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Wyoming v. Oklahoma: "[M]isguided Exercise of Discretion"

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WYOMING V. OKLAHOMA: "[M]ISGUIDED EXERCISE OF DISCRETION"[1]

INTRODUCTION

The purpose of this casenote is to analyze the Supreme Court's reasoning in *Wyoming v. Oklahoma*. Section II of this casenote reiterates background law in the area of standing, exclusive original jurisdiction, and the negative Commerce Clause. Section II (A) recapitulates the doctrine of standing to sue. Section II (B) discusses the Supreme Court's exclusive original jurisdiction. Section II (C) summarizes the negative Commerce Clause. Section III presents the statement of the case.

Section IV analyzes the Supreme Court's decision in *Wyoming v. Oklahoma*. Section IV (A) criticizes the Court for failing to delineate a solid standing causation analysis. Section IV (B) castigates the Court's discretionary review of exclusive original jurisdiction. Section IV (C) acknowledges the Court's traditional approach of invalidating state statutes that discriminate against interstate commerce. Section V concludes the casenote with some general observations.

BACKGROUND

Standing to Sue

When an exclusive original jurisdiction[2] case is before the Supreme Court, the Court is obligated to exercise original jurisdiction if the matter is justiciable.[3] The Supreme Court has held that suits by States seeking determinations of the validity of other states' statutes are justiciable controversies.[4] In suits by one state enjoining enforcement of the laws of another state, the questions presented are often intensely political, reflecting deliberate determinations by one state to advance its own interests at the expense of other states.[5]

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[1] Wyoming v. Oklahoma, 112 S. Ct. 789, 810. (1992) (Thomas J., dissenting).

[2] Current statute regulating exclusive original jurisdiction: "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more states." 28 U.S.C. § 1251 (a) (Supp. III 1979).

[3] *See* Pennsylvania v. West Virginia, 262 U.S. 553 (1923); Maryland v. Louisiana, 451 U.S. 725 (1981). Concepts of justiciability serve to define and refine both the constitutional limits of judicial power and the appropriate occasions for refusing to exercise that power even in cases within the reach of Article III. *See* ROBERT L. STERN, EUGENE GRESSMAN, AND STEPHEN M. SHAPIRO, JUSTICIABILITY: STANDING, MOOTNESS, AND ABATEMENT Ch. 18, SUPREME COURT PRACTICE, (6th ed. 1985). *See also* 13 and 13A CHARLES A.WRIGHT, ARTHUR R. MILLER and EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 3529-35 (2d ed. 1984).

[4] Pennsylvania v. West Virginia, 262 U.S. 553 (1923); Maryland v. Louisiana, 451 U.S. 725 (1981)(justiciable).

[5] 17 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: SUITS BETWEEN STATES § 4045, at 200 (1988).

Examples of justiciable controversies in which states seek determination of the validity of another state's statute are *Pennsylvania v. West Virginia*[6] and *Maryland v. Louisiana*.[7] However, the Supreme Court found in *Alabama v. Arizona*,[8] *Arizona v. New Mexico*,[9] and *Pennsylvania v. New Jersey*[10] that it did not have jurisdiction over original proceedings seeking determination of the validity of the defendant state's statutes.

Standing is a component of the justiciability doctrine.[11] The law of standing requires a court to determine whether the litigant has suffered actual injury,[12] and whether a causal connection[13] exists between the wrongful act and the claimed injury.[14] A party seeking to sue must also be the real party in interest.[15]

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[6] 262 U.S. 553 (1923). Pennsylvania, whose public institutions were supplied with natural gas produced in West Virginia, challenged the validity of West Virginia's statute requiring the producing companies to give preference to West Virginia consumers which would result in the interference with the supply to the Pennsylvania's institutions. The Court held that injury was "certainly impending" if the supply of gas were cut off or curtailed. *Id.* at 593.

[7] 451 U.S. 725 (1981). The Court held that the plaintiff states, which were substantial consumers of natural gas, had standing to bring the suit under the Supreme Court's original jurisdiction where gas costs within the complaining states had increased as a direct result of the imposition of the tax. The states were thus affected in a substantial and real way. Standing for constitutional purposes exists if the injury could fairly be traced to the challenged action. *Id.* at 736-37. *See also* ROBERT L. STERN, EUGENE GRESSMAN & STEPHEN M. SHAPIRO, SUPREME COURT PRACTICE, ch. 18 at 706 (6th ed. 1986) (discussing justiciability and standing).

[8] 291 U.S. 286 (1934). Alabama engaged in selling products made with convict labor and challenged the validity of statutes in five states, Arizona, Idaho, Montana, New York, and Pennsylvania, which precluded the sale of goods made with convict labor. The court found that there were other markets for its goods outside of the five defendant states; therefore, there was no sufficient injury to warrant invoking original jurisdiction. *Id.* at 292.

[9] 425 U.S. 794 (1976). Arizona sought relief against an electrical energy tax collected by New Mexico on power generated in New Mexico for sale in Arizona. The court declined leave to file as a matter of discretion, finding it better to have the issues resolved in pending litigation instituted by three Arizona utilities in New Mexico state courts. *Id.* at 796-97.

[10] 426 U.S. 660 (1976). Pennsylvania challenged two states' income tax statutes. Leave to file the complaints were denied, partly on the ground that the plaintiff states were responsible for their own injuries through provisions of their own tax laws, and partly on the ground that the plaintiff states could not secure standing to protect the interests of their individual citizens. *Id.* at 664-65.

[11] *See* STERN ET. AL., *supra* note 3; WRIGHT ET. AL., *supra* note 3.

[12] Flast v. Cohen, 392 U.S. 83, 92 (1968). According to *Flast*, standing exists when a plaintiff alleges the challenged action has caused him injury-in-fact. Generally, for purposes of standing, actual injury has been economic in nature. *Id. But see* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 687 (1973) (discussing the existence of standing when injury-in-fact arose out of environmental damage).

[13] Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973). The causation component requires that a plaintiff allege actual injury resulting from the challenged action before a court will adjudicate the controversy. *Id.*

[14] *See* Nancy E. Schiavone, Note, *Standing to Invoke Original Supreme Court Jurisdiction*- Maryland v. Louisiana, 31 DEPAUL L. REV. 227, 229 (1981) (discussing standing to invoke original Supreme Court jurisdiction).

[15] Florida v. Anderson, 91 U.S. 667 (1875). SEE CF. FEDERAL PRACTICE AND PROCEDURE, L. E D., COURTS AND JUDICIAL SYSTEMS § 20:201 (discussing real party in interest). Proprietary capacity standing is a settled doctrine that grants a State standing to sue only when it is the real party in interest. A State seeking to file an action sues to protect its own interests in its capacity as proprietor. *See* PAUL M. BATOR, PAUL J. MISKIN, DAVID L. SHAPIRO & HERBERT WECHSLER, HART & WECHSLER'S THE FEDERAL COURT'S AND THE FEDERAL SYSTEM 156 (2d ed. 1973)(analyzing the underlying policies of the standing doctrine).

Compared to the requirement of actual injury, the requirement of establishing causal connection is the more difficult standing inquiry.[16] The Court has attempted to establish a standard causation principle. One test formulated by the Court is the "zone of interest" test, which requires that the litigant's interest be within the zone of interest to be protected by the statutory or constitutional provision from which the claim arose.[17]

Another test used by the Court is the "fairly traceable" causal connection test.[18] The "fairly traceable" test permits a court to hear only those suits where the alleged injury fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.[19] Both the "zone of interest" and "fairly traceable" tests have been used in recent decisions.[20]

Original Jurisdiction in Suits between States

Article III, § 2, Clause 2 of the Constitution of the United States delegates original jurisdiction[21] to the United States Supreme Court in all cases in which a State shall be a Party.[22] Although there is no requirement in the Constitution that the original jurisdiction of the Supreme Court be exclusive,[23] Congress in 28 U.S.C. § 1251(a) grants original and exclusive jurisdiction to the Supreme Court

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16 *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 74 (1978).

17 *See* Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970)(formulating the "zone of interest" test).

18 *See* Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976)(formulating the "fair traceable" test).

19 *Id.* at 41-42.

20 Air Courier Conference of America v. American Postal Workers Union, 111 S. Ct. 913 (1991) (using "zone of interest" test). Wyoming v. Oklahoma, 112 S. Ct. 789 (1992) (using "fairly traceable" test).

21 *See* Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665 (1959) (discussing generally the original jurisdiction of the Supreme Court).

22 Article III, § 2, Clause 2 of the Constitution of the United States provides:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III,§ 2, cl. 2.

23 Originally, even though the Constitution does not distinguish between exclusive and nonexclusive Supreme Court jurisdiction, the Judiciary Act of 1789 articulated the distinction. The Act provided:

> Sec. 13. *And be it further enacted*, That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.

Judiciary Act 1789, ch. 20, § 13, 1 Stat. 80 (1853) (repealed by act, ch. 231, § 297, 36 Stat. 1168 (1911) (current version at 28 U.S.C. § 1251 (1976)).

of all controversies[24] between two or more States.[25] The Supreme Court is the only federal forum in which the parties can litigate such a controversy.[26] The rationale behind bestowing original jurisdiction on the Supreme Court over controversies between States is to provide States with an impartial means to peaceably settle disputes between themselves.[27]

The Court has acknowledged that it has a responsibility to exercise its original, exclusive jurisdiction over actions between states.[28] However, because of its over-burdened docket[29] and in order to preserve its abilities to administer its appellate duties,[30] in cases of nonexclusive original jurisdiction the Court developed a discretionary analysis, which is used to determine whether to defer the case to a lower federal court which has concurrent jurisdiction.[31] Historically, this discretionary element was not applied to the Supreme Court's exercise of exclusive original jurisdiction— justicability indicated when to exercise exclusive original jurisdiction.[32] However, currently the Court has interpreted 28 U.S.C. §

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[24] If there is no controversy between two states, then there is no Supreme Court jurisdiction. *See Alabama v. Arizona*, 291 U.S. 286 (1934). To constitute a controversy, "it must appear that the complaining State has suffered a wrong through the action of the other State . . . ." Massachusetts v. Missouri, 308 U.S. 1, 15 (1939). *See generally* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Cases or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979).

[25] 28 U.S.C. § 1251(a) provides that "[t]he Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

[26] *See* United States v. Texas, 143 U.S. 621 (1892). In *Texas*, the Supreme Court stressed that cases under exclusive original jurisdiction should be determined in the highest tribunal of the nation to ensure that jurisdiction comports with the dignity of the parties. *Id.* at 643. *But see* Arizona v. New Mexico, 425 U.S. 794 (1976). In *Arizona*, the Supreme Court declined to exercise exclusive original jurisdiction because a pending state court action provided an alternative forum for litigation of the issues. *Id.* at 797.

[27] Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945). *See generally* Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665 n.3 (1959) (indicating that very little evidence exists regarding the Framers' intent in granting original jurisdiction). "In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal." THE FEDERALIST NO. 81, at 508 (Alexander Hamilton) (B. Wright ed., 1961).

[28] "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); California v. Texas, 437 U.S. 601 (1978).

[29] *See* Samuel Estreicher & John Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681 (1984) (studying the Supreme Court's overburdened docket and attempting to formulate criteria the Supreme Court should use when granting or denying review of cases).

[30] In *Ohio v. Wyandotte*, the Court insisted on the need for "sound discretion" when another competent tribunal was available and when the burdens of exercising original jurisdiction in a vast array of such cases might seriously interfere with the exercise of its more critical function as a court of review. 401 U.S. 493, 499 (1971). *See also* David Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (October, 1985) (analyzing the Supreme Court's use of discretion).

[31] In *Arizona*, the Supreme Court exercised discretion in adjudicating original jurisdiction even though the jurisdiction was exclusive. Arizona v. New Mexico, 425 U.S. 794 (1976). The Court relied on nonexclusive original jurisdiction decisions to decline exclusive original jurisdiction in a suit between two states. *Id.* at 796. The Court ignored the fundamental differences between exclusive and nonexclusive jurisdiction. The Court used this discretionary analysis in Maryland v. Louisiana, 451 U.S. 725 (1981). The problem with the application of the discretionary policy is that it appears arbitrary. Schiavone, *supra* note 14, at 244.

[32] *See* Julie Vick Stevenson, Note, *Exclusive Original Jurisdiction of the United States Supreme Court: Does It Still Exist?*, 1982 B.Y.U. L. REV. 727, 729. (discussing historical application of the statutory distinction between exclusive and concurrent original jurisdiction). *See also* sources cited *supra* note 3.

1251(a)(1) to permit the exercise of discretion in exclusive original jurisdiction cases.[33]

Commerce Clause Invalidates Discriminatory State Act[34]

The Commerce Clause provides: "The Congress shall have the Power ...To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[35] The Commerce Clause has been interpreted as conferring power on the national government to regulate commerce, but also as limiting states' power to interfere with commerce.[36] The primary purpose of the Commerce Clause is to promote free trade and prevent commercial wars among the states.[37]

Based on the Commerce Clause, the Supreme Court has invalidated state regulations as improper interferences with interstate commerce.[38] Reasons for invalidating discriminatory state regulations include adherence to the intent of the Framers,[39] fear of the economic and political consequences of interstate hostility,[40]

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[33] The Court held that:

> A determination that this Court has original jurisdiction over a case, of course, does not require us to exercise that jurisdiction. We have imposed prudential and equitable limitations upon the exercise of original jurisdiction. As we explained in Illinois v. City of Milwaukee, 406 U.S. 91, 93 - 94 (1972):
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> 'We construe 28 U.S.C. § 1251(a)(1), as we do Art. III, §2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is of appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer.'

California v. Texas, 457 U.S. 164, 168 (1982).

[34] U.S. CONST. art. I. § 8, cl. 3.

[35] *Id.*

[36] *See generally* Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

[37] *See* McLeod v. J.E. Dilworth Co., 322 U.S. 327, 330 (1944).

[38] *See* Michael Smith, *State Discriminations Against Interstate Commerce*, 74 CALIF. L. REV. 1203 (1986); Julian Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425 (1982).

[39] Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949). *See* Smith, *supra* note 38, at 1206.

[40] Discriminatory regulations are thought to be particularly harmful because they arouse greater anger in other states and lead to retaliatory measures. The Court found that:

> We need only consider the consequences if each of the few states that produce copper, lead, high-grade iron ore, timber, cotton, oil, or gas should decree that industries located in that state should have priority. What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun!

Hood, 336 U.S. at 536-39.

and concern about biased local political processes.[41] The party challenging the regulation has the burden of proving that the regulation is discriminatory.[42]

Discrimination has been tentatively defined as a regulation that would "suppress or mitigate the consequences of competition between the states"[43] and that would establish an "economic barrier against competition with . . . another state."[44] Regulations which discriminate against interstate commerce have been described as providing a "gain for those within the state and an advantage at the expense of those without" the state.[45] The Commerce Clause prohibits economic protectionism--regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.[46]

If a regulation is discriminatory on its face,[47] the state bears the burden of justifying it. The state must prove that the regulation has a legitimate state interest to be served by the regulation[48] and that the regulation is rationally related to serving that interest.[49] The state must also show that it does not have a less discriminatory alternative to the regulation available.[50]

There are three types of discriminatory regulations.[51] The first type of discriminatory regulation is a regulation which discriminates on its face. If the very terms of the regulation deal unequally with people inside and outside the state and the state has given the advantage to the insiders, then the regulation is discriminatory on its face.[52]

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41 South Carolina Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938) (regulation placing burden on outside states and benefit to the state which established the regulation). *See also* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 205-06 (1980).

42 Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

43 *Baldwin*, 294 U.S. at 522.

44 *Id.* at 527.

45 *Barnwell*, 303 U.S. at 184 n.2. (dictum).

46 New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273-74 (1988).

47 *See infra* note 52 and accompanying text.

48 *E.g.*, New England Power Co. v. New Hampshire, 455 U.S. 331, 339 (1982); Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); City of Philadelphia v. New Jersey, 437 U.S. 617, 627-29 (1978); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 379-80 (1976); Polar Ice Creme & Creamery Co. v. Andrews, 375 U.S. 361, 377 (1964); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951); H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 535 (1949); Edwards v. California, 314 U.S. 160, 173 (1941); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522, 527 (1935).

49 Lewis v. BT Inv. Managers, 447 U.S. 27, 44 (1980); Hughes v. Oklahoma, 441 U.S. 322, 338 (1979); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 377; Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 353 (1977); Toomer v. Witsell, 334 U.S. 385, 406 n.41 (1948).

50 *Hughes*, 441 U.S. at 336; *Hunt*, 432 U.S. at 353; *Dean Milk*, 340 U.S. at 354; *Lewis*, 447 U.S. at 43; *Great Atl. & Pac. Tea Co.*, 424 U.S. at 377; *Baldwin* , 294 U.S. at 524.

51 *See* Smith, *supra* note 38, at 1239.

52 In *Hughes*, the very terms of the statute placed out-of-state buyers at a disadvantage as compared to local buyers. 441 U.S. at 323.

The second type of discriminatory regulation is a regulation which discriminates in purpose. If those enacting the regulation intended to give people within the state an economic advantage by placing heavier burdens on people outside the state, then the regulation is discriminatory in purpose.[53] Proving that a statute has a discriminatory purpose requires proof of legislative intent to discriminate; whereas, proving the statute is discriminatory on its face, focuses on the discriminatory words used in the statute.

The third type of discriminatory regulation discriminates in effect. If a regulation has the effect of imposing greater burdens on those outside the state, thereby affording an advantage to local inhabitants, it is discriminatory in effect.[54]

STATEMENT OF THE CASE

Wyoming imposes a severance tax[55] on those who extract coal from Wyoming's land.[56] Four Oklahoma electric utilities[57] purchased almost 100% of their coal from Wyoming.[58] In 1988, the Oklahoma legislature passed an Act requiring coal-fired utilities to burn a mixture of coal containing at least 10% Oklahoma-mined coal.[59] Subsequent to the passage of the Act, Wyoming's severance tax revenues declined.[60]

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[53] In *H.P. Hood & Sons*, the regulation was intended to give local milk drinkers an advantage over their counterparts. 336 U.S. at 548-49.

[54] Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 353-354 (1977). The Court invalidated the regulation on the ground that it was an unjustified discrimination in effect.

[55] Wyoming v. Oklahoma, 112 S. Ct. 789, 793 (1992). *See* WYO. STAT. §§ 39-6-301 to 39-6-308 (1990 and Supp. 1991). Wyoming does not sell coal, but the severance tax is assessed against the person or company extracting the coal and is payable when the coal is extracted. *Id.*

[56] *Id.* Wyoming is a major coal-producing state.

[57] The four Oklahoma electric utilities subject to the requirements of the Act are Oklahoma Gas and Electric Co., Public Service Company of Oklahoma, and Western Farmers Electric Cooperative, all privately owned, and the Grand River Dam Authority (GRDA), an agency of the state of Oklahoma. None of these utilities complied with Res. 21. *Id.* at 794.

[58] *Id.* at 790.

[59] *Wyoming*, 112 S. Ct. at 794. The resolution, which preceded the challenged Act, requested: "Oklahoma utility companies using coal-fired generating plants to consider plans to blend ten percent Oklahoma coal with their present use of Wyoming coal, effecting a result of keeping a portion of ratepayers' dollars in Oklahoma and promoting economic development." OKLA S. RES. 21, 40th Leg., 1985 Okla Sess. Laws 1694.
The challenged resolution included the following:

> Whereas, the passage of this law in 1986 has provided over 700 new jobs in Oklahoma"s coal mining industry and related employment sectors; and
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> Whereas, another benefit of this law is an additional $31 million of taxable income has been generated through the purchase of Oklahoma mined coal; and
>
> Whereas, The Grand River Dam Authority has failed to comply with said law and has refused to recognize the intent of the Oklahoma State Legislature to utilize Oklahoma mined coal.
>
> Now, Therefore be it resolved . . . :
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> That the Oklahoma State Legislature hereby directs the Grand Rapid Dam Authority to immediately begin purchasing Oklahoma mined coal and to comply with the law stated in [the Act].

In 1988, Wyoming submitted a motion for leave to file a complaint under the Supreme Court's exclusive original jurisdiction[61] claiming that Oklahoma's statute,[62] requiring Oklahoma coal-fired electric generating plants producing power for sale in Oklahoma to burn a mixture of coal containing at least 10% Oklahoma-mined coal, was a per se violation of the Commerce Clause.[63] Wyoming sought an injunction permanently enjoining the Act.[64]

The Court granted Wyoming's leave to file its bill of complaint despite Oklahoma's claim which questioned Wyoming's standing to sue and challenged the appropriateness of the Court's exercise of original jurisdiction.[65] Thereafter, Oklahoma filed a motion to dismiss for lack of jurisdiction.[66] The Court denied Oklahoma's motion to dismiss.[67]

A Special Master was appointed, and both States filed cross-motions for summary judgment.[68] The Special Master recommended that the Court hold that Wyoming had standing to sue, that the case was appropriate to original jurisdiction, and that the Act violated the Commerce Clause on its face and in practical effect.[69] The Court adopted the recommendations of the Special Master's findings of fact, granted Wyoming's motion for summary judgment and denied Oklahoma's motion summary judgement.[70] The Supreme Court held in *Wyoming v. Oklahoma* that Wyoming clearly had standing to sue[71] and that the case was appropriate for the exercise of the Court's original jurisdiction.[72] The court also held that the Act was invalid under the Commerce Clause because the Act

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OKLA. S. RES. 82, 41st Leg., 1988 Okla. Sess. Laws 1915. [hereinafter the Act].

[60] Unrebutted evidence demonstrated that, since the effective date of the Act, Wyoming lost severance taxes in the amounts of $535,886 in 1987, $542,352 in 1988, and $87,130 in the first four months of 1989. Other unrebutted submissions confirmed that Wyoming has a significant excess mining capacity, such that the loss of any market cannot be made up by sales elsewhere, where Wyoming's demand has risen to meet demand. *Wyoming*, 112 S. Ct. at 795.

[61] U.S. CONST., art. III, § 2.

[62] *See* the Act, supra note 59.

[63] *Wyoming*, 112 S. Ct. at 793. U.S. CONST., art. I, § 8, cl. 3.

[64] *Wyoming*, 112 S. Ct. at 793.

[65] *Id.*

[66] *Id.*

[67] *Wyoming*, 112 S. Ct. at 793.

[68] *Id.*

[69] *Id.* The discriminatory Act was not justified by any purpose advanced by Oklahoma. The Special Master also recommended that the Court either dismiss the suit as it relates to an Oklahoma-owned utility without prejudice to Wyoming to assert its claim in an appropriate forum, or alternatively, find the Act severable to the extent that it may constitutionally be applied to that utility. The Court held that the Act must stand or fall as a whole because there are no separate provisions in the invalid part of the Act. The Act applied to "[a]ll entities providing electric power for the sale to the consumer in Oklahoma". *See id.* at 803. If this is stricken then nothing remains.

[70] *Id.*

[71] *Id.* at 796.

[72] *Id.* at 798.

discriminated against interstate commerce and because Oklahoma advanced no purposes to justify such discrimination.[73]

ANALYSIS

Sacrifice of Clarity and Predictability in Standing

The Supreme Court in *Wyoming v. Oklahoma* summarily adopted the Special Master's finding[74] that "Wyoming's loss of severance tax revenues 'fairly [could] be traced' to the Act."[75] The *Wyoming* Court determined that "Wyoming clearly had standing to bring this action."[76] The Court inadequately applied the "fairly traceable" test to the Wyoming situation. A closer analysis indicates that standing did not "clearly" exist.

To show that Wyoming's loss of severance tax revenues "fairly can be traced" to Oklahoma's Act, Wyoming had to show that the Oklahoma statute prevented Wyoming coal from being severed.[77] Wyoming must prove that the coal that was to be sold to Oklahoma was not severed to be sold elsewhere, or if it was severed to be sold elsewhere, that the severance and sale elsewhere would have occurred even if the sale to Oklahoma had been made.[78] Wyoming made no attempt to prove either of these points except by providing expert opinions of annual production capacity versus actual production capacity.[79]

The Court assumed, based on two reports showing annual production capacity versus actual production, that Wyoming had a significant excess mining capacity, such that the loss of any market could not be compensated by sales elsewhere.[80] Justice Scalia argued in the dissent that the loss in severance tax revenue could have resulted from Wyoming mining experts' "forecasts of high demand."[81]

If Wyoming's excess mining capacity resulted from reliance on high forecasts, it is feasible that Wyoming chose to allow facilities to lie dormant because they could not produce quantities of coal at a cost that would yield a current profit.[82]

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[73] *Id.* at 800.

[74] *Id.* at 794.

[75] The *Wyoming* opinion merely quoted the "fairly traceable" test and made a cursory summation that standing existed. *Id.* at 796. *See also* Maryland v. Louisiana, 451 U.S. 725, 735 (1981) (an example of another cursory summation).

[76] *Wyoming*, 112 S. Ct. at 796.

[77] *Id.* at 806 (Scalia, J., dissenting).

[78] *Id.* Wyoming does not tax the sale of coal to Oklahoma utilities; Wyoming taxes the severance of coal.

[79] *Id.* at 807. Affidavit of consulting firm and affidavit of Wyoming Department of Environmental Quality. Appendix to Wyoming's Response to Motion to Dismiss.

[80] *Id.*

[81] *Id.* at 807.

[82] *Id.*

Assuming Wyoming chose to allow its facilities to lie dormant, Wyoming's loss of severance tax revenue is not necessarily "fairly traced" to the Oklahoma Act, but rather to Wyoming's reliance on the "forecast of high demand". Regardless of whether the Act passed, if Wyoming relied on the forecast of high demand and the high demand did not occur, then Wyoming would have lost severence tax revenue anyway.

By assuming that less Wyoming coal was sold to Oklahoma as a result of the Act, the Court also failed to consider the other factors offered by Oklahoma which may have resulted in the loss of tax revenues. Oklahoma argued that the decline in the price of Wyoming coal and the decrease in Wyoming's severance tax rate resulted in the loss of Wyoming's coal severance revenues.[83] If the decline in the price of Wyoming coal and the decrease in Wyoming's severance tax rate resulted in the loss of Wyoming's coal severance revenues, then Wyoming's loss could not "fairly be traced" to the actions of Oklahoma. If Wyoming's loss could not "fairly be traced" to the actions of Oklahoma, then Wyoming did not have standing to sue.

The *Wyoming* Court did not articulate why it chose the "fairly traceable" test rather than the "zone of injury" test;[84] thus perpetuating the vacillation between the two tests of causation.[85] By failing to establish an adequate basis for its standing decision, the Court fostered judicial unpredictability due to lack of guidance for future application of the standing causation component.[86] The sacrifice of clarity and predictability in standing analyses is more than a sacrifice of intellectual tidiness; it is a sacrifice of judicial resources.[87] Because the law of standing is "amorphous and confused," the ease of manipulation may produce unintended results.[88] In the future, rather than summarily concluding that standing "clearly" exists, the Court should delineate a solid standing causation analysis.[89]

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[83] *Id.* Brief on the Merits for the State of Oklahoma, Wyoming v. Oklahoma, 112 S. Ct. 789 (1992), Oklahoma Exhibit G, Affidavit of David M. Weinstein, para. 7; Oklahoma Appendix, 19a-21a *available in* LEXIS, Genfed Library, Briefs File.

[84] The "zone-of-interest" test "denies a right of review if the plaintiff's interests are. . . marginally related to or inconsistent with the purposes implicit in the [constitutional provision]." Clarke v. Securities Industry Ass'n, 479 U.S. 388, 394, 399 (1987). The starting point must be the negative Commerce Clause, which is an inference based on states' "right to engage in interstate commerce free of discriminat[ion]." Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 320-21 (1977). If Wyoming bought or sold coal or otherwise directly participated in the coal market, then it would pass the "zone-of-interest" test. Wyoming would then be asserting its "right to engage in interstate commerce free of discriminat[ion]." *Wyoming*, 112 S. Ct. at 808.

[85] *See supra* note 20.

[86] Schiavone, *supra* note 14, at 243.

[87] *See* Jonathan D. Varat, *Variable Justiciability and the Duke Power Case*, 58 TEX. L. REV. 273, 319 (1980).

[88] Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1705 (1980).

[89] Schiavone, *supra* note 14, at 242.

Misguided Discretionary Analysis of Exclusive Jurisdiction

Even though the Supreme Court reached the proper conclusion, it incorrectly applied a discretionary analysis in its grant of original jurisdiction in *Wyoming v. Oklahoma*.[90] The Wyoming Court imposed the limitations of nonexclusive original jurisdiction on the exercise of exclusive original jurisdiction.[91] This discretionary analysis was intended for nonexclusive original jurisdiction situations,[92] and was unnecessary in suits between the states because the justiciability requirement protects the Court from the exercise of unwarranted exclusive original jurisdiction.[93]

Discretionary limitations of nonexclusive original jurisdiction do not apply to actions under the Supreme Court's exclusive original jurisdiction because the discretionary analysis focuses on the availability of an alternative forum.[94] This contradicts the fundamental purpose of exclusive original Supreme Court jurisdiction which is to ensure that actions between states be brought only before the nation's highest tribunal.[95] In suits between states this fundamental policy coupled with 28 U.S.C. § 1251(a) mandates that the Supreme Court exercise original jurisdiction regardless of availability of an alternative forum.

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[90] *See* Stevenson, *supra* note 32.

[91] Wyoming v. Oklahoma, 112 S. Ct. 789, 798 (1992) (*quoting* from Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972); California v. Texas, 457 U.S. 164, 168 (1982)):

> Specifically, we have imposed prudential and equitable limitations upon the exercise of our original jurisdiction, and of these limitations we have said:
> We construe 28 U.S.C. § 1251(a)(1), as we do Art. III, §2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had.

Id.

[92] *See supra* text accompanying notes 32-34.

[93] In order to invoke exclusive original jurisdiction, the plaintiff State must demonstrate a justiciable controversy. Pennsylvania v. New Jersey, 426 U.S. 660, 663 (1976); Texas v. Florida, 306 U.S. 398, 405 (1939)(justiciability doctrine guides determinations pertaining to exclusive original Supreme Court jurisdiction).

[94] *See generally supra* note 21, at 694-96.

[95] The Supreme Court has recognized that a State should not be compelled to resort to the tribunals of other states because parochial factors might result in the appearance, if not the reality, of preferential treatment. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 475-76 (1793).
Alexander Hamilton stated:

> The Supreme Court is to be invested with original jurisdiction [in all controversies which] are so directly connected to the public peace, that as well for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory in the nation.

THE FEDERALIST NO. 81, at 510-11 (Alexander Hamilton) (B. Wright ed., 1961).

Resorting to a policy of discretion to review exclusive original jurisdiction cases suggests that the Court is willing to divest its exclusive original jurisdiction.[96] The Supreme Court in divesting its exclusive original jurisdiction completely disregards 28 U.S.C. § 1251 which specifically divides original jurisdiction into exclusive and nonexclusive original jurisdiction.[97]

The Supreme Court is the only federal forum in which the parties can litigate the controversy in an exclusive original jurisdiction.[98] The Court has acknowledged that it has a responsibility to exercise its original exclusive jurisdiction over actions between states.[99] The Supreme Court has a responsibility to exercise exclusive original jurisdiction when its jurisdiction is properly invoked;[100] the Court ignored this responsibility by misapplying the 1251(b) nonexclusive original jurisdiction discretionary test to 1251(a) exclusive original jurisdiction situations.[101] The Court should have granted exclusive original jurisdiction without applying the discretionary analysis.

Traditional Approach to Discriminatory Regulations

The Court follows precedent in holding that the Oklahoma Act on its face and in practical effect, discriminated against interstate commerce.[102] The Act expressly reserved a segment of the Oklahoma coal market for Oklahoma-mined coal to the exclusion of other states.[103] The Act is discriminatory on its face because the very terms of the Act deal unequally with coal producers inside and outside the state, and the Act has given the advantage to the insiders.[104]

The Act is discriminatory in effect because it has the result of placing greater burdens on those without the state, giving an advantage to local inhabitants.[105] As the Court claims, such a preference for coal from domestic sources cannot be characterized as anything other than protectionism.[106] The very purpose behind the Commerce Clause is to prohibit economic protectionism.[107] Oklahoma attempts to argue that the Act sets aside a "small portion" of the Oklahoma coal market,

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96 Schiavone, *supra* note 14, at 244.

97 Did Congress have the power to make and apply section 1251 to the Constitutional grant of original jurisdiction; may the Supreme Court override such congressional action? *See* Stevenson, *supra* note 32, at 750-51.

98 *See supra* note 26.

99 *See supra* note 28.

100 California v. Texas, 437 U.S. 601, 606 (1978) (Stewart, J. concurring).

101 *See* Stevenson, *supra* note 32.

102 *See* cases cited *supra* notes 41-54.

103 *Wyoming*, 112 S. Ct. at 800.

104 *See* Hughes v. Oklahoma, 441 U.S. 322 (1979). *See* text accompanying note 52. *See also supra* note 59 for language of the Act.

105 *See supra* note 41.

106 *Wyoming*, 112 S. Ct. at 800.

107 *See* New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273-74 (1988).

without placing an "overall burden" on the out-of-state coal producers.[108] Since the Act was discriminatory on its face, the Court stated that the amount of discrimination was irrelevant.[109]

The state bears the burden of justifying the discriminatory regulation.[110] Oklahoma unsuccessfully argued that the Act's discrimination against the out-of-state coal was justified because using Oklahoma's coal lessens Oklahoma's reliance on a single source of coal from Wyoming.[111] The Court accepted Wyoming's argument that a non-discriminatory alternative was available including requiring electric utilities to maintain a stockpile of a certain amount of coal to be used only if coal became unavailable or if the price of coal changed radically in a short period.[112]

Oklahoma also argued that the use of Oklahoma coal conserves Wyoming's cleaner coal for future use. The court dismissed this argument based on the fact that the Wyoming coal reserves are estimated to be in excess of 110 billion tons. The reserves will provide Wyoming with coal for several hundred years at present rate of extraction.[113]

As a result of Oklahoma's unsuccessful arguments attempting to rationalize the discriminatory Act, the Court held that the Oklahoma failed to justify the Act and found that the Act violated the Commerce Clause.

CONCLUSION

In *Wyoming v. Oklahoma,* the Supreme Court failed to delineate a solid standing causation analysis; thus, the decision perpetuates the sacrifice of judicial resources.[114] Uncertainty in the law increases litigation, and the additional costs of this uncertainty will occur throughout the entire federal judicial system.

Even though the *Wyoming* Court reached the proper conclusion, it incorrectly applied a discretionary analysis in its grant of original exclusive jurisdiction.[115] Resorting to a policy of discretion to review exclusive original jurisdiction completely disregards 28 U.S.C. § 1251 which specifically divides original

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[108] *Wyoming*, 112 S. Ct. at 801.

[109] *Id.* "The volume of commerce affected measures only the *extent* of the discrimination; it is of no relevance to the determination whether the State has discriminated against interstate commerce." *Id.*

[110] *See* cases cited *supra* notes 48-50.

[111] *Wyoming*, 112 S. Ct. at 802. Oklahoma has a vital interest in 1) insuring that electrical power is available to its citizens at the lowest possible price, and 2) avoiding interruptions in utility service caused by catastrophes such as railroad strikes, supply cutoffs and the like.

[112] *Id.* at 801-02.

[113] *Id.*

[114] *Id.*

[115] *See supra* text accompanying note 91.

jurisdiction into exclusive and nonexclusive original jurisdiction.[116] Unnecessary, incorrect application of legal analysis is a waste of judicial time.

Finally, the Court correctly followed precedent by holding that the Oklahoma Act violated the Commerce Clause. In holding that the Oklahoma Act on its face and in practical effect discriminated against interstate commerce, the Court reaffirmed the traditional approach to discriminatory regulations under the Commerce Clause.[117]

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[116] *See supra* text accompanying notes 97-98.

[117] *See* Smith, *supra* note 40.