Commonwealth Edison Co. v. Montana

101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981)

INTRODUCTION

In 1975 the Montana Legislature increased its coal severance tax\(^1\) to as much as 30% of the contract sale price of each ton of coal extracted in the state, including coal mined on federal land.\(^2\) The variable tax rates depend on the coal's value and energy content and on the method of extraction.\(^3\) Although the tax was partly designed to compensate for coal mining impacts,\(^4\) the Montana legislature also intended to increase revenues to invest in alternative income-generating activities, anticipating the future, “when new energy technologies reduce our dependency on coal and mining activity may decline.”\(^5\) The tax was also levied to fund numerous services, not all or even many of which need be related to coal development.\(^6\)

In *Commonwealth Edison v. Montana*,\(^7\) several Montana coal producing companies and their out-of-state utility company customers attacked the severance tax as being invalid under the commerce clause and the supremacy clause.\(^8\) These companies, appellants in the

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8. *Id.* at 2951-52. The commerce clause provides that “Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .” *U.S. Const.* art. I, § 8, cl. 3. The supremacy clause provides that the “Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . .” *U.S. Const.* art. VI, cl. 2.
Supreme Court, argued that the tax discriminates against interstate commerce in that the majority of the coal is shipped out of Montana, shifting a disproportionate share of the state's tax burden onto out-of-state consumers.\(^9\) The commerce clause was also assertively violated because the amount of the taxes collected exceeds the value of the services provided to coal extractors by the state. The appellants contended that the tax violated the supremacy clause because it was contrary to federal energy development policy and preempted by federal law.\(^{10}\)

A divided Supreme Court\(^{11}\) affirmed the Montana Supreme Court's determination that Montana's coal severance tax violates neither the commerce clause nor the supremacy clause. Justice Marshall's majority opinion drew broad constitutional guidelines for severance taxes, deferring direct scrutiny of tax rates to legislative bodies with greater research and analytical resources.\(^{12}\) The decision establishes Constitutional measures of state severance tax validity and clarifies the judicial role in scrutinizing state taxes.

### I

**SUPREMACY CLAUSE**

The Court unanimously agreed that the Montana tax does not violate the supremacy clause,\(^{13}\) holding the tax to be neither specifically preempted by federal legislation\(^{14}\) nor invalid as substantially frustrating national energy policies.\(^{15}\) Appellants had contended that the application of the severance tax to coal mined on federal lands violated the supremacy clause by substantially frustrating the purposes of the Mineral Lands Leasing Act of 1920.\(^{16}\) The Mineral lands Leasing Act of 1920 exacts royalty payments on profits from coal mined on federal land.\(^{17}\) State coal severance taxes, while potentially reducing royalty payments to the Federal Government, are expressly allowed by section 32 of the Act.\(^{18}\) The Court held the severance tax to be lawful, since no language in the Act or legislative history indicated a legislative intent to maximize potential royalty payments, and Congress explicitly granted

\(^9\) Id. at 2954.
\(^{10}\) Id. at 2960.
\(^{11}\) Justice Marshall delivered the opinion of the Court, id. at 2951, Justice White concurred, id. at 2965, and Justice Blackmun, joined by Justice Powell and Justice Stevens, dissented. Id. at 2964.
\(^{12}\) Id. at 2959.
\(^{13}\) The majority held that the supremacy clause was not violated, id. at 2963-64, and the dissent agreed. Id. at 2972 n.21.
\(^{14}\) Id. at 2961-62.
\(^{15}\) Id. at 2963-64.
taxing authority to the states under section 32.\textsuperscript{19}

Appellants had also contended that the tax’s frustration of national energy policies rendered it unconstitutional. These policies were established in the language of several federal statutes encouraging the production and use of coal.\textsuperscript{20} Appellants alleged that the tax would increase coal prices and thus frustrate these policies.\textsuperscript{21} The Court refused appellants’ demands for a trial to prove frustration of federal policy. Justice Marshall recognized the conflict but asserted that basic national policies and general statements of statutory objectives in themselves do not preempt state laws.\textsuperscript{22}

The nature of federal coal regulation need not dictate preemption, since state taxes are not necessarily incompatible with increased use of coal. The Court therefore looked for evidence of unmistakable Congressional control of the area, requiring “specific federal statutes with which the state law is claimed to conflict.”\textsuperscript{23} The Montana severance tax was held not to conflict with any specific federal statutes.\textsuperscript{24} The only statute with which the severance tax might conflict, the Powerplant and Industrial Fuel Use Act of 1978,\textsuperscript{25} takes severance taxes into account in section 601(a)(2),\textsuperscript{26} and Congress therefore did not intend to preempt state severance taxes.\textsuperscript{27}

II

COMMERCIAL CLAUSE

A. The Majority Opinion

The Supreme Court affirmed the Montana Supreme Court’s decision upholding the tax under the commerce clause, but rejected the mechanical approach of \textit{Heisler v. Thomas Colliery Co.}\textsuperscript{28} upon which

\begin{itemize}
  \item \textsuperscript{19} 101 S. Ct. at 2961.
  \item \textsuperscript{21} 101 S. Ct. at 2961.
  \item \textsuperscript{22} \textit{Id.} at 2962. “Pre-emption of state law by federal statute or regulation is not favored in the ‘absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.’” \textit{Id} (quoting Chicago North Western & Transportation Co. v. Kalo Brick & Tile, 450 U.S. 311, 317 (1981)).
  \item \textsuperscript{23} 101 S. Ct. at 2962. \textit{See} Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 130-33 (1978).
  \item \textsuperscript{24} 101 S. Ct. at 2962-64.
  \item \textsuperscript{25} 42 U.S.C. §§ 8301-8483 (Supp. III 1979).
  \item \textsuperscript{26} 42 U.S.C. § 8401(a)(1) (Supp. III 1979).
  \item \textsuperscript{27} 101 S. Ct. at 2962-63.
  \item \textsuperscript{28} 260 U.S. 245 (1922).
\end{itemize}
the state court decision partially rested. In *Heisler*, a state tax was imposed on the market value of coal extracted. The majority of that coal was marketed outside the state. Decided at a time when state taxes levied directly on interstate commerce were considered per se invalid under the commerce clause, *Heisler* and its progeny focused on whether a state tax is levied on goods prior to their entry into interstate commerce. Since the time of the *Heisler* decision, however, states have been allowed to levy taxes on interstate commerce. The expansion of states' taxing powers was accompanied by increased commerce clause scrutiny of state taxation on interstate commerce. The difficulty of making the often arbitrary determination required by *Heisler* of exactly when goods entered interstate commerce, produced "opaque" results.

The Court did not apply the *Heisler* test, and held that the deciding factor is now the "practical effect" of the state tax upon interstate commerce, with the underlying tenet that "[e]ven interstate business must pay its own way."

The Court held that state taxes on the severance of natural resources must be evaluated under the four-part test of *Complete Auto Transit v. Brady*. A state may constitutionally tax the severance of natural resources if the tax "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State."

29. 101 S. Ct. at 2953.
30. 260 U.S. at 258 (1922).
31. *See, e.g.*, Helson & Randolph v. Kentucky, 279 U.S. 245, 250-52 (1929); Ozark Pipe Line Corp. v. Monier, 266 U.S. 555, 562 (1925). These cases have since been weakened. See notes 33-40 infra and accompanying text.
35. 101 S. Ct. at 2953 n.6.
36. *Id.* at 2953.
40. 101 S. Ct. at 2953 (quoting *Complete Auto Transit*, 430 U.S. at 279).
The entire court agreed that the Montana severance tax meets the first two Complete Auto requirements. Severance of the coal within the state provides the requisite substantial nexus. Fair tax apportionment between states is also ensured, as severance can occur in only one state and only that state can tax the severance. The problem of multiple taxation by various entities is therefore absent.

Appellants asserted that because most of the Montana coal is shipped out of state, most of the severance tax burden is borne by out-of-state consumers, and that constituted discrimination. Justice Marshall, for the majority, maintained that even the virtual monopoly of a resource is constitutionally insufficient to invalidate a state tax on the ground that it discriminatorily places the tax burden primarily on out-of-state consumers. Otherwise, it seems, any state tax on a rare resource would be per se invalid as exporting the tax burden if a large percentage of the resource were shipped out of the state and most of the tax burden was paid by interstate commerce. Invalidation of a state tax on a rare resource would be contrary to the longstanding doctrine that interstate commerce must pay its own way. Invalidation would also discriminate against states with unique resources, giving out-of-state consumers access to those resources at "reasonable" prices without regard to the cost of resource development and depletion to those states. Establishing whether a sufficient monopoly exists and whether the tax burden is shifted out of the state would involve complex factual inquiries and "formidable evidentiary difficulties," making this approach cumbersome, if not impossible, for courts to administer.

The majority held that under the Complete Auto "fairly related" test, the cost of specific services provided to the taxed party by the state is not measured against the tax revenue generated. Rather, if the interstate business has sufficient nexus with the state to justify imposition of some tax, the only requirement is that the "measure of the tax must be reasonably related to the extent of the contact." The majority in-

41. 101 S. Ct. at 2953, 2968.
42. Id.
43. Id. at 2954.
44. Id.
45. Id. at 2955.
46. Id. at 2953; See, e.g., Western Live Stock, 303 U.S. at 254; Washington Revenue Dept., 435 U.S. at 745.
49. 101 S. Ct. at 2955-56.
50. Id. at 2958.
terpreted the “fairly related” prong as allowing states taxing powers under the commerce clause as broad as those allowed by the due process clause.\textsuperscript{51} Under the due process clause, states have great latitude in imposing general revenue taxes.\textsuperscript{52} Marshall wrote that “there is no requirement under the due process clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity.”\textsuperscript{53}

Companies extracting natural resources from a state enjoy many advantages, and services provided by the state and secured by the state’s police power.\textsuperscript{54} In return, they are expected to bear their “just share” of the costs of providing these generally valuable, amorphous, and indivisible goods,\textsuperscript{55} without which business might be far more costly, if not impossible. Justice Marshall explained that “just share” does not mean exact share, but may be measured as a percentage of the value of the resource extracted.\textsuperscript{56} It is virtually impossible to accurately weight the amount of a tax against the specific costs the state incurs from the interstate producers’ activities, or against specific benefits provided to interstate producers.\textsuperscript{57} The court instead focused upon the opportunities and benefits the state makes possible, and required that the measure of the tax be reasonably related to interstate producers’ activities in the state.\textsuperscript{58} “The simple but controlling question is whether the state has given anything for which it can ask return.”\textsuperscript{59} Citing a lack of judicial competence and the appropriate division of tasks between the legislative and judicial branches, the majority declined to mandate, as a test of constitutionality, judicial calculation of appropriate tax rates on activities legitimately taxed by states.\textsuperscript{60}

\textbf{B. Dissent}

Justice Blackmun, in his dissent, agreed with the majority that the tax does not discriminate against interstate commerce in the most com-

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\textsuperscript{51} 101 S. Ct. at 2957. The due process clause is found at U.S. Const. amend. XIV, \S 1.

\textsuperscript{52} 101 S. Ct. at 2956.

\textsuperscript{53} Id.

\textsuperscript{54} 101 S. Ct. at 2957 (citing Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207, 228 (1980), (quoting Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434, 445 (1979))).

\textsuperscript{55} 101 S. Ct. at 2957.

\textsuperscript{56} Id. at 2958-59.

\textsuperscript{57} Hellerstein, supra note 48, at 51.

\textsuperscript{58} 101 S. Ct. at 2960.

\textsuperscript{59} 101 S. Ct. at 2958 (quoting General Motors Corp. v. Washington, 377 U.S. 436, 440-41 (1964). The General Motors opinion, in turn, quoted Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940)). The J.C. Penney case is one of several cases from which the Complete Auto “fairly related” test was developed. 101 S. Ct. at 2958 n.14.

\textsuperscript{60} 101 S. Ct. at 2959.
mon fashion, where interstate commerce is placed at a competitive disadvantage relative to intrastate commerce. The facial neutrality of the tax, burdening equally all coal mined regardless of its destination, rules out such discrimination. Justice Blackmun implied, however, that the tax fails the discrimination and “fairly related” requirements by forcing out-of-state consumers to bear an undue amount of the state’s tax burden. He employed language derived mainly from the facial discrimination cases in contending that the tax places an undue burden on interstate commerce.

Justice Blackmun maintained that the proper focus is on the effect of a tax on state coffers and on state residents’ tax burden. He proposed calculating the costs directly incurred by the state in making the extraction of a limited natural resource possible, and chose not to consider the value of the resource enjoyed by those who pay the severance tax.

Justice Blackmun further argued that the due process standard applied only to determine whether a state can impose any tax at all on interstate commerce. The commerce clause should then be applied, which requires a determination of the substantial effects the state tax has, or may have, upon interstate commerce.

Justice Blackmun proposed a rigorous three-stage analysis of severance taxes in lieu of the majority’s minimal scrutiny approach. A court would first determine at trial whether the state has taxed goods destined for exportation at a rate designed to recoup the costs incurred by the state in making the goods available. If the tax passed this requirement, the court would determine whether it was “a legitimate general revenue measure identical or roughly comparable to taxes imposed on similar industries.” If not, the court would ask whether there was “some reasonable basis for the legislative judgment that the tax is necessary to compensate the State for the particular costs imposed by the

61. 101 S. Ct. at 2968.
62. Id.
66. Id. at 2968-69.
67. Id.
68. Id. at 2969.
69. Id.
70. Id. at 2971.
71. Id. at 2971-72 n.18.
72. Id. at 2972.
activity. If it failed to pass these tests, a state severance tax would be invalid under the commerce clause.

III
ANALYSIS

Given the Supreme Court's repeated pronouncement that inter-state commerce must bear its fair share of the tax burden, some level of severance tax must be allowed. The sole argument for commerce clause invalidation of the Montana severance tax was that the cumulative tax burden on out-of-state consumers unconstitutionally exceeded the value of the services rendered to them by the State. The majority opinion in Commonwealth Edison reaffirms the Court's historic reluctance to actually set state tax rates. As the Court has stated, "[w]hen the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers." Under this rationale, as long as the state tax rate is equal for local and interstate commerce, there seems no basis for courts to scrutinize the tax rate as a constitutional matter.

Essentially, the dissent's standard for evaluating the discriminatory effect of a tax restated Complete Auto's fourth standard, under which a tax must be "fairly related to the services provided by the State." The only discrimination emanating from the operation of the Montana tax is that out-of-state consumers pay more to Montana in severance taxes than do in-state consumers. This does not constitute facial discrimination however, because in-state and out-of-state consumers are taxed at identical rates.

The divergent views on the proper "fairly related" standard to apply stem from fundamental disagreement about the proper judicial role in scrutinizing state taxes on interstate commerce. The majority set low standards for valid taxation in the belief that "the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution." Justice Blackmun however, advocated a more active judicial role in measuring state taxes under the commerce clause. The issue underlying inquiry into commerce clause limits on state severance taxation in cases of this type is the appropriate division of power between legislative and judicial branches of government.

73. Id.
74. Id.
75. See note 35 supra and accompanying text.
76. 101 S. Ct. at 2955.
78. 430 U.S. at 279.
79. 101 S. Ct. at 2959.
80. Id. at 2971, (Blackmun, J., dissenting).
81. Blackmun and his fellow dissenter Powell also dissented from the Court's opinion
ports the majority.82

Under Commonwealth Edison, any facially neutral general revenue severance tax is constitutional under the commerce clause as long as the tax is set as a percentage of the value of the resource extracted.83 Judicial scrutiny will not extend to the tax rate;84 Congress may, however, limit these state tax rates,85 and is presently considering exercising this power.86

The dissent argued that the majority’s standard, derived from the due process clause, is too mechanical, allowing any proportional severance tax to withstand commerce clause scrutiny.87 Indeed, under the majority’s test any severance tax measured as a percentage of the extracted resource’s value will be deemed proper.88 A state tax on interstate commerce will be judicially disapproved only when it is “so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property.”89

The alternative, Blackmun’s three-pronged analysis, would, however, be difficult for courts to apply. Justice Blackmun stated that “interstate commerce may be required to share equally with intrastate commerce the cost of providing” general government services.90 The cases he cited,91 however, do not require that states assume the Herculean task of tailoring taxes to attain a precise apportionment of state government costs among interstate and local commerce.92 That a state must leave interstate commerce “actually on a plane of equality with

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83. 101 S. Ct. at 2958-59.
84. Id. at 2959. The Court left open the possibility of an equal protection challenge since “interstate commerce may be required to contribute the cost providing all government services, including those from which it arguably receives no direct ‘benefit.’” (emphasis in original). Id. at 2959 n.16.
85. Id. at 2959.
86. See note 106 infra.
87. 101 S. Ct. at 2968 (Blackmun, J., dissenting).
88. Id. at 2958-59.
89. Id. at 2959 n.17 (quoting Magnano v. Hamilton, 292 U.S. 40, 44 (1934)).
90. 101 S. Ct. at 2969 (Blackmun, J., dissenting) (emphasis added).
92. See note 91 supra.
local trade in local taxation"\textsuperscript{93} does not mean that intrastate and interstate commerce must each bear equal portions of the total tax burden on commerce. Rather, it means only that interstate commerce must be taxed at a rate which, as applied, is equivalent to that applied to local commerce.\textsuperscript{94}

Besides "sharing equally" costs of state government with intrastate commerce, Justice Blackmun posited that interstate commerce may be taxed "for the purpose of recovering those costs attributable to the activity itself."\textsuperscript{95} This requirement is gleaned from "user fee" cases, where states charge interstate commerce for costs incurred in providing specific quantifiable services.\textsuperscript{96} Exact compensation is not required in these cases, but the fees are invalid if "manifestly disproportionate to the services rendered."\textsuperscript{97}

This rough compensation test derived from the user fee cases does not easily lend itself to less specific general revenue taxes. Courts lack the tools needed to assess accurately costs borne by the state and to balance them against general revenue taxes levied to support a wide variety of services. The majority accepted the Montana Supreme Court's determination that the coal severance tax is a general revenue tax, and chose to apply the relatively lenient due process standard largely because of measurement difficulties.\textsuperscript{98} The dissent disagreed,\textsuperscript{99} largely on the basis of the vague objectives of the 1975 Montana amendment.\textsuperscript{100} Justice Blackmun would have established a higher degree of judicial scrutiny by classifying the tax as a type courts have historically scrutinized more closely than general revenue taxes.\textsuperscript{101}

Justice Blackmun argued that severance taxes, although very similar to other general revenue taxes, may be appropriately scrutinized by courts.\textsuperscript{102} Justice Blackmun's test is, at best, judicially difficult to administer. As the majority stated, "it is doubtful whether any legal test could adequately reflect the numerous and competing economic, geographic, demographic, social, and political considerations that must inform a decision about an acceptable rate or level of state taxation, and

\textsuperscript{93} 101 S. Ct. at 2970 (Blackmun, J., dissenting) (quoting Nippert v. Richmond, 327 U.S. 416, 434 (1946)).
\textsuperscript{94} Nippert v. Richmond, 327 U.S. 416, 433-34 (1946).
\textsuperscript{95} 101 S. Ct. at 2969 (Blackmun, J., dissenting).
\textsuperscript{96} See, e.g., Postal Telegraph-Cable Co. v. Richmond, 249 U.S. 252 (1919) (annual license tax on telegraph poles maintained by appellant designed to cover their inspection and superintendence by city); Clark v. Paul Gray Inc., 306 U.S. 583 (1939) (fees for use of highways by automobiles driven into the state for sale).
\textsuperscript{98} 101 S. Ct. at 2956.
\textsuperscript{99} Id. at 2969-70 n.13, 2970 (Blackmun, J., dissenting).
\textsuperscript{100} See id. at 2969-70 n.13 (Blackmun, J., dissenting).
\textsuperscript{101} Id. (Blackmun, J., dissenting).
\textsuperscript{102} Id. at 2971-72 (Blackmun, J., dissenting).
yet be reasonably capable of application in a wide variety of individual cases."

The "reasonable basis for the legislative judgment" prong of the dissent's test could alleviate these problems to some extent by allowing courts to set a low "reasonable basis" standard and thereby essentially defer to legislative judgment. Other dangers, however, emerge by focusing on costs that interstate activity imposes on a state. For example, courts are not well equipped to accurately determine full costs. An accurate determination of costs requires predictions of all conceivable environmental and societal costs generated by the extracting industry, a difficult task at best. A mistake might impose huge costs on the state.

The broader constitutional standard that the majority established by focusing on the relationship between interstate commerce and the state is clearly within the realm of judicial competence, and leaves the difficult assessment of the appropriateness of a tax rate to Congress. Congress has better factfinding and analyzing abilities, and can also consider many factors involved in the formulation of state tax rates.

Each state has a voice in setting appropriate and effective severance rates, but Congress can prohibit tax rates that might promote fragmentation of the national economy. Judicial determination of appropriate severance tax rates, as suggested by the dissent, risks depriving states of the opportunity to set effective tax rates. Judicial determination of tax rates would also inhibit Congress' ability to determine collectively appropriate tax rate limits and thus to reduce the possibility of "economic Balkanization."

Congress may have tools enabling it to more accurately determine costs to be met by state severance taxes, but even federal taxing schemes well enough engineered to adequately meet the costs may be less effective than state severance taxes. This view is apparently held by the current administration and Senate majority, because both have expressed a desire for greater state autonomy and less federal regulation. Congressional limits on state severance taxes could impair state control over natural resource depletion by removing states' ability

103. Id. at 2959.
104. See text accompanying notes 72-74 supra.
105. See 101 S. Ct. at 2959.
106. Id. Numerous bills have been introduced in the 97th Congress which address the issue of state severance rates. See, e.g., S. 178, S. 1244, S. 1732, H.R. 1313, H.R. 4461, H.R. 4591, H.R. 4850. 97th Cong. (1981).
107. See 101 S. Ct. at 2972.
to apply a circumstantially appropriate tax rate. It appears that the limits may also decrease states' ability to finance remedial measures, increasing their dependence on the Federal Government.

IV

ALTERNATIVES TO SEVERANCE TAXATION

In the face of possible Congressional severance tax limits, states may employ other means to direct resource depletion and to finance costs associated with resource extraction. Implementation of supplementary tax programs is one possibility. Although the rate of each tax may be limited by Congress, states may levy a variety of taxes to attain, cumulatively, their goals. To attain the lowest level of commerce clause scrutiny, such taxes must be enacted for general revenue purposes. Taxes enacted to meet specific costs imposed by interstate commerce activity are more closely scrutinized, but are constitutionally valid unless "manifestly disproportionate to the services rendered by the State." The proceeds from such taxes may be employed as the taxing state chooses, not solely to meet costs imposed by the interstate commerce activity.

As an example of one possible supplementary tax, a state may tax interstate commerce for the use of highways and other facilities built or maintained by state funds and used directly in the resource development process. The same tax rate must apply to all similar users to avoid unconstitutional discrimination, but rates may vary between distinguishable classes of users imposing different economic and social costs on a state.

A state could also conceivably tax resource extracting industries for other resources used in the extraction process, such as water. A general revenue tax levied on each unit of water used, measured as a percentage of the value of the resource such as coal, the extraction of which it makes possible, seems to fall within the new standards pronounced by the Court in Commonwealth Edison. However, a water use

109. Such tax programs may be tailored to influence resource depletion or to achieve other lawful state goals: "Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful powers are matters beyond the scope of judicial inquiry." Fox v. Standard Oil Co. of New Jersey, 294 U.S. 87, 100-01 (1934) (quoting Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934)).

110. 101 S. Ct. at 2956.

111. Id. at 2956 n.12.

112. Id.


115. See Fox v. Standard Oil Co. of New Jersey, 294 U.S. 87, 100-01 (1934).
tax may present unique problems if the water flows through several states, giving those states some rights to tax its use. An apportionment formula may need to be devised if such a "processing" resource is taxed so as to avoid unconstitutional multiple taxation by more than one state.\textsuperscript{116} A general revenue tax such as this, however, since it affects interstate commerce, would be subject to congressional rate limits, just as is a coal severance tax.\textsuperscript{117}

A tax on water used could alternatively be seen as a "user fee" imposed on the extracting industry, similar to a tax for the use of highways. A state may regulate, via taxation, users of public property to ensure its conservation.\textsuperscript{118} Industries using such public property may be charged for costs to the state of maintaining such property,\textsuperscript{119} subject to the "manifestly disproportionate" limitation.\textsuperscript{120}

Any of these taxes would provide a state with a greater degree of control over the rate of extraction of its natural resources, "a legitimate local interest."\textsuperscript{121} Revenues would be generated to help a state meet social and environmental costs imposed by resource extraction, and consumers would be forced to bear more fully the costs of resource use, thereby providing an economic incentive to consume resources with less costly environmental and social impacts. Potential adverse effects on interstate commerce may be reduced through the legislative process, where Congress can set state tax rates at levels its members collectively determine to fairly finance resource and production costs.\textsuperscript{122}

A state may also retain control over the extraction of its natural resources by regulating the local market for those resources.\textsuperscript{123} For example, a state's imposition of a minimum wellhead price on locally produced natural gas and its subsequent direction of a gas pipeline operator to take gas from an out-of-state producer at that fixed price was held by the Supreme Court to be a constitutional regulation of a local market.\textsuperscript{124} The Court stated: "A state may adopt reasonable regulations to prevent uneconomic and physical waste of natural gas, . . . or to protect the economy of the state."\textsuperscript{125} This extends logically to coal and other limited natural resources. "The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvi-

\textsuperscript{116} Western Live Stock v. Bureau of Revenue, 303 U.S. at 255-56 (1938).
\textsuperscript{117} See 101 S. Ct. at 2959.
\textsuperscript{118} See Clark v. Poor, 274 U.S. 554, 557 (1927).
\textsuperscript{119} Id.
\textsuperscript{122} See note 106 supra.
\textsuperscript{124} Id.
\textsuperscript{125} Id. at 185.
ous state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions."\textsuperscript{126}

The Supreme Court has long recognized that "[a] state is justifiably concerned with preventing rapid and uneconomic dissipation of one of its chief natural resources."\textsuperscript{127} To that end, "a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce."\textsuperscript{128} States must have broad constitutional powers in regulating natural resource extraction,\textsuperscript{129} in much the same way that they apparently have these powers when taxing the extraction of such resources. This direct regulatory power is, however, limited where federal legislation has been enacted to control the area.\textsuperscript{130}

\textbf{CONCLUSION}

In confirming the constitutionality of Montana's coal severance tax, the Supreme Court wrestled with the larger question of the constitutionally appropriate degree of judicial commerce clause scrutiny of state taxes. The majority of the Court disagreed with the dissent's argument for a fairly high degree of scrutiny, preferring to establish only broad constitutional parameters within which states may exercise their discretionary taxation powers.\textsuperscript{131} Congress, rather than the courts, will determine the upper limits on state severance tax rates.\textsuperscript{132}

A majority of the Court asserted that out-of-state consumers have no right under the commerce clause to demand cheap resources from resource-rich sister states, nor "the right to control in this fashion the terms of resource development and depletion in a sister State."\textsuperscript{133} The \textit{Commonwealth Edison v. Montana} decision is thus ostensibly a victory for resource-rich states desiring to retain self-determination over the development of their natural resources, and, correspondingly, over their economic and environmental well-being in the future. Congress now bears the burden of finding the balancing point of allowing states to adequately provide for their own present and future fiscal and envi-

\textsuperscript{126} Id. at 186-87.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} See, e.g., Cities Service Co. v. Peerless Co., 340 U.S. 179 (1950); Phillips Petroleum Co. v. Oklahoma, 340 U.S. 190 (1952). State regulations setting minimum wellhead prices on natural gas extracted within the state were upheld against due process, equal protection, and commerce clause challenges.
\textsuperscript{131} 101 S. Ct. at 2956-60.
\textsuperscript{132} Id. at 2959.
\textsuperscript{133} Id. at 2955.
ronmental health while not allowing resource-rich states to take unfair advantage of those with fewer resources.

Mark Shepherd