipment, they
had bound themselves to it, the logs were segregated and were moving in the con-
templated journey which neither could prevent if they carried out their agreement.
The delays in the continuity of movement were only incidental to the journey . . . .” *Id.*
223. Carson Petroleum Co. v. Vial, 279 U.S. 95 (1929); United States v. Erie R.R.,
280 U.S. 98 (1929); Texas Co. v. Brown, 258 U.S. 466 (1922); United Fuel Gas Co. v.
Hallanan, 257 U.S. 277 (1921); Western Oil Ref. Co. v. Lipscomb, 244 U.S. 346 (1917);
scope of the transporting company's business operations rather than on the origin and destination of individual shipments.224

Furthermore, there are two reasons to doubt that "interruption" is as great a constraint on the scope of the ICA as some of these cases suggest. One reason is that most of these cases deal with the power of state and local government to tax or otherwise regulate businesses and property. They trace back to Brown v. Houston,225 wherein the Court upheld the power of New Orleans to tax coal which had originated in Pennsylvania, but had been put up for sale in New Orleans. The Court held that the shipment was taxable because the shipment "had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans."226 The coal, it said, "had become a part of the general mass of property in the State."227

Principles of Brown and its progeny were incorporated into subsequent decisions requiring the Court to decide whether transportation was interstate or local.228 Later, however, the Court recognized that the states' power to tax could coexist with federal regulation:

[B]ecause there is a flow of interstate commerce which is subject to the regulating power of the Congress, it does not necessarily follow that, in the absence of a conflict with the exercise of that power, a State may not lay a non-discriminatory tax upon property which, although connected with that flow as a general course of business, has come to rest and has acquired a situs within the State.229

Although the Ninth Circuit recently rejected the ICC's argument that the early taxation cases were not apposite to the scope of its

224. See Eureka Pipe Line Co. v. Hallanan, 257 U.S. 265 (1921). In Eureka, the state of West Virginia wanted to levy a tax on transportation of all oil originating in West Virginia, even if transported to Pennsylvania. Shippers, in any case, had the power to direct delivery to points within West Virginia, and on that basis, West Virginia argued that the entire stream was intrastate and could be taxed as such. The Court disagreed, observing that the pipeline "controls the movement" and is "master of the destination" of any specific quantity of oil; the Court held that the pipeline's "intent and action determined the character of the movement." Id. at 271-72. See also United Fuel Gas Co. v. Hallanan, 257 U.S. 277, 280-81 (1921) ("typical and actual course of events" determines whether carrier pipeline transportation is interstate).
225. 114 U.S. 622 (1885).
226. Id. at 632.
227. Id. at 633.
jurisdiction, the Supreme Court's disassociation of the state taxation and federal regulation issues renders reliance on Brown and its progeny treacherous.

A second consideration in applying these cases is that many of them deal with the status of shippers and shipments in regard to whether they are subject to local or federal regulation. Arguably, the interstate or intrastate status of the carrier is a wholly different matter. Clearly, the use of an otherwise interstate system for intrastate shipments should not defeat federal regulation of the system. Similarly, whether a carrier operating entirely within the boundaries of a state ought to be subject to federal regulation probably should depend less on interruptions in movement which may occur at its terminals than on the nature of its participation in moving shipments to their final destination. In this context, it is noteworthy that in Champlain and Hughes Brothers, the Court stated that its analysis was more difficult where shippers retained custody and control of their shipments. In Hughes Brothers, the Court stated:

Solution is easy when the shipment has been delivered to a carrier for a destination in another State. It is much more difficult when the owner retains complete control of the transportation and can change his mind and divert the delivery from the intended interstate destination . . . . The character of the shipment in such a case depends upon all the evidential circumstances looking to what the owner has done in the preparation for the journey and carrying it out. The mere power of the owner to divert the shipment already started does not take it out of interstate commerce, if other facts show that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation . . . .

The Court's decision in Hughes Brothers, finding that the movements within the state were interstate, rested on its conclusion that a contract for the sale of lumber by a Minnesota lumber company to a Michigan paper mill, with delivery at the mouth of a Minnesota river, was in fact a contract "to divide the interstate responsibility for the continuous interstate transportation." The Court had earlier held that an otherwise intrastate railroad became subject to ICA regulation by entering into "an arrangement for the continuous carriage or

231. 272 U.S. at 475-76.
232. Id. at 476.
shipment from one state to another" with an interstate carrier. Accordingly, where the issue has been whether an ostensibly intrastate carrier is subject to federal regulation, the Court has focused on the carrier's relationship and arrangements with interstate carriers.

Nevertheless, despite these cases and despite the genesis of "continuous transportation" theory in the context of state taxation issues, it is useful to consider and analyze the distinction that the Court has attempted to draw between continuous and interrupted transportation. While the courts have suggested that their analysis may vary according to the facet of federalism before them, the courts have never drawn explicit methodological distinctions. Instead, the courts have emphasized the significance of particular facts and circumstances.

Indeed, since Congress evidently intended that the ICA would apply to the pipelining operations of the oil industry, the integrated nature of the oil pipeline industry may argue for greater attention to points of interruption as the means to distinguish and segregate jurisdictional activities. In *Grand Trunk Railway v. Michigan Railroad Commission*, confronted with an intracity railroad which had filed tariffs with the ICC and, on those grounds, opposed state regulation,

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233. Later, in *Southern Pac. Term. Co. v. Interstate Commerce Comm'n*, 219 U.S. 498 (1911), a terminal company with physical operations entirely in Texas, but connected to an interstate railroad system, was deemed interstate. The Court found that "control and operation" of the terminal company by a connecting interstate railroad had "united them into a system of which all [were] necessary parts." *Id.* at 521. Although the terminal company actually performed manufacturing operations on the shipments that passed over its docks, the Court found that the terminal was in fact a "link in the chain of transportation" and "part and parcel of the [transportation] system." *Id.* at 522. It could not be treated as an independent entity because the interstate railroad was "actively managing" the terminal as part of an "organized system." *Id.* at 523. Accord United States v. Union Stock Yard & Transit Co., 226 U.S. 286 (1912).

In *Union Stock Yard*, the ICC ordered a stock yard company located in a single state, but connected with an interstate railroad, to file tariffs. The stock yard was operated by a separate corporate entity. Nevertheless, the Court held that "common stock ownership with its consequent control" determined the regulatory status of the company. *Id.* at 306. In *Baer Bros. Mercantile v. Denver & Rio Grande R.R.*, 233 U.S. 479 (1914), a railroad located entirely within Colorado and independent, both in terms of ownership and management, was deemed interstate for purposes of certain shipments received from a connecting interstate railroad and originating in St. Louis. The Court found that there was a "common arrangement" between the connecting carriers to share the rates collected for the shipments. *Id.* at 491. Cf. *Atlantic Coast Line R.R. v. Standard Oil Co. of Ky.*, 275 U.S. 257, 267 (1927) (railroad transportation within Florida was not subject to interstate rate when entity at final destination had not contracted with the connecting interstate carrier).


235. 231 U.S. 457 (1913).
the Court stated: "A precise distinction between facilities can neither be expressed nor enforced. Transportation is the business of railroads, and when that business may be regulated and to what extent regulated may depend upon circumstances. No inflexible principle of decision can be laid down." The business of oil companies is not transportation, however, and arguably, the "principles of decision" should be less flexible regarding them.

CONCLUSION

The thesis of this article is that Congress did not repeal the ICA, either expressly or by implication, when it enacted the OCSLA and that it is therefore necessary to examine the jurisdictional provisions of the ICA to determine whether particular oil pipelines on the OCS are subject to ICA regulation. Certain OCS oil pipeline operations will fall outside the scope of the ICA because they are the operations of private carriers, not common carriers. In addition, certain OCS pipelines may be more closely related to extracting oil from the earth and reducing it to the possession of the producer than they are to the transportation of oil for "downstream" purposes such as sale, marketing, storage, refining, or use. The ICA does not apply to pipelines used exclusively for production operations.

Yet another ground for excluding particular oil pipeline activity from the scope of the ICA is that the pipeline is not engaged in interstate transportation. Bearing heavily on this determination is an unresolved legal issue—whether the OCS is a territory within the meaning of the ICA. If it is, all common carrier oil pipeline transportation on the OCS is interstate and within the scope of the ICA. There is support for the notion that the ICA should be construed to cover all OCS transportation, given that section 1(3) probably was intended to occupy the full realm of congressional power over common carrier transportation. There is no doubt that Congress has the power under the Constitution to subject OCS pipeline transportation to regulation under the ICA, and there is no evidence that Congress intended to exercise less than its full constitutional power when it enacted the ICA. It is likely that FERC will treat its jurisdiction over the OCS as comparable to its jurisdiction under the Natural Gas Act, wherein natural gas pipeline transportation has long been viewed as jurisdictional.

Even if the OCS is not held to be a territory under the ICA, many OCS oil pipelines still may be subject to the ICA because they are

236. Id. at 472.
integral parts of otherwise interstate transportation systems. The oil that flows onshore from the OCS generally is not fully consumed in the immediately adjacent state and frequently will be moved beyond that state before refining. The material inquiry is whether transportation from the OCS to the shore and beyond is interrupted before passing out of the state immediately adjacent to the site of OCS production. This article has attempted to show that the concepts of continuity and interruption involved in this analysis are subject to a liberal construction in favor of ICA application, especially where segments of interstate movement are subject to the control of a single company or an arrangement involving several companies is contemplated at the outset by the shipper and the initial carrier.

Thus OCS oil pipelines should not be viewed as per se exempt from ICA regulation. Indeed, the notion of “OCS oil pipelines” would appear to be a somewhat misleading legal category for purposes of the ICA. The OCS is part of the United States, subject to the laws which extended to it. The ICA is one of these laws.