POLICY report
Goldwater Institute
No. 238 | May 18, 2010

Rediscovering the ACC's Roots: Returning to the Original Purpose of the Arizona Corporation Commission

By Benjamin Barr, Senior Fellow, Goldwater Institute and CEO, Government Watch

EXECUTIVE SUMMARY

The Arizona Corporation Commission was established through the state constitution to regulate corporations, public utilities, securities, and other investments. But in an unprecedented move, the Arizona Corporation Commission sought to single-handedly determine alternative energy policy in Arizona with a bold and unconstitutional energy mandate in 2006.[1] This mandate forced energy producers to embrace state-favored alternatives instead of deciding for themselves which options are most attractive in Arizona.

Arizonans now face the real threat that the Arizona Corporation Commission will continue to seize power meant to be held by the state's legislative branch. Important decisions about energy policy, corporate governance, and other areas have been removed from the legislative process which, for all its faults, offers more transparency, citizen input, and accountability than the opaque and bureaucratic proceedings of the Arizona Corporation Commission.

The framers of the Arizona Constitution had serious concerns about the Commission's potential to abuse its authority. Records of the state constitutional debate show the constitution's authors intentionally limited the Commission's powers to prevent interference with internal business decisions. The framers' fears have been borne out. The Commission's attempt to act as the state's de facto energy czar clearly oversteps its original role.

Arizona courts should re-establish a proper balance between the Commission and legislative power. Courts in other states with similar utility regulatory commissions already have concluded such agencies don't have constitutional authority to mandate statewide policy. The Legislature also can reassert its authority by ordering an audit of the Commission that would recommend ways to streamline the agency and to restore it to its proper role. Finally, the state constitution could be amended to transfer necessary functions to other agencies and decommission the ACC to stop its policymaking power grabs, which Arizona's founders specifically aimed to prevent.

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Introduction

The utilities division enjoys jurisdiction over public-service utilities, which are regulated monopolies pursuant to Arizona law. In connection with this jurisdiction, the Commission has ratemaking authority - the power to set rates for railroads and public utilities - also known as public-service corporations.

Through Article 15, the Arizona Constitution establishes the Arizona Corporation Commission (ACC) - a feature peculiar to seven states in the nation.[2] The Commission includes several major divisions, including securities, corporations, utilities and hearings.[3] The securities division regulates financial securities, reviews new security offerings, and licenses investment representatives.[4] It wields the authority to inspect the business affairs of corporations whose stocks are offered for sale to the public.[5] In this respect, the Commission is authorized to function much like the federal Securities and Exchange Commission. The corporations division provides for organizational filings for corporations and limited liability companies (LLCs).[6] It collects annual reports from corporations for public access and provides businesses "whatever information is mission-critical."[7] Lastly, the utilities division enjoys jurisdiction over public-service utilities, which are regulated monopolies pursuant to Arizona law. In connection with this jurisdiction, the Commission has ratemaking authority - the power to set rates for railroads and public utilities - also known as public-service corporations.

The Commission is also expressly authorized by the state constitution to "make reasonable rules, regulations, and orders, by which [public-service corporations] shall be governed in the transaction of business within the State"[8] and to "make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons."[9] However, these regulatory powers have been interpreted by the Arizona Supreme Court as subordinate to the Commission's ratemaking authority.[10] In the Commission's own words, it "tries to balance the customers' interest in affordable and reliable utility service with the utility's interest in earning a fair profit."[11]

In 2008, the Goldwater Institute filed a legal challenge against the Corporation Commission, arguing that its renewable energy mandates exceeded its limited constitutional authority. Unfortunately, on September 2, 2009, the Superior Court of Arizona, Maricopa County, ruled against the Institute, largely due to the vast deference afforded to the Commission by other government branches. Instead of viewing the Commission's promulgation of the Renewable Energy Standard and Tariff (REST) rules as an unwarranted expansion of the ACC's power, the court ruled that the Commission's acts were simply the latest in a long string of energy policy decisions, fully compliant with the state constitution.

While early Arizona case law suggested that the Corporation Commission had limited authority over the "classifications, rates and charges of public service corporations," the Superior Court examined other precedents to suggest that the ACC and the legislature shared concurrent powers. In that sense, the court ascended the constitutional authority of the Commission into a miniature legislature that could regulate beyond the "scope of classification, rates, and charges." Under this vision of the Commission's authority, the ACC would retain expanded, unenumerated powers to take "reasonably necessary steps in ratemaking." What amounts to a reasonably necessary step, the court would hold, is determined by the Corporation Commission itself.[12]

After the enactment of the REST rules, the ACC fundamentally changed from a government body of limited authority to one with the presumptive authority to dictate energy policy in Arizona. With the Superior Court's ruling, the path would be set to emasculate the state legislature while denying Arizonans the benefits of the legislative process in deciding weighty issues such as how renewable energy resources should be developed in the state. Indeed, the trial court would come to refer to the ACC as somehow possessing "permissive authority." The court's ruling worked a further evil against the rule of law - it ignored the historical framework from which the Commission arose and the original understanding of its powers.

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When Arizona's Constitutional Convention took place, the framers of the state constitution debated whether a state Corporation Commission should exist and, if so, the degree of power it should possess. For many framers, the thought of concocting a commission to rule over corporate affairs was an odd concept. They understood corporations were just collections of individuals, and those individuals retain constitutionally protected rights that would not evaporate simply because individuals associate together in the corporate form. For these Arizonans, the idea that a centralized government bureaucracy could dictate prices for certain markets, pick winners and losers, and investigate the business affairs of others was contradictory to the American conception of liberty, individual rights, and limited government authority.

Nevertheless, during the period of Arizona's territorial experience and leading into statehood, political sentiments of the Progressive Movement were beginning to take hold. Progressive advocates were increasingly successful in dehumanizing corporations to depict them as nothing but greedy, profit-driven engines of despair. Correspondingly, they championed supposedly scientific regulatory management of the economy by government bureaucracies. Those sentiments would eventually come to be felt in the Arizona Constitution, which incorporated the concept of the Corporation Commission, a constitutionalized regulatory agency.

The Corporation Commission, however, was not meant to be the utopian regulatory leviathan idealized by progressives. It became a creature of compromise

between progressives and advocates of limited government and free enterprise. For this basic reason, the Commission is not the fourth branch of state government with unlimited power. This perspective of the ACC as a commission with moderate authority is often lost in state courts today.

Unfortunately, the passage of time has obscured this original understanding of the Commission's broad but still limited power. As a result, Arizona's compromise experiment in constitutionalized bureaucracy has since resulted in the decline of individual and associational freedoms. Determining who is fit to offer competitive services in the context of public utilities, engaging in humanitarian campaigns with funds coerced by the Commission, and broadly interfering in the intimate details of corporate life are all things the Corporation Commission engages in on a daily basis. In light of recent economic crises worldwide and Arizona's own unique challenges in energy markets, it is high time to reexamine the creation of the Commission and to reconsider its fundamental role in the state.

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The ACC and Energy Policy

The Corporation Commission claims the role of energy czar in the State of Arizona. In 2006, the Commission issued its own rulings that utilities would be required to generate 15 percent of their total energy from renewable resources by the year 2025.[13] Energy producers could pick from wind, biomass, solar or geothermal resources to provide "clean" energy. Only the Commission itself could dictate which new energies were qualified as sufficiently clean and which were not, thereby eliminating diversity and competition in those areas. To assess the feasibility of the energy mandates, every year on April 1, the Commission will review compliance reports.[14] Commission studies of this program estimate it will impose $2.4 billion in costs above the normal cost of conventional energy - all to be shouldered by consumers.

As with many government programs, the Commission's foray into energy policy did not suddenly appear with its REST rules. Instead, it grew slowly with time and great planning. In 1996, the ACC started its own "Solar Portfolio Standard." In 2001, that changed to the Environmental Portfolio Standard (EPS), more expansive in its reach. These efforts transformed into statewide workshops in 2003 and 2004, where individuals could provide input about the "appropriate resource mix, surcharge levels, portfolio percentages and phase-in levels" for the EPS and proposed amendments. Over the course of time, and leading into 2006, the Commission issued a second draft of its EPS standards that were intended to "increase renewable energy resources of diversity of the fuel supply, to enhance system reliability and safety in the post 9/11 era, and to mitigate against volatility in non-renewable fuel prices."[15]

Even Arizona's Attorney General doubted the constitutional authority of the Commission to issue renewable energy fiats. Responding to the Attorney General's request to provide a citation to its specific authority to do so, the Commission replied by noting that the "Commission cannot necessarily compartmentalize its decision-making into precise categories that will neatly reflect an isolated source of statutory or constitutional authority."[16] The Attorney General then gave deference to the Commission as a result. By permissively bypassing the task of review, the Attorney General deferred to the assertions of the Commission instead of conducting his own constitutionally mandated scrutiny of the ACC's actions.

By contrast, the Goldwater Institute initiated a challenge to the resulting REST rules, arguing that the Commission lacked the constitutional authority to dictate under the guise of ratemaking the sources of energy utilities must use. Doing so would invade the province of the legislature to set public policy. In response, the Corporation Commission argued that by mandating renewable energy resources, fewer chances of electrical disruption would occur, resulting in more reliable service and lower rates. In short, the use of broader energy options, in the Commission's estimation, provided "insurance against future possible disruptions." In ruling against the Institute, the trial court gave great deference to the Corporation Commission's findings, agreeing with the Commission's assertion that renewable energy mandates were nothing more than "the progeny of a long line of rate-regulating rules and regulations."[17] Put another way, the trial court determined that since the Commission must work toward providing low, reasonable rates to consumers, virtually any action by the Commission labeled ratemaking would be held constitutional. So long as the government employed magic words about reasonable rates, its exercise of authority would be upheld. Such deference cannot be squared with the constitutional compromise that generated the ACC, much less the doctrine of the separation of powers.

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The Constitutional Principle at Stake: Separation of Powers

In drafting the federal and Arizona constitutions, framers of both generations understood that the separation of powers doctrine would help prevent oppression and the infringement of liberty. James Madison, writing in Federalist Number 47, reasoned that separation of powers was necessary because the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many ... may justly be pronounced the very definition of tyranny."[18] It would not matter whether those who held the power were elected or not, because the constitutional damage occurs by concentrating power.

John Locke explained it another way: since the people themselves delegate their power to the legislature, "they who have it cannot pass it to others."[19] Today, legislative, judicial, and executive powers are increasingly delegated to administrative commissions and agencies, such as the Arizona Corporation

Commission. In Madison's view, no matter how benign their purpose, nor whether they were elected, such commissions were the very realization of tyranny. Accordingly, with the recent bold move of the Arizona Corporation Commission to mandate renewable energy usage, careful attention should be given to whether the body has overstepped its proper role.

Respect for the separation of powers is not optional under the Arizona Constitution. Unlike the U.S. Constitution, Article III of the Arizona Constitution expressly guarantees the division of powers between legislative, executive, and judicial departments – except where those powers are combined by express constitutional provisions. Accordingly, consistent with separation of powers doctrine, the Corporation Commission has been regarded as circumscribed in the executive authority it possesses. Unlike the legislature or other bodies of government, Arizona courts have held that it enjoys no implied powers. Instead, the Commission derives its sole authority from the state constitution and from statutes compliant with it.

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Nevertheless, because of the Commission's constitutional imprimatur and questions regarding the scope of the ratemaking power, Arizona state courts have wavered in interpreting and defining the ratemaking powers. A prime example of this confusion came just two years after the enactment of the Arizona Constitution, where the Arizona Supreme Court reasoned that "Article 15 of our Constitution is unique in that no other state has given its Commission, by whatever name called, so extensive power and jurisdiction."[20] The Court would come to state that the "supervision and control of public utilities has ever been, and probably always will be, one of the most vexatious as well as vital questions of government."[21] Accurately defining the scope of the ACC's authority has, as the state supreme court predicted, become a matter of some vexation, especially as the ratemaking power has increasingly evolved into something quasi-legislative. Therefore, it is necessary to plumb the Commission's origins to determine the nature of the compromise that brought it into existence, and to articulate the original meaning of the provisions that define its powers.

ACC: A Creature of Compromise and Limited Power

Delegates to the Constitutional Convention realized that corporate entanglement in government affairs needed to be addressed. One framer, Michael Cunniff, was representative of this voice - "in almost every state ... corporations have altogether too much influence in the [state's] direction and control."[22] In territorial days, when corporations became enmeshed with government bodies, they tended to compel taxpayers to fund or finance their activities. This was often the case with railroads and mining. As demonstrated in *Regifting the Gift Clause*, the result of such programs was typically financial ruin and indebtedness for the government body and taxpayers involved.[23]

Still, the delegates were not of one mind in regard to solving the problem of corporate abuse. They were divided between the "progressive" faction, who wanted to fashion a powerful bureaucracy empowered to dominate corporations of all shapes and sizes, and traditional advocates of limited government, who wanted to tailor any regulatory solution much more narrowly, retaining ultimate lawmaking authority in the legislature. What was initially proposed as a constitutional bureaucracy that would combine in one hand virtually unlimited executive, legislative, and judicial powers over all corporations eventually was shaped by compromise into a primarily executive agency with limited and targeted regulatory authority. It is this very limit on the core of the ACC's authority that has been lost today.

The skirmish between progressive and limited government factions began immediately with the introduction of Proposition 113, the original version of the language establishing the Corporation Commission. The proposition passed out of committee with language granting the Corporation Commission broad and unspecified power to engage in "general supervision" of all "private corporations" throughout the state.[24] This proposition immediately met with resistance at the convention when Mr. Lynch, a delegate, moved to replace the word "private" with "public service" to ensure that the Corporation Commission would have no regulatory jurisdiction over "hundreds of little corporations, some doing a mercantile business or cattle companies or fire associations ... engaged in private pursuits."[25] The motion was not only approved, but the entire section granting the Corporation Commission general supervisory power was eventually stricken.

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The defeat of the effort to grant general supervisory power to the Corporation Commission over all corporations strongly supports the recognition that the Commission was not meant to have unlimited regulatory authority. But the wrangling over the exact scope of the Commission's authority continued in the ensuing days. In support of Substitute Proposition 58, which purported to authorize the state to investigate, search, and seize business records for all corporations, Mr. Ingraham, a delegate, argued the state constitution should "put under the supervision of the commission all corporations, not merely public service corporations, but insurance and bank corporations, building and loan associations, and all those like corporations which are not classed by the books as public or quasi public corporations but which fall below that border line."[26] In response, other delegates, including Mr. Wells and Mr. Curtis, explained that it was not proper to subject private corporations, in addition to public-service corporations, to intrusive investigations by the Commission without regard to privacy rights that would otherwise be respected for unincorporated businesses.[27] Delegate Lynch further explained that the judiciary had ample powers to investigate claims of misconduct and that there was no need for similar and redundant powers to be vested in the Commission.[28]

Delegate Wells, from Yavapai, underscored the danger a Corporation Commission posed to entrepreneurs in Arizona, stating: "If this office is in the hands of hostile individuals, they can put that corporation out of business."[29] Delegate Lynch further warned, "I think the gentleman has struck the key-note. It will drive out all private corporations in the new state."[30] Based on these objections, a motion was made to strike out all investigatory powers of the Commission. This motion failed narrowly, but the Commission's investigatory powers were subsequently amended to affect only public-service corporations, state banks, building and loan associations, trust, insurance, and guarantee companies.[31] The final constitutional text largely restricts the Commission's authority over private corporations to paper-keeping functions.

The Commission's proposed investigatory and regulatory authority thus was steadily narrowed over the course of the constitutional debates. Common ground was found based on the considerable desire to provide the public a means of effective redress concerning worthless corporate stock offerings and fraudulent dealings.[32] This redress would be found proactively in the rate-setting features of the Commission as to specific public-service corporations and reactively as to its investigatory powers focused on other corporations. But no evidence exists to support the claim that any such power was plenary in nature.[33]

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The essence of the framers' debates comes down to the exact scope of the Commission's *limited* authority, not a debate between plenary powers or their lesser varieties. Correspondingly, what evidence exists regarding the nature of the Commission's ratemaking powers supports the inference that the Commission was not granted unlimited power to call anything it wanted "ratemaking."

The only mention of the Commission's ratemaking powers during Arizona's Constitutional Convention occurred during the afternoon of December 8, 1910, when an effort was made to amend the final language of the Arizona Constitution to allow the Commission to consider assessed property values in "determining and fixing the rates and charges."[34] The proposal of this amendment indicates that the Commission's ratemaking authority was publicly understood as discrete in its scope, not open-ended - otherwise, there would be no point in seeking to add the consideration of additional factors, such as assessed property values, to the Commission's ratemaking authority. The limited nature of the Commission's ratemaking authority coincides with its limited regulatory and investigatory powers. And it further confirms that progressives did not prevail in crafting a constitutionalized bureaucracy with unlimited power over all corporations.

Finally, what evidence exists of the debate at the Constitutional Convention regarding the relationship of the Commission's powers to those of the legislature supports an inference that even the Commission's "sole" powers were meant to be subordinate to the legislature's lawmaking powers. For example, Substitute

Proposition 58 originally proposed to grant the Commission "sole" power to issue certificates of incorporation. This power was then modified by the Committee of the Whole to be exercised "as may be prescribed by law" based on the concern of another delegate, Mr. Weinberger, that "this commission should be regulated by law."[35]

The subordination of the Commission's "sole power" to legislative regulation was apparently so uncontroversial that it was approved on *a voice vote*, without counting yays or nays.[36] Ultimately, Article XV, Section 6 of the Arizona Constitution confirmed that the *legislature* is authorized to expand the powers and duties of the Commission.[37] These provisions preclude the ACC from claiming independence from legislative control or authority to unilaterally expand its powers and duties.

To summarize, the Commission was proposed as an agency with general supervisory authority over all corporations. But this proposed power was quashed in the course of the constitutional debates. Then, the Commission was proposed as an agency with broad investigatory power over all corporations, able to bypass constitutional privacy protections. This proposed power was ultimately narrowed to target only public-service corporations and the like. Likewise, delegates to the convention rebuffed an effort to expand the Commission's ratemaking power. And the Commission's "sole" delegated powers were expressly brought under the legislative yoke.

Article XV, Section 6 of the Arizona Constitution confirmed that the legislature is authorized to expand the powers and duties of the Commission. These provisions preclude the ACC from claiming independence from legislative control or authority to unilaterally expand its powers and duties.

Consequently, while there is no question the progressive faction sought to establish a dominant government agency with unlimited power to bring corporations to heel, the truth is that the "scope of the powers ultimately given the commission was not nearly so great as originally envisaged by the progressives."[38] Any resulting construction of the Arizona Corporation Commission and its constitutional authority must then take this history into account by finding judicially enforceable limits to the ACC's authority. But before limits on the ACC's powers can be restored, the intellectual source of such deference - progressivism's core tenet that bureaucratic experts know best how to organize society - must be examined and uprooted.

The Rise of the Progressive Movement

The fundamental question posed by the Progressive Movement is whether commissions should be trusted as the sole, closed, trusted guardians of complicated policymaking. Progressive advocates support an expanded administrative state through several arguments. First, proponents of the administrative state explain that modern legislation is vastly more complex and sophisticated than in the past. This complex legislation requires more staff, resources, bureaucrats, and time to cobble together optimal regulations. Second, progressive scholars reason that more

modern society requires the employment of experts with technical expertise to solve complex policy issues of the day, such as environmental problems. Third, an enhanced bureaucracy affords decidedly more time for important issues to be conclusively settled by administrative experts.

As progressive trends advanced in the United States, several states began to develop regulatory commissions, often in response to railway operations. But these early regulatory commissions were far distant cousins from their counterparts today. For example, the Massachusetts Board of Railroad Commissioners provided education and information to consumers, but possessed no enforcement authority. Likewise, the creation of the federal Interstate Commerce Commission in 1887 followed a similar path. It possessed limited rate-setting authority for railway operations and provided consumer information on a nationwide basis.

Typical of this time period, these commissions would act as a clearinghouse of information for interested consumers, and when they did conduct investigations, any remedial solutions were suggested in a voluntary manner. Voluntarism, a respect for individual dignity, and a sense of public civic responsibility guided the way for meaningful corporate responsibility.

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In 1893 and moving forward, courts regularly defended the rights of individuals who made up corporations. In that year, the U.S. Supreme Court decided *Noble v. Union River Logging Railroad*, acknowledging corporate protection against government interference with property rights.[39] Before the mid-1930s, several cases established constitutional protection for corporations against government fishing expeditions for private corporate papers and upheld the right to be free from unreasonable searches and seizures. From 1905 until the mid-1930s, the Court struck down over 200 economic regulations, ordinarily involving corporate challengers.[40] These normally involved the right of these associations to freely negotiate wages, determine their own prices for marketable goods, and be free to enter into business operations without undue state restriction.

Nevertheless, three legal trends emerged from the Progressive Era that weakened constitutional protection for individuals associated as corporations. First, corporate constitutional rights became devalued by viewing the corporation not as a set of individuals with basic constitutional rights, but as an abstract, artificial entity. Second, the sanctity of economic liberty was removed by valuing the supposed wisdom of central planners and bureaucrats over individuals making their own decisions in a free society. Third, starting with a move to place concentrated pressure on the judiciary, courts became increasingly unwilling to recognize the primacy of individual liberty over commission rule.

During the 1930s, these progressive trends were manifested in the Roosevelt administration's attempted to centralize and exert government control over

economic activities to limit the extent of the Great Depression. While the U.S. Supreme Court dealt Roosevelt several setbacks in declaring major portions of New Deal initiatives unconstitutional, courts eventually retreated in their traditional recognition of corporate constitutional protections. In *United States v. Morton Salt*, for example, the Court permitted the Federal Trade Commission (FTC) to compel a large corporation to produce price and detail lists for its products, even if the FTC only wanted the information for "nothing more than official curiosity."[41]

By the 1950s, the Court's precedent slowly erased or severely limited the rights enjoyed by individuals voluntarily associated as corporations, allowing the administrative regulatory state favored by the Progressive Movement to flourish. By 1984, in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[42] the Court completed the legal edifice that would give the utmost deference to the supposed wisdom and expertise of administrative agencies. As Justice John Paul Stevens explained, "regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[43] Step by step, after *Chevron*, agencies would receive legal insulation from the courts to take the law and shape it according to their whims.

Instead of applying a strict separation of powers doctrine on the Constitutional Convention debates that led to the adoption of the Commission, Arizona courts have largely examined the sociopolitical implications of these principles in a complex, modern society and self-elected not to be too hard on any commission, especially the Corporation Commission.

Arizona Courts and Progressive Influences

Similar problems of commission deference have crept into Arizona's state court jurisprudence. Instead of recognizing the very limited and sparsely sanctioned power of the Commission, the state judiciary has reasoned that the "absolute independence of the branches of government and complete separation of powers is impracticable."[44] Instead of applying a strict separation of powers doctrine or even focusing on the Constitutional Convention debates that led to the adoption of the Commission, and thus limiting commission authority, Arizona courts have largely examined the sociopolitical implications of these principles in a complex, modern society and self-elected not to be too hard on any commission, especially the Corporation Commission.

Arizona state courts have detailed their commitment to commission authority in many ways, but with a common theme. Where statutes lack legislative precision, courts will entrust not legislative expertise in defining them, but administrative expertise: "we will give considerable weight to an administrative agency's construction of the statutory scheme which it is entrusted to administer."[45] State courts have regularly relied on the *Chevron* doctrine to bolster this effect.[46] Arizona judges in particular have relied upon this approach as a mainstay, reasoning that "considerable weight" must be given "to an executive department's construction of a statutory scheme."[47]

As the federal judicial moved toward embracing bureaucratic power over individual liberty, the Arizona judiciary moved in a similar direction. The effects of

subordinating the natural rights of individual liberty to government authority can be seen in resulting Arizona case law concerning the Corporation Commission. For example, in *Stop Exploiting Taxpayers v. Jones*, the court ruled that where the Corporation Commission has exclusive power, its power is "supreme."[48] Especially because Arizona's framers embedded the Commission into the state constitution, Arizona courts have found it to possess a "unique constitutional authority," making challenges to it all the more difficult.

Rulings by Arizona courts have explained that unless a Commission order is wholly arbitrary, it will be upheld based on "any reasonable evidence."[49] As a result of these judicial preferences, only the most unlawful rulings of the Commission will receive redress, leaving those that are invalid but still supportable in place. The resulting lesson to the Corporation Commission is simple: ensure that power grabs and usurpations of citizens' rights are well reasoned, and they will be upheld.

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It has long been held that it is "emphatically the province and duty of the judicial department to say what the law is."[50] When deference is granted to individual administrative agencies like the Corporation Commission, citizens face two competing bodies for interpretation of the law. When justice is sought, pursuing challenges through the judiciary will result in the judicial branch being in league with the Corporation Commission, granting controlling deference to most of its decisions and interpretations. This result then leaves citizens without redress should violations of their constitutional liberties occur. It also effectively combines executive, legislative, and judicial power in the Commission's hands. Ignoring separation-of-powers doctrine in this way is fundamentally insulting to the Arizona Constitution.

As early as 1913, the Arizona Supreme Court instructed that separation of powers was a bedrock of healthy civil government. At that time, the Court considered the doctrine a "vital principle" intrinsic to the very foundation of Arizona government.[51] The doctrine was so vital during the Constitutional Convention that its influence on proposals for the creation of a Corporation Commission transformed what could have been a tyrannical bureaucracy combining all of the powers of government into a primarily executive agency answerable to the legislature. With the judiciary acting in tandem with administrative agencies, which increasingly wield both executive and quasi-legislative power, that vital principle could soon vanish, leaving citizens in constitutional chaos.

Simply urging courts to enforce the doctrine of separation of powers will likely continue to fall on deaf ears. Therefore, it is crucial to show why the Progressive Movement was wrong to demand judicial deference to administrative agencies and commissions.

Who Knows Best: Regulatory Commissions or a Free People?

Designing the perfect mousetrap to encourage benign corporate behavior and otherwise regulate markets has been all but impossible historically. Even in consideration of the English Common Law, serious doubt existed over the rectitude of applying corporation regulation through bureaucratic institutions. Writing in 1849 in *Government by Commissions, Illegal and Pernicious*, J. Toulmin Smith explained the fundamental problem intrinsic to any rule of law dependent upon agencies for its realization:

> There can be no civil liberty where the law that protects the rights and enjoyment of property, and of privileges or franchises, is not administered in a certain known course. It is a principle of the Common Law, which is ever favourable to liberty, that the king cannot administer justice, except in his courts, and by his judges, duly established.[52]

As commissions are established that displace courts of law and equity, the certainty of the rule of law, liberty that is protected by procedural safeguards, and the free functioning of civil society is diminished. In the 1830s, England experienced the real effect of transferring power to commissions, where considerable doubt arose about whether the political nature of such posts would ever permit these bodies to fairly carry out the law.[53]

As commissions are established that displace courts of law and equity, the certainty of the rule of law, liberty that is protected by procedural safeguards, and the free functioning of civil society is diminished.

England was not alone in weeding out the corrupting influence of regulatory commissions in its government. In 1916, the Kansas Supreme Court declared portions of the state's oil regulation scheme constitutionally infirm. Kansas's oil inspection law imposed a coercive, mandatory inspection fee that reaped undue benefits to the state. Instead of just covering the state inspections at bay, the fees were considerably larger, and often pocketed by state inspectors to fund their salary.[54] Corruption, or its appearance, also became apparent in the functions of state commissions as Virginia, Connecticut, Michigan, New York, Rhode Island, Washington, and Wisconsin passed laws between 1904 and 1906 to prohibit the corruption of commission agents and employees.[55]

As the regularity of commissions began to be accepted in the American landscape, it would not take long for them to be captured by the very interests they were supposed to regulate. For example, the New State Ice Company manufactured, sold, and distributed ice pursuant to a license having been granted by the Oklahoma Corporation Commission in 1932.[56] Realizing the displacing power it could wield through the commission, the New State Ice Company brought suit against an individual bold enough to compete and produce ice without state sanction. By operation of Oklahoma law, people wishing to provide ice to other people needed to demonstrate public necessity for ice before permission would

be granted. This move by the commission replaced ordinary market calculations performed by numerous private actors - bankers, entrepreneurs, and the paying public – and subsumed them into one centralized body that could then be easily manipulated by market players to squash competition.

Pollution, and specifically the issue of clean water, is commonly used as an example of complex consideration best left to the administrative genius of bureaucracies such as the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers. But as demonstrated in a prior Goldwater Institute study, these agencies' stretched interpretation of desert lands as "navigable waters of the United States," for example, reveals the unsettling and unscientific nature of administrative decisionmaking.[57] Since "agencies know best" under the *Chevron* doctrine, only the most absurd agency actions and abuses will receive correction by the judiciary.

There is no real-world basis for the deference routinely granted by courts to the decisions of regulatory agencies and commissions like the ACC. The shifting of authority toward regulatory agencies and away from individuals, legislators and the courts disregards the lessons of history.

Furthermore, support for deference to the administrative state cannot be found in the supposed justification of expert decisionmaking. In 1992, the EPA's Science Advisory Board released a report explaining that the EPA's science is "perceived by many people both inside and outside the agency to be adjusted to fit policy."[58] High administrative federal posts are often filled by lawyers, not scientists, who do not possess the specialized expertise so often cheered about. Instead, science is used as leverage to promote policy favorable to the current political trends. Even where experts are present, it is not clear that government by unelected experts would serve citizens better than government by elected representatives.

For example, while the Arizona Corporation Commission plays the role of energy czar, Arizona faces a stark consumption and distribution problem for electricity markets.[59] Confronted with reliance on costly energy resources, such as natural gas and solar energy, with a consumption rate growing at three times the national average, Arizonans need new options for competitive energy resources.[60] And yet, under the Commission's presumably expert watch, little has been accomplished to solve those problems.

At the end of the day, there is no real-world basis for the deference routinely granted by courts to the decisions of regulatory agencies and commissions like the ACC. Competition, experimentation, free exchange, and old-fashioned trial and error have proven much more reliable a vehicle for innovation, the good of mankind, and the security of individual liberty than any centralized planning regime.[61] The shifting of authority toward regulatory agencies and away from individuals, legislators and the courts disregards the lessons of history.

Recommendations

Awaken the State Judiciary

The notion that the Corporation Commission has unlimited power to determine energy policy is completely contrary to the original meaning of the Arizona Constitution. Therefore, Arizona courts must strive to provide a better line of demarcation between commission authority and individual liberty. Courts should adopt an objective test that (1) draws a clear line of demarcation between the Commission's ratemaking authority and the management autonomy of public-service corporations, and (2) requires a real and definite connection between a ratemaking regulation and the maintenance of reasonable rates.

Other courts have developed just such a test. As early as 1923, the U.S. Supreme Court held that specific areas of a public utility's business operations were reserved to management discretion. In *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, the Public Service Commission of Missouri forced Southwestern Bell to lower its rates and eliminate certain fixed charges.[62] Southwestern Bell fought back and illustrated evidence about the necessity of its charges. The court realized that the commission's charge determinations were substantially lower than market forces, and it reversed judgment, permitting the Missouri utilities the right to exercise their management judgment.[63]

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Missouri ex rel. Southwestern Bell Telephone Co. helped delineate a line of pragmatic distance between the authority of state commissions and the entities they regulate. This distinction was important for the court, explaining that 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."[64] State commissions are not empowered to substitute their judgment over the business acumen of corporate managers.[65]

In accordance with these principles, state supreme courts began to adopt the invasion-of-management, or "managerial interference," doctrines to establish a litmus test for permissible commission actions. The Rhode Island Supreme Court, for example, invalidated a commission-imposed $1 reduction in rates for senior citizens.[66] In doing so, it recognized a simple truth: commissions may only regulate utility services and facilities provided to consumers - not how those services will be provided.[67]

Similarly, Oklahoma state courts have been vigilant in maintaining a clear line between permitting the state commission to exercise its authority and letting market participants innovate and decide best practices for their own affairs.[68] This principle has maintained a clear line of demarcation between ratemaking authority

and utility management autonomy over which the state commission should not step.[69]

For example, in *Public Service Co. of Oklahoma v. State of Oklahoma*, the Oklahoma Supreme Court struck down actions of its state's constitutionally embedded corporation commission when it attempted to compel utilities to pass on to consumers substantial costs associated with changes in electric distribution.[70] Acting in the public interest would be permitted, but intervening into the internal affairs and management decisions of the public utilities would render the commission's actions unconstitutional. The clearest statement of this preference is announced as a rule of protection for internal corporate management, explaining that the "Constitution does not clothe [the corporation commission] with the general power of internal management and control incident to ownership."[71]

The Wyoming Supreme Court likewise clarified the management invasion doctrine in 1984 when it decided *Pacific Power & Light Co. v. Public Service Comm'n of Wyoming*.[72] In deciding whether certain investments, expenses, and losses were proper to rely upon for rate determinations, the court reasoned that the Public Service Commission is not "in a position to take on any aspect of utility management. It must restrict its position to 'regulation' with management decisions being entirely that of the utility. The difficulty surfaces when it is necessary to distinguish between 'regulation' and 'management.'"[73] For the Wyoming Supreme Court, and based on state law, "regulation" meant empowering the commission to act when it "determines a rate to be inadequate or unremunerative, or to be unjust, or unreasonable, or unjustly discriminatory, or unduly preferential and it may fix such rate as it shall determine to be just and reasonable and in compliance with the provisions of this act."[74] What constituted "regulation" could also be found in plain statutory language that instructed what the precise contours of "regulation" looked like.[75]

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In examining whether obtaining new sources of energy was more a matter of rate regulation or of management autonomy, the Wyoming Supreme Court held that if "an effort to obtain a new source of energy supply will affect rates - potentially lowering them if successful and potentially raising them if not successful[—the commission] has the power to control the effect such project will have on rates."[76] But, significantly, this does not confer upon the commission the power to "dictate whether or not the project should be undertaken or to concern itself with other aspects of the conduct relative to the project."[77] In that sense, the court gave deference to managerial wisdom in recognizing whether new projects for providing alternative energy were proper to start.

The Wyoming Supreme Court continued its recognition and application of the management-invasion doctrine in *In re: Mountain States Telephone & Telegraph Co.*[78] There, the Wyoming commission ordered Mountain States to rescind its

decision to transfer its directory publishing division to another related corporation. But the Wyoming Supreme Court explained that there was an insufficient connection between the revenues produced by such services and the rates charged for the commission to exercise jurisdiction. To support its reasoning, the court noted that a commission does not enjoy the authority to "take on any aspect of utility management. It must restrict its position to 'regulation' with management decisions being entirely that of the utility."[79] This kind of focus and immediate framework is essential to narrowing the precise nature of the commission's authority so that utility markets and consumers need not fear the overreaching hand of an aggressive corporation commission. Arizona courts should follow in similar suit.

Fortunately, one line of judicial reasoning existing in Arizona's courts casts some hope for the revitalization of judicially enforceable lines of demarcation detailing the end points of the ACC's authority. Cases such as *Corp. Comm'n v. Pac Greyhound Lines*, *Arizona Corp. Comm'n v. State ex rel. Woods*, and *Phelps Dodge v. Arizona Elec. Power Co-Op., Inc.* reveal the current limits and promises of existing precedent. *Woods* provides Arizona courts with a proper historical understanding of the role of the Commission - to "protect our citizens from the results of speculation, mismanagement, and abuse of power."

While it is recognized that areas outside of ratemaking are left to the discretion of the legislature, deciding which Commission actions are "reasonably necessary steps in ratemaking" requires the establishment of a judicially enforceable and objective test.

While it is recognized that areas outside of ratemaking are left to the discretion of the legislature, deciding which Commission actions are "reasonably necessary steps in ratemaking" requires the establishment of a judicially enforceable and objective test. Arizona appellate courts have recognized the ambiguity here, as the *Phelps* court explained that "[a]lthough the line separating permissible Commission acts and unauthorized managerial interference can be difficult to precisely discern, our supreme court has suggested that the line is drawn between rules that attempt to control rates, which are permissible, and rules that attempt to control the corporation, which are impermissible."[80]

It is commendable that Arizona courts have struggled to provide an effective barrier between recognizing Commission jurisdiction and preserving management autonomy, but their efforts still prove lacking. For example, in the *Phelps* challenge, the appellate court worked hard to divine the intent of the Commission in taking various courses of action. The *Phelps* court held that the ACC's establishment of code of conduct rules in areas such as "information access, bookkeeping, marketing and joint employment of personnel" were ratemaking related, while other rules aimed at forced divestiture of "competitive generation assets" were invalid because they were not related to rates. Most of the court's analysis focused on discovering the apparent intent of the Commission, and if the Commission could somehow illustrate that the action in hand was supported by an intent to manage rates, Commission authority would be justified.

The recurrent issue of deference thus raises its devious head even in *Phelps* - making an already obscure analysis even more complex. Once the Commission can generate statements of intent or produce evidence thereof, courts will give heightened deference to this evidence, even if conjured by the Commission. This lopsided deference only then creates the perverse incentive for the ACC to be creative in its roster of intent statements. A judicial habit of embracing deference ensures that any line of protection between management interference and Commission authority will err inevitably in favor of the ACC.

While the *Phelps* line of reasoning is a promising first step, the court's test fails in centering on what the Commission is thinking and not what it is doing. The Commission may have the grandest of intent to preserve rates, but at some point, far-flung programs with the best of intent must objectively rest outside of its jurisdiction because of their interference with management autonomy. The jurisdiction of the Corporation Commission is fixed, and that line should not waver based on how creative the ACC may be in fashioning statements of intent to justify actions resting outside its limited constitutional authority. The most recent example of this imaginary game of "intent and regulate" is found in the REST rules, in which the trial court upheld the promulgation of the rules because the ACC could make an attenuated argument that its intent was to stabilize rates in the future.

If Arizona courts wish to cling to an intent-based test to examine the actions of the Commission, should not that test place a heavy burden against the operation of government coercive action instead of one that nearly celebrates its use?

"The road to hell is paved with good intentions" illustrates the deficiencies of the *Phelps* intent test. In other areas of constitutional law, courts recognize that divining the intent of an actor can be especially difficult, which is one reason why serious burdens are placed on the government to prove intent (*mens rea*) in criminal actions. In those instances, the government acts to displace the liberty of an individual by alleging his criminal action and intent. In the case of the ACC, the Commission displaces individual liberty by interfering in the marketplace and creates burdens for individual consumers for products or services they may not wish to purchase. If Arizona courts wish to cling to an intent-based test to examine the actions of the Commission, should not that test place a heavy burden against the operation of government coercive action instead of one that nearly celebrates its use?

Concerns about murky intent-and-effect tests are found in other traditional lines of constitutional reasoning. In the realm of the First Amendment, commissions are forbidden from establishing wavering lines of authority based on their own desire to regulate with good intent.[81] Courts have slowly recognized that those wavering lines of jurisdiction and authority inhibit people from speaking, regardless of the intent of the commission in question.[82] In the same way, innovators and entrepreneurs are less apt to provide investment, energy and new innovations if the line of jurisdiction by the Corporation Commission rests upon intent rather than the objective nature of its actions. Fashioning a jurisdictional

test based on the objective impact of the Commission's proposed actions would provide a steadier basis in the law to protect innovators, while permitting the ACC to legitimately regulate rates.

A better course of judicial reasoning is to eliminate any line of thought that relies on examinations of the intent of a regulating commission to determine whether it acted properly. It takes only the most average bureaucrat to fashion a creative statement of reasons to support the ACC's intent to regulate and stabilize rates, even if it is acting for entirely impermissible reasons. The proper focus of state courts' attention should be on the actions of the Commission and not a nebulous examination of the intent of regulators. Steady courses of action are more readily apparent, can be objectively tested, and involve less convoluted analyses. Examining the immediate impact of the regulating body's actions provides a closer nexus to the ratemaking function of the Commission and allows for an easier examination: does the particular act in question properly manage rates in Arizona, or does it interfere with the managerial authority of the utility in question?

To be certain, examining the act, instead of the intent, of the Commission only gets courts halfway through the analytical process at bay. There must also exist outer boundaries of that authority, and the doctrine of managerial interference, well alive in Oklahoma and Wyoming courts, should help ensure that core areas of management authority are not invaded, thus sacrificing innovation and entrepreneurialism to government edicts.

Audit the Commission

An independent audit and review should be done to determine which, if any, functions the Corporation Commission should retain. In Michigan, Governor John Engler designed a Privatize, Eliminate, Retain, or Modify (PERM) program to decide whether state agencies should be reformed.[83] The system stalled in some ways because it failed to include reliable benchmarks from which to make final judgments. More recently, Florida has outsourced more than 150 projects, leading to substantial savings. The state has also created its own Council on Efficient Government to act as a watchdog for wasteful spending and provide sensible reform options.[84] In Indiana, Governor Mitch Daniels created the Indiana Commission on Local Government Reform to "recommend ways to restructure local government to increase efficiency and reduce the financial burden on Indiana taxpayers."[85] Its initial recommendations included limiting the power of unelected bureaucrats to increase taxes and designing more deliberate and lengthy processes when elected officials sought to increase spending.

Implementing a modified PERM system, administered by a temporary board, would offer the legislature a fact-based starting point for crafting comprehensive reform of the Corporation Commission.

An independent audit and review should be done to determine which, if any, functions the Corporation Commission should retain. Implementing a modified PERM system, administered by a temporary board, would offer the legislature a fact-based starting point for crafting comprehensive reform of the Corporation Commission.

Decommission the Commission

Understanding corporations as simply groupings of individuals[86] undermines the case for singling them out for intrusive regulation by a constitutionalized bureaucracy. By registering as a corporation with the state, certain benefits accrue to the organization of individuals, including indefinite continuation (corporations may continue to exist after the death of shareholders or officers perpetually), limited liability and protection of personal assets, and stock creation options.[87] Still, none of these benefits are unique "gifts" that flow from the bounty of the state. Individuals joined together for business or other interests could privately contract with one another in a variety of ways to achieve nearly the same benefits as provided through the state incorporation process.

Whether they employ the labels "LLC," "PC," or "Inc.," corporations are simply people acting in concert behind a legal form.[88] In the case of public utilities, these are individuals, of an entrepreneurial mindset, gathered together to provide power services to Arizona residents in innovative ways. To do so, substantial risk, investment, planning and hard work must be carried out successfully through the corporate team. There is nothing inherently suspect, wrong or corrupt about these activities.

If an audit of the Corporation Commission reveals that it performs no functions requiring constitutional imprimatur, Arizonans are well equipped to scrap or streamline the Commission, which would free the spirit of entrepreneurialism while protecting individual liberty.

Over time, there has been movement in most courts toward accepting the principle that corporations have the same individual rights as the individuals who compose them. The individuals making up corporations have felt the sting of intrusive government regulations, searches, and limits on their speech, and in response they have flexed their constitutional muscles.[89] Through these challenges, courts have affirmed corporations' rights to a trial by jury, protections against unreasonable search and seizures, double jeopardy, and some forms of political and commercial speech.[90] If these rights had not been affirmed, the people making up these corporations would also be deprived of their fundamental rights under the Constitution, just for assembling together with a common purpose.

It remains a curious artifact of Arizona (and only six other states) that its Corporation Commission is embedded in the state constitution and is created so that the state can exercise regulatory dominion over some associations of individuals and not others. There is no philosophical, legal, or constitutional basis for such discriminatory treatment. Moreover, enabling reform, streamlining functions, and keeping the Commission accountable would no doubt be easier achieved and carried out if it was a creature of statutory enactment, not constitutional stonemasonry. Accordingly, if an audit of the Corporation Commission reveals that it performs no functions requiring constitutional imprimatur, Arizonans are well equipped to scrap or streamline the Commission, which would free the spirit of entrepreneurialism while protecting individual liberty.

Conclusion

Most states have experimented with centralized planning in varying degrees. Unfortunately, Arizona took this mistaken experiment a step further by embedding its commission for corporate regulation into the state constitution. Doing so has produced a commission that steps outside of its constitutional mandate.

Had the state constitution's framers agreed to delegate such power and authority to the Commission, it might make sense to interpret its authority in such a broad fashion. But the deep-seated concerns and fears of Arizona's founding generation should not be dismissed easily in today's context, especially as the records of the Constitutional Convention show that the Commission was a creature of compromise and possesses much more limited powers.

While concerns about growing corporate power and entanglement with government may be justified, so are concerns about the growth of government authority over the people who are part and parcel of corporations. Fears of political retribution, destruction of privacy, and the elimination of economic liberty prompted the founding generation to place considerable limits on the Commission, minimizing any infringements on individual liberty. With the recent move of the Arizona Corporation Commission to mandate renewable energy usage, careful attention should be given to its constitutional legitimacy and whether the body has overstepped its proper role. Courts should reinvigorate the limits of the Corporation Commission. The legislature should require an independent audit of its functions, and if the Commission fails to demonstrate its continued necessity, it should be decommissioned as a constitutional body.

With the recent move of the Arizona Corporation Commission to mandate renewable energy usage, careful attention should be given to its constitutional legitimacy and whether the body has overstepped its proper role.

NOTES

1. Arizona Corporation Commission Decision no. 69127 (Nov. 14, 2006).
2. Ariz. Const. art. XV, § 3. *See* Arizona Corporation Commission, "Background and Organization," http://www.cc.state.az.us/# (accessed April 26, 2010).
3. Section Two of Article XV of the Arizona Constitution delineates the regulatory ambit of the Commission through its oversight of so-called public-service corporations (Ariz. Const. art. XV, § 2). Section Three delineates further powers of the Commission in ratemaking matters (Ariz. Const. art. XV, § 3). Section Six permits the state legislature to expand the powers of the Commission consistent with the Arizona Constitution (Ariz. Const. art. XV, § 6).
4. Ibid.
5. Ariz. Const. art. XV, § 4.
6. Ibid.
7. Ibid.
8. Ariz. Const. art. XV, § 3.
9. Ibid.
10. *Ariz. E. Rr. Co. v. State*, 19 Ariz. 409, 414 (1918).
11. Arizona Corporation Commission, "Background and Organization," http://www.cc.state.az.us/divisions/administration/about.asp (accessed April 26, 2010).
12. In fact, Arizona courts generally ask what the "intent" of the Commission was in acting in a given fashion. If the Corporation Commission can make a plausible argument that any action, however far removed from ratemaking it may be, was taken with the "intent" of stabilizing or protecting rates, courts will largely defer to such exercise of authority. *See, e.g., Corp. Comm'n v. Pac Greyhound Lines*, 54 Ariz. 159 (1939); *Arizona Corp. Comm'n v. State ex rel. Woods*, 171 Ariz. 286 (1992); *Phelps Dodge v. Arizona Elec. Power Co-Op., Inc.*, 207 Ariz. 95 (Ct. App. 2004). As pointed out later in this paper, this intent-based test fails to provide any meaningful protection for Arizonans against an overzealous commission.
13. The REST rules are located within the Arizona Administrative Code at R14-2-1801 through R14-2-1816 and were made effective August 14, 2007.
14. Comment from Chairman Jeff Hatch-Miller of the Arizona Corporation Commission for docket number RE-00000C-05-0030.
15. *Miller v. State of Arizona Corporation Commission*, CV 2008-029293, slip op. at 4.
16. Ibid. at 4.
17. Ibid. at 5.
18. The Federalist 47 (Colonial Press 1901): 274.
19. John Locke, *Of Civil Government* § 141 (reprinted in *The Works of John Locke*, Vol. V, London, 1823): 423.
20. *State v. Tucson Gas, Elec. Light & Power Co.*, 138 P. 781, 783–84 (Ariz. 1914).

21. Ibid. at 786.

22. *Journal of the Constitutional Convention of Arizona* 435 (Cronin comp. 1925) (quoted in *Making the Arizona Constitution, supra,* at 88–89).

23. Benjamin Barr, *Regifting the Gift Clause* (Goldwater Institute 2007).

24. Con P. Cronin, Journals of the Constitutional Convention of Arizona, evening session, Nov. 23, 1910, at 613 (ed. 1925).

25. Ibid. at 613–16.

26. Ibid., morning session, Nov. 28, 1910, at 719.

27. Ibid. at 720.

28. Ibid. at 721.

29. Ibid., morning session, Nov. 28, 1910, at 719.

30. Ibid. at 721.

31. Ibid. at 724.

32. Con P. Cronin, *Journals of the Constitutional Convention of Arizona*, morning session, Dec. 8, 1910, at 972.

33. Ibid., morning session, Nov. 28, 1910, at 719.

34. Ibid., evening session, Nov. 23, 1910, at 986.

35. Ibid., afternoon session, Nov. 28, 1910, at 729.

36. Ibid.

37. Ariz. Const. art. XV, §6.

38. *Arizona Public Service Co. v. Arizona Corp. Comm'n*, 157 Ariz. 532, 535 (Ariz. 1988) (quoting Gordon Bakken, *The Arizona Constitutional Convention of 1910*, 1978 Ariz. St. L.J.1, 15).

39. 147 U.S. 165 (1893).

40. Daniel William Russo, *Protecting Property Rights with Strict Scrutiny*, 25 Fordham Urb. L.J. 575 (1998).

41. 338 U.S. 632, 652 (1950).

42. 467 U.S. 837 (1984); *see also* William Consovoy, *Can Bush Supreme Court Appointments Lead to a Rollback of the New Deal?* 14–16 (The Federalist Society 2005).

43. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984).

44. *J.W. Hancock Enters v. Arizona State Registrar of Contractors*, 142 Ariz. 400, 405 (Ct. App. 1984).

45. *City of Mesa v. Killingsworth*, 96 Ariz. 290, 296 (1964).

46. *See, e.g., State v. Turner, 175 Ariz. 256* (Ct. App. 1993); *Arizona Water Co. v. Ariz. Dep't of Water Res.*, 208 Ariz. 147 (2004).

47. *Ballestros v. American Standard Ins. Co. of Wisc.,* 222 P.3d 292 (Ct. App. 2009).

48. 211 Ariz. 576 (Ct. App. 2005).

49. *Arizona Corp. Commission v. Citizens Utilities Co.*, 120 Ariz. 184 (Ct. App. 1978); *Burroughs v. Town of Paradise Valley*, 150 Ariz. 570, 573 (Ct. App. 1986); *Marco Crane & Rigging v. Ariz. Corp. Comm'n*, 155 Ariz. 292, 294 (Ct. App. 1987).

50. *Marbury v. Madison*, 5 U.S. 137 (1803).

51. *Allen v. State*, 14 Ariz. 458 (1913).

52. J. Toulmin Smith, *Government by Commissions, Illegal and Pernicious* 203 (Richard and John E. Taylor, 1849). Emphasis added.

53. Ibid. at 203–204. *See also* Ian Newbould, *Whiggery and Reform*, *1830–41: The Politics of Government* 184 (Macmillan Press 1990).

54. The Oklahoma Law Journal, vol. 14, *Oil Inspection Law Annulled* 11 (D.H. Fernandes 1915).

55. Robert H. Whitten, *Notes on Current Legislation,* The American Political Science Review, vol. I (The Waverly Press 1907): 92.

56. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

57. Benjamin Barr, *Deconstructing the Clean Water Act in Arizona* (Goldwater Institute, 2008).

58. Henry I. Miller & Gregory Conko, *The Frankenfood Myth: How Protest and Politics Threaten the Biotech Revolution* 118 (Praeger Publishing 2004).

59. Stanley S. Reynolds & Andrew N. Kleit, *Opening the Grid: How to Recharge Arizona's Electricity System for the 21st Century* (Goldwater Institute, July 2009).

60. Ibid.

61. Exactly how a more privatized and dynamic market might handles these challenges is beyond the scope of this paper, but first principles of reform are found in this Institute's *Opening the Grid* study.

62. 262 U.S. 276, 282 (1923).

63. Ibid. at 288–89.

64. Ibid. at 289.

65. Ibid.

66. 302 A.2d 757 (R.I. 1973).

67. Ibid. at 775.

68. *See, e.g., Missouri Pac. Ry. Corp. v. Corporation Comm'n*, 672 P.2d 44 (Okla. 1983); *City of Chickasha v. Arkansas Louisiana Gas Co.*, 625 P.2d 638 (Okla. App. 1981); *Oklahoma Gas & Elec. Co. v. Corporation Comm'n*, 543 P.2d 546 (Okla. 1975) ("the Constitution does not clothe it with the general power of internal management and control incident to ownership").

69. *See, e.g., Public Service Co. v. State*, 645 P.2d 465, 466 (Okla. 1982) (only authority expressly conferred or necessary by implication is held by the Commission); *Public Service Co. v. State of Oklahoma,* 918 P.2d 733 (Okla. 1996) (detailing limited authority of the constitutionally embedded corporation commission and striking down certain actions in violation of its limited authority).

70. 918 P.2d 733.

71. *Oklahoma Gas & Elec. Co*, 543 P.2d at 551.

72. 677 P.2d 799 (Wyo. 1984).

73. Ibid. at 807.

74. Ibid.

75. Ibid.

76. Ibid. at 808.

77. Ibid.

78. 745 P.2d 563 (Wyo. 1987).

79. Ibid. at 568.

80. *Phelps Dodge Corp. v. Ariz. Elec. Power Coop., Inc.*, 207 Ariz. 95, 113 (Ct. App. 2004).

81. *FEC v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652, 2666 (2007) (noting that no "reasonable speaker would choose to run an ad covered by [federal campaign finance law] if its only defense to a criminal prosecution would be that its motives were pure").

82. *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (explaining that any analysis of speech in terms "of intent and of effect" would provide "no security for free discussion").

83. *See* Michael D. Lafaive, *State Produces Useful Privatization Overview* (Mackinaw Center 2002).

84. *See* State of Florida Department of Management Services, "Council on Efficient Government," http://dms.myflorida.com/other_programs/council_on_efficient_government (accessed April 26, 2010).

85. *See* Indiana Commission on Local Government Reform, "Welcome," http://indianalocalgovreform.iu.edu/ (accessed April 26, 2010).

86. Kenneth Lipartito & David B. Sicilia, *Constructing Corporate America: History, Politics, Culture* (Oxford University Press 2004): 44.

87. William Blackstone, *Commentaries on the Laws of England*, vol. 1, chap. 18, 455 (University of Chicago Press 1979).

88. *See Santa Clara County v. Southern Pac. R. Co.*, 118 U.S. 394 (1886).

89. *See, e.g., Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978) (recognizing that the Fourth Amendment protected corporations from regulatory searches without a warrant); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (upholding the free speech rights of citizens gathered together as corporations).

90. *See, e.g., Minneapolis & St. Louis Railway Co. v. Beckwith,* 129 U.S. 26, 28 (1889) (Fourteenth Amendment due process rights); *Noble v. Union River Logging R.R Co.*, 147 U.S. 165 (1893) (Fifth Amendment due process rights); *Armour Packing Co. v. United States*, 209 U.S. 56, 76 (1908) (Sixth Amendment right to jury trial); *Fong Foo v. United States*, 369 U.S. 141 (1962) (right against double jeopardy); *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748 (1976) (right to corporate commercial speech); *Dow Chem. Co. v. United States*, 476 U.S. 227, 235 (1986) (reaffirming that corporations have privacy interests protected under the Fourth Amendment).

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