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ARTICLES

REFLECTIONS ON COMMONWEALTH EDISON CO. V. MONTANA

Mike McGrath* and Walter Hellerstein**

On the final day of its 1980-81 term, the United States Supreme Court handed down its long-awaited decision in *Commonwealth Edison Co. v. Montana*,¹ which sustained Montana's coal severance tax over commerce and supremacy clause objections. In a six-to-three decision,² the Court upheld the right of the states to set their own tax rates without fear of judicial interference. The Court's conclusion was rooted in its recognition that the determination of the rate or amount of a state tax is fundamentally a political question, which "must be resolved through the political process . . . by state legislatures in the first instance and, if necessary, by Congress, when particular state taxes are thought to be contrary to federal interests."³

The following reflections on the Court's opinion in *Commonwealth Edison* are, no doubt, colored by our role in the case as advocates for the state. Our views of the case may therefore lack the cool detachment of one who had no part in litigating it. We would like to think, however, that our involvement in the severance tax controversy has provided us with some insights, worth recording here, into the nature of the underlying issues before the Court and the implications of its decision.

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While both authors played a substantial role in litigating the case of *Commonwealth Edison Co. v. Montana*, 101 S. Ct. 2946 (1981), on behalf of the State of Montana, the views expressed here are those of the authors and do not necessarily represent those of the State of Montana.

1. 101 S. Ct. 2946 (1981) (at time of publication, U.S. cite available at 453 U.S. 609 (1981)).

2. Justices Blackmun, Stevens and Powell dissented; Justice White filed a concurring opinion.

I. HISTORICAL BACKGROUND

The Court's decision in *Commonwealth Edison* cannot be fully appreciated without an understanding of the context in which the constitutional conflict arose. Throughout its history Montana's economy has been dependent upon the development of the state's abundant natural resources. As a result, Montana's citizens have long suffered periodic economic and psychological dislocations from the boom and bust cycles of mineral production. As Justice Sheehy stated in his opinion for the Montana Supreme Court:

Montana's experience has shown that its mineral wealth could be exhausted and exported with little left in Montana to make up the loss of its irreplaceable resources. Montana has been painfully educated about the extreme economic jolts that follow when the mine runs out, the oil depletes, or the timber saws come still.⁴

The noted historian, K. Ross Toole, has observed that Montana was destined to be burdened with a "colonial economy."⁵ Traditionally the capital necessary to fund resource development comes from non-Montana interests. When the resources are mined, they are shipped out of the state. When the resources are gone, so too is the economic base of the state. Yet the state must continue to deal with the social and environmental problems that the mining industries leave in their wake. The introduction of vastly expanded coal mining operations in Montana has continued the pattern. "[M]ining of the coal depletes the resource base and wealth of the State, thereby diminishing a future source of taxes and economic activity."⁶ At the same time, increased social costs and environmental degradation have accompanied the development of Montana's coal industry.

In an avowed effort to learn from the past rather than to repeat it,⁷ the Montana Legislature in 1975 enacted the present coal severance tax.⁸ The level of the tax was set at 30 percent of the

4. *Commonwealth Edison Co. v. Montana*, ___ Mont. ___, 615 P.2d 847, 850 (1980).

5. K. TOOLE, *MONTANA: AN UNCOMMON LAND* 9 (1959).

6. *Commonwealth Edison*, 101 S. Ct. at 2957.

7. In its report to the legislature, the free-joint conference committee, formed to resolve the rate of the tax, stated the following:

In setting the level of the tax, the conference committee looked at the needs to be met. The objectives were to (a) preserve or modestly increase revenues going to the general fund, (b) to respond to current social impacts attributable to coal development, and (c) to invest into the future, when new energy technologies reduce our dependence on coal and mining activity may be quiet.

MONTANA LEGISLATIVE COUNCIL, STATEMENT TO ACCOMPANY THE REPORT OF THE FREE JOINT CONFERENCE COMMITTEE ON COAL TAXATION (April 16, 1975).

8. MONTANA CODE ANNOTATED [hereinafter cited as MCA] §§ 15-35-101 through -111

contract sales price of coal.⁹ The effective rate of the tax was less than the statutory rate, approximately 22.5 percent, because other taxes paid on production to federal, state, and local governments were excluded in computing the value of the coal.¹⁰

The tax was imposed on "each ton of coal produced in the state" based on the value and energy content of the coal and the method of extraction.¹¹ For strip-mined coal there was an exemption from the tax for the first 20,000 tons mined.¹² As of the end of calendar year 1981, the State of Montana had collected a total of \$325,995,706.95 in coal severance taxes.¹³

In 1976 the voters of Montana revealed their determination to reverse historical trends by overwhelmingly adopting a referendum to amend the Montana Constitution to provide that 50 percent of the proceeds of the coal severance tax be dedicated to a permanent trust fund.¹⁴ The trust fund represented a self-imposed savings account to pay for future costs of unforeseen social and environmental impacts caused by strip mining, as well as to assist in stabilizing the state's economic base when the resources are depleted or the mining activity ceases. As of the end of calendar year 1981, the total principal placed in the trust fund was \$98,400,462.59.¹⁵ Of the remaining 50 percent of the severance tax proceeds not dedicated to the trust fund, approximately 20 percent were allocated to the state general fund. The balance was earmarked for various programs to assist with the impact of coal mining in local areas.¹⁶

In June of 1978, four major coal mining companies in the State of Montana together with eleven of their utility customers¹⁷

(1981).

9. MCA § 15-35-102(1) (1981) defines contract sales price as "the price of coal extracted and prepared for shipment F.O.B. mine, excluding the amount charged by the seller to pay taxes paid on production . . ." Taxes paid on production are defined in MCA § 15-35-102(6) (1981), and include The Montana Resource Indemnity Trust Tax, MCA §§ 15-38-101 through -109 (1981); The Gross Proceeds Tax, paid to local governments, MCA § 15-6-132 (1981); the federal Abandoned Mine Reclamation Fee, 30 U.S.C. § 1232 (1976); and the federal Black Lung Tax, 26 U.S.C. § 4121 (1976).

10. *Id.*

11. MCA § 15-35-103 (1981).

12. MCA § 15-35-103(3) (1981).

13. Montana Department of Revenue figure.

14. MONT. CONST. art. IX, § 5. *See also* MCA § 15-35-108 (1981).

15. Montana Department of Revenue figure.

16. MCA § 15-35-108 (1981).

17. The coal company plaintiffs were Decker Coal Company, Peabody Coal Company, Westmoreland Resources Incorporated and Western Energy Company. The utilities were Commonwealth Edison Company, Central Illinois Light Company, Dairyland Power Cooperative, Detroit Edison Company, Interstate Power Company, Lake Superior District Power Company, Lower Colorado River Authority/City of Austin, Minnesota Power and Light Company, Northern States Power Company, Upper Peninsula Generating Company, and

filed a suit in state district court challenging the constitutionality of the tax.¹⁸ The complaint asserted, in three counts, that the tax was assessed in violation of two constitutional provisions, the commerce clause and the supremacy clause of the United States Constitution.¹⁹

II. THE COMMERCE CLAUSE CLAIM

The gravamen of the taxpayers' commerce clause claim was that the high rate of the tax imposed an undue burden on interstate commerce. In their view, the tax discouraged coal development and impermissibly exploited Montana's resource position at the expense of enterprises engaged in interstate commerce and their out-of-state customers. The taxpayers alleged that, since 90 percent of the coal mined in Montana is shipped out-of-state, the tax is tailored to fall on out-of-state consumers and therefore discriminates against interstate commerce. Finally the taxpayers asserted that the tax is not fairly related to the benefits and services provided the taxpayers by the state.

The state countered by filing a motion to dismiss all of the counts for failure to state a cause of action. It was the state's contention that, as a matter of law, severance taxes do not impose an impermissible burden on interstate commerce, citing the series of cases beginning with *Heisler v. Thomas Colliery Co.*²⁰ *Heisler* and its progeny had held that severance taxes were invulnerable to commerce clause objections because they were imposed on local events that preceded interstate commerce. The state also asserted that, even if those cases were not dispositive of the taxpayers' commerce clause claims, the tax fully satisfied more recent standards for reviewing state taxes affecting interstate commerce that the Supreme Court had articulated in a series of cases beginning with *Complete Auto Transit, Inc. v. Brady*.²¹

The district court granted the state's motion to dismiss and

Wisconsin Power and Light Company.

18. The federal courts are precluded from enjoining the levy of state taxes where adequate state remedies are available. 28 U.S.C. § 1341 (1976).

19. The plaintiffs filed a fourth count in the district court alleging that, under the tax protest statute of the State of Montana, MCA § 15-1-402 (1981), the state was required to place all funds paid under protest in an escrow account to be held pending final determination by the courts. This count was dismissed by the district court and the issue subsequently became moot by legislative enactment in 1979. See MCA § 15-1-402 (1981).

20. 260 U.S. 245 (1922). See also *Hope Natural Gas Co. v. Hall*, 274 U.S. 284 (1927); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923).

21. 430 U.S. 274 (1977).

judgment was entered on August 22, 1979.²² On July 17, 1980 the Supreme Court of the State of Montana affirmed the decision of the district court.²³ The United States Supreme Court subsequently affirmed the decision of the Montana Supreme Court.²⁴

A. *The Supreme Court's Opinion*

In writing for the majority, Justice Marshall agreed with the taxpayers that the mechanical test of *Heisler* and its progeny for determining whether a tax was imposed on a local, as opposed to interstate, activity was not a valid standard under modern commerce clause theories. The Court noted that the "local activities test" evolved at a time when the commerce clause was thought to prohibit all taxes on interstate commerce.²⁵ Under modern commerce clause decisions, the court should focus on "the practical effect of a challenged tax."²⁶ Thus severance taxes are not immune from commerce clause scrutiny and the courts must apply the four-prong test enunciated in *Complete Auto*.²⁷ That test holds that a tax affecting interstate commerce will not create an unconstitutional burden on commerce 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 services provided by the state.²⁸

The plaintiffs focused their challenge on the last two prongs of that test: that the tax discriminated against interstate commerce and that it was not fairly related to the services provided by the state.

The Court had little difficulty in determining that the Montana coal severance tax did not discriminate against interstate commerce, even though 90 percent of the coal subject to the tax is shipped out-of-state. The tax applied evenly to all coal produced within the state, regardless of its ultimate destination, and thus was not discriminatory within the meaning of the commerce

22. *Commonwealth Edison Co. v. Montana*, No. 42657 (1st Judicial Dist., Mont.).

23. *Commonwealth Edison*, ___ Mont. ___, 615 P.2d at 863.

24. *Commonwealth Edison*, 101 S. Ct. at 2964.

25. That theory had been substantially eroded over the years and was laid to rest in *Complete Auto Transit Co. v. Brady*, 430 U.S. 274 (1970), *overruling Spector Motor Services v. O'Connor*, 340 U.S. 602 (1951).

26. *Commonwealth Edison*, 101 S. Ct. at 2953.

27. *Id.*

28. *Complete Auto*, 430 U.S. at 279.

clause.²⁹

The principal issue of the case on appeal concerned the application of the fourth prong of the *Complete Auto* test, whether the tax is fairly related to the services provided by the state.³⁰ As noted earlier, the crux of the taxpayers' case was that the rate of the tax was too high. It was their contention that the fourth prong of the *Complete Auto* test required courts to review taxes for excessiveness by quantitatively comparing the amount of the tax and the value of benefits provided to the taxpayer by the state.

The majority opinion flatly rejected this position, making it clear that the "fairly related" test was not an invitation to judicial review of taxes for excessiveness. The Court observed that the Montana severance tax was a general revenue measure (as distinguished from a user charge for specified state-provided services)³¹ and, as such, could not be treated as an assessment of benefits. Rather, like other general revenue measures, it must be viewed as a means of distributing the burden of the costs of government.³² Those engaged in interstate commerce, the Court declared, must pay their "just share of the state tax burden even though it increases the cost of doing business."³³ The just share of the state tax burden "includes sharing in the cost of providing police and fire protection, the benefits of a trained work force, and the advantages of a civilized society."³⁴

The Court held that the relevant inquiry under the "fairly related test" is closely connected to the nexus requirement. The pertinent inquiry is whether the tax is reasonably related to the extent of the contact with the taxing state, "since it is the activities or presence of the taxpayer in the state that may properly be made to bear a 'just share of state tax burden.'"³⁵ Since Montana's coal severance tax was assessed in proportion to the taxpayers' mining activities within the state and was measured as a percentage of the

29. *Commonwealth Edison*, 101 S. Ct. at 2954-55.

30. As presented to the Court, the issue was whether plaintiffs were entitled to a trial on their theory that the tax was not fairly related to services provided by the state.

31. *Commonwealth Edison*, 101 S. Ct. at 2956.

32. *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495, 521-22 (1937), *quoted in Commonwealth Edison*, 101 S. Ct. at 2956.

33. *Colonial Pipeline Co. v. Triagle*, 421 U.S. 100, 108 (1975); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938), *quoted in Commonwealth Edison*, 101 S. Ct. at 2957.

34. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979); *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 228 (1980), *quoted in Commonwealth Edison*, 101 S. Ct. at 2957.

35. *Commonwealth Edison*, 101 S. Ct. at 2958 (citing *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)).

value of the coal taken in Montana, it was fairly related to the services provided by the state.³⁶

In his dissent Justice Blackmun strongly disagreed with the majority's analysis of the "fairly related test." In his judgment, the majority had emasculated the fourth prong and left it utterly without meaning. He wrote that any *ad valorem* tax placed on items in interstate commerce would meet the fairly related requirement under the majority opinion.³⁷

B. *Assessing The Court's Opinion*

It is difficult to argue with Justice Blackmun's conclusion. However, it is extremely important to note the underlying rationale compelling the result in the majority opinion. The real problems faced by the Court were policy considerations concerning the institutional capacity of the court system itself in cases of this nature.

It must be kept in mind that the crux of the challenge to the tax was that the rate was unconstitutionally excessive. By that reasoning there must be some rate at which the tax would be able to pass constitutional muster. Therefore, it would presumably be the role of the judiciary to determine the appropriate rate. The taxpayers were thus asking the Court to embark on a fundamental undertaking, one which no court had ever chosen to do before. The Court's recognition that determining the proper rate or amount of a state tax is not a judicial function reflected sound institutional considerations.

If the courts were saddled with this responsibility based on an inquiry into the quantitative relationship between the tax burden and the costs and benefits involved, they would become entangled in an issue which they are institutionally ill-equipped to resolve. How high is too high? How can the courts quantify benefits which the state furnishes its taxpayers? Particularly, how can a court quantify the benefits of an organized society; the loss of aesthetic values; unpredictable damage to the environment; general social costs of increased crime, alcoholism and divorce in communities experiencing rapid resource development; the ultimate loss of a non-renewable resource; and the future costs of economic and social dislocation which result when a resource is mined out? How can a court take into account the fact that a tax may fall on non-residents because of monopolistic or oligopolistic market power of

36. Commonwealth Edison, 101 S. Ct. at 2958.

37. *Id.* at 2969.

the taxpayer, or because of the regulatory schemes in consuming states? How is a court to weigh the economic considerations that must be reviewed to determine the extent of exportation of any tax? Indeed how could the court differentiate between the coal severance tax and a sales tax in states such as Nevada or Florida that are, to a large degree, imposed on out-of-state tourists?

The answer is that the courts are institutionally incapable of making such determinations. Given the inherent limitations of the judicial system's own resources, a court is simply incapable of putting a dollar value on ecological damage, social disruption, and the loss of an economic base.

Moreover, how would the court system arm itself against the continuous challenges that would be raised if it began such an undertaking? If a tax of 30 percent is unconstitutional for one tax period, what about the subsequent tax periods when the costs imposed on, or the benefits provided by, the state may have increased? If the judicial standard is whether the tax is fairly related to such costs and benefits, why should a rate that was held to be too high in one year be too high for a future year when costs or benefits may have increased due to unanticipated environmental damage or higher governmental expenditures? To admit such an undertaking would require the tax to be subjected to an annual judicial review, based on a detailed inquiry into all of these questions.

The inability of the courts to embark on such an endeavor is clearly recognized in the Court's opinion in this case. As noted in the majority opinion:

[T]he appellants labor under a misconception about a court's role in cases such as this. The simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution.³⁸

This point is particularly poignant in light of Justice White's concurring opinion. Justice White's decision to join the majority is bottomed on the very institutional considerations discussed here.³⁹ And, in his view, the legislative branch of government has the power to protect interstate commerce from intolerable or even undesirable burdens if it chooses to do so.

C. *Implications of the Court's Opinion*

There are several factors with significance for the future in the

38. *Id.* at 2959.

39. *Id.* at 2964.

Court's decision. First, the opinion unquestionably reaffirms the role of the states to set their own tax rates without judicial interference. Because of divergent economic bases, each state must make its own taxing and spending decisions based on the availability of resources and local needs. These decisions are necessarily tempered with a view toward the historical experiences of the state and region. Those decisions must be political, rather than judicial. As the majority opinion states:

Under our federal system, the determination needs to be made by state legislatures in the first instance and if necessary by Congress if a particular state tax is thought to be contrary to federal interests.⁴⁰

Secondly, state taxes on interstate commerce are not to be compared quantitatively to the value of the services provided the taxpayer by the state. Rather, those taxes are to be reviewed as any other general revenue raising device and not considered as an assessment of benefits provided by the state. All taxpayers have the obligation of providing their fair share of the costs of government. Moreover, it is clear in the Court's opinion that the manner in which tax revenue is put to use by the state does not affect its constitutionality. Justice Marshall noted in a specific reference to the 50 percent trust fund:

Nothing in the Constitution prohibits the people of Montana from choosing to allocate a portion of current tax revenues for use by future generations.⁴¹

Finally, and perhaps most significantly, the Court's opinion provides considerable comfort to those states, particularly in the West, that are concerned about the pace and nature of resource development within their borders. As the court noted:

[A]ppellants assume that the commerce clause gives residents of one state the right of access at "reasonable" prices to resources located in another state that is richly endowed with such resources, without regard to whether and on what terms residents of the resource rich state have access to the resources. We are not convinced that the commerce clause, of its own force, gives the residents of one state the right to control and decide the terms of resource development and depletion in a sister state.⁴²

40. *Id.* at 2959.

41. *Id.* at 2956 n.11.

42. *Id.* at 2955.

III. THE SUPREMACY CLAUSE CLAIMS

In their supremacy clause claims the taxpayers alleged that the tax, because of its rate, discouraged the use of low sulfur coal and therefore frustrated certain federal energy policies established by Congress in such legislation as the Power Plant and Industrial Fuel Use Act of 1978⁴³ and the Clean Air Act as amended in 1970.⁴⁴ The taxpayers claimed in addition that the tax violated the compromise between the states and the federal government which was embodied in the Mineral Lands Leasing Act of 1920.⁴⁵ The state countered that, as a matter of law, a court could not conclude from any of the federal statutes cited by the taxpayers that there was any congressional purpose or policy to limit the amount of coal severance taxes. The state advanced essentially the same argument with respect to the claim predicated on the Mineral Lands Leasing Act, relying heavily on a clause in the Act specifically disavowing any intent to limit the states' power to tax natural resources extracted within their borders.⁴⁶

While agreeing with the taxpayers that many federal enactments did indeed encourage the use of coal, the Court refused to accept the taxpayers' "implicit suggestion that these general statements demonstrate a congressional intent to preempt all state legislation that may have an adverse impact on the use of coal."⁴⁷ Relying on prior decisions where the Court has declared that broad implications or general policies embodied in federal statutes should not be construed as a congressional decision to preempt state law,⁴⁸ the Court in *Commonwealth Edison* held that "[i]n cases such as this, it is necessary to look beyond general expressions of 'national policy' to specific federal statutes with which the state law is claimed to conflict."⁴⁹ As for the contention that Montana's coal severance tax conflicted with the federal Mineral Lands Leasing Act, the Court relied on the Act's proviso disclaiming any intent to limit the states' rights "to levy and collect taxes upon . . . outputs of mines."⁵⁰ It also observed that nothing in the legislative history of the Act supported the taxpayers' version of the alleged compromise which the Act supposedly embodied.

43. 42 U.S.C. §§ 8301-8483 (Supp. 1981).

44. 42 U.S.C. §§ 1857-1860 (1976).

45. 30 U.S.C. §§ 181-287 (1976).

46. 30 U.S.C. § 189 (1976).

47. *Commonwealth Edison*, 101 S. Ct. at 2962.

48. See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978).

49. *Commonwealth Edison*, 101 S. Ct. at 2962.

50. 30 U.S.C. § 189 (1976).

Throughout the litigation over the constitutionality of Montana's coal severance tax, there was never much doubt that the preemption claims were secondary to those predicated on the commerce clause. As Justice Blackmun, who dissented from the Court's disposition of the commerce clause issue, succinctly put it: "I agree with the Court that appellants' Supremacy Clause claims are without merit."⁵¹

IV. THE AFTERMATH OF COMMONWEALTH EDISON⁵²

A. *The Role of the Court in Adjudicating State Tax Controversies Under the Commerce Clause*

The Court's opinion in *Commonwealth Edison* makes it clear that a typical state severance tax will survive commerce clause scrutiny regardless of the extent to which the resource (or the tax) is exported and regardless of its rate or amount. As indicated above, the central meaning of the Court's opinion has less to do with doctrinal considerations than with institutional considerations that seem to have guided the Court in delineating the scope of state tax power under the commerce clause. The Court has made it plain, especially in recent years, that its role in adjudicating state tax controversies is a limited one.⁵³ The Court's adoption of a narrow role in this area is attributable to two critical institutional considerations. First, the Court is institutionally incapable of prescribing broad solutions to the vexing problems of state taxation of interstate commerce. As Justice Frankfurter stated:

At best, this Court can only act negatively; it can determine whether a specific state tax is imposed in violation of the Commerce Clause. Such decisions must necessarily depend on the application of rough and ready legal concepts. We cannot make a detailed inquiry into the incidence of diverse economic burdens in order to determine the extent to which such burdens conflict with the necessities of national economic life. Neither can we devise appropriate standards for dividing up national revenue on the ba-

51. *Commonwealth Edison*, 101 S. Ct. at 2972 n.21.

52. The ensuing discussion draws from testimony of Walter Hellerstein, *Fiscal Disparities: The Commerce Clause and State Severance Taxes, Before the Subcommittee on Intergovernmental Relations of the United States Senate Committee on Governmental Affairs*, 97th Cong., 1st Sess. (July 15, 1981).

53. See, e.g., *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 209 (1980); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978); *Washington Revenue Dep't v. Stevedoring Ass'n*, 435 U.S. 734 (1978); *National Geographic Society v. Board of Equalization*, 430 U.S. 551 (1977); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976).

sis of more or less abstract principles of constitutional law, which cannot be responsive to the subtleties of the interrelated economies of Nation and State.⁵⁴

As the Special Subcommittee on State Taxation of Interstate Commerce of the House Judiciary Committee observed over 15 years ago: "The inadequacy of the judicial process to deal with the problems of multistate taxation has long been recognized by members of the Supreme Court. In recent years, jurists with such varied philosophies as Justices Jackson, Rutledge, Black, Frankfurter, Douglas, and Clark, have all subscribed to this view"⁵⁵

Second, the Court is well aware that in our constitutional scheme its decisions under the commerce clause are tentative accommodations of state and national interests that are ultimately subject to revision by Congress.⁵⁶ The Court has consistently reaffirmed its view of the broad power of Congress to draw whatever lines it believes are appropriate with respect to matters affecting interstate commerce.⁵⁷ Indeed, in many of its recent decisions refusing to invalidate state tax legislation under the commerce clause, the Court has invited Congress to act if it is unhappy with the results flowing from the Court's hands-off attitude in this domain. In *Moorman Manufacturing Co. v. Bair*,⁵⁸ the Court, in declining to prescribe a uniform apportionment formula governing the division of income from interstate business, stated:

While the freedom of the States to formulate independent policy in this area may have to yield to an overriding national interest in uniformity, the content of any uniform rules to which they must subscribe should be determined only after due consideration is given to the interests of all affected states. It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income. It is to that body, and not this Court, that the Constitution has committed such policy decisions.⁵⁹

54. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 476 (1959) (Frankfurter, J., dissenting).

55. SPECIAL SUBCOMM. ON STATE TAXATION OF INTERSTATE COMMERCE OF THE HOUSE COMM. ON THE JUDICIARY, STATE TAXATION OF INTERSTATE COMMERCE, H.R. REP. NO. 1480, 88th Cong., 2d Sess. 13 (1964).

56. See Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219 (1957).

57. See, e.g., *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 155-56 (1942); *South Carolina Highway Dep't v. Barnwell Brothers, Inc.*, 303 U.S. 177, 189-90 (1938).

58. 437 U.S. 267 (1978).

59. *Id.* at 280.

Likewise in *Mobil Oil Corp. v. Commissioner of Taxes*,⁶⁰ in which the Court rejected a constitutional challenge to Vermont's taxation of an apportioned share of Mobil's foreign source dividends, the Court observed: "Congress in the future may see fit to enact legislation requiring a uniform method for state taxation of foreign dividends. To date, however, it has not done so."⁶¹

As noted above, the Court's opinion in *Commonwealth Edison* relied heavily on these institutional considerations in refusing to strike down Montana's tax. Once this point is recognized, however, it must also be conceded that the Court's decisions in cases like *Commonwealth Edison* do not by any means reflect a judgment that the taxing schemes the Court has sustained comport with its view of optimum or even sound national policy. Rather they reflect a determination that the state, in the exercise of its essential taxing power, has not transcended any of the specific limitations that the commerce clause imposes on state taxation, and that the Court is institutionally incapable of going beyond such a judgment in adjudicating the constitutionality of such measures. Moreover, in adopting such a posture the Court knows that there is another branch of the federal government, the Congress, that is institutionally equipped and constitutionally empowered to forge more systematic and restrictive limitations on the power of the state to tax interstate commerce.

B. *The Role of Congress in Limiting State Tax Power Under the Commerce Clause*

There are many complex, controversial, and sensitive issues surrounding the question whether Congress should limit state tax power in general and state severance taxes in particular. As already suggested,⁶² however, the existence of congressional power under the commerce clause to legislate in this area is not one of them. The Supreme Court made this clear in *Commonwealth Edison* by declaring that "the appropriate level of state taxes must be resolved through the political process . . . by state legislature in the first instance and, if necessary, by Congress, when particular state taxes are thought to be contrary to federal interests."⁶³ The truly difficult questions are whether Congress ought to intervene in this domain, and if so, in what form.

We make no pretense here of evaluating in any comprehensive

60. 445 U.S. 425 (1980).

61. *Id.* at 449.

62. See *supra* text accompanying notes 56-61.

63. *Commonwealth Edison*, 101 S. Ct. at 2959.

manner the merits of these issues. There are already volumes of congressional testimony devoted to them⁶⁴ and Congress has only begun to address the issues involved. We would, however, like to suggest some general considerations that ought to inform a congressional determination whether and how to make law in this area. We limit our discussion here to state severance taxes, although congressional interest in limiting state tax power is not restricted to that domain.⁶⁵

First, just as the Court's decision sustaining Montana's severance tax should not be taken as an endorsement of the tax as a matter of sound national policy, neither should the existence of congressional power to limit such taxes be taken as a mandate for Congress to act in this area. As Chief Justice Marshall recognized, the states' "power of taxation is indispensable to their existence,"⁶⁶ and any efforts to limit the power should be treated as a matter of the greatest delicacy.

Second, if Congress does decide to legislate with respect to state severance taxes, it should do so in an evenhanded manner. If consumers are in fact bearing the burden of state severance taxes, an issue that is hardly free from doubt, and if Congress is concerned about this burden, then Congress should forge a solution that is responsive to the general problem. Although the Constitution may not limit Congress' power to single out particular resources such as coal or particular geographic regions of the country as the focus of a rate limitation,⁶⁷ if Congress is concerned about the burden of energy taxes on energy consumers it would be hard, as a matter of interstate equity, to ignore severance taxes on oil and gas which may impose even greater cost burdens on the consumers of such energy. Moreover, if Congress is concerned generally about state tax exportation, then perhaps Congress should focus on a wide variety of levels, such as Nevada's taxes on

64. See *Coal Severance Tax: Hearing on S. 2695 Before the Senate Comm. on Energy and Natural Resources*, 96th Cong., 2d Sess. (1980); *Coal Severance Taxes: Hearings on H.R. 6625, H.R. 6654, and H.R. 7163 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. (1980).

65. See Hellerstein, *State Income Taxation of Multijurisdictional Corporations: Reflections on Mobil, Exxon, and H.R. 5076*, 79 MICH. L. REV. 113, 154-71 (1980). The discussion that follows draws from Hellerstein, *Legal Constraints on State Taxation of Natural Resources in the American Federal System*, to be published in C. McLURE & P. MEISZOWSKI (eds.), *FISCAL FEDERALISM AND THE TAXATION OF NATURAL RESOURCES* (1982).

66. *Gibbons v. Odgen*, 22 U.S. (9 Wheat.) 1, 199 (1924).

67. See, e.g., *Hodel v. Indiana*, 101 S. Ct. 2376, 2386-87 (1981). Most of the legislation introduced into Congress thus far does in fact focus solely on coal. See *supra* note 64 and *infra* note 73.

gambling⁶⁸ or New York's tax on stock transfers,⁶⁹ before settling on an appropriate legislative solution to the problem.

Finally, if Congress wants to limit the power of the states to take advantage of their resource position through taxation of natural resources by imposing a restraint on severance taxes, it is not at all clear that Congress will have accomplished its purpose. As anyone with more than a passing familiarity with state taxation well knows, state tax structures have diverse and protean characteristics and may therefore be resistant to congressional efforts at controlling them. Thus several states⁷⁰ tax natural resources largely through the real property tax, a number that would certainly increase if Congress were to limit state severance taxes. Other states tax natural resources through general business and occupation taxes,⁷¹ which provide the states with another alternative for escaping the impact of a severance tax limitation. Indeed, even a corporate income tax may be made to serve as a special levy on the natural resource industry.⁷² In short, if Congress is serious about restraining the power of the states to tax natural resources, it has a much more thorny problem on its hands than merely determining the rate at which the state should be allowed to impose severance taxes, which is the principal limitation embodied in proposed federal restrictions on state severance taxes at this time.⁷³

68. NEV. REV. STAT. §§ 463.370-406 (1979).

69. N.Y. TAX LAW §§ 270-81a (McKinney 1966, Supp. 1980-81).

70. Pennsylvania and Illinois, for example. See T. STINSON, STATE TAXATION OF MINERAL DEPOSITS AND PRODUCTION 3 (U.S. Dept. of Agric.-U.S. Env. Prot. Agency 1977).

71. West Virginia, for example. See Thompson, *State and Local Taxation of the Bituminous Coal Industry*, 76 W. VA. L. REV. 297, 305 (1973).

72. See ALASKA STAT. §§ 43.21.010-0.120 (Supp. 1980).

73. See, e.g., S. 178, 97th Cong., 1st Sess., 127 CONG. REC. S422 (daily ed. Jan. 21, 1981); S. 2695, 96th Cong., 2d Sess., 126 CONG. REC. S5371 (daily ed. May 14, 1980); H.R. 7163, 96th Cong., 2d Sess., 126 CONG. REC. H2987 (daily ed. Apr. 14, 1980); H.R. 6654, 96th Cong., 2d Sess., 126 CONG. REC. H1402 (daily ed. Feb. 27, 1980); H.R. 6625, 96th Cong., 2d Sess., 126 CONG. REC. H1326 (daily ed. Feb. 26, 1980).

