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The Right to Manage Private Property: An Analysis of Whether Investor-Owned Utilities Have the Right to Manage Their Own Business

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THE RIGHT TO MANAGE PRIVATE PROPERTY: AN ANALYSIS OF WHETHER INVESTOR-OWNED UTILITIES HAVE THE RIGHT TO MANAGE THEIR OWN BUSINESS

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We have no doubt that the freedom to make use of one's own property . . . whether in pursuit of business or pleasure, is a 'liberty' which under the Fourteenth Amendment cannot be denied or curtailed by a state without due process of law.[1]

I. INTRODUCTION

Over the last 100 years, our country's view of the sanctity of private property rights has changed dramatically. From a period when private property was protected with almost religious zeal by our Supreme Court, we have evolved to where many facets of the institution of property are subject to government scrutiny. The zenith of such governmental control and the correlative nadir of private prerogative is illustrated by the regulation of this nation's investor-owned public utility industry.

Ever since the landmark decision of *Munn v. Illinois*,[2] our country has recognized that public utilities are subject to more onerous regulation than other businesses. Writing for the Court in *Munn*, Chief Justice Waite stated that utilities are "affected with a public interest," and accordingly, the public has a greater stake in the service provided by such businesses.[3] Because of this greater stake, the public can legislatively impose conditions and restrictions on public utilities which are not imposable on other businesses. These restrictions include limits on the prices which utilities can charge for their services.[4]

Utilities are, therefore, more susceptible to government regulation than other private companies. This fact has led to extensive state and federal regulation covering most facets of the business. Nevertheless,

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1. Wall v. King, 206 F.2d 878, 882 (1st Cir.), *cert. denied*, 346 U.S. 915 (1953).

2. 94 U.S. 113 (1877).

3. *Id.* at 126. Actually, the phrase "affected with a public interest" is borrowed from an earlier work by Lord Hale, *De Portibus Maris*, noted in *Munn*. The public has a greater stake in the services provided by public utilities primarily because such services are often considered as necessities. For example, Lord Hale was concerned with such things as ferries and wharfs which played an essential role in England's economy in the late 1600s when he articulated the "affected with a public interest" principle. *Munn*, 94 U.S. at 126-27.

4. *Id.* at 134.

until recently, utility companies retained control over their most important business decisions. For example, electric and gas utilities, the primary focus of this article, could choose which suppliers of coal and gas they would do business with, what kinds of power plants they could build, when they could build them, and what they could say to their customers. However, a trend has emerged in recent years wherein state regulators have tried to take these decisions away from the companies they regulate. This development portends a major and fundamental change in the investor-owned utility industry; a change which may have long-term, harmful consequences.

In analyzing this new regulatory trend, there are some important questions which must be explored. Do utility companies enjoy some legally protected right to manage their own property? If so, why, and what is the scope of such a right? Finally, if state utility commissions are encroaching upon this right, what are the implications?

The importance of answering these questions extends far beyond the utility industry. By seeking to determine how far state regulators can intrude on managerial decisionmaking in the most highly regulated industry in this country, the absolute limits of state power over private property can be better understood; and the line between what is "private" power and what is "public" power in our society can be more readily drawn.[5]

This article will first discuss some of the regulatory practices which initiated the concern that state regulators have usurped private decisionmaking from the companies they regulate. It will then analyze whether a right to manage exists, the scope of the right to manage, and why such a right exists. Finally, this article will discuss some of the implications for taking decisionmaking out of the hands of utility company managers and placing it in the hands of state regulators.

II. THE NEW REGULATORY PHENOMENON: MANAGEMENT BY REGULATORS

A. *A Brief Historical Perspective*

State utility regulation as it exists today started in 1907 when, recognizing the need for professional, continuous regulation over the natural monopolies which furnished the public with energy, water, and telephone services, the State of Wisconsin passed legislation creating a specialized state utility commission.[6] This statute provided a model which was followed by the rest of the states in one form or another.[7]

5. *See infra* notes 51-74 and accompanying text.

6. P. GARFIELD & W. LOVEJOY, PUBLIC UTILITY ECONOMICS 34 (1964) [hereinafter GARFIELD & LOVEJOY]. It is also important to note the significant contribution of New York which passed an act creating two public service commissions on June 6, 1907. *Laws of 1907*, ch. 429. Wisconsin did not enact its comprehensive public utility law until July 9, 1907. *Laws of 1907*, ch. 499.

7. GARFIELD & LOVEJOY, *supra* note 6. The state public utility commission movement spread throughout the nation so rapidly that by 1913 more than one half of the states had

Under this statutory scheme, state utility commissions were formed and usually consisted of between three to seven people. These commissions set rates, implemented utility statutes by promulgating rules and regulations, and insured that the service provided by utilities was adequate.[8] Congress also created a federal regulatory body called the Federal Power Commission[9] — later changed to the Federal Energy Regulatory Commission[10] — for the purpose of regulating interstate sales of energy.

Early United States Supreme Court decisions reviewing the power of the states to regulate utilities were strict. For example, in *Smyth v. Ames,*[11] the Supreme Court affirmed a lower court ruling holding a state statute which fixed maximum rates for railroads as unconstitutional under the fourteenth amendment.[12] In so doing, the Supreme Court put the states on a short leash, forcing all states to comply with the "fair value" formula[13] which was designed by the Court for computing what rates would pass constitutional muster. This "short leash" treatment and its accompanying "fair value" formula were later exhibited in a number of other cases, including, *The Minnesota Rate Cases,*[14] *Missouri ex*

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public utility commissions. *See generally* E. JONES AND T. BIGHAM, PRINCIPLES OF PUBLIC UTILITIES 163-90 (1932).

8. GARFIELD & LOVEJOY, *supra* note 6, at 32. *See also* Note, *The Duty of a Public Utility to Render Adequate Service: Its Scope and Enforcement,* 62 COLUM. L. REV. 312 (1962).

9. Federal Power Act, 16 U.S.C. § 813 (1920).

10. Department of Energy Organization Act, Pub. L. No. 91-95, 91 Stat. 565, 582 (1977).

11. 169 U.S. 466 (1898).

12. It should be noted that *Smyth* resulted from a rate determination made by a state legislature, before that state had a specialized utility commission.

The Supreme Court, after extensively surveying its caselaw decided since *Munn* dealing with rate regulation, made, *inter alia,* the following conclusions:

> 2. A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad [or the rates of any utility for that matter] that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States.
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> 3. While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the State or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry.

169 U.S. at 526.

13. *Id.* at 546-47. The Court stated "that the basis of all calculations as to the reasonableness of rates to be charged by a corporation . . . must be the fair value of the property being used by it for the convenience of the public." *Id.* at 546.

14. 230 U.S. 352 (1913). In this case, the Court made the following observation indicating the strictness of the Supreme Court's review of state regulation of utility property:

> The property of the railroad corporation has been devoted to a public use. There is always the obligation springing from the nature of the business in which it is engaged — which private exigency may not be permitted to ignore — that there shall not be an exorbitant charge for the service rendered. But the State has not seen fit to undertake the service itself; and the private property embarked in it is not placed at the mercy of legislative caprice. It rests secure under the

rel. Southwestern Bell Telephone Co. v. Public Service Commission,[15] and especially *Ohio Valley Water Co. v. Ben Avon Borough*.[16]

This strict judicial treatment of state regulatory power yielded to a far more flexible approach in the 1940s through some major Supreme Court decisions which dealt with the general question of judicial review of administrative action. The leading proponent of this change was Justice Brandeis. In a number of dissenting and concurring opinions, Justice Brandeis articulated the view that regulatory commission decisions should be given more deference by the courts.[17] Other important commentators of that period also forcefully argued that regulatory agencies should be given more control.[18] Thus, in what were to become landmark decisions of the early 1940s, the Supreme Court changed its position, ruling that regulatory agency decisions were to be given more deference by the courts.

In *Federal Power Commission v. Natural Gas Pipeline Co.*,[19] Chief Justice Stone made the following observation:

> The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the

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constitutional protection which extends not merely to the title but to the right to receive just compensation for the service given to the public.

Id. at 433-34.

15. 262 U.S. 276, 287-88 (1923) (The court held that "a fair return upon value of properties devoted to public service" could not be ascertained without considering the present cost of labor, supplies, and "[a]n honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances.").

16. 253 U.S. 287 (1920) (requiring, in effect, judicial de novo review of utility commission decision when regulated utility claims that rate regulation denies it property without due process of law).

17. For example, in Saint Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936), Justice Brandeis, concurring with the result reached by the Court involving a federal agency ratemaking proceeding, argued that regulatory agencies should have greater discretion:

> The obstacles encountered in the case at bar and in the regulation of the rates of the large utilities are attributable, in the main, to the Court's adherence to the rule declared in *Smyth v. Ames* for determining the value of the property. In *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm'n*, I stated my reasons for believing that the Constitution did not require the Court to adopt that rule which so seriously impairs the power of rate-regulation. But since the decision of *Smyth v. Ames* is adhered to, there is the greater need of applying to cases in which rate-regulation is alleged to be confiscatory to the rule of reason under which the Court has sanctioned, in other cases of taking, the legislative provision giving finality to quasi-judicial findings of value and income by administrative tribunals.
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> . . . Congress concluded that a wealthy and litigious utility might practically nullify rate regulation if the correctness of findings by the regulating body of the facts as to value and income were made subject to judicial review. For that conclusion experience affords ample basis. I cannot believe that the Constitution, which confers upon Congress the power of rate-regulation, denies to it power to adopt measures indispensible to its effective exercise.

Id. at 92-93 (Brandeis, J., concurring) (citation omitted). *See also* St. Louis & O'Fallon Ry. Co. v. United States, 279 U.S. 461, 488-548 (1929) (Brandeis, J., dissenting).

18. *E.g.*, J. LANDIS, THE ADMINISTRATIVE PROCESS 126-54 (1938). *See generally* J. Pfiffner, *The Development of Administrative Regulation*, 221 ANNALS 1 (1942).

19. 315 U.S. 575 (1942).

> pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end.[20]

In *Natural Gas Pipeline*, the Court thwarted a challenge to an interim order issued by the Federal Power Commission which directed natural gas companies to file a new schedule of rates so as to effect a decrease in annual operating revenues.[21] While the Court held that no single formula needed to be adopted and followed in order to determine fair value, it intimated that some type of rate base was necessary and refused to overrule the well-established "fair value" factors. Following *Natural Gas Pipeline*, however, the Supreme Court decided *Federal Power Commission v. Hope Natural Gas Co.*[22] wherein it announced the "end result" doctrine, under which a regulatory agency can generally use any statutorily acceptable means to set rates, so long as the "end result" is not unjust or unreasonable.[23] *Hope* and *Natural Gas Pipeline* began the era, continuing until the present, in which the courts have followed a much more deferential approach to all administrative decisionmaking.[24]

This change in the Court's view of judicial oversight of administrative decisionmaking was necessary, especially since the very purpose of professional, specialized regulatory bodies is frustrated when the courts are forever looking over the regulators' shoulders. But this deferential approach to administrative action affecting regulated companies has led to some extreme examples of state regulation of investor-owned utilities. As the next section illustrates, a trend is emerging wherein state

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20. *Id.* at 586.

21. *Id.* at 580.

22. 320 U.S. 591 (1944).

23. *Id.* at 602. It should be pointed out that this "end-result" analysis applies only to the methods used by regulatory agencies to set rates. In other words, under *Hope*, the courts will not second-guess how the regulatory agencies compute what is an adequate return to the utilities. The *Hope* case, however, has no relevance to the issue of how far regulators can encroach on management decisionmaking.

24. *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). In *Vermont Yankee*, the Supreme Court reversed and remanded the decision of the Court of Appeals for the District of Columbia to overturn a "fuel cycle" rule adopted by the Atomic Energy Commission for considering the environmental impact associated with nuclear fuel reprocessing and disposal, the effect of which was to deny a license to operate a nuclear reactor to the Vermont Yankee Nuclear Power Corporation. *Vermont Yankee* is indicative of the deference accorded administrative decisionmaking by the courts. Indeed, Justice Rehnquist, writing for the Court in *Vermont Yankee*, chided the Court of Appeals for intruding into the administrative process by stating that "this sort of unwarranted judicial examination of perceived procedural shortcomings of a rulemaking proceeding can do nothing but seriously interfere with that process prescribed by Congress." *Id.* at 548. Rehnquist further stated that "[t]he court should . . . not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Id.* at 549. *See generally* 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 29.16, 29.19 (2d ed. 1984).

regulators are beginning to take over the management of the investor-owned utilities they regulate — a development warranting a serious reappraisal of the regulators' role.

B. *State Regulation Today*

The most troublesome major development in state utility regulation today is what can be described as "resource-plan" regulation. The leading example of such regulation is Nevada's General Order Number 43, which was adopted by the Nevada Public Service Commission in response to legislation passed in 1983 entitled the Utility Resource Planning Act.[25] This regulation, in effect, makes the Nevada Commission primarily responsible for planning future energy development in that state, thus usurping the role of utility company management. As authorized by statute, Nevada's utility companies are required to submit detailed energy plans to the Commission.[26] The regulation requires that these plans reduce every future energy-supply decision to an econometric model detailing every assumption, and requires that every possible choice concerning future energy development be included.[27] The Commission has veto power over any item contained in the plan thereby giving it the ultimate management control over the decision-making process.[28]

One Nevada commissioner who was primarily responsible for the drafting of the regulation has acknowledged that this new regulatory scheme is a radical departure from traditional utility regulation.[29] Moreover, Nevada's statutorily authorized Consumer Advocate has asserted that the approach inherent in this regulatory scheme has a definite ideological thrust,[30] one against which many utility companies have strenuously fought.[31] Undoubtedly, Nevada's regulatory scheme is a regulator-defined, predetermined approach to energy development in

25. 1983 NEV. STAT. § 5.2 (codified at NEV. REV. STAT. §§ 704.741, 704.746, 704.751, 704.890 (1985)).

26. NEV. REV. STAT. § 704.741 (1985).

27. For a discussion summarizing the regulation, see J. Wellinghoff & C. Mitchell, *A Model for Statewide Integrated Utility Resource Planning*, 116 PUB. UTIL. FORT. 19, 25 (August 8, 1985).

28. NEV. REV. STAT. § 704.751 (1985).

29. R. Haman-Guild, *State Involvement in Utility Resource Planning: Towards Partnership*, 115 PUB. UTIL. FORT. 22, 22-23 (April 18, 1985). Ms. Haman-Guild observed that:

> [b]ringing a regulatory body into a utility's resource planning process . . . goes against long standing traditions of utility regulation: that 'hindsight' shall govern the process of regulatory decisionmaking, and that 'prudence' and 'reasonableness' shall be decided after the fact, when regulators have access to a (theoretically) complete set of facts and information.

Id. at 22. Ms. Haman-Guild further noted that utility management in the state was concerned that the legislation authorizing the regulation "preempted management's right to make investment decisions for its stockholders . . . ." *Id.* at 23.

30. Wellinghoff & Mitchell, *supra* note 27, at 19. The authors mention an "emerging public policy awareness that a least-cost energy strategy [such as that implemented by Nevada] could make good business sense for public utilities." *Id.*

31. Wellinghoff & Mitchell, *supra* note 27, states that the regulatory scheme is designed to address the so-called "soft energy path" espoused by Amory Lovins. *See* A. LOVINS, SOFT ENERGY PATHS (1977).

that state. There is also no doubt that Nevada's scheme removes decisionmaking from utility managers in that state, and places it in the hands of Nevada's utility commission.

Other states have adopted some form of resource-planning regulation.[32] Additionally, the trade association for the state utility commissions, the National Association of Regulatory Utility Commissioners, has formally adopted a resolution calling for nationwide implementation of Nevada-like resource plan regulation.[33] The pervasive intrusion by regulators into the management of the utilities they are regulating is illustrated by state utility commissions that have imposed conditions on utilities' business practices. For example, state utility commissions have forced power companies to renegotiate their debt,[34] omit dividends and limit capital expenses,[35] and complete the construction of a power plant.[36] State regulators have even gone so far as to try to tell utility companies what they can and cannot say to their customers, although the Supreme Court has recently struck down such regulation.[37] It is, therefore, beyond dispute that this phenomenon of regulator-initiated and controlled energy planning is a significant emerging trend in state utility regulation.

What are the consequences of the encroachment by utility regulators upon what has traditionally been management's role? Some would argue that the investor-owned utility industry is obsolete, thereby justifying what can be perceived as its political demise.[38] But before the fun-

32. Wellinghoff & Mitchell, *supra* note 27 at 20-24. The article discusses resource planning objectives similar to those of the Nevada plan incorporated by the following jurisdictions: the Pacific Northwest, California, Florida, New York, Ohio, and Wisconsin.

33. Convention Resolution No. 7, NAT'L ASSN. OF REG. UTIL. COMM'RS (NARUC) BULL. No. 2 (Jan. 14, 1985).

34. As noted in Consumer Power Company's "Interim Report to Shareholders," March 31, 1985, the Michigan Public Service Commission informed the Company it would grant it a rate increase, but only after, *inter alia*, the company renegotiated a major portion of its debt with its creditor banks. Moreover, as reported in the Wall Street Journal, the Michigan Commission earlier wanted to condition any rate hike on the company's firing of its chief executive. *Departure of Consumers Power Head is Urged by State Official in Rate Case*, Wall St. J., Aug. 6, 1984, at 5, col. 2.

35. The Indiana Public Service Commission told Public Service Company of Indiana that it could write off over $2 billion invested in an abandoned nuclear plant, but only after the company agreed to omit certain dividends and limit its capital expenses. Richards, *PS Indiana to Omit Dividends in Plan To Write Off $2.7 Billion Nuclear Plant*, Wall St. J., Feb. 3, 1986, at 6, col. 2.

36. According to a bulletin by NARUC, No. 8-1983m at 19 (February 21, 1983), the New York Public Service Commission rejected a proposal by the Long Island Lighting Company to establish a subsidiary. The reason given was that the Commission thought that the company's management should devote more of its attention to the completion of a power plant then under construction.

37. Pacific Gas & Elec. Co. v. Public Util. Comm'n, 106 S. Ct. 903 (1986), *see infra* notes 63-74 and accompanying text. *See also* Consolidated Edision Co. v. Public Serv. Comm'n of N.Y., 447 U.S. 530 (1980) (The Supreme Court recognized that administrative bodies empowered to regulate utilities have the authority and the duty to take actions necessary to further the national interest in energy conservation. But when such action suppresses free speech the Constitution requires that the restriction be no more extensive than is necessary to serve legitimate state interests.); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

38. *See generally* R. MUNSON, THE POWER MAKERS 9-12 (1985). Munson goes so far as

damental decisions concerning this country's energy future are to be taken away from utility management and placed in the hands of state regulators, an open and informed debate should first take place. Central to this debate is the issue of whether utility companies have some protected right to manage their property. For if such a right exists, it exists for a reason. If the reason is still valid, the important decisions affecting this country's energy future should remain in management's hands, not state regulators'.

III. THE RIGHT TO MANAGE

In *Board of Regents v. Roth*,[39] the Supreme Court made the following observation concerning the nature of property interests:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[40]

What the Constitution does provide for, however, is the protection of these rights once they are created. For example, as noted by the quote appearing at the beginning of this article, the "liberty" interest of using one's own property in the manner in which he, she, or it[41] wishes is protected by the due process clause of the fourteenth amendment.[42] Specifically, in the context of the utility industry, that clause also protects utilities from being subjected to rate regulation which is confiscatory.[43]

Property rights, though, are not absolute. As announced by the Supreme Court in *Nebbia v. New York*,[44] at least insofar as economic regulation is concerned, the states have considerable discretion in regulating businesses when to do so promotes the public welfare.[45] Utilities are subject to extensive regulation because of the importance of the services they provide to the public.[46] Therefore, by definition, any

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to imply that utility bankruptcies would actually be advantageous to consumers: "If the local impacts of the first utility bankruptcy are similarly tame—in other words, if the lights stay on—regulators in other states may deny rate relief to their troubled power companies, while consumers increase their political willingness to 'stick it to investors.' " *Id.* at 12.

39. 408 U.S. 564 (1972).

40. *Id.* at 577.

41. In Santa Clara County v. Southern Pac. R.R. Co., 118 U.S. 394, 396 (1886), the Supreme Court announced that corporations are "persons" within the meaning of U.S. CONST. amend. XIV.

42. Wall v. King, 206 F.2d 878, 882 (1st Cir.), *cert. denied*, 346 U.S. 915 (1953).

43. *See* Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 585 (1942) (unreasonably low regulation rate is confiscatory and unconstitutional). *See also* H. Booser, *The Constitutional Limitations on Public Utility Regulation*, 67 DICK. L. REV. 363 (1963).

44. 291 U.S. 502 (1934) (regulation of milk prices held to be constitutional since protection of dairy industry promoted public welfare).

45. *Id.* at 537.

46. In *Chas. Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522 (1923), the Supreme Court discussed a principle which applies with equal force today: A "sliding-scale," of sorts, exists in the area of public regulation of private business. The greater the

property rights a utility may have, including the right to manage its own property, are subject to some regulation. The issues then become, the extent and the manner of such regulation.

It is important to note that even the most protected forms of property, such as a vested interest in real estate, can be taken by the state as long as the property owner is given due process of law.[47] The fourteenth amendment's protection, by its very terms, makes this proposition clear.[48] Therefore, even if utility companies have the right to manage their own property, this right can be taken away, so long as the state provides the utility with due process of law. Consequently, the burden is on the state to articulate the reason why state regulators should be given the power to make the important decisions affecting our energy future.[49] The degree to which the courts will scrutinize any articulated justification given by the state for assuming the right to manage will, in turn, depend upon how fundamental the right to manage is viewed by the courts.[50]

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public's concern in a particular business, the more regulation of that business will be tolerated. According to the Court:

> To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. *To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner.* The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation.

Id. at 539 (emphasis added). It is important to note that this discussion by the Supreme Court acknowledging the state's extensive power to regulate nevertheless expressly excepted from such power the right to "take over" management of the regulated company.

47. Texaco, Inc. v. Short, 454 U.S. 516 (1982) (upholding Indiana statute making retention of severed mineral interests in land conditioned upon filing a statement of claim with the state).

48. "[N]or shall any State deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV, § 1.

49. An example of such due process is found in the statutory scheme regulating utilities in Colorado. Under COLO. REV. STAT. § 40-3-101 (1973), utility companies in that state are charged with providing service that is "adequate, efficient, just, and reasonable." The very next statutory provision empowers the Colorado utility commission to ensure that the utilities live up to these obligations. COLO. REV. STAT. § 40-3-102 (1973). To correct any abuses by a Colorado utility, however, the Commission must first hold hearings, and make a formal finding that the abuse exists. COLO. REV. STAT. §§ 40-4-101, 40-2-106 (1973). Such a finding is then subject to judicial review. COLO. REV. STAT. § 40-6-115 (1973). *See* Western Colo. Power Co. v. Public Util. Comm'n, 159 Colo. 262, 285, 411 P.2d 785, 797 (court not only has right to review but is obligated to do so), *cert. denied*, 385 U.S. 22 (1966).

50. The degree of judicial review afforded today reflects the view expressed by Justice Holmes in his famous dissent in Lochner v. New York, 198 U.S. 45 (1905). In dissenting from the Court's opinion invalidating a statute regulating the number of hours a baker could work, Holmes stated the following:

> Every opinion tends to become a law. I think that the word 'liberty' in the Fourteenth Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessar-

How fundamental is the right to manage, if it exists at all? This question strikes at the heart of the concept of private property. Charles Reich has described property as the tool by which society distinguishes between public and private power.[51] By defining a person's property rights, the law, in effect, draws a circle around that person.[52] Within that circle, the person has a great degree of control, and the burden is on the state to justify any intrusion. Outside the circle, the burden is on the person to show the authority for his actions.[53] Thus, if the state wants to affect a protected property right, the state must show why the public interest will benefit.

Beyond this procedural point, there is another reason for distinguishing between public and private power. John Locke was of the view that the concept of private property insures the most advantageous use of our resources. In the early stages of man's development, man is afforded a property right because, through his labor, resources of little value are transformed into things of great value to himself and others.[54] As society becomes more advanced and industrialized, however, it becomes necessary to settle, by "compact and agreement," the property rights of all persons in society, so as to allow for the production of goods now taken for granted in a civilized society.[55] The thrust of Locke's conception of property is a principle equally as valid today: preserving private property rights leads to the greatest good for the greatest number of people.[56] The role of government, according to Locke, is to preserve private property.[57] Thus, under Locke's view, *private industry* is given the responsibility for insuring the development of our material wealth, not government.

Early decisions by the Supreme Court strongly enforced the public-private distinction in the regulation of utilities. Perhaps the most famous articulation of this principle is found in *Missouri ex rel. Southwestern*

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ily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

Id. at 76 (Holmes, J., dissenting). Thus, under Justice Holmes's view, legislation or regulation which infringes upon fundamental principles should be struck down. Application of this view can indeed be seen today and specifically in the public-utility context. For example, in Pacific Gas and Elec. Co. v. Public Util. Comm'n, 106 S. Ct. 903 (1986), the Supreme Court invalidated a regulation requiring a company to include in its bills hostile messages from an activist organization that opposed the company in proceedings before the state utility commission. The concurrence by Justice Marshall makes it clear that one of the major reasons the Court struck down the regulation was that the company's fundamental right of access to and use of its own property, i.e., its billing envelope, was substantially infringed upon by the state without adequate justification. *Id.* at 914 (Marshall, J., concurring).

51. C. Reich, *The New Property*, 73 YALE L. J. 733, 771 (1964).

52. *Id.*

53. *Id.*

54. J. LOCKE, OF CIVIL GOVERNMENT 129 (Everyman's Library ed. 1924).

55. *Id.* at 137-40.

56. It is interesting that Locke appreciated the usefulness of feedstocks and the value they have for all of society, *id.* at 137-38. Perhaps the most valuable feedstock today is electricity.

57. *Id.* at 187.

Bell Telephone Co. v. Public Service Commission,[58] where Justice McReynolds declared:

> It must never be forgotten that while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in *State Public Utilities Commission ex rel. Springfield v. Springfield Gas and Electric Company*, 291 Ill. 209, 234.
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> 'The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers.'[59]

Thus, the court distinguished the regulatory function of the states from the ownership rights of the public utility companies. This same principle was stated with equal strength in discussing the property rights of railroads.[60] Management is responsible for making business decisions and regulators are responsible for insuring, that in making these decisions, management does not unreasonably harm the public.[61] More recent Supreme Court decisions in the area of labor show that the Court is still respectful of the rights of businesses to manage their own affairs.[62]

The importance of recognizing utility companies' right to manage cannot be understated. As evidenced by *Pacific Gas & Electric Co. v. Public Utilities Commission*,[63] state regulators can infringe on utilities' fundamen-

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58. 262 U.S. 276 (1923).

59. *Id.* at 289.

60. In Interstate Commerce Comm'n v. Chicago Great W. Ry. Co., 209 U.S. 108 (1908), the Supreme Court made the following statement:

> It must be remembered that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet, in no proper sense, is the public a general manager. As said in *Int. Com. Com. v. Ala. Mid. R. R. Co.*, 168 U.S. 144, 172, quoting from the opinion of Circuit Judge Jackson, later Mr. Justice Jackson of this Court, in *Int. Com. Com. v. B. & O. R. R. Co.*, 43 Fed. Rep. 37, 50:
>
> 'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits.'

Id. at 119. *See also* Great N. Ry. Co. v. Minnesota ex rel. State R.R. & Warehouse Comm'n, 238 U.S. 340 (1915).

61. *See Chicago Great W. Ry. Co.*, 209 U.S. at 119.

62. *See, e.g.*, Eastex, Inc. v. NLRB, 437 U.S. 556, 573 n.22 (1978) (An employer may prevent distribution of literature on his property which threatens business functions.); Hudgens v. NLRB, 424 U.S. 507, 521-22 (1976) (Employees had no first amendment right to strike against employer located in privately-owned shopping center.); Central Hardware v. NLRB, 407 U.S. 539, 543-45 (1972) (non-employee, no-solicitation rule upheld).

63. 106 S. Ct. 903 (1986).

tal rights[64] only by asserting a substantially relevant correlation between the compelling interest sought to be protected and the means chosen to achieve that compelling interest.[65] The state must make a compelling case for taking decisionmaking away from the utilities. In *Pacific Gas & Electric Co.*, Justice Powell, expressing the view of a plurality of the Court,[66] held "that the Commission's order impermissibly burden[ed the utility's] First Amendment rights because it force[d] appellant to associate with the views of other speakers, and because it select[ed] the other speakers on the basis of their viewpoints."[67]

It is important to note that one argument used by the state to justify its regulation in *Pacific Gas & Electric Co.*[68] was that the company had no property interest in its own billing envelopes and thus no constitutionally protected right to restrict access to them.[69] The Supreme Court rejected this argument, stating that "[w]here, as in this case, the danger is one that arises from a content-based grant of access to private property, it is a danger that the government may not impose absent a compelling interest."[70] The Court found that the state's argument, that the utility had no property right in its billing envelopes, "misperceives . . . the relevant property rights."[71] Chief Justice Burger noted in his concurrence that the state could not force the company to carry the messages of others in its "property used in the conduct of its business."[72] Chief Justice Marshall was the most forceful of all in his view that the state could not "redefine its common-law property rights" by preventing the company from "deny[ing] access to its property — its billing envelope."[73] In his concurring opinion, Marshall specifically recognized that as long as utility company property remains in private hands, the state's ability to control that property is limited.

> The State seizes upon appellant's status as a regulated monopoly in order to argue that the inclusion of postage and other billing costs in the utility's rate base demonstrates that these items 'belong' to the public, which has paid for them. However, a consumer who purchases food in a grocery store is 'paying' for the store's rent, heat, electricity, wages, etc., but no one would seriously argue that the consumer thereby acquires a property interest in the store. *That the utility passes on its over-*

64. In *Pacific Gas & Elec. Co.*, both first amendment and property rights were threatened by the state's regulation. *Id.*

65. 106 S. Ct. at 413.

66. Justice Powell was joined by Justice Brennan, Justice O'Connor, and Chief Justice Burger, who wrote a separate concurring opinion. Justice Marshall concurred in the judgment. Justice Rehnquist, with whom Justice White and Justice Stevens joined as to Part I, dissented. Justice Stevens also wrote a separate dissenting opinion.

67. *Pacific Gas & Elec. Co.*, 106 S. Ct. at 914.

68. The regulation at issue in *Pacific Gas & Electric Co.* required the Pacific Gas and Electric Company to include the literature of a hostile activist organization, Toward Utility Rate Normalization (TURN), in its billing envelopes.

69. *Id.* at 907.

70. *Id.* at 912.

71. *Id.*

72. *Id.* at 914 (Burger, C.J., concurring).

73. *Id.* at 915 (Marshall, J., concurring).

> *head costs to ratepayers at a rate fixed by law rather than the market cannot affect the utility's ownership of its property, nor its right to use that property for expressive purposes. The State could have concluded that the public interest would be best served by state ownership of utilities. Having chosen to keep utilities in private hands, however, the State may not arbitrarily appropriate property for the use of third parties by stating that the public has 'paid' for the property by paying utility bills.*[74]

There is no doubt that utilities are highly regulated. But, as Justice Marshall's comments make clear, utility company property is still private, and the state must respect that fact.

IV. CONCLUSION

At the heart of the institution of private property is the right to manage it, for it would do no good for a state to allow nominal ownership of property while at the same time assuming control over it. A state may decide to run the utility business itself, but it must pay the existing owners just compensation for the taking.[75] In other words, if the state chooses to become the general manager of utility property, it must first become the owner. If the state wishes to do less than that, then it has to justify any intrustion on utility management by explaining why the intrusion is necessary to protect the public. If it cannot do so, then the state has no right to deprive utility companies of the right to manage their property.[76] These principles are the essence of due process of law.[77]

The present utility regulatory system has many benefits. Like our federal government, which functions as well as it does as a result of the tension between the three branches of government, utility regulation creates a healthy tension between regulated companies and the regulatory commissions. Utility companies, in order to maintain a favorable political climate and avoid punitive regulation, are more responsive to their customers' needs than they would be if they were government owned. The separation of the roles of management and regulatory oversight leads to a dynamic environment within which utility companies are more innovative and responsive to their customers' needs.[78]

Some utility managers today reportedly are welcoming greater con-

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74. *Id.* at 915 n.1 (Marshall, J. concurring) (emphasis added) (citation omitted).

75. *See supra* notes 47-49.

76. In a broader context, one commentator has criticized regulatory agencies for what he describes as "regulatory activism." W. Pond, *Restraining Regulatory Activism: The Proper Scope of Public Utility Regulation*, 35 AD. L. REV. 423 (1983).

77. The new justice on the Supreme Court, Antonin Scalia, made the following observation concerning the fundamental nature of property rights:

> Surely the freedom to dispose of one's property as one pleases, for example, is not as high an aspiration as the freedom to think or write or worship as one's conscience dictates. On closer analysis, however, it seems to me that the difference between economic freedoms and what are generally called civil rights turns out to be a difference of degree rather than of kind. Few of us, I suspect, would have much difficulty choosing between the right to own property and the right to receive a Miranda warning . . . .

The Nat. L. J., June 30, 1986 at 20, col. 3.

78. From conversations with H. Peter Metzger, Manager of Public Affairs Planning, Public Service Company of Colorado, Summer, 1986.

trol by the regulatory commissions. Such acquiescence, however, would indeed be a Faustain bargain that would eventually lead to a stagnant environment wherein utility customers everywhere will end up paying much more for much less. The institution of investor-owned utilities is worth preserving. For those people who wish to do away with it, the burden is on them to justify why we should eliminate it. In any event, whatever we decide, we should do so after an honest and thoughtful debate. We should not let the basic structure separating public and private power silently erode without recognizing what is really happening.