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MARQUETTE LAW REVIEW

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125 YEARS SINCE THE INTERSTATE COMMERCE ACT: A Symposium in the Form of a Final Convocation

FOREWORD

THE LAST ASSEMBLY OF INTERSTATE COMMERCE ACT LAWYERS

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T.

Upon graduating from law school in 1989 and completing a one-year clerkship, I began my career as a lawyer at Sidley & Austin in Chicago, a firm whose clients over the decades have included railroads, electric utilities, and telecommunications carriers. One of my first assignments involved a challenge to the emerging technology of "Caller ID." The Pennsylvania Public Utility Commission had cast doubt on the legality of the technology as proposed to be deployed by the local telephone As counsel for a long-distance company, American Telephone & Telegraph Co. (AT&T), we were less concerned about the particular ruling than by its implications for our own interstate service. I prepared a substantial brief on the matter, but among its legal arguments I can recall today only the one that (like the man upon the stair) was not there. For upon reading my draft, David W. Carpenter, an extraordinary lawyer and AT&T's primary outside counsel at the time, said something to this effect: "It omits the best argument." And what was that? "The filed rate doctrine," came the answer.

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^{1.} In his work for AT&T, Carpenter was the successor to the legendary Howard J. Trienens, who simultaneously (in the early 1980s) had been the leader of Sidley & Austin and general counsel of AT&T—i.e., of the Bell System, the world's largest industrial organization. "Asked why he allowed Trienens to retain his Sidley & Austin partnership while at AT&T, [CEO Charlie] Brown replied that he needed the best lawyer in the world—that is, Trienens—and he would get him any way he could." PETER TEMIN WITH LOUIS

So began my introduction to a legal world that even then seemed as much of the railroads as of telephones. AT&T was required to file tariffs with the Federal Communications Commission (FCC), setting forth its rates and (necessarily) its services. Here is a succinct statement of this regime, frequently summarized as the filed rate doctrine: "Deviation from these tariffs is strictly prohibited under any circumstances, unless the regulatory commission concludes that the carrier's rates fail to meet the statutory requirement of being just, reasonable, and not unreasonably discriminatory." The model had been imported into the Communications Act of 1934 from the Interstate Commerce Act, whose great purpose upon its enactment in 1887 was to ensure that interstate railroads charged nondiscriminatory rates.

Carpenter had done some impressive things with the filed rate doctrine. In particular, in a series of cases involving electric utility companies, he (together with Rex E. Lee and others) had persuaded the Supreme Court that various state attempts to allocate or disallow certain costs were preempted by filings with the Federal Energy Regulatory Commission (because state regulators could not tread on federally filed tariffs).⁴ Indeed, at the same time as the Caller ID matter, we seemed to be on the cusp of another victory in the Supreme Court based on the filed rate doctrine.⁵

In a sense, none of this was novel. The filed rate doctrine had been the law since 1895.⁶ It had proved powerful enough to oust the antitrust

GALAMBOS, THE FALL OF THE BELL SYSTEM: A STUDY IN PRICES AND POLITICS 204 n.80 (1987). The story at the firm sometimes included that Trienens had insisted on the joint arrangement because he did not want the AT&T position and believed that his retaining the law firm partnership was the one condition that Brown would have to regard as both reasonable and unacceptable.

6

^{2.} Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1331 (1998) ("Even where a customer has been quoted a lower rate and has relied on that quotation, the Supreme Court has held that the tariff rate rather than the contract rate prevails.").

^{3.} Ch. 104, 24 Stat. 379 (1887); see Ch. 652, 48 Stat. 1064 (1934).

^{4.} Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986); Mississippi Power & Light Co. v. Mississippi *ex rel*. Moore, 487 U.S. 354 (1988).

^{5.} The Court had granted certiorari in a case that seemed in important respects on all fours with *Mississippi Power & Light*: it even involved the same interstate utility system whose same filings with the Federal Energy Regulatory Commission were said under the filed rate doctrine to preempt the local ratemaker's disallowance of certain costs. To be sure, the Fifth Circuit had seen it otherwise. In all events, the parties settled the case after it was fully briefed and awaiting argument. *See* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 502 U.S. 954 (1991) (order dismissing certiorari pursuant to Supreme Court Rule 46).

^{6.} See Gulf, Colo. & Santa Fé Ry. v. Hefley, 158 U.S. 98, 101-03 (1895).

laws.⁷ And the same year as I learned of its existence, the Supreme Court rejected even the Interstate Commerce Commission's attempt to soften the effect of the doctrine. The agency had ruled that it was an unreasonable practice for a motor carrier to enforce a filed rate where the parties had explicitly negotiated a lower rate—that is, where there was a contract rate of the sort that typifies most business transactions. In *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, ⁸ the Court struck down this policy because, by allowing deviations from tariffs, it offended the nondiscrimination regime at the heart of the system and the Act itself.

The effect of Maislin was that trustees in bankruptcy of motor carriers—there were many because of the deregulation and thus competition that the Motor Carrier Act of 1980 had engendered proceeded against shippers who had entered into apparent contracts for lower rates and knew not of filed tariffs. To many, the filed rate doctrine seemed out of place in the world of the 1990s. The inequity of such shippers' fate after *Maislin* attracted even popular attention, with CBS's 60 Minutes running a story entitled "You're Kidding." Justice John Paul Stevens and Chief Justice William H. Rehnquist were among the critics in the legal world, the former writing for them both in *Maislin* that "[t]he 'filed rate doctrine' was developed in the 19th century as part of a program to regulate the ruthless exercise of monopoly power by the Nation's railroads" and that the Court "fail[ed] to appreciate the significance of the 'sea change' in the statutory scheme that has converted a regime of regulated monopoly pricing into a highly competitive market."11

Even most of those forming the majority in *Maislin* seemed almost relieved a few years later, in *Reiter v. Cooper*,¹² when shippers—now proceeding within the Interstate Commerce Act paradigm by asserting the traditional defense that the filed rates were unreasonable—cobbled together a different argument that might protect at least some of them against the invocation of the filed rate doctrine by trustees in bankruptcy of failed motor carriers.

^{7.} Keogh v. Chicago & N.W. Ry., 260 U.S. 156, 163 (1922); Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 422–24 (1986).

^{8. 497} U.S. 116 (1990).

^{9.} Pub. L. 96-296, 94 Stat. 793 (1980).

^{10.} See 139 CONG. REC. 30,299 (1993) (statement of Mr. Danforth).

^{11. 497} U.S. at 138–39 (Stevens, J., dissenting).

^{12. 507} U.S. 258 (1993).

The telecommunications legal world in which I was moving, during these years as a young lawyer, also struggled with the filed rate doctrine. The FCC wished to do without it. Indeed, the agency for years excused all long-distance carriers besides our client, AT&T, from the statutory obligation to file their rates: the agency claimed that its authority to "modify" the tariffing obligation gave it sufficient authority.¹³ Carpenter led a team of us who persuaded the Supreme Court to set the record straight, with Justice Antonin Scalia writing for the Court and quoting one of the greatest cases decided under the Interstate Commerce Act:

The tariff-filing requirement is ... the heart of the commoncarrier section of the Communications Act. In the context of the Interstate Commerce Act, which served as its model, this Court has repeatedly stressed that rate filing was Congress's chosen means of preventing unreasonableness and discrimination in charges: "There is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination."¹⁴

^{13. 47} U.S.C. § 203(b)(2) (1994) (permitting the FCC to "modify" any requirement of section 203, whose basic provision was that "every common carrier . . . shall . . . file" tariffs). The Communications Act of 1934, as originally enacted and as not materially revised thereafter, provided that the FCC "may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions." Ch. 652, § 203(b), 48 Stat. 1064, 1071 (1934). The language had been essentially copied from the Interstate Commerce Act—or, more precisely, from the Hepburn Act's 1906 revision of section 6 of the 1887 Act. See Ch. 3591, § 2, 34 Stat. 584, 586 (1906).

^{14.} MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 229–30 (1994) (quoting Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 440 (1907)). Although it escapes the attention of most modern administrative law scholars, *Abilene* has been variously described as a "famous opinion," ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910–21, at 653 (1984) (vol. 9 of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States), a "landmark" case, T.I.M.E. Inc. v. United States, 359 U.S. 464, 473 (1959), and the "fountainhead" of the primary jurisdiction doctrine, 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 19.02, at 6 (1958).

In all events, *Abilene* is a gem of statutory interpretation. The Court held that the common law right of shippers to sue an interstate common carrier by rail for exaction of an unreasonable rate was preempted by the Interstate Commerce Act, *despite* the Act's explicit provision saving all common law rights. Justice (future Chief Justice) Edward White reasoned that the great purpose of the Act had been to protect against *discriminatory* rates and that permitting common law suits, with varying verdicts and judgments, would necessarily entail discrimination. The filed rate was the only lawful rate unless and until it was found by the ICC to be unjust, unreasonable, discriminatory, or otherwise in violation of the Act. "[The saving clause] cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of

Justice Stevens was left in dissent to make the same point as in *Maislin* had been true of trucking—that "[t]he communications industry has an unusually dynamic character"—and to decry "a rigid literalism that deprives the FCC of the flexibility Congress meant it to have in order to implement the core policies of the Act in rapidly changing conditions."¹⁵

II.

My purpose in remembering a few aspects of my early career is less to recall the filed rate doctrine and more to evoke the spirit of the age, as is captured in the struggle over the doctrine. There seemed little doubt even then that we were nearing the end of an era. Events would soon confirm it. In 1995, I left Sidley & Austin for another clerkship; by the time I returned the next year, the legal landscape had changed unmistakably.

Most prominent was the new Telecommunications Act of 1996. The Act contained numerous provisions, including the termination of the Modification of Final Judgment—the Bell System consent decree that had provided one of the twin pillars of telecommunications regulation for more than a decade (the other pillar being the Communications Act of 1934) and that had provided perhaps the bulk

the act. In other words, the act cannot be held to destroy itself." Abilene Cotton Oil, 204 U.S. at 446.

Upon Chief Justice White's death, Chief Justice Taft's memorial included the following observation:

The capital importance which our railroad system has come to have in the welfare of this country made the judicial construction of the interstate commerce act of critical moment. It is not too much to say that Chief Justice White in construing the measure and its great amendments has had more to do with placing this vital part of our practical government on a useful basis than any other judge. His opinions in the case of the *Texas & Pacific Railway Co. v. The Abilene Cotton Oil Co.*, and the cases which followed it, are models of clear and satisfactory reasoning which gave to the people, to state legislatures, to Congress, and the courts a much-needed knowledge of the practical functions the Commerce Commission was to discharge, and of how they were to be reconciled to existing governmental machinery, for the vindication of the rights of the public in respect of national transportation. They are a conspicuous instance of his unusual and remarkable power and facility in statesmanlike interpretation of statute law.

Proceedings on the Death of Chief Justice White, 257 U.S. v, xxv (1921).

^{15.} MCI v. AT&T, 512 U.S. at 235 (Stevens, J., joined by Blackmun & Souter, JJ., dissenting).

^{16.} Pub. L. No. 104-104, 110 Stat. 56 (1996).

of my practice as a lawyer.¹⁷ Congress also gave the FCC the authority that it had so long sought and even claimed (unsuccessfully in the *MCI* v. *AT&T* case): specifically, it provided that the FCC could forbear from enforcing any regulation not necessary to accomplish the Communications Act's purposes—including the tariffing requirement.¹⁸

Less relevant to my practice and to the larger economy, but more symbolically notable, during this year Congress also eliminated the Interstate Commerce Commission. A new entity had to be created, the Surface Transportation Board (STB), but not with the same independent-agency status—or with the same building on Constitution Avenue. And the authority afforded the STB over rail carriers was slight.

To be sure, some vestiges of the past remained. I had the satisfaction of seeing a case in which I had been unsuccessfully involved in my first run at the law firm be overturned by the Supreme Court on the basis of the filed rate doctrine, ²¹ more or less at the same time that even some well familiar with the doctrine were suggesting that the Court could no longer be counted on to have the stomach for it. ²²

I made my own departure from this fading realm in becoming a law professor. In recalling my time as an Interstate Commerce Act lawyer (of a sort) and the era of which I was part, I am not here trying to tie together all these changes in any sort of synthetic way. Tom Merrill and I already sought to do this, in the article which bridged my transition from fulltime practice to academe.²³

Instead, my motivation frankly is sentimental, although it is not nostalgic. By this, I mean that I do not consider myself (at least in this context) to be "of an older fashion," in the sense that "much that I love

^{17.} See generally Joseph D. Kearney, From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications Under Judge Greene, 50 HASTINGS L.J. 1395 (1999).

^{18.} Telecommunications Act of 1996, Pub. L. 104-104, § 401, 110 Stat. 56, 128 (1996) (adding 47 U.S.C. § 160).

^{19.} ICC Termination Act of 1995, Pub. L. No. 104-88, § 701, 109 Stat. 803, 932 (1995).

^{20.} Kearney & Merrill, *supra* note 2, at 1337 & n.58.

^{21.} AT&T v. Central Office Tel., Inc., 524 U.S. 214 (1998).

^{22.} See Southwestern Bell Corp. v. FCC, 43 F.3d 1515, 1527 (D.C. Cir. 1995) (Silberman, J., concurring) (citing recent Supreme Court authority in support of statement that, despite MCI, "[i]t is rather obvious that a number of justices are not comfortable with the hard logic of Maislin" and concluding "I lack confidence that the Court will adhere to the logic of Maislin and MCI when again faced with consequences that appear undesirable ex post").

^{23.} Kearney & Merrill, supra note 2.

has been destroyed or sent into exile."²⁴ I hold no brief for filed tariffs over contracts in a competitive world. Yet, for the sentiment, the developing world of regulated industries law today rather resembles the larger culture, in that it has become fragmented. One could handle rather well, I should think, a negotiation of a content contract for a local exchange company, in the world defined largely by the Telecommunications Act of 1996, without any sense of the Hepburn Act,²⁵ or the Mann–Elkins Act,²⁶ or any number of other amendments to the Interstate Commerce Act. But less than a quarter century ago, as my own experience shows, a lawyer could not competently confront the new technology of Caller ID without some knowledge of the Interstate Commerce Act.

So for those of us who grew up at least partly in the old world, there is some pleasure in remembering. We hope that there is some value in the remembrance for others.

We expect that there is. The remembrance is not at the scale or scope of the law review symposia celebrating the 50th and 75th anniversaries of the Act—or even the rather more ambivalent observation of the 100th anniversary.²⁷ Yet we have gathered an impressive collection of scholars. The following essays range from a recollection of the beginning, in the essay by James W. Ely, Jr., of Vanderbilt University,²⁸ to the interplay between the Interstate Commerce Act and the antitrust law enacted only three years later (the Sherman Act), as explored by the University of Chicago's Randal C. Picker.²⁹ Thomas W. Merrill, of Columbia University, discusses the unusual phenomenon of administered contracts in the Interstate Commerce Act's regulatory scheme, suggesting that the form of

^{24.} G.K. Chesterton, The Judgment of Dr. Johnson: A Comedy in Three Acts 117 (1928).

^{25.} Ch. 3591, 34 Stat. 584 (1906).

^{26.} Ch. 309, 36 Stat. 539 (1910).

^{27.} See Interstate Commerce Commission Semi-Centennial Commemorative Issue, 5 GEO. WASH. L. REV. 288–808 (1937); Symposium on the Interstate Commerce Commission, 31 GEO. WASH. L. REV. 1–326 (1962); Symposium, 16 TRANSP. L.J. 1–178 (1987); see also FELIX FRANKFURTER, The Interstate Commerce Commission, in OF LAW AND LIFE & OTHER THINGS THAT MATTER: PAPERS AND ADDRESSES OF FELIX FRANKFURTER, 1956–1963, at 235, 235–45 (Philip B. Kurland ed., 1965) (address marking the 75th anniversary of the Interstate Commerce Act).

^{28.} James W. Ely, Jr., The Troubled Beginning of the Interstate Commerce Act, 95 MARQ. L. REV. 1131 (2012).

^{29.} Randal C. Picker, The Interstate Commerce Act and the Sherman Act: Playing Railroad Tycoon, 95 MARQ. L. REV. 1135 (2012).

regulation was more impressive than the fact.³⁰ McGill University's Paul Stephen Dempsey focuses on the Interstate Commerce Commission as an agency, taking us broadly from its creation to its demise.³¹ Judge Richard D. Cudahy of the Seventh Circuit points us to the future, sketching the possible relevance of the Interstate Commerce Act's paradigm for modern debates over regulation.³² James B. Speta, of Northwestern University, with whom it was my privilege to convene this group, concludes with an assessment of the Act's pertinence in an area with almost as much importance to the twenty-first century as railroads possessed in the nineteenth: namely, telecommunications.³³

There no doubt will be other remembrances of the Interstate Commerce Act in times to come. One would imagine that, twenty-five years hence, the sesquicentennial will be marked. Any such observance will have the benefit of greater critical distance. Yet it will lack a substantial group of folks who can make some plausible claim to have grown up in the law, in some important sense, under the Interstate Commerce Act. In all events, we invite you to read these essays and to join us in remembering it.

^{30.} Thomas W. Merrill, *The Interstate Commerce Act, Administered Contracts, and the Illusion of Comprehensive Regulation*, 95 MARQ. L. REV. 1141 (2012). While we make no effort here to trace out each author's career, it should not go unremarked that Merrill argued *Maislin* for the Interstate Commerce Commission.

^{31.} Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission*, 95 MARQ. L. REV. 1151 (2012).

^{32.} Richard D. Cudahy, *The Interstate Commerce Act as a Model of Regulation*, 95 MARQ. L. REV. 1191 (2012).

^{33.} James B. Speta, Supervising Discrimination: Reflections of the Interstate Commerce Act in the Broadband Debate, 95 MARQ. L. REV. 1195 (2012).