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Montana Strikes It Rich: Commonwealth Edison Co. v. Montana

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MONTANA STRIKES IT RICH: *COMMONWEALTH EDISON CO. V. MONTANA*

INTRODUCTION

If the Montana legislature met in Helena this month and passed a measure that would impose a tax on coal consumed in Arkansas, there is little doubt that the tax would be invalid. Yet a tax on coal mined in Montana and ultimately consumed in Arkansas is just as clearly a valid exercise of state power. As a result, while the taxes may have identical economic impact, they receive different judicial treatment. This dichotomy lies at the center of the controversy surrounding Montana's coal severance tax, specifically: May Montana do indirectly what the Constitution forbids when done directly? This comment will explore the state of the law concerning state resource severance taxation after the United States Supreme Court's opinion in *Commonwealth Edison v. Montana*.[1]

A severance tax may be defined generally as, "a levy assessed at a flat or graduated rate by a government on the privilege, process, or act of commercially severing or extracting natural resources from the soil or water, and measured by the physical amount or the gross or net value of the natural resource produced or severed."[2] The first such tax was imposed by Michigan in 1846;[3] by 1979, thirty-three states had adopted some type of mineral severance tax.[4]

The sharp increase in energy prices since 1973 and an expanded awareness of the environmental effects of mineral production encouraged some state legislatures to increase their severance taxes. While the added revenues generated by these taxes undoubtedly are and were welcomed by the coal-producing states, these higher taxes are being decried by many as an attempt on the part of the coal-rich western states to line their coffers at the expense of the rest of the nation. Before condemning our sister states as "blue-eyed Arabs,"[5] we should examine the purposes and motivation behind such taxing measures.

Severance taxes tend to reduce the speed of extraction and to decrease the total amount of mineral to be extracted.[6] States enact such taxes for the dual purposes of raising revenues and preserving their mineral resources for future generations. Some states that impose these taxes dedicate a substantial portion of the revenues to some type of trust fund, the principal of which

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1. 101 S. Ct. 2946 (1981).

2. *See* Lockner, *The Economic Effect of the Severance Tax on Decisions of the Mining Firm*, 4 NAT. RES. J. 468, 469 (1965).

3. U.S. DEP'T OF AGRICULTURE, STATE TAXATION OF MINERAL DEPOSITS AND PRODUCTION (1978).

4. BUREAU OF CENSUS, STATE GOV'T TAX COLLECTIONS IN 1979, table 3 (1980).

5. *See* Washington Post, May 27, 1977, at 1, col. 1, (quoting then-Governor of Montana Tom Judge).

6. *See* Lockner, *supra* note 2, at 485.

is typically held for the benefit of future generations.[7]

The effect of a severance tax will, of course, depend upon the demand for the taxed resource. As the tax increases the price of the resource, in a flexible market where there are good substitutes produced in other states, consumers will opt for the less expensive minerals produced in those other states. This preserves mineral reserves in the taxing state.

On the other hand, where no good substitute is available in other states and an inflexible demand exists, the coal will be produced and the taxing state will reap the monetary benefits in return. The political advantage of these taxes becomes evident where, as is the case with Montana and other western coal states, no substantial market exists within the state. The major burden of the tax, therefore, falls on residents of other states.[8]

A third motive behind escalating severance tax rates is to mitigate the detrimental effects that increased coal production by surface mining has on the environment of producing states. Problems inherent to surface mining include handling of spoil, revegetation, sediment control, and acid mine drainage.[9] Finally, the impacts coal boomtowns will have on state highway, health, school, and sanitation facilities are also major considerations behind rising tax rates.[10]

I. The Controversy

A. *The Tax*

Montana levies a severance tax on coal mined within the state.[11] The rate of taxation differs, depending upon the value of the coal, its energy content measured in BTUs, and method of resource extraction.[12] The tax may equal, at a maximum, thirty percent of the contract sales price, which is defined as the price of coal extracted and prepared for shipment f.o.b. mine, excluding the amount charged by the seller to cover taxes paid on production.[13] At thirty percent, Montana's tax is the highest of all coal-producing states.[14] Montana amended its constitution in 1976 to require at least fifty percent of the revenues generated by the tax to be paid into a trust fund, the principal of which may be appropriated only by a three-fourths vote of each

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7. *See* Appendix for comparison among states of the disposition of revenues from severance taxes on coal.

8. Note, *The Increasing Conflict Between State Coal Severance Taxation and Federal Energy Policy*, 57 TEX. L.REV. 675 (1979). *See generally* R. POSNER, ECONOMIC ANALYSIS OF LAW, 279-83 (2d ed. 1977).

9. Note, *Energy v. Environment: Who Wins in the Race For Coal in Kentucky*, 64 KY. L.J. 641 (1976).

10. The idea that coal consumers should finance increased coal production led some writers to describe severance taxes as "analagous to the fabled tax on bachelors, where collections were earmarked for children born out of wedlock; the underlying tax policy was that the parties [allegedly] causing the problem should compensate society for some of the damage." *See* Whiteside & Gillig, *Coal and Conservation—Tax Policy*, 64 KY. L.J. 573, 598 (1976).

11. *See* MONT. CODE ANN. § 15-35-101 (1981).

12. *Id.*

13. *Id.*

14. *See* Appendix.

house of the state legislature.[15]

A Montana legislative subcommittee explained the state's reasoning behind enacting the tax:

> Severance taxes are levied upon a State's natural resources for several reasons. One obviously, is the need for revenues. Another is that a State's natural resources, particularly its mineral resources are nonrenewable. When the resources are mined, the State loses a valuable asset forever. The levying of a severance tax is one manner by which the State can share in the profits associated with the extraction of a mineral asset. A severance tax, moreover, can help discourage waste; a basic assumption of severance taxation is that future generations will need mineral resources similar to those used today.[16]

B. *The Facts*

On June, 1978, a group of four coal and eleven utility companies filed suits seeking to have Montana's thirty percent coal severance tax declared unconstitutional.[17] They argued that the tax was a burden on interstate commerce, an impermissible intrusion into an area preempted by federal legislation, and a violation of the supremacy clause of the United States Constitution because it frustrated national policies embodied in the Mineral Lands Leasing Act of 1920.[18]

The trial court upheld the tax without hearing any evidence, and dismissed the complaints. The Montana Supreme Court affirmed.[19] The United States Supreme Court noted probable jurisdiction[20] and on July 2,

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15. MONT. CONST. art. 9, § 5. The table below indicates how Montana's severance tax revenues are and have been allocated:

	Fiscal Year		
Fund	1979	1980 (in thousands)	1981
Trust fund for future generations	$10,700	$23,600	$40,300
Alternative energy grants for research, and demonstration programs in solar, wind, biomass and other areas	800	1,500	2,000
Local impact account to mitigate social, environmental problems (Coal Board)	5,400	9,000	7,100
Educational trust	3,100	8,900	8,000
State equalization aid State School Foundation	3,200	5,200	4,000
County land planning	300	500.045	400
Renewable resources, water projects, dams and irrigation projects	800	1,300	1,000
Parks and cultural projects	800	2,200	2,000
State libraries		400	400
General Funds	12,800	20,100	15,300

16. MONTANA LEGISLATIVE SUBCOMMITTEE ON FOSSIL FUEL TAXATION, INTERIM STUDY 3 (1974).

17. Commonwealth Edison Co. v. Montana, No. 42657 (D. Mont., June 20, 1978). The suits were consolidated by the district court.

18. 30 U.S.C. § 189 (1976). For a list of the statutes that petitioners asserted indicated a clear federal policy encouraging the production and use of coal, see Petitioners' Jurisdictional Statement at 1-2, 101 S. Ct. at 2962-63.

19. 615 P.2d 847 (Mont. 1980).

20. 449 U.S. 1033 (1980).

1981, affirmed in a six-to-three opinion delivered by Justice Marshall.[21]

II. BACKGROUND OF THE LAW

Article I, section 8 of the United States Constitution includes, among the powers of Congress, the authority "to regulate Commerce . . . among the several States. . . ." The history of the Supreme Court's interpretation of the commerce clause reflects the very nature of the Constitution itself. To endure, it must be flexible, able to adapt itself to changing social and economic realities.

Decisions respecting the right of a state to impose taxes that affect interstate commerce have evolved from the notion that interstate commerce enjoyed a privileged position (and was immune from any taxes), to the contemporary view that "interstate business must pay its own way."[22]

Until recently, state taxes burdening interstate commerce were subject to a somewhat formalistic analysis by the Supreme Court. Any state tax imposed on a multi-state business for "the privilege of doing business" was held *per se* unconstitutional.[23] This process resulted in a simplistic labeling of the statute rather than an examination of the effects of the tax on interstate commerce. States were permitted to tax only the purely "local" incidents of an otherwise interstate business.[24]

The Supreme Court's first and last consideration of the constitutionality of state severance taxes occurred more than fifty years ago. In *Heisler v. Thomas Colliery Co.*,[25] the Court considered a challenge to a Pennsylvania tax on every ton of anthracite coal mined, washed, screened or otherwise prepared for market in the state. Plaintiffs, owners and operators of anthracite coal mines, alleged that to tax anthracite, but not bituminous, coal was an arbitrary and unreasonable classification in violation of the equal protection clause of the fourteenth amendment. Second, they contended that because most of the coal was shipped out of state, the tax imposed a burden on interstate commerce under a theory of "tax exporting."[26]

The Supreme Court rejected both arguments. In rejecting the equal protection claim, the Court held that the state may properly differentiate between the two types of coal, the differing physical properties of each providing a rational basis for according differential tax treatment.[27] The Court dismissed the commerce clause claim because the coal had not yet entered

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21. 101 S. Ct. 2946 (1981).

22. Western Livestock v. Bureau of Revenue, 303 U.S. 250, 254 (1938). *See generally* Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219 (1957).

23. *See, e.g.*, Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951); Freeman v. Hewit, 329 U.S. 249, 253 (1946) ("[s]tate taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys. . . ."); McLeod v. Dilworth Co., 322 U.S. 327 (1944); Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 (1925); Ozark Pipe Line Corp. v. Monier, 266 U.S. 555 (1925).

24. Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948).

25. 260 U.S. 245 (1922).

26. *Id.* at 260.

27. *Id.* at 257.

the stream of commerce when taxed.[28]

Heisler, and its progeny, *Oliver Iron Mining Co. v. Lord*,[29] and *Hope Natural Gas Co. v. Hall*,[30] which upheld, respectively, Minnesota[31] and West Virginia[32] occupational taxes on the business of mining, have for over half a century stood for the proposition that states have wide latitude in classifying energy resources for tax purposes. These cases reflected the Court's view that imposition of facially neutral, non-discriminatory, state taxes on energy resources prior to entry into the stream of commerce falls outside the pale of commerce clause protection. Under the logic of previous cases, the Court focused, not on the coal's out-of-state destination or the impact on interstate commerce, but on the status of the coal at the time the tax was imposed. States continue to employ this reasoning in imposing coal severance taxes[33] even though this mode of analysis conflicts with the Court's present approach, which concentrates on the practical effects the tax has on interstate commerce.[34]

III. THE DECISION

A. *The Majority*

In *Commonwealth Edison Co. v. Montana*,[35] the Supreme Court has finally laid to rest the claim that by levying a tax on goods prior to their entry into the stream of interstate commerce, a state can avoid the limitations of the commerce clause. The Court held that the proper inquiry should focus on the "practical effect" of the challenged tax. This four-part "practical analysis" test is set out in *Complete Auto Transit, Inc. v. Brady*,[36] which held that a state tax does not offend the commerce clause if 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.[37]

At the outset, the Court in *Commonwealth Edison* noted that the Montana tax easily satisfied the first two prongs of the *Complete Auto Transit* test. The Court quoted the Montana Supreme Court as observing: "there can be no argument here that a substantial, in fact, the only nexus of the severance of

28. *Id.* at 259.
29. 262 U.S. 172 (1923).
30. 274 U.S. 284 (1927).
31. 262 U.S. at 174, n. 1.
32. 274 U.S. at 285-86.
33. *See, e.g.*, Industrial Uranium Co. v. State Tax Comm'n, 95 Ariz. 130, 387 P.2d 1013 (1963) (upholding Arizona transaction privilege tax on mining companies); California Co. v. Colorado, 141 Colo. 288, 348 P.2d 382 (1959) (upholding Colorado's graduated tax on oil and gas drilling and production); Virginia Elec. and Power Co. v. Haden, 157 W. Va. 298, 200 S.E.2d 848 (1973), *cert. denied*, 416 U.S. 916 (1974) (upholding West Virginia's tax on the commercial act of manufacturing electric power).
34. *See, e.g.*, Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942).
35. 101 S. Ct. 2946 (1981).
36. 430 U.S. 274 (1977).
37. *Id.* at 279.

coal is established in Montana."[38] Likewise, there was no question of apportionment or potential multiple taxation because "the severance can occur in no other state."[39] The Court then observed that because the tax is imposed on all coal shipments, regardless of destination, no discrimination against out-of-state coal consumers exists.[40] Having thus satisfied the first three prongs of the *Complete Auto Transit* test, the Court scrutinized the fourth prong of the test—the claim that the amount collected under the Montana scheme is not "fairly related to the services provided by the State" to the coal producers.[41] This requirement that the tax be "fairly related" to services provided by the taxing state was the most troublesome one for the Court. The majority refused to equate the severance tax with a privilege or "user" tax, and held the severance tax to be a general revenue tax.[42] A general revenue tax, as opposed to a "user" fee, or tax designed as a specific charge for the use of state-owned facilities, is the means by which a state distributes the costs of government. Stated the Court:

> [T]he only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes, except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principal of government—that it exists primarily to provide for the common good.[43]

The Court rejected appellants' suggestion that the relevant inquiry under *Complete Auto Transit* is the amount of the tax or the value of the benefits received, as measured by some type of cost-benefit analysis. Rather, the proper inquiry is whether there is a substantial nexus with the taxing state, and if so, the measure of the tax must be reasonably related to the extent of that contact. Applying these criteria to the Montana tax, the Court noted that since the contact with the taxing state was the severance of the coal itself, and since the tax was measured as a percentage of the value of the coal taken, the tax passed the *Complete Auto Transit* test.[44]

As to the *rate* of the tax, the Court deferred to the legislature: "apart from the difficulty of the judicial undertaking, the nature of the factfinding and judgment that would be required of the courts merely reinforces the conclusion that questions about the appropriate level of state taxes must be resolved through the political process."[45]

The Court also concluded that the tax did not frustrate the purposes of the Mineral Leasing Act of 1920 because section 32 of the Act expressly authorizes states to impose severance taxes.[46] Appellants claimed the Act,

38. 101 S. Ct. at 2954 (citing Commonwealth Edison Co. v. Montana, 615 P.2d at 855).
39. 101 S. Ct. at 2954.
40. *Id.*
41. *Id.* at 2955 (citing Complete Auto Transit, Inc. v. Brady, 430 U.S. at 279).
42. 101 S. Ct. at 2956.
43. *Id.* (citing Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 521-22 (1937)).
44. 101 S. Ct. at 2960.
45. *Id.* at 2959.
46. 30 U.S.C. § 189 (1976).

which provides that royalty payments from federal lessees be divided between the leasing state and the federal government, was frustrated by the tax that appropriated directly to Montana a major portion of the "economic rents" from the leased federal land.[47] Section 32 of the Act was interpreted in *Mid-Northern Oil Co. v. Walker*[48] as holding that if a state tax is otherwise lawful, the state may impose the tax "as though the government were not concerned."[49]

Finally, the Court addressed the argument that Montana's severance tax was an impermissible intrusion into an area preempted by federal legislation. Even in the absence of express congressional intent to dominate a field, if state regulation may produce a result in conflict or inconsistent with federal legislation, such intent will be inferred.[50] The utility and coal companies in *Commonwealth Edison* argued that an examination of several federal statutes revealed a clear national policy encouraging the production and use of coal.[51] The general statements included within these statutes—"to encourage and foster the greater use [of] coal, and other alternative fuels . . ."—indicated, appellants reasoned, a congressional intent to preempt all state legislation having an adverse impact on coal production.[52]

The Court pointed out that it had recently rejected a similar argument in *Exxon Corp. v. Governor of Maryland*,[53] and stated that "[p]re-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 unmistakeably so ordained'."[54] The statutes cited by appellants, while containing policy statements encouraging the use of coal, did not contain language indicating a congressional intent to pre-empt state severance taxes.

B. *The Concurrence*

In his concurring opinion,[55] Justice White conceded the persuasiveness of the argument that Montana has over-compensated itself by collecting a tax on coal mined from federally leased lands, while at the same time sharing equally with the federal government all of the royalties paid under these leases. The fact that an additional forty percent of the federal revenues from these lease lands are also returned to the state through a reclamation fund, further supplemented by federal grants to areas impacted by coal production, led Justice White to express his doubts as to the compensatory nature of the tax.[56] Although he agreed with the majority that Congress should man-

47. 101 S. Ct. at 2962-63.
48. 268 U.S. 45 (1925).
49. *Id.* at 48-50.
50. *See* Comment, *Preemption Doctrine in the Environmental Context: A Unified Method of Analysis*, 127 U. PA. L. REV. 197 (1978).
51. 101 S. Ct. at 2962.
52. *Id.*
53. 437 U.S. 117 (1978), where the Court rejected arguments that basic federal policy favoring competition pre-empted a state law regulating retail distribution of gasoline.
54. *See* Petitioners' Jurisdictional Statement at 22-24.
55. 101 S. Ct. at 2964 (White, J., concurring).
56. *Id.*

date what is or is not a tolerable rate for state severance taxes, the tone of Justice White's brief concurrence indicates his lack of commitment to the majority view:

> I join the Court's opinion with considerable doubt and with the realization that Montana's levy on consumers in other States may in the long run prove to be an intolerable and unacceptable burden on commerce. Indeed, there is particular force in the argument that the tax is here and now unconstitutional.[57]

C. *The Dissent*

The dissenting members of the Court agreed with the majority that the Montana tax must be evaluated under the four-prong test of *Complete Auto Transit*.[58] They further agreed that the tax is facially neutral, fairly apportioned and substantially related to the taxed activity and the taxing state.[59] The gravamen of Justice Blackmun's dissent is the fact that the majority opinion did not remand the case for a trial on the issue of whether the tax was reasonably related to services provided by the taxing state.[60] The majority found the reasonable relationship, as required by the fourth prong of the *Complete Auto Transit* test, by equating the tax to a general revenue tax. Such a general revenue tax is measured by a formula relating tax liability to the value of the taxpayer's activities within the state. The dissent, however, would require a trial to determine the nature of the tax:

> [i]f the tax is in fact a legitimate general revenue measure identical or roughly comparable to taxes imposed upon similar industries, a court's inquiry is at an end; on the other hand, if the tax singles out this particular interstate activity and charges it with a grossly disproportionate share of the general costs of government, the court must determine whether there is some reasonable basis for the legislative judgment that the tax is necessary to compensate the State for the particular costs imposed by the activity.[61]

IV. THE IMPACT OF *COMMONWEALTH EDISON V. MONTANA*

By adopting the constitutional test of *Complete Auto Transit*, the Court has brought its decisions concerning state severance taxes into line with modern commerce clause analysis, at least to the extent that it overrules the mechanical approach of *Heisler*. Under the majority view, so long as the state has devised a tax measured at a proportional rather than at a flat rate, it is unlikely that the issue of whether the tax is fairly related to services provided by the state will ever be determined at trial. However, as the dissent pointed out, the interpretation the majority placed upon this fourth prong of the *Complete Auto Transit* test is rather formalistic.[62] For the majority, the label of "general revenue tax" emasculates the very standard it is

57. *Id.*
58. *Id.* at 2964 (Blackmun, J., dissenting, joined by Powell, J. and Steven J.).
59. *Id.* at 2968.
60. *Id.* at 2971-72.
61. *Id.*
62. *Id.* at 2968 (Blackmun, J., dissenting).

purporting to apply, as "[t]here 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."[63]

In considering the impact of state taxes upon interstate commerce, the Court has attempted to accommodate legitimate local needs, while at the same time, assuring free trade between the states, which is the underlying policy of the commerce clause. The Court previously has voiced its frustration with attempts to judicially control the nation's commerce. In his dissent to an opinion upholding a Minnesota income tax imposed on an Iowa corporation engaged in the manufacture and sale of cement from its Iowa plant to dealers in Minnesota, Justice Frankfurter mused that:

> [R]elying on the courts to solve these problems only aggravates the difficulties and retards proper legislative solution.
>
> At best, this Court can only act negatively; it can determine whether a specific state tax is imposed in violation of the Commerce Clause. Such decisions must necessarily depend on the application of rough and ready legal concepts. We cannot make a detailed inquiry into the incidence of diverse economic burdens in order to determine the extent to which such burdens conflict with the necessities of national economic life. Neither can we devise appropriate standards for dividing up national revenue on the basis of more or less abstract principles of constitutional law, which cannot be responsive to the subtleties of the interrelated economies of Nation and State.
>
> The problem calls for solution by devising a congressional policy. Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose the problem of the taxing freedom of the States and the needed limits on such state taxing power.[64]

The Court's refusal to examine the *rate* of Montana's challenged tax is consistent with its historic approach in reviewing state taxes under the commerce clause. While the Court will not hesitate to invalidate a tax it determines is a burden upon interstate commerce, its determination has never rested on the *rate* of the taxing measure.[65]

Pending federal legislation limiting severance taxes, other coal producing states may safely follow Montana's lead and increase their severance tax rate structures. As long as their taxes are measured as a percentage of the value of the coal removed and are not discriminatorily assessed based on the destination of the resource, they should withstand constitutional scrutiny.

The Court's refusal in *Commonwealth Edison* to define an equitable rate for state coal severance taxes should pressure Congress to impose a ceiling on these taxes. Although such legislation failed to pass the 1980 legislative ses-

63. *Id.* at 2956.
64. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 476 (1959) (Frankfurter, J., dissenting).
65. 101 S. Ct. at 2955. *See also* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979); Washington Revenue Dept. v. Stevedoring Ass'n, 435 U.S. 734 (1978).

sion, similar legislation has been reintroduced into both houses of Congress.[66] While last year's proposals won committee approval in the House, this year's attempt to amend the Fuel Use Act of 1978[67] to impose a limit of 12.5% on state coal severance taxes faces an uphill battle in light of a tight legislative schedule and renewed opposition from western legislators.

The arguments by the proponents of the proposed 12.5% rate ceiling parallel those of the unsuccessful plaintiff utilities in *Commonwealth Edison*: that the present tax rate structure of the coal producing states reduces coal production, thereby frustrating national energy policies.[68]

In its report to Congress recommending passage of last year's proposal, the Committee on Interstate and Foreign Commerce stated that the proposed 12.5% ceiling would promote the interstate use of a domestic resource, would result in decreased use of imported oil, and therefore, would reduce the export of dollars and improve the nation's balance of trade deficit.[69] The Committee criticized state tax rates in excess of 12.5% as not being in proportion to the direct and indirect impact costs attributable to the production of coal. Committee members also expressed fears that placing the tax burden on out-of-state consumers, who are denied a voting voice in determining such tax, would polarize the nation and promote regional divisiveness.[70]

Opponents to a federally mandated rate ceiling denounced last year's bill as "an attempt by the federal government to run roughshod over the rights of the states."[71] These representatives claimed that the state's right to tax the severance of minerals within its borders is a fundamental right reserved to the states under the Constitution (presumably under the tenth amendment).[72]

There can be little doubt that Congress has plenary power under article I, section 8, clause 3 of the United States Constitution to limit legislatively the power of the states to impose severance taxes. In *Arizona Public Service Co. v. Snead*,[73] the Supreme Court, in upholding a 1976 federal statute placing limitations on state taxation of the interstate transmission of electricity, restated the broad powers of Congress under the commerce clause. The Court held that where Congress has a rational basis for finding that a state taxing measure interferes with interstate commerce, legislation limiting such taxa-

66. *See* S. 178, 97th Cong., 1st Sess. (1981), sponsored by Sen. D. Durenberger (R-Minn.), which would impose a 12.5% ceiling on state coal severance taxes. A companion bill, H.R. 1313, 97th Cong., 1st Sess. (1981), has been introduced and as of this writing is in the House Energy and Commerce Committee.

67. 42 U.S.C. § 8301(b)(3) (1976 & Supp. III 1979).

68. *See* note 66 *supra*. *See also* H.R. REP. NO. 96-1527, Pt. I, pp. 2-6, 97th Cong., 1st Sess. (1981).

69. Other sources estimate that the 12.5% tax ceiling, over the next 30 years, would save as much as $11 billion. *See Washington and the Utilities*, 105 PUB. UTIL. FORT. No. 8, at 30, 32 (April 10, 1980).

70. *See* H.R. REP. NO. 96-1527, Pt. I, at 19, 97th Cong., 1st Sess. (1981).

71. *Id.*

72. *See* remarks of Rep. Timothy Wirth (D-Colo.), H.R. REP. NO. 96-1527, Pt. I, at 20-21, 97th Cong., 1st Sess. (1981). For a discussion on the economics of "tax exporting," see McLure, *Economic Constraints on State and Local Taxation of Energy Resources*, 31 NAT'L TAX J. 257 (1978).

73. 441 U.S. 141 (1979).

tion is a reasonable means of eliminating that interference and thus is within the constitutional power of Congress.[74]

CONCLUSION

The Supreme Court has, for the moment, eschewed the difficult task of mandating an equitable rate for state severance taxes while at the same time recognizing the right of states to impose such taxes and the proper role of Congress to place limits on the rate of such taxes. Justice White, even as he joined in the opinion of the Court, expressed his doubts as to the constitutionality of the Montana tax. His brief concurrence appears to recognize the persuasiveness of both the pre-emption argument and the concept of discriminatory tax-exporting. If Montana's sister coal-producing states should, in the absence of a congressionally imposed ceiling, choose to raise their severance tax rates,[75] it is likely that Justice White could be persuaded to change his vote on this issue which, when added to the three votes of the dissent, would be enough to carry a vote on a grant of certiorari and ensure that this issue would again be examined by the Supreme Court.

While critics of Montana's coal severance tax express fears that this case signals a trend in state taxation of energy resources which will lead to the "Balkanization" of this country,[76] it is unlikely that Congress will allow the states to continue increasing their mineral severance taxes. Given the disparity of political clout between the coal-producing states of the West and the coal-consuming states of the East, it is not likely any coal cartel can withstand the political storm that is brewing.

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74. *Id.* at 150.

75. Action has already been taken by other states to increase severance taxation. A Colorado citizen's committee has been formed in an attempt to place an initiative on that state's ballot to adopt a constitutional amendment which would increase the rate of Colorado's mineral severance taxes. The group, Initiative on Mineral Policy Assisting Colorado Taxpayers (IMPACT), also seeks to change the measure of the present severance tax structure from the present flat rate to rates based on a percentage of the value of the mineral. IMPACT, Constitutional Amendment, Draft of 10/6/81, Denver, Colorado. Colorado Governor Richard Lamm also favors this measure of taxation and a higher rate for his state, but looks to the state legislature to enact such changes. *See Squaring Off On Severance Taxes*, COLO. BUS. 83 (April 1981).

76. Former Secretary of State William P. Rogers, who represented appellant utility companies in *Commonwealth Edison*, recently warned, in a hearing before the Senate Intergovernmental Relations Subcommittee, that within two weeks of the Court's decision, proposals had already been made to increase state taxes on energy resources. THE WEEK IN CONGRESS, (CCH), July 17, 1981, at 1, col.2.

APPENDIX

The following chart provides comparative information on the states that impose a tax on the severance of coal:

State	Rate	Revenue Disposition
Alabama	33.5¢ per ton, 20¢ per ton of coal or lignite severed, ALA. CODE § 40-13-31 (Supp. 1981), plus 13.5¢ per ton of coal severed, ALA. CODE § 40-13-2 (1975).	50% goes to the municipality from which the coal was taken; 50% goes to each county from which the coal was severed. ALA. CODE § 40-13-32 (Supp. 1981).
Alaska	A mining license tax upon the net income of the taxpayer from the property in the state computed with allowable depletion: over $40,000, not over $50,000, 3%; over $50,000, not over $100,000, $1,500 plus 5% of the excess over $50,000; over $100,000, $4,000 plus 7% of the excess over $100,000. ALASKA STAT. § 43.65.010 (Supp. 1981).	Statutes silent on disposition.
Arkansas	2¢ per ton of coal severed. ARK. STAT. ANN. § 84-2102(b) (1980).	75% of revenues are deposited as general revenue, 25% are deposited as special revenue into the county aid fund. ARK. STAT. ANN. § 84-2112 (1980).
Colorado	60¢ per ton, subject to increase or decrease of 1% per each 3 points change in index of wholesale prices of U.S. Dept. of Labor. (78.6¢ eff. 7/10/81) COLO. REV. STAT. § 39-29-106 (Supp. 1981).	50% of revenues credited to a local government severance tax fund for impact aid. 50% of revenues credited to state severance tax fund, which is perpetual, and held in trust as a replacement for depleted resources and water conservation and development. COLO. REV. STAT. § 39-29-110 (Supp. 1981).
Florida	All solid minerals, including coal, 5% of value at point of severance. FLA. STAT. ANN. § 211.31 (West Supp. 1982).	50% to Conservation & Recreation Lands Trust Fund and 50% to Land Reclamation Trust Fund. FLA. STAT. ANN. § 211.31 (West Supp. 1982).
Idaho	License tax equal to 2% of net value of ore mined or extracted. IDAHO CODE § 47-1201 (Supp. 1981).	Revenues go to state's general fund. IDAHO CODE § 47-1206 (Supp. 1981).
Kentucky	4½% of gross value of coal severed. (50¢ per ton minimum). KY. REV. STAT. § 143.020 (1982).	Revenues are divided between the Kentucky Department of Transportation and Department of Energy. KY. REV. STAT. § 143.090 (1982). Local taxes are prohibited. KY. REV. STAT. § 143.100 (1982).
Louisiana	10¢ per ton of coal severed. LA. REV. STAT. ANN. § 631,633(12) (West 1970 & Supp. 1981).	Credited to state treasury unless otherwise allocated by state constitution of 1974. LA. REV. STAT. ANN. § 645 (West Supp. 1981).

Montana	Tax due is higher of tax in dollars or percentage in value (rates differ for surface vs. underground mines). Under 7,000 BTU per lb., 12¢ or 20%; 7,000-8,000 BTU, 22¢ or 30%; 8,000-9,000 BTU, 34¢ or 30%; over 9,000 BTU, 40¢ or 30%. MONT. REV. CODES ANN. § 15-35-101 (1981).	50% of revenues generated by the tax are allocated to trust fund, the principal of which requires a three-fourths vote of each house to appropriate. For disposition of the remaining 50%, see text, at 564-65.
New Mexico	57¢ per ton (plus a surtax tied to the index of wholesale prices, U.S. Dept. of Labor) N.M. STAT. ANN. § 7-26-6 (1980).	Proceeds from the tax are credited to the severance tax bonding fund. N.M. STAT. ANN. § 7-27-1 (1980).
North Dakota	85¢ per ton, subject to increase only at one cent per ton for every four point increase in the index of wholesale prices, U.S. Dept. of Labor, N.D. CENT. CODE § 57-61-01 (Supp. 1981).	The revenues are paid into the coal development fund. 35% goes by grant to impacted cities and counties, 15% to a fund to provide loans to impacted local governments, 20% is allocated directly to the coal-producing counties and 30% goes to the general fund. N.D. CENT. CODE § 57-62-02 (Supp. 1981).
Ohio	4¢ per ton of coal severed. OHIO REV. CODE ANN. § 5749.02 (Page 1980).	75% of revenues credited to the unreclaimed lands special account. OHIO REV. CODE ANN. § 1513.30 (Page 1980). 25% of revenues credited to the oil and gas well-plugging account. OHIO REV. CODE ANN. § 1513.071 (Page 1980).
South Dakota	4.5% of taxable value (posted field price, market value) of any energy minerals severed. S.D. COMP. LAWS ANN. § 10-39A-1 (Supp. 1981).	Revenues are divided, 50% to county where severed; 20% to energy development impact fund; and 30% to general fund. S.D. COMP. LAWS ANN. § 10-39A-8 (Supp. 1981).
Tennessee	20¢ per ton of coal severed. TENN. CODE ANN. § 67-5902 (Supp. 1981).	All revenues collected from tax are allocated to the county from which such coal products were severed. TENN. CODE ANN. § 67-5905 (Supp. 1981).
West Virginia	3.5% of value of coal produced, processed and prepared, plus gross proceeds derived from sale, multiplied by .35. W. VA. CODE § 11-13-2(L)(a) (Supp. 1981).	75% of revenue goes to coal-producing counties; 25% to all counties regardless of coal production therein. W. VA. CODE § 11-13-2(L)(b) (Supp. 1981).
Wyoming	State severance and local *ad valorem* taxes equal a combined total of approximately 17½% of value. WYO. STAT. §§ 39-2-202, 39-2-402, 39-6-302(a)-(f), and 39-6-303(a) (1977 & Supp. 1981).	All revenue collected from the levy of state taxes is transferred to the state treasurer who, in turn, transfers the funds to various earmarked revenue funds, the general fund and the permanent mineral trust fund, depending upon under which statutory section the revenues were collected. *See* WYO. STAT. §§ 39-6-303(a)-(j), 39-6-306(a)-(e) (1977 & Supp. 1981).