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Commerce Clause Limitations on State Regulation and Taxation of the Energy Industry

*Edward A. Tanzman**

INTRODUCTION

Limitations on state power over the energy industry embodied in the commerce clause of the United States Constitution are becoming increasingly important as states begin to assert themselves in an area that long has been controlled primarily by the federal government. This development necessitates a review of selected major United States Supreme Court decisions which have considered challenges to state energy regulatory and tax measures on commerce clause grounds, in order to evaluate the extent to which the Court will allow similar state laws in future cases.

It is evident that a wave of federal energy regulation has crested and is, at least for the present, receding. During the Carter Administration, the Natural Gas Policy Act of 1978¹ was enacted, which has as a primary goal the elimination of federal price controls on much natural gas in interstate commerce.² The Reagan Adminis-

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1. 15 U.S.C. §§ 3301-3432 (Supp. IV 1980).

2. A partial listing of federal energy statutes enacted since the oil embargo of 1973 includes: the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-760h (1976 & Supp. IV 1980); the Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. §§ 791-798 (1976 & Supp. IV 1980); the Energy Policy and Conservation Act of 1975, 42 U.S.C. §§ 6201-6422 (1976 & Supp. III 1979); the Energy Conservation and Production Act of 1976, 42 U.S.C. §§ 6801-6892 (1976 & Supp. III 1979); the Department of Energy Organization Act of 1977, 5 U.S.C. § 101 (Supp. IV 1980); the Petroleum Marketing Practices Act of 1978, 15 U.S.C. §§ 2801-2841 (Supp. IV 1980); the Public Utility Regulatory Policies Act of 1978, 15 U.S.C. §§ 3201-3211 (Supp. IV 1980); the Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. §§ 8301-8483 (Supp. III 1979); the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (Supp. IV 1980); the National Energy Conservation Policy Act of 1978, 42 U.S.C. §§ 8201-8278 (Supp. III 1979); the Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174 (codified in scattered sections of 26 U.S.C.); the Solar Photovoltaic Energy Research, Development and Demonstration Act of 1978, 42 U.S.C. §§ 5501-5594 (1976 & Supp. III 1979); the Emergency Energy Conservation Act of 1979, 42 U.S.C. §§ 8501-8541 (Supp. III 1979); the Crude Oil Windfall Profit Tax Act of 1980, 26 U.S.C.A. § 4986-4998 (West

tration energy policymakers are deeply committed to reducing the federal presence in energy production and consumption³ and already have permitted the Emergency Petroleum Allocation Act of 1973 (EPAA), which imposed federal ceiling prices on domestic crude oil sales, to expire.⁴

Similarly, the federal government is taxing energy businesses less. For example, section 602 of the Economic Recovery Tax Act of 1981⁵ reduces the tax created by the Crude Oil Windfall Profit Tax Act of 1980⁶ on "newly-discovered oil" from thirty percent of the so-called "windfall profit"⁷ to fifteen percent by 1986.⁸ Since federal taxation of a commodity does not preempt a state from imposing its own tax,⁹ tax rate reduction does not have the same effect on state authority as repeal of a federal regulatory statute. However, a reduction in federal energy tax rates does imply that more profits will be available for state taxation.

As the federal government reduces its role in managing the energy industry, state governments apparently are acting to replace some of the federal energy laws with their own. The Library of Congress Congressional Research Service recently suggested that the expiration of the EPAA "marks a point where state regulation may be expanded for purposes of providing tax revenue, carrying on production, conservation, and other forms of regulation which may have formerly conflicted with EPAA."¹⁰ Indeed, some federal

1980); and the Strategic Petroleum Reserve Amendments Act of 1981, 42 U.S.C.A. §§ 6201-6422 (West Supp. 1981).

3. See, e.g., U.S. Department of Energy, *Securing America's Energy Future: The National Energy Policy Plan 2* (DOE/S-0008) (July 1981) [hereinafter cited as *Securing America's Energy Future*], which states that:

Increased reliance on market decisions offers a continuing national referendum which is a far better means of charting the Nation's energy path than stubborn reliance on government dictates or on a combination of subsidies and regulations. . . . This approach represents a radical departure from the prevailing policy instituted after the first shock of rapid oil price increases in 1973 and 1974.

4. 15 U.S.C. § 760g (1976 & Supp. IV 1980). See *infra* note 61.

5. Pub. L. No. 97-34, 95 Stat. 172, 337-38 (August 13, 1981).

6. 26 U.S.C.A. §§ 4986-4998 (West 1980).

7. *Id.* § 4988(a).

8. *Id.* § 4987(b), as amended by § 602 of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172, 337-38.

9. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 198-99 (1824).

10. R. Poling, *Legal Effect of the Expiration of the Emergency Petroleum Allocation Act: Termination of Federal Statutory Pre-emption of State Law*, Library of Congress Congressional Research Service (May 14, 1981), reprinted in *Cong. Rec.* (daily ed. Aug. 3, 1981) (statement of Sen. Ford) [hereinafter cited as Poling]. See Office of State Programs, U.S. Nuclear Regulatory Commission, *Information Report On State Legislation - Special*

officials seem to be encouraging states in this direction.¹¹

A general withdrawal of the federal government from energy regulation and taxation does not, of course, leave the field totally open to state lawmakers. Restraints grounded in the commerce clause will continue to limit state action even where no federal statute exists to preempt the state laws. The nature and extent of these restrictions can be expected to shape the kinds of state energy laws which emerge.

State lawmakers who look to Supreme Court decisions for guidance on the commerce clause limitations on their power to pass energy laws may become frustrated in their attempt to discover standards. The spate of federal energy regulatory statutes beginning in the New Deal preempted so much of the field that the only decisions bearing directly on many important questions about state power under the commerce clause are over a half-century old. Other decisions, notably concerning state taxation of energy firms, are so recent that their implications have not yet been realized.

This article will separate its consideration of commerce clause limitations on state power over the interstate energy industry into discussions of regulation and taxation.¹² First, a brief discussion of the historical origins of commerce clause restrictions of state power will be presented. Second, commerce clause limitations on state regulation of the energy industry will be examined. Third, commerce clause restrictions on state taxation of the energy industry will be considered. Finally, this article will conclude by asserting

Edition - State Laws: Radioactive Waste Disposal and Management (December 1981), which contains a summary of some 84 state laws and resolutions enacted between March 1975 and October 1981 regarding radioactive waste.

11. See *Securing America's Energy Future*, *supra* note 3, where it is stated that: "The challenge ahead is to provide a healthy economy and policy environment that enables citizens, businesses, and state and local governments to make rational energy production and consumption decisions. . . ." *Id.* at 2 (emphasis added).

Commissioner Peter Bradford of the U.S. Nuclear Regulatory Commission (NRC) suggested in a recent speech that:

at a time in which both Congress and the Administration seem inclined to treat . . . the NRC regulatory process . . . as little more than a nuisance, it is vitally important that the states in which reactors exist or are being built or may in the future be sited be prepared to play an effective and constructive role in their oversight.

P. Bradford, "Emerging Federal Nuclear Policy and Its Effect On Safety In The States," remarks delivered to the Eastern Association of Attorneys General (October 19, 1981) (Speech No. S-3-81), *reprinted in* 7 Nuclear Regulatory News Releases No. 39 at 5 (October 27, 1981).

12. The distinction in commerce clause analysis between state regulatory laws and tax laws was first made in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199-200 (1824).

that present Supreme Court doctrine allows states greater latitude in regulating and taxing the energy industry than in the past.

ORIGINS OF COMMERCE CLAUSE RESTRICTION OF STATE POWER

The commerce clause, which states that "[t]he Congress shall have power . . . To regulate Commerce . . . among the several States . . .,"¹³ carves out an area of policymaking which is reserved to the federal government and denied to state governments. This reserved area results from Supreme Court decisions interpreting the commerce clause as creating two distinct limits on state power. First, the commerce clause grants to the federal government authority to preempt conflicting state laws by enacting statutes regulating interstate commerce.¹⁴ Second, the commerce clause acts as an independent restriction on state power over interstate commerce,¹⁵ even where no federal statute exists. Since the current trend is toward federal withdrawal from managing the energy industry, this article will consider only independent restrictions imposed by the commerce clause on state authority to regulate and tax this industry.¹⁶

*Cooley v. Board of Wardens*¹⁷ is the first Supreme Court decision explicitly establishing that the commerce clause, by its own terms, can prohibit states from governing interstate trade even if the federal government has not preempted them.¹⁸ This case is significant not only for its precedential value, but also because its

13. U.S. Const., art. I, § 8, cl. 3.

14. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 229-31 (1947).

15. *Carter v. Virginia*, 321 U.S. 131, 137 (1944).

16. For analyses of the preemptive authority of the federal government to pass statutes governing the energy industry, see, e.g., White & Barry, *Energy Development In the West: Conflict and Coordination of Governmental Decision-Making*, 52 N.D.L. REV. 451 (1976); Engdahl, *Some Observations On State and Federal Control of Natural Resources*, 15 Hous. L. REV. 1201 (1978).

17. 53 U.S. (12 How.) 299 (1851).

18. See Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 4 (1940) [hereinafter cited as Dowling]. See also *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440 (1978). Two commerce clause cases that preceded *Cooley* indicate the historical antecedents of the dispute it tried to resolve. See *Willson v. Blackbird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827). In *Blackbird Creek*, the Court held that Delaware could authorize construction of a dam across a navigable stream, provided that the federal government had not enacted a statute regulating the area, 27 U.S. (2 Pet.) at 249. In *Brown*, on the other hand, the Court held that Maryland could not require a fifty dollar license as a condition of selling imported goods at retail, even though no federal statute apparently existed. 25 U.S. (12 Wheat.) at 459. See generally P. HARTMAN, *FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION* § 2:13 (1981) [hereinafter cited as P. HARTMAN] for a discussion of early commerce clause decisions.

three opinions delineate the basic ongoing tensions inherent in commerce clause analysis.

In *Cooley*, one question faced by the Court was whether a Pennsylvania statute imposing a penalty on ships entering or leaving the Port of Philadelphia without a pilot was contrary to the commerce clause.¹⁹ Having established that the statute in question was a regulation of interstate commerce,²⁰ the Court held that the statute was not an unconstitutional invasion of the grant of authority given to the federal government by the commerce clause. The majority, speaking through Justice Curtis, reasoned that although the commerce clause prohibited certain state actions even where no federal statute existed, it was not an exclusive grant of authority to the federal government in all areas. The Court concluded that:

the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain.²¹

The majority interpreted the commerce clause to require the Court to examine the area of interstate commerce which a state seeks to regulate and, in the absence of a contrary federal law, to uphold the state law unless that area of commerce required a uniform national regulatory system. Thus, the Court in *Cooley* rejected the

19. 53 U.S. (12 How.) at 311-12, 315. Other constitutional challenges to the statute included allegations that the statute violated the restrictions in art. I, § 10, cl. 2 on state imposts or duties, that it contravened the requirement embodied in art. I, § 8, cl. 1 that all duties, imposts, and excises be uniform, and that it operated in violation of art. I, § 9, cl. 6 as a preference to the ports of one state over another. *Id.* at 313-14. Each of these contentions was rejected by the Court.

20. *Id.* at 317.

21. *Id.* at 319.

notion that states never could regulate interstate commerce and prescribed the first test for determining when such regulation was appropriate.

Justice Daniel, who concurred in the result,²² took a different approach. He apparently accepted the majority's interpretation of the federal commerce power,²³ but concluded that the Pennsylvania statute did not regulate interstate commerce, and thus, could not contravene the commerce clause.²⁴

Justice McLean's dissent reveals a more literal view than that of the majority. Agreeing with the majority that the Pennsylvania piloting statute regulated interstate commerce,²⁵ Justice McLean reasoned that this finding placed the activity of piloting outside the scope of state sovereignty.²⁶ Reminding the majority of the abuses which led to the inclusion of the commerce clause in the Constitution,²⁷ he raised the specter that "the principle of this case, if carried out, will deeply affect the commercial prosperity of the country . . . [A] conflict similar to that which existed before

22. *Id.* at 325-26 (Daniel, J., concurring). It is not clear how far this acceptance went. Although Justice Daniel disagreed with Justice McLean that the potential for state abuse of interstate commerce was enough to invalidate its regulation by states, *id.* at 326 (Daniel, J., concurring), his statement that the "power of commercial regulation vested by the Constitution in Congress, and which by the Constitution must, *when exercised by Congress*, be enforced with perfect equality . . .," *id.* at 325 (Daniel, J., concurring) (emphasis added), suggests that he would have required a federal statute to preempt state regulation of interstate commerce, and would not have held that the commerce clause, by its own force, could accomplish this result.

23. *Id.* at 325 (Daniel, J., concurring).

24. *Id.* (Daniel, J., concurring).

25. *Id.* at 322-23 (McLean, J., dissenting).

26. *Id.* at 323 (McLean, J., dissenting).

27. *Id.* at 324 (McLean, J., dissenting). Chief Justice Marshall, writing in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), summarized the experience under the Articles of Confederation as follows:

The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by Congress.

Id. at 445-46.

the adopting of the Constitution [will arise]. The States favorably situated . . . may levy a contribution upon the commerce of other states. . . ."²⁸ Justice McLean would have held that any state attempt at exercising authority over interstate commerce was unconstitutional.²⁹

These three views—the so-called “concurrent theory,” that the commerce clause prohibits some but not all state exercises of power over interstate commerce,³⁰ the “exclusive theory,” that the commerce clause prohibits all such assertions of authority,³¹ and that regardless of what the commerce clause prohibits, the real question is what interstate commerce encompasses—are a recurring theme in subsequent opinions. As the makeup of the Supreme Court has shifted, so has the popularity of any one of these various approaches.³² It is crucial to an understanding of state power over the energy industry to determine both which view of this question the Court may have taken in deciding landmark energy cases from *Cooley* to the present, and to what extent this view has retained its vitality.

COMMERCE CLAUSE LIMITATIONS ON STATE REGULATION OF THE ENERGY INDUSTRY

Precedent must be approached with caution in seeking to understand how the commerce clause limitations announced in *Cooley* affect modern state regulation of the energy industry in the absence of preemptive federal law. The reason for this prudence is that a number of landmark decisions in this area occurred early in this century, a period when the Court had become more suspicious of state regulation of interstate commerce than at the time of *Cooley*.³³ Consequently, several state statutes which were passed to

28. 53 U.S. (12 How.) at 324-25 (McLean, J., dissenting).

29. *Id.* at 325 (McLean, J., dissenting).

30. Scholley, *The Negative Implications of the Commerce Clause*, 3 U. CHI. L. REV. 556, 559, 576-77 (1936) [hereinafter cited as Scholley].

31. *Id.*

32. See, e.g., *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440-41 (1978), stating that “the Court has employed various tests to express the distinction between permissible and impermissible impact upon interstate commerce [by state statutes,] but experience teaches that no single conceptual approach identifies all of the factors that may bear on a particular case.” (footnotes omitted).

33. Professor Scholley suggested that this “revolutionary” change originated with the *State Freight Tax Case*, 82 U.S. (15 Wall.) 232, 276-77 (1873). Scholley, *supra* note 30, at 580-81. By the time of *Wabash, St. Louis & P. Ry. Co. v. Illinois*, 118 U.S. 557 (1886), the change had been recognized openly by the Court. *Id.* at 580-81 (Bradley, J., dissenting).

control the then-burgeoning natural gas and electricity industries³⁴ were held to violate commerce clause restrictions.

Modern commerce clause analysis by the Court is more reminiscent of the tolerant attitude of *Cooley* toward state regulation of interstate commerce than of the hostile view suggested by the early energy regulation cases.³⁵ Nonetheless, some of these early cases never have been overruled, probably because passage of such New Deal federal statutes as the Federal Power Act of 1935³⁶ and the Natural Gas Act of 1938³⁷ preempted the field and made state regulation of much of the energy industry irrelevant. As the federal government reduces its energy regulation, these precedents may again be invoked as increasing state regulation of the energy industry generates new litigation.³⁸ A re-examination of the reasoning which determined these early decisions in light of more recent cases is necessary to understand the extent to which the principles they announced still are valid.

This section will compare one early Supreme Court decision with one modern decision in each of three selected regulatory areas, in order to illustrate the extent to which the commerce clause analysis in the original, landmark cases retain their vitality. The three regulatory areas selected for analysis are energy price regulation, structure of energy companies, and reservation of scarce energy supplies for state residents. These are obvious areas which a state might choose to regulate today, and appropriate cases on these subjects are available for comparison. This section will demonstrate that the older Supreme Court case in each regulatory category was premised on an interpretation of the commerce clause

34. DeVane, *Highlights of Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938*, 14 GEO. WASH. L. REV. 30, 32 (1945).

35. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), for the Court's most frequently cited recent formulation of its standard.

36. 16 U.S.C. §§791-828c (1976).

37. 15 U.S.C. §§717-717w (1976 & Supp. IV 1980).

38. This may already be taking place in energy taxation. The Court in *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980), noted that "[t]he effect of the commerce clause on state taxation of interstate commerce is a frequently litigated subject that appears to be undergoing a revival of sorts." *Id.* at 443. This case is considered in detail at text accompanying notes 144-54 *infra*. Cf. *Commonwealth Edison Co. v. Montana*, 101 S.Ct. 2946 (1981), where the Court disapproved *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922), and held that a state severance tax is not immunized from commerce clause scrutiny by a claim that the tax is imposed on the goods prior to their entry into the stream of commerce. 100 S.Ct. at 2952-53. *Commonwealth Edison* is considered in detail at text accompanying notes 114-27 *infra*. As a result of such recent decisions, commerce clause limitations on state energy taxation are considerably clearer.

that the Court rejected in *Cooley* and probably would reject again today. As a result, state energy price regulation laws which once were invalidated might be sustained today. In addition, the scope of state authority to determine the structure of energy firms has been expanded. Nevertheless, protectionist state laws reserving scarce energy supplies for state residents seem no more likely to pass constitutional muster than in the past.

Energy Price Regulation

Perhaps because the distribution of some forms of energy is a natural monopoly function,³⁹ states frequently have attempted to impose controls on its wholesale or retail price.⁴⁰ In *Missouri v. Kansas Natural Gas Co.*,⁴¹ the Court confronted the question of whether the commerce clause prevented Missouri and Kansas from imposing a ceiling on the price of natural gas sold wholesale to local distributing companies in those states for later resale to consumers.⁴² Kansas Natural Gas Co. purchased natural gas in Oklahoma, transported it into Missouri and Kansas, and sold it to local distributing companies there for resale.⁴³ In both states, the Utilities Commissions had set a maximum price of thirty-five cents

39. Professor Kellman explains that "[a] natural monopoly endeavor is an activity that can be accomplished more efficiently by one entity than by several entities. . . ." and that energy distribution frequently is a natural monopoly. Kellman, *De-Utilizing the Energy Industry: Planning the Solar Transition*, 28 U.C.L.A. L. Rev. 1, 15 (1980).

40. Professor Kellman adds that:

Essentially, regulation is a contract between the natural monopolist and the populace. The reason for entering this contract is as follows: while competition would force a lower price and higher output than regulation, regulation stabilizes the market and protects against the abuse of monopoly power. The natural monopolist would like to have a guarantee of "no competition," enforced by the state. With such a guarantee, it could charge a monopoly price for its highly prized good, overcharging customers who are willing to pay and failing to serve those who cannot pay. Since the populace does not want this sort of "regulation," a compromise much like a contract is reached. In consideration of state protection from competition, the natural monopolist agrees to charge only enough to allow him a reasonable return on his investment.

Id. at 18 (footnote omitted).

41. 265 U.S. 298 (1924).

42. *Id.* at 305. A closely-related question, not at issue in *Kansas Natural Gas*, was whether the state could regulate the price of natural gas sold at *retail* from a distributor to consumers. This question was considered in *Public Util. Comm'n v. Landon*, 249 U.S. 236 (1919), where the Court held that natural gas sales originating from the same company involved in the *Kansas Natural Gas* litigation, but between distributors and consumers, were *not* in interstate commerce and therefore were subject to price controls set by the Commission. *Id.* at 245.

43. 265 U.S. at 305.

per thousand cubic feet (mcf) for these sales.⁴⁴ Kansas Natural Gas Co. unilaterally raised its price to forty cents per mcf, and officials of both states brought suit in three different courts seeking to rescind the price hike.⁴⁵ In two of the cases, the injunction sought against the higher prices was denied, whereas in the third, a writ of mandamus to compel a price reduction was granted.⁴⁶

The Supreme Court affirmed the two courts which had refused to prevent the price increase and reversed the court which had acted to stop the hike.⁴⁷ In a discussion more reminiscent of Justice McLean's *Cooley* dissent than of the concurrent theory embraced by the *Cooley* majority, the Court declared that "the commerce clause of the Constitution, of its own force, restrains the States from imposing direct burdens upon interstate commerce . . . [The] silence [of Congress], where it has the sole power to speak, is equivalent to a declaration that that particular commerce shall be free from regulation."⁴⁸ Thus, the commerce clause was held to preempt any state regulation of goods in interstate commerce.⁴⁹

44. *Id.*

45. *Id.* at 305-06.

46. *Central Trust Co. v. Consumers' Light, Heat & Power Co.*, 282 F. 680 (D. Kan. 1922); *Missouri v. Kansas Natural Gas Co.*, 282 F. 341 (W.D. Mo. 1922); *State v. Kansas Natural Gas Co.*, 111 Kan. 809, 208 P. 622 (1922).

47. 265 U.S. at 310.

48. *Id.* at 307-08. The use of the phrase "direct burdens upon interstate commerce" in this opinion has its own history and contributes to the confusion associated with understanding commerce clause restrictions on state regulatory authority. Professor Scholley asserted that the so-called direct/indirect burden doctrine first was used in the *Minnesota Rate Cases*, 230 U.S. 352, 396 (1913) and was regarded as the "equivalent" of the *Cooley* doctrine. Scholley, *supra* note 30, at 589. Unfortunately, later opinions were not consistent with this formulation and the distinction became a mere label for outcomes, "since it offered so little of a criterion for determining on which side a case would fall." Dowling, *supra* note 17, at 6 (citing *DiSanto v. Pennsylvania*, 273 U.S. 34, 44 (1927)) (Stone, J., dissenting).

Professor Hartman suggests that a review of decisions employing the direct/indirect criteria reveals that the Court felt that any state regulation or taxation of interstate commerce contravened the commerce clause. Cases where a state law was invalidated because it was held to directly burden interstate commerce were those where the state regulated interstate commerce, whereas those in which the state law was upheld because it only indirectly burdened interstate commerce were situations where the state law only regulated intrastate commerce. P. HARTMAN, *supra* note 18, at § 2:13. In effect, the direct/indirect burden doctrine simply became another formulation of the "exclusive theory". See text accompanying note 30 *supra*.

49. A contemporary commerce clause challenge to a federal energy price control statute met similar success, although for opposite reasons to those in *Kansas Natural Gas*. In *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the Court held that a federal statute regulating the coal industry and authorizing price controls violated the commerce clause because coal mining was an activity in intrastate commerce and, therefore, not a valid subject for federal regulation. *Id.* at 304-17.

The only relevant inquiry, according to this view, is whether a particular commodity which a state seeks to regulate is actually in interstate commerce.⁵⁰ In *Kansas Natural Gas*, the Court had little difficulty concluding that the natural gas sales in question were in interstate commerce, thereby automatically invalidating the state attempts at price control.⁵¹

In *Cities Service Gas Co. v. Peerless Oil & Gas Co.*,⁵² decided some twenty-six years after *Kansas Natural Gas*, the Court adopted an approach to state regulation of energy prices which suggests that it had returned to the views of the majority in *Coolley*. In *Peerless*, the Oklahoma Corporation Commission had directed Cities Service, owner of certain substantial production wells and one of the only pipelines which could transport natural gas from the wells to market, to take gas ratably from Peerless' wells in the same field⁵³ and set a minimum price of seven cents per mcf for gas sold from the field.⁵⁴ Some ninety percent of the production

50. The logical conclusion of this approach is that natural gas sold at retail is in intrastate commerce and subject to state price control regulation, whereas wholesale sales between pipeline companies and distributors are in interstate commerce and immune from state price regulation. See note 42 *supra*. Indeed, this is exactly the conclusion the Court reached in *Illinois Natural Gas Co. v. Central Ill. Pub. Serv. Co.*, 314 U.S. 498 (1942). The Court traced its decisions in the area of natural gas price regulation and also points out that another early line of cases used a less "mechanical" approach, *id.* at 505-06, similar to the approach the Court would later apply in *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179 (1980). The Court in *Illinois Natural Gas* found it unnecessary to resolve the dilemma created by the conflicting approaches, however, because it held that the Natural Gas Act of 1938, 15 U.S.C. §§ 717-717w (1976 & Supp. IV 1980), preempted states from any regulatory authority they might otherwise have had over wholesale sales of natural gas. 314 U.S. at 506. *Peerless* is discussed in detail at text accompanying notes 52-63 *infra*.

51. 265 U.S. at 308; *accord*, *Public Util. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927) (electricity sold across state lines).

Passage of the Natural Gas Act of 1938, 15 U.S.C. §§ 717-717w (1976 & Supp. IV 1980), was a direct result of the decisions in *Kansas Natural Gas* and *Attleboro*. Both the Senate and the House of Representatives reports on the bills which later became the Natural Gas Act noted these two cases and stated, in identical language, that "[t]he basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act." S. REP. NO. 1162, 75th Cong., 1st Sess. 2 (1937); H.R. REP. NO. 79, 75th Cong., 1st Sess. 2 (1937).

52. 340 U.S. 179 (1950).

53. "Ratable taking" is defined as the "production of oil and/or gas in such quantities that each landowner whose tract overlies a producing formation will be able to recover a fair share of the oil and/or gas originally in place beneath his land." 8 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW: MANUAL OF OIL AND GAS TERMS 615-16 (1981). In *Peerless*, the Oklahoma Corporation Commission prescribed a formula for calculating the share Cities Service was required to purchase from Peerless. 340 U.S. at 183.

54. 340 U.S. at 181-83. Thus, the effect of the Commission order was to require Cities Service to purchase a specified quantity of natural gas from Peerless at not less than a minimum price. The dispute underlying this case resulted from Cities Service's apparent

from the field ultimately was consumed outside of Oklahoma.⁵⁵ Cities Service appealed the orders to the Oklahoma Supreme Court, alleging that the two orders violated the commerce clause.⁵⁶ The Oklahoma Supreme Court upheld the Commission.⁵⁷

The United States Supreme Court affirmed the Oklahoma Supreme Court.⁵⁸ Unlike the approach it had taken in *Kansas Natural Gas*, the Court in *Peerless* did not view the commerce clause as an exclusive delegation to Congress of authority over interstate commerce. Reflecting a revival of the majority view in *Cooley* that states may regulate interstate commerce under certain circumstances, the Court explained that:

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. The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions.⁵⁹

Thus, the Court expressed its willingness to look at the effects on interstate commerce of a state law in order to evaluate the extent of the state's justification.⁶⁰ Because it found a state interest in

attempt to use its ownership of an interstate natural gas pipeline to take advantage of *Peerless* and other non-integrated producers in the same natural gas field. Cities Service owned a substantial number of wells in the field, as well as a pipeline to transport the natural gas produced there to market. *Id.* at 181-82. The effect of Cities Service's rapid production was to deplete not only its own wells, but, due to loss of pressure throughout the field, those of *Peerless*. *Id.* at 182. This left *Peerless* with the disagreeable choice of producing natural gas which it had no means of transporting to market, or losing the natural gas altogether. *Id.* As a result, *Peerless* offered to sell its potential output to Cities Service, which offered only four cents per mcf and conditioned the contract on other unfavorable terms. *Id.* *Peerless* then turned to the Oklahoma Corporation Commission for relief. *Id.*

55. *Id.* at 181.

56. *Id.* at 183-84.

57. 203 Okla. 35, 220 P.2d 279 (1950).

58. 340 U.S. at 189.

59. *Id.* at 186-87.

60. In *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), the Court applied this test to determine whether a 1977 Minnesota statute banning retail milk sales in non-returnable plastic containers, but permitting use of non-returnables made of paper, contravened the commerce clause. *Id.* at 459. Rejecting the argument that the statute discriminated in favor of Minnesota pulpwood manufacturers, who make paper milk containers, and against out-of-state plastic resin manufacturers, the Court weighed the burden the law imposed on interstate commerce against its local benefits. *Id.* at 472. Finding little adverse effect on dairy container manufacturers as a practical matter, *id.* at 472-73, the Court found

“preventing rapid and uneconomic dissipation of one of its chief natural resources” and no clear national interest to the contrary,⁶¹ the Court concluded that the Commission’s orders did not contravene the commerce clause.⁶²

The change in approach to commerce clause restrictions on state energy price regulation illustrated by these two cases suggests that the Court might approve a modern state law imposing the wholesale price controls which were struck down in *Kansas Natural Gas*. Of course, the outcome of such a case would turn on the extent to which the particular statute being reviewed meets the *Peerless* balancing test. Nevertheless, the fact that the analysis which determined the outcome in *Kansas Natural Gas* has been discredited signifies that some circumstances might justify state regulation of wholesale energy prices. The recent federal price decontrol of both crude oil and certain categories of natural gas leaves the way open for states to enact such statutes.⁶³

an overriding local justification in the statute’s stated purpose of “promoting conservation of energy and other natural resources and easing solid waste disposal problems. . . .” *Id.* at 473.

61. Prophetically, the Court pointed out that “strong arguments have been made that the national interest lies in preserving this limited resource for domestic and industrial uses for which natural gas has no completely satisfactory substitute” even though the Court recognized that its decision would raise natural gas prices. 340 U.S. at 187.

62. 340 U.S. at 187-88. It is important to note that the Court in *Peerless* emphasized that it did not consider potential conflict between the Oklahoma orders and the Natural Gas Act of 1938. The Court expressly reserved the question of whether state authority in this area might be preempted by the Act. *Id.* at 188-89. In *Natural Gas Pipeline Co. of America v. Panoma Corp.*, 349 U.S. 44 (1955) (per curiam), the Court considered this question and held that the Natural Gas Act of 1938 preempted Oklahoma’s power to set minimum natural gas prices for sales into interstate commerce. *Id.* at 45. But see *Federal Power Comm’n v. Corporation Comm’n*, 362 F. Supp. 522, 535 (W.D. Okla. 1973), which questions in dicta whether *Peerless* still is good law on its facts.

63. See text accompanying notes 4-9 *supra*. Whether the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (Supp. IV 1980), in fact constitutes a federal withdrawal from natural gas price control is by no means clear. Although section 602(a) of the Act, 15 U.S.C. § 3432(a) (Supp. IV 1980), states that “[n]othing in this Chapter shall affect the authority of any State to establish or enforce any maximum lawful price for the first sale of natural gas produced in such State which does not exceed the applicable maximum lawful price, if any, under Subchapter I of this Chapter” (emphasis added), the impact of the Act on the authority of natural gas consuming states is not addressed specifically. It would indeed be ironic for the court to construe uncertainty in this statute against state power to regulate wholesale natural gas prices, since the express reason for creation of the scheme of federal natural gas price regulation was the court’s own refusal on now discredited grounds to permit states to do so.

State power to regulate crude oil and refined petroleum product prices is less ambiguous. S.1503, 97th Cong., 1st Sess. (1981), which passed both the Senate and the House of Representatives but was vetoed by the President, contained provisions which mandated unregulated oil prices except during specified emergencies upon Presidential declaration, and ex-

Restrictions on Structure of Energy Companies

Two cases involving state restrictions on the kinds of energy companies which may do business within state borders illustrate a similar evolution in commerce clause doctrine and a corresponding liberalization in the kinds of state laws that will be upheld. *West v. Kansas Natural Gas Co.*⁶⁴ presented the question of whether the commerce clause prohibited Oklahoma from banning any corporations not chartered in the state from transporting natural gas produced there.⁶⁵ In 1907, Oklahoma enacted a statute which created a number of restrictions on natural gas transmission companies, ostensibly to promote conservation of the resource.⁶⁶ One of these provisions excluded non-Oklahoma corporations from constructing natural gas pipelines in the state.⁶⁷ *Kansas Natural Gas Co.*, a Delaware corporation, and three other citizens of West Virginia, Ohio, and Pennsylvania owning various rights to natural gas in Oklahoma, brought suit challenging the constitutionality of this law on the grounds that it violated the commerce clause.⁶⁸ The Circuit Court of the United States for the Eastern District of Oklahoma agreed with the plaintiffs and enjoined further enforcement of the Oklahoma statute.⁶⁹

The Supreme Court affirmed the Circuit Court.⁷⁰ Echoing the values of Justice McLean's dissent in *Cooley* pronounced sixty years earlier, the Court asserted that "the right to engage in interstate commerce is not the gift of a State, and . . . cannot be regulated or restrained by a State."⁷¹ Rejecting the state's contention that its law was a conservation statute and, therefore, did not regulate interstate commerce, the Court held that the statute was

plicitly preempted state control over oil prices. (See S. REP. No. 97-313, 97th Cong., 2d Sess. 8-9, 21-24 (1982) for the final version of the vetoed bill and the explanation of the Conference Committee of the bill's preemption provisions. The President's veto message, which makes no mention of the preemption provisions, can be found at CONG. REC. S2513-14 (daily ed. March 22, 1982)). The passage of this bill by the Senate and House suggests a recognition by Congress that states have the power to regulate crude oil and refined petroleum product prices; its veto leaves this power intact.

64. 221 U.S. 229 (1911).

65. *Id.* at 239-40.

66. *Id.* at 239-43.

67. *Id.* at 239 n.1.

68. *Id.* at 241-44.

69. *Kansas Natural Gas Co. v. Haskell*, 172 F. 545 (E.D. Okla. 1909).

70. 221 U.S. at 262.

71. *Id.* at 260.

unconstitutional.⁷²

By 1978, the Court had returned more nearly to the majority position in *Cooley* and upheld a Maryland statute in *Exxon Corp. v. Governor of Maryland*⁷³ that might have been struck down if the reasoning in *West* had been followed literally. Maryland had enacted a statute in 1977 which forbade any producer or refiner of petroleum from operating a retail service station in Maryland and required producers and refiners to make so-called "voluntary allowances" uniformly to all service stations within the state.⁷⁴ Exxon and three other vertically-integrated petroleum producers and refiners filed suit in a Maryland state court seeking a declaratory judgment that the statute violated the commerce clause.⁷⁵ A trial followed in which the evidence indicated that only some five percent of the number of gasoline service stations operating in Maryland were owned by petroleum producers or refiners, no production or refining occurred in the state, and the plaintiff companies might withdraw from the Maryland market altogether if forced to divest their retail stations.⁷⁶ However, no evidence indicated that the amount of petroleum products available in Maryland would be reduced as a result of the statute.⁷⁷ The state court invalidated the statute, primarily on the ground that it violated substantive due process restrictions.⁷⁸ The Maryland Court of Appeals reversed.⁷⁹

The Supreme Court affirmed the Maryland Court of Appeals,⁸⁰ noting that the burden of the divestiture statute fell equally on interstate and intrastate businesses⁸¹ and that the statute erected no barriers to interstate gasoline distributors.⁸² The Court declared that:

[W]e cannot adopt appellants' novel suggestion that because the economic market for petroleum products is nationwide, no State has the power to regulate the retail marketing of gas [W]e do not find that the Commerce Clause, by its own force, preempts the field of retail gas marketing In the absence of a

72. *Id.* at 261.

73. 437 U.S. 117.

74. *Id.* at 119-20.

75. *Id.* at 121-22.

76. *Id.* at 123.

77. *Id.*

78. *Id.*

79. *Governor of Maryland v. Exxon Corp.*, 279 Md. 410, 370 A.2d 1102 (C.A. Md. 1977).

80. 437 U.S. at 134.

81. *Id.* at 125-26.

82. *Id.*

relevant congressional declaration of policy, or a showing of a specific discrimination against, or burdening of, interstate commerce, we cannot conclude that the States are without power to regulate in this area.⁸³

Thus, the Court in *Exxon v. Maryland* analyzed the effect of the commerce clause on the Maryland statute by an approach similar to the one used by the majority in *Cooley* and *Peerless*—and in terms exactly opposite the language in *Kansas Natural Gas*.

This comparison of *West* and *Exxon v. Maryland* shows that commerce clause interpretation has shifted in favor of greater state authority to regulate the structure of energy companies. Although the statute struck down in *West* probably would not have survived the test announced in *Exxon v. Maryland* because of its obvious discrimination against interstate commerce, the fact that Maryland's law was upheld indicates that commerce clause restrictions now are much narrower.⁸⁴ A state law regulating the structure of energy companies which avoids the overtly parochial features of the statute in *West* would stand a good chance of being approved by the Court.

Reserving Scarce Energy Supplies for State Residents

If the liberalization in commerce clause doctrine illustrated above was responsible for a complete reversal in the Court's attitude toward the constitutionality of state energy price control statutes, and a less dramatic shift in its opinion of energy firm structure laws, it has stopped short of indicating broad approval of state laws regulating the private market to reserve scarce energy supplies for state residents. In *Pennsylvania v. West Virginia*,⁸⁵ the State of West Virginia had enacted a statute in 1919 which limited natural gas shipments to other states to surplus gas not needed in

83. *Id.* at 128-29.

84. *Id.* Although the analysis in *Exxon v. Maryland* implies that *West* has been superceded, *West* itself has recently been cited favorably in at least two cases. *Hughes v. Oklahoma*, 441 U.S. 322 (1979) and *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). However, in *Philadelphia v. New Jersey*, *West* is referred to only in the context of its facts, and not its rationale. *Id.* at 627. Similarly, in *Hughes*, the Court's reliance on *West* was for its ringing rhetorical denunciation of protectionism, 441 U.S. at 329-30. The dissent in *Hughes* criticized the majority's reliance on *West* as inapposite to the facts. *Id.* at 340-41 (Rehnquist, J., dissenting). *But see* *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808 (1976), where the Court inexplicably quotes with favor language from *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 535 (1946) that is very close to the language from *West* quoted in the text accompanying note 71 *supra*.

85. 262 U.S. 553 (1923).

West Virginia.⁸⁶ In spite of its policy to hoard supplies for its own citizens, West Virginia, during the previous thirty years, had encouraged efforts to develop markets in Pennsylvania and Ohio, permitting corporations to be chartered for the purpose of exporting natural gas and granting them the right of eminent domain to build pipelines. West Virginia benefited from these efforts by collecting substantial tax revenues as a result of the economic activity these efforts spawned.⁸⁷ At the time of the decision, and in spite of excess demand, West Virginia was the largest natural gas producer in the nation,⁸⁸ exporting some 59.2 percent of its natural gas to serve the needs of 1.5 million Pennsylvanians and over 3.5 million Ohioans.⁸⁹

The Commonwealth of Pennsylvania and the State of Ohio, invoking the Court's original jurisdiction on their own behalf and as *parens patriae* for their citizens, sued to enjoin West Virginia from enforcing its 1919 statute.⁹⁰ The basis for the action was the allegation that the law contravened the commerce clause.⁹¹ The Court agreed, applying virtually the same test for constitutionality as it had in *Kansas Natural Gas* and *West*. Finding that West Virginia had violated the commerce clause, the Court stated that:

the power to regulate interstate commerce is expressly committed to Congress and therefore impliedly forbidden to the States. . . . Natural gas is a lawful article of commerce, and its transmission from one state to another for sale and consumption in the latter is interstate commerce. . . . [The statute] is in effect an attempt to regulate the interstate business to the advantage of the local consumers. But this [West Virginia] may not do. . . . That power is lodged elsewhere.⁹²

As in the other cases discussed above deciding the constitutionality of different state energy statutes, the Court in *Pennsylvania v. West Virginia* did not permit the preservation of scarce energy supplies by a state because such regulation invaded the exclusive prerogative of Congress, even where Congress had not acted.

*New England Power Co. v. New Hampshire*⁹³ is the most recent

86. *Id.* at 581.

87. *Id.* at 587.

88. *Id.* at 586.

89. *Id.* at 590.

90. *Id.* at 590-91.

91. *Id.* at 591.

92. *Id.* at 596-98.

93. 50 U.S.L.W. 4223 (U.S. Feb. 24, 1982).

analogue to *Pennsylvania v. West Virginia*. It reaffirms the holding of the older case, even though the Court's reasoning was considerably different. In *New England Power*, the Court decided whether an order based on a 1913 New Hampshire statute violated the commerce clause. The law permitted the New Hampshire Public Utilities Commission to prohibit the export of hydroelectric power from rivers in the state when the electricity "is reasonably required for use within the state and the public good requires that it be delivered for such use."⁹⁴ *New England Power Co.*, a Massachusetts corporation which sold most of its production outside New Hampshire, owned a number of hydroelectric generating facilities in New Hampshire comprising some ten percent of its total generating capacity.⁹⁵ In 1980, the New Hampshire Commission exercised its long-dormant authority and ordered that the entire production be sold in New Hampshire.⁹⁶ It estimated that its order would save state residents some \$25 million annually by displacing electricity from more expensive fuels.⁹⁷

New England Power Co., the Commonwealth of Massachusetts, and the Attorney General of Rhode Island appealed to the New Hampshire Supreme Court, arguing that the 1913 statute was preempted by the Federal Power Act of 1935 and that, as applied in the Commission order, it violated the commerce clause.⁹⁸ The New

94. *Id.* at 4224 (quoting N.H. REV. STAT. ANN. § 374:35 (1966)).

95. *Id.*

96. *Id.* at 4225. The order did not require that the electricity physically be kept within New Hampshire, but rather required a change in the system by which its cost is billed to customers. Most utilities in New England, including *New England Power Co.*, are members of the New England Power Pool, which centrally dispatches electricity generated by its member companies. *Id.* at 4224. The purpose of the Pool is to increase regional efficiency in electricity generation by assuring that the least expensive available power plant always is used to meet new demand, regardless of whether the location demanding the additional electricity is within the service area of the company which owns the most efficient unit available at that moment with unused capacity. *Id.* The savings thus created are divided between the company which owns the plant and the company which purchases the power. *Id.* All members of the Pool have interconnected their generating and transmission systems so that the flow of electricity between companies is physically uninhibited. *Id.* at 4225. The Commission order sought to change the way wholesale electricity costs are assessed between Pool members, so that New Hampshire utilities, and hence their customers, were allocated the entire savings from the *New England Power Co.* hydroelectric generating facilities, rather than only a pro rata share. *Id.*

97. *Id.* at 4225. Since the actual change the order sought to accomplish was only in the *New England Power Pool* billing system, one might expect a side effect to be that electricity prices to Pool members outside New Hampshire (and their customers) would increase by the same amount.

98. Appeal of *New England Power Co.*, 120 N.H. 866, 424 A.2d 807 (N.H. 1980).

Hampshire Supreme Court affirmed the Commission.⁹⁹ Avoiding the commerce clause question, that court held that a section of the Federal Power Act of 1935 explicitly ratified the 1913 statute, thereby granting authority to the Commission to issue the export prohibition order, even though it might otherwise have transgressed the commerce clause.¹⁰⁰

On appeal, the United States Supreme Court reversed and struck down the Commission order.¹⁰¹ Disagreeing with the state court's interpretation of the Federal Power Act of 1935, the Court reached the question of whether the order passed commerce clause scrutiny.¹⁰² Although the opinion cited *Pennsylvania v. West Virginia* with favor,¹⁰³ it did not adopt the same rigid reasoning which so closely resembles the McLean dissent in *Cooley*. Instead of holding that the New Hampshire order was unconstitutional merely because it regulated interstate commerce, the Court in *New England Power* stated that "the Commerce Clause . . . precludes a State from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom."¹⁰⁴ Thus, the Court invalidated the order because it was overtly protectionist. What may seem at first glance to be a fine, but irrelevant, distinction becomes more important on closer examination. States have open to them numerous methods of directing scarce energy supplies to their citizens through regulation without explicitly denying access to out-of-state consumers.¹⁰⁵ The Court in *New Eng-*

99. *Id.* at 869, 424 A.2d at 809.

100. *Id.* at 873-74, 876, 424 A.2d at 812, 814.

101. 50 U.S.L.W. at 4227.

102. *Id.*

103. *Id.* at 4225. The Court also favorably cited *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911) and *Public Util. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). See text accompanying notes 64-72 *supra*.

104. 50 U.S.L.W. at 4225. Compare *Hughes v. Oklahoma*, 441 U.S. 332, 336-37 (1979), with *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978), both of which are cited by the Court. 50 U.S.L.W. at 4225-26.

105. Poling, *supra* note 10, at 28-89, presents a collection of state statutes which restrict the circumstances under which gasoline franchisors may terminate their supply agreements with franchisees. As a hypothetical example of a state law which increases energy supplies for residents without unconstitutional protectionism, consider a statute which requires each gasoline and home heating oil dealer to maintain a certain level of reserves over their ordinary sales as a condition for a state business license. Such a requirement would tend to assure a larger supply of fuel than in a neighboring state without such a law, all other factors being equal. Although nothing in this hypothetical statute would prohibit those from across the state border from purchasing fuel during a shortage from dealers with the mandated extra stocks, the expense and inconvenience of doing so would probably keep their

land Power itself recognized that when a state goes so far as to produce a good, it may restrict sales of that item to its residents.¹⁰⁶ Whether the present Court would accept a state regulatory scheme to assure energy supplies for its citizens which compromises between the extremes of outright protectionism and outright state ownership remains to be tested.

Implications

These six decisions serve notice on states that they are now more in control of their energy futures than they have been in the past. The modern approach to commerce clause analysis illustrated by *Peerless*, *Exxon v. Maryland*, and *New England Power* recognizes that states have the right to regulate energy in interstate commerce in the absence of a preempting federal statute. These cases imply that this right may outweigh contrary federal interests in avoiding burdens on interstate commerce. An absolute prohibition against state laws such as those struck down in *Kansas Natural Gas* and *West* no longer applies. Instead, the Court has given way to the more lenient commerce clause analysis which originated in *Cooley*.

Nonetheless, the comparison of *Pennsylvania v. West Virginia*

numbers low. Consequently, the state with such a law would succeed in using its power to enhance energy supplies available to its residents without contravening the rule of *New England Power*.

106. 50 U.S.L.W. at 4225-26 n.6. The Court rejected New Hampshire's claim that it owned the electricity that New England Power Co. sought to export. The Court reasoned that the Federal Power Act of 1935 had preempted whatever authority alleged state ownership of the river might otherwise have conferred over electricity generated from its waters, and that the actual production of electricity was by a private corporation using its own facilities. *Id.* In so doing, the Court acknowledged the possibility that a state could restrict sales of a product it actually produced. *Id.* This exemption from ordinary commerce clause standards is discussed extensively in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). In *Reeves*, the Court resolved whether a state-owned and operated cement plant could limit sales to its residents by upholding the restrictive sales policy. *Id.* at 446-47. Noting that "the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace," *id.* at 436-37, the Court held that the fact that the cement plant was state-owned distinguished it from cases like *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), where the state action in question was a statute which regulated private activities. 447 U.S. at 436-37. Where the state itself entered the market, the Court was unwilling to conclude that its avowedly protectionist sales policies contravened the commerce clause. *Id.* at 440-41. Although the majority opinion specifically limited its decision to cases where the state simply provides capital to convert freely-available raw materials into a finished product (and explicitly excluded natural gas under the circumstances in *Pennsylvania v. West Virginia* where it was a scarce natural resource), *id.* at 443-44, the dissent read the majority opinion as permitting a state-owned synthetic or processed energy facility to limit the availability of its product to its residents. *Id.* at 453 n.6 (Powell, J., dissenting).

with *New England Power* indicates that the Court is very suspicious of state laws which protect citizens by depriving out-of-state citizens of access to resources. Although a reemergence of the majority position in *Cooley* is implicit in *New England Power*, the state lost this case in spite of the application of a more liberal test. A state which seeks to increase its energy supplies is likely to be more successful at using price controls, changes in the structures of its energy businesses, or indirect methods of directing scarce energy resources to residents as tools for change than it will be if it engages directly in protectionism.

The exercise of state power to regulate energy where the federal government has not enacted a contrary statute now is accorded a significant new respect by the Court. State laws controlling wholesale prices of energy in interstate commerce will not automatically be invalidated, and non-protectionist state regulation of the structure of energy companies doing business within their borders will be permitted. Withdrawal by the federal government from energy regulation does not necessarily mean a return to the absence of regulation that stimulated some New Deal energy laws.

COMMERCE CLAUSE LIMITATIONS² ON STATE TAXATION OF THE ENERGY INDUSTRY

Commerce clause restrictions on state taxation of the energy industry have become more defined than limitations on state energy regulation in a series of recent decisions. The challenge these recent tax decisions present is the difficulty of reconciling them. This section will present a comparison of these opinions and the principles of state taxation of energy in interstate commerce which they endorse.

Pre-1977 Supreme Court analysis of the extent of state power to tax interstate commerce was at least as confusing as its approaches to state regulatory power.¹⁰⁷ In spite of *Cooley*, many decisions evidenced a view that states simply were without power to tax any commodity in interstate commerce.¹⁰⁸ Instead of evaluating the importance of state taxation given the facts of a particular case, these decisions typically turned on whether the tax in question "di-

107. See P. HARTMAN, *supra* note 18, § 2:9.

108. *Id.* §2:13. See, e.g., *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 258-59 (1922), *disapproved*, *Commonwealth Edison Co. v. Montana*, 101 S.Ct. 2946, 2953 (1981). Compare *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 177-83 (1932), with *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157, 166-70 (1954).

rectly" or "indirectly" affected interstate commerce,¹⁰⁹ the question thought most important by Justice Daniel in his concurring opinion in *Cooley*. The result, according to one commentator, was "decades of distinctions based upon insubstantial and pointless formalism. . . ."¹¹⁰

In 1977, the Court finally admitted that the commerce clause permits states to impose certain kinds of taxes on the privilege of engaging in interstate commerce. In *Complete Auto Transit, Inc. v. Brady*,¹¹¹ it concluded that a state tax on interstate commerce is valid if "it 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 the services provided by the State."¹¹² Thus, the Court returned more closely to the majority view in *Cooley* and provided clear guidance on the commerce clause criteria by which state taxes on interstate commerce would be evaluated in the future.

Four cases decided since *Complete Auto Transit* have given the Court the opportunity to apply its new test to state taxes on energy in interstate commerce. Two cases were challenges to production taxes imposed by energy-producing states, while the other two considered the validity of income taxes imposed by energy-consuming states. Together, they provide considerable information for determining the extent to which the Court will allow states to tax energy.

State Taxation of Energy Production

Two 1981 cases, *Commonwealth Edison, Inc. v. Montana*¹¹³ and *Maryland v. Louisiana*,¹¹⁴ presented the Court with state taxes on energy production that were alleged to amount to an unconstitutional burden on interstate commerce. The Court held that the Montana coal severance tax passed muster under its *Complete Auto Transit* test,¹¹⁵ but that the Louisiana first-use tax did not.¹¹⁶ These two opinions delineate the constitutional limits beyond which state taxes on energy production cannot go.

109. *Id.* See note 48 *supra*.

110. *Id.* §2:17.

111. 430 U.S. 274 (1977).

112. *Id.* at 279.

113. 101 S.Ct. 2946 (1981).

114. 101 S.Ct. 2114 (1981).

115. 101 S.Ct. at 2960.

116. 101 S.Ct. at 2134.

Commonwealth Edison, Inc. v. Montana

The basic constitutional question in *Commonwealth Edison, Inc. v. Montana* was whether a very high state tax on energy production was an unconstitutional burden on interstate commerce simply because much of the coal subject to the tax was to be exported to other states.¹¹⁷ Montana was the location of some twenty-five percent of the entire coal reserves in the United States, and as much as ninety percent of its annual mined tonnage was sold to other states.¹¹⁸ In 1975, Montana raised its tax on the severance of coal from 34 cents per ton to a maximum of thirty percent of the "contract sales price."¹¹⁹

Plaintiffs, Commonwealth Edison, Inc. and fourteen other coal

117. 101 S.Ct. at 2954. For a detailed discussion of this case, see generally Sager, *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 17, 102-12 (1981) [hereinafter cited as Sager].

118. *Id.* at 2965 (Blackmun, J., dissenting).

119. *Id.* (Blackmun, J., dissenting). The contract sales price is "the sales price f.o.b. mine less any production taxes the seller passed on to the buyer." Sager, *supra* note 117, at 102 n.3. Montana is by no means the only state recently to have enacted high severance taxes. Coates, "It's Economic War Among These United States", Chicago Tribune, July 26, 1981, at 4, col. 4.

The following chart illustrates severance tax rates as of 1978 among leading energy exporting states, as well as the extent to which these taxes support their operations.

LEADING ENERGY—EXPORTING STATES' SEVERANCE TAXES
(as of 1978)

Exporting Rank	OIL TAX RATE	GAS TAX RATE	COAL TAX RATE	SEVERANCE TAXES AS % OF STATE REVENUE
1. Louisiana	12.5%	3.5%	0.2%	23.55
2. Wyoming	4.0	4.0	10.5	22.81
3. New Mexico	7.0	5.8	8.4	19.16
4. Kentucky	1.5	NA	4.5	6.96
5. Alaska	12.25	10.0	NA	19.13
6. Oklahoma	7.0	7.0	0.3	17.51
7. West Virginia	4.35	8.63	3.5	13.99
8. Montana	2.1-2.65	2.65	30.5	11.95
9. Texas	4.6	7.5	NA	17.68

NA—Not available

Source: Northeast-Midwest Institute, *reprinted in* Coates, "It's Economic War Among These United States," Chicago Tribune, July 26, 1981, at 4, col. 4.

mining and utility companies, brought suit in Montana state court seeking refunds of the new tax, which had been paid under protest, and an injunction against its future collection.¹²⁰ They claimed that the tax was invalid because it violated the commerce clause by discriminating against interstate commerce and through its failure to be fairly related to services provided by Montana.¹²¹ The trial court rejected both claims, and the Montana Supreme Court affirmed.¹²²

The United States Supreme Court affirmed the Montana Supreme Court, reasoning that the tax did not discriminate against interstate commerce under the *Complete Auto Transit* test. Rejecting the companies' claim that the severance tax violated the commerce clause because most of the tax burden was paid by out-of-staters, the Court declared that "the tax burden is borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers."¹²³ Thus, the Court focused only on whether the statute on its face discriminated between intrastate and interstate commerce and concluded that it did not, because the tax rate imposed on both categories was identical.¹²⁴

Similarly, the Court rejected the contention that the tax was not fairly related to services provided by the state. Declining to adopt the companies' invitation to inquire into the reasonableness of the amount of revenues collected from interstate businesses compared to the state services provided them,¹²⁵ the Court determined that the commerce clause was satisfied if "the *measure* of the tax [was] reasonably related to the extent of the contact . . ."¹²⁶ between the interstate business and the taxing state. Since Montana taxed coal mining on the basis of a percentage of the coal mined, the Court found it to be "in 'proper proportion'" to the activities of the appellants in Montana.¹²⁷

120. 101 S.Ct. at 2951.

121. *Id.* at 2954-55.

122. *Commonwealth Edison Co. v. Montana*, 615 P.2d 847, 863 (Mont. 1980).

123. 101 S.Ct. at 2954-55.

124. *Id.* at 2955. Indeed, the Court thought this conclusion to be so obvious that it treated the plaintiffs' claim as if it were, in fact, a variant of the second claim that the tax was not "fairly related" to the state services it was supposed to finance. *Id.* at 2955-56.

125. *Id.* at 2959.

126. *Id.* at 2958 (emphasis in original).

127. *Id.* Undoubtedly, a strong influencing factor in this conclusion was the Court's belief that interstate businesses could constitutionally be required to pay their share of the costs of providing them with government services, but that no formula existed to calculate

Maryland v. Louisiana

The State of Louisiana was not as fortunate as Montana when its first-use tax was challenged by nine states, seventeen pipeline companies, and the Federal Energy Regulatory Commission.¹²⁸ Like the coal in Montana, some ninety-eight percent of the natural gas extracted from 948 wells off the Louisiana coast was shipped to consumers in other states.¹²⁹ In 1978, Louisiana enacted a statute to impose a tax of seven cents per mcf on the sale, processing, transportation, use in manufacturing, or other action within Louisiana involving natural gas brought via gathering pipelines from the federally-owned Outer Continental Shelf into the state.¹³⁰ The same Act which created the first-use tax simultaneously created several credits and exemptions from the tax whose effect generally was to relieve most Louisiana citizens from payment of the tax.¹³¹

Invoking the Supreme Court's original jurisdiction, the plaintiffs sought a declaratory judgment that the first-use tax was unconstitutional under the commerce clause because it discriminated against interstate commerce, an injunction against future collection, and a refund of taxes already collected.¹³² A special master was appointed, who recommended that the case was appropriate for the Court's original jurisdiction and that evidentiary hearings should be held on the effects of the tax.¹³³

The Court agreed with the special master that the suit was appropriate for the exercise of its original jurisdiction, both because the plaintiff states were themselves purchasers of natural gas subject to the tax and because they had *parens patriae* standing to sue on behalf of their citizens.¹³⁴ The Court denied his recommendation that evidentiary hearings be conducted, however, instead granting the plaintiffs' motions to invalidate the tax.¹³⁵ Applying the *Complete Auto Transit* test to the commerce clause claim, the Court held that the operation of the tax together with its credits

this amount. *Id.* at 2955-58.

128. 101 S.Ct. at 2119. The original action was brought by eight states. The State of New Jersey, the Federal Energy Regulatory Commission, and the pipeline companies sought intervention at a later date. Their petitions to intervene were granted in the Court's opinion itself. *Id.* at 2128 n.21.

129. *Id.* at 2119-20.

130. *Id.* at 2121.

131. *Id.* at 2121-22.

132. *Id.* at 2122.

133. *Id.* at 2122-23.

134. *Id.* at 2128.

135. *Id.* at 2136.

and exemptions for Louisiana citizens "unquestionably discriminates against interstate commerce in favor of local interests."¹³⁶ Although the Court did not conduct the factual inquiry into the economic effects of the tax which it rejected in *Commonwealth Edison*, it did look beyond the specific section of law embodying the first-use tax and considered the state's tax structure as a whole.¹³⁷

Commonwealth Edison and *Maryland v. Louisiana* neatly bracket the power of energy-producing states to tax their resources as they enter interstate commerce. *Commonwealth Edison* establishes that a severance tax imposed equally on energy sold intra and interstate—no matter how high the rate—does not violate per se the commerce clause. *Maryland v. Louisiana* suggests that a discriminatory scheme of taxation which imposes higher rates on energy sold to out-of-state residents—no matter how deeply buried the scheme is in the state's overall tax structure of taxes, credits, and exemptions—contravenes the commerce clause.

State Taxation of Income from Energy Companies

If the Court has demonstrated a willingness to permit energy-producing states to tax their resources at non-discriminatory high rates as they enter interstate commerce, it has shown an equally solicitous attitude toward energy-consuming states. In *Mobil Oil Corp. v. Commissioner of Taxes*¹³⁸ and *Exxon Corp. v. Wisconsin Department of Revenue*¹³⁹ the Court upheld income taxes imposed on energy company activities occurring outside the physical borders of the taxing states. A comparison of these two decisions reveals how far the taxes imposed by energy consuming states can reach.

Understanding the concept of apportionment is central both to *Mobil* and *Exxon v. Wisconsin*. The commerce clause has long

136. *Id.* at 2134.

137. *Cf. Arthur Daniels Midland Co. v. Minnesota*, 315 N.W.2d 597 (Minn. 1982), which held unconstitutional on commerce clause grounds a Minnesota statute exempting from a portion of the state's gasoline excise tax gasohol blended with alcohol distilled in Minnesota from Minnesota agricultural products. *Id.* at 599. The court did not rely on *Maryland v. Louisiana* or any other Supreme Court tax decision, but based its decision on Supreme Court commerce clause cases which considered state regulatory laws. *Id.* at 598-99. See note 12 *supra*. This anomaly may have occurred because the court viewed the tax statute as a law which "clearly thrusts the State into the role of market regulator." *Id.* at 600 (emphasis added).

138. 445 U.S. 425 (1980).

139. 447 U.S. 207 (1980).

been interpreted to prohibit so-called "multiple taxation", i.e., the imposition by more than one state of the same tax.¹⁴⁰ Such taxation is unconstitutional because it subjects businesses in interstate commerce to a greater tax burden than the identical enterprise would pay if it were only in intrastate commerce.¹⁴¹ Three approaches have been developed to overcome, through approximation, the difficult problems of distinguishing which state is entitled to tax the goods and services of firms doing business in interstate commerce: separate accounting, formula apportionment, and specific allocation.¹⁴² In formula apportionment, the method chosen by the states of Vermont and Wisconsin:

Net income is considered to be derived from the States proportionately to corporate activities in the States, and the tax base is divided accordingly. The location of employees, through a payroll factor, and the location of tangible assets, through a property factor, are commonly used to measure the proportion of corporate activity in a State. In addition, a sales factor is commonly used to locate the source of monetary receipts.¹⁴³

Thus, a state which uses formula apportionment calculates the taxes it is owed by multiplying its tax rate by a taxable income which is reduced to its fair share by the application of the apportionment formula.

Mobil Oil Corp. v. Commissioner of Taxes

Among the questions raised by *Mobil Oil Corp. v. Commissioner of Taxes* was whether the State of Vermont could constitutionally tax income through its apportionment formula from dividends paid by subsidiary and affiliate companies to the non-domiciliary appellant energy company. Mobil, domiciled in New York and authorized to do business in Vermont, owned many subsidiaries and affiliates which did business entirely outside Vermont and paid the parent Mobil dividends.¹⁴⁴ Following the filing of Mobil's 1970, 1971, and 1972 Vermont income tax returns, the Vermont Department of Taxes recalculated Mobil's liability for those years and as-

140. *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157, 166 (1954).

141. 71 AM. JUR. 2d *State and Local Taxation* § 143 (1973).

142. HELLERSTEIN, *STATE AND LOCAL TAXATION: CASES AND MATERIALS* 310 (1969) [hereinafter cited as HELLERSTEIN], (quoting H.R. REP. No. 1480, 88th Cong., 2d Sess. (1964), also known as the Willis Committee Report).

143. *Id.*

144. 445 U.S. at 427-28.

essed a deficiency,¹⁴⁵ claiming that Mobil had improperly excluded the dividends from its affiliates and subsidiaries from its reported income.¹⁴⁶

Mobil unsuccessfully challenged the deficiency assessment before the Vermont Commissioner of Taxes.¹⁴⁷ The company then filed suit in Vermont state court, which reversed the Commissioner. The court held that imposing the income tax on dividends paid by affiliates and subsidiaries discriminated against interstate commerce because it subjected Mobil to dual taxation.¹⁴⁸ The Supreme Court of Vermont, however, reversed the lower court and reinstated the Commissioner's assessment.¹⁴⁹

The United States Supreme Court affirmed the decision of the Vermont Supreme Court.¹⁵⁰ Applying the *Complete Auto Transit* standard, the Court concluded that the tax did not discriminate against interstate commerce because no duplicate taxation was proven.¹⁵¹ Moreover, the Court declined to hold that only New York, Mobil's domiciliary, could tax such dividends, suggesting that the dividends were as much a part of Mobil's income as any other assets and could be taxed in accordance with accepted methods of apportionment by all states in which it did business.¹⁵²

In effect, the Court left to Vermont's apportionment formula the proper division of Mobil's income among the many states which could claim the right to tax its many sources. This had the effect of placing the burden on Mobil to prove that the apportionment formula was unfair, a difficult and unpromising venture.¹⁵³ Moreover, the holding denied to interstate energy companies an additional forum for reducing their tax burdens by contesting whether certain categories of income unfairly burdened interstate commerce.¹⁵⁴

145. *Id.* at 431-32.

146. *Id.* at 432.

147. *Id.*

148. *Id.* at 433.

149. *Mobil Oil Corp. v. Commissioner of Taxes*, 136 Vt. 545, 394 A.2d 1147 (1978).

150. 445 U.S. at 449.

151. *Id.* at 443-44. Mobil apparently pressed this issue, even though New York did not tax the dividends in question, to establish that the commerce clause requires dividends to be ascribed to a single situs for tax purposes, rather than apportioned among all states where the company does business. *Id.*

152. *Id.*

153. See W. BEAMAN, PAYING TAXES TO OTHER STATES § 3.17 (1963).

154. Cf. HELLERSTEIN, *supra* note 142, at 360 (quoting Hellerstein, *State Taxation of Interstate Business: Reflections on Legislative Directions*, 1967 FEDERAL-STATE-LOCAL FISCAL RELATIONS TAX INSTITUTE SYMPOSIUM, 257 (1967)).

Exxon Corp. v. Wisconsin Department of Revenue

The Court's approval in *Mobil* of state taxation of energy company dividend income accrued in other states was paralleled by its endorsement in *Exxon Corp. v. Wisconsin Department of Revenue*¹⁵⁵ of state taxes imposed on income from levels of vertically-integrated energy companies located in other states. Exxon filed Wisconsin corporate income and franchise tax returns for the years 1965 through 1968 for its Wisconsin marketing operations, but did not include income from its out-of-state exploration, production, and refining activities.¹⁵⁶ In 1971, the Wisconsin Department of Revenue audited Exxon and notified the corporation that it had to pay additional taxes because its reportable income included that from all of its operations, even those not carried out in Wisconsin.¹⁵⁷

Exxon filed an application for abatement, which was denied. The corporation then filed a petition for review in the Wisconsin Tax Appeals Commission, which was granted in part.¹⁵⁸ Review by a state court resulted in yet a third formulation of Exxon's tax liability, which was more favorable to the company than the original audit.¹⁵⁹

Exxon appealed to the Wisconsin Supreme Court, arguing that taxation of exploration and refining operations carried on entirely out-of-state unconstitutionally burdened interstate commerce.¹⁶⁰ The Wisconsin Supreme Court not only affirmed that portion of the lower court decision which upheld the tax, but reinstated the higher tax liability calculated in the original 1971 audit.¹⁶¹

The United States Supreme Court affirmed the Wisconsin decision.¹⁶² The Court responded to the appellant's commerce clause claim exactly as it had in *Mobil*, concluding that "the Commerce

155. 447 U.S. 207 (1980).

156. *Id.* at 213.

157. *Id.* at 214-16. A large portion of the opinion is devoted to Exxon's assertion that its accounting system, which separated its marketing function from the others at issue in the case, established that the company actually constituted three businesses for purposes of the Wisconsin tax, only one of which was located in Wisconsin for tax purposes. *Id.* at 211-13. The Court concluded that the company was a single, or "unitary", business and that the Wisconsin tax reached all of its activities. *Id.* at 226.

158. *Id.* at 215.

159. *Id.* at 216-17.

160. *Id.* at 217.

161. *Wisconsin Dept. of Revenue v. Exxon Corp.*, 90 Wis. 2d 700, 735, 281 N.W.2d 94, 113 (1979).

162. 447 U.S. at 230.

Clause does not require that any income which a taxpayer is able to separate through accounting methods and attribute to exploration and production of crude oil and gas be allocated to the States in which those production centers are located."¹⁶³ Although the Court suggested, as it had in *Mobil*, that an actual showing of multiple taxation might result in a different outcome, it was unwilling to hold as a matter of constitutional law that a tax such as that of Wisconsin was invalid.¹⁶⁴

Taken together, these two cases show that the Court will not interpret the commerce clause as automatically restricting energy-consuming states who seek to tax income from energy-producing companies that accrues in other states. Both the dividends from subsidiaries and affiliates in *Mobil* and the revenues from separate exploration and production activities in *Exxon v. Wisconsin* were held to be subject to state taxes, even though these profits were paid outside the borders of the taxing state in each case. Although the Court left open the possibility that it would reexamine its position where actual multiple taxation resulted, this interpretation of the commerce clause places a heavy burden on the energy company which seeks to avoid taxation.

The outcome of these two cases removes a potentially lucrative opportunity for integrated energy corporations to shelter income from state taxation. Rather than being able to restrict taxation of their far-flung activities to the states in which such activities take place, enterprises will be taxable in many states, albeit only to the extent of their proportional share of taxes resulting from application of the apportionment formula in each state. This reduces the incentive for individual states to compete with each other to create tax havens for the energy businesses being conducted inside their borders.

Implications

The outcomes of these four cases are a resounding endorsement of state power to impose taxes on energy companies. In *Commonwealth Edison*, *Mobil*, and *Exxon v. Wisconsin*, the state taxes were upheld without regard to whether the taxes were being imposed by an energy-rich state taking advantage of its geological good fortune or an energy-poor state trying to reap revenues from

163. *Id.* at 229-30. Indeed, the Court cites the *Mobil* opinion several times as controlling. *Id.* at 228-29.

164. *Id.* at 229.

its position as a necessary marketing outlet to the producing companies. Even in *Maryland v. Louisiana*, the only case in which a state energy tax was struck down, the original plaintiffs were other states acting in their capacity both as energy consumers and as *parens patriae* for their consuming citizens.

Moreover, the commerce clause analysis used by the Court in deciding these cases indicates great deference to state energy taxes. The determination of whether a state tax discriminated against interstate commerce in each case was made while relying only on the face of the tax statutes in question, and not on the actual economic effects of the tax rates. In every case, the Court eschewed the need for further factual inquiry into the operation of the tax law, dismissing the requests for additional information in *Commonwealth Edison*¹⁶⁵ and *Maryland v. Louisiana*¹⁶⁶ as unnecessary, and in *Mobil*¹⁶⁷ and *Exxon v. Wisconsin*¹⁶⁸ as "hypothetical". In *Maryland v. Louisiana*, the only case where the Court actually looked beyond the tax being challenged, it explicitly refused to look further than the tax exemptions and credits enacted into law at the same time and drew its conclusions entirely from the combined statutes.¹⁶⁹

Nevertheless, it must be remembered that these four cases only applied two of the four parts of the *Complete Auto Transit* test for state energy taxes. *Maryland v. Louisiana*, *Mobil*, and *Exxon v. Wisconsin* considered only the prohibition of discrimination against interstate commerce, whereas *Commonwealth Edison* discussed both discrimination and what constituted a fair relation between a state tax and the services the state provides. None of the cases elaborated on what established a substantial nexus between the activity being taxed and the taxing state or on what fair apportionment of a tax entails. These requirements might result in additional restrictions on state energy taxing power in the future.

CONCLUSION

As the federal government reduces its control over the energy industry, states that wish to increase their energy regulations and taxes will find a more favorable constitutional climate than in the

165. 101 S.Ct. at 2959.

166. 101 S.Ct. at 2136.

167. 445 U.S. at 448-49.

168. 447 U.S. at 229.

169. 101 S.Ct. at 2134-35.

recent past. Commerce clause restrictions that once automatically invalidated state laws which regulated or taxed energy in interstate commerce have been loosened. The once moribund doctrine of concurrent federal and state authority over interstate commerce announced in *Cooley v. Board of Wardens* has been resurrected in a modern form.

The change in the Supreme Court's analysis of state regulation of interstate commerce has been gradual and implicit. Neither *Kansas Natural Gas* nor *West* has been overruled, although the reasoning which determined their outcomes has been eroded. As a result, state laws controlling wholesale prices of energy in interstate commerce and restricting the structures of energy companies operating in interstate commerce, laws which once would have been held to violate the commerce clause, now are more likely to be sustained.

In contrast, the change in the Supreme Court's approach to state taxation of energy in interstate commerce was sudden and direct. Decades of conflict over the criteria for determining when state taxes contravened the commerce clause have been made irrelevant by the *Complete Auto Transit* doctrine. Four decisions in the last two years have applied this test to establish that both energy-producing and energy-consuming states have great latitude to impose production and income taxes on energy businesses.

With these changes has come a reaffirmance of the basic purpose of the commerce clause to prohibit discrimination by a state in favor of its citizens or against those of other states. The outcomes of *New England Power* and *Maryland v. Louisiana* emphasize that the Court will not tolerate direct geographical favoritism in either regulatory or tax laws, even under today's easier commerce clause restrictions. Whatever the formulation of its test for constitutionality of a state law under the commerce clause has been over the years, the Court has rarely lost sight of its basic uniting force.