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Balkanization of Interstate Energy Markets: New Variations of Sovereign Self-Interest

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The current “energy crisis” has prompted many states to invoke measures which restrict interstate consumption of their energy resources in order to preserve or profit from such materials. Other states, feeling the pinch between energy needs and environmental regulations, have also sought to restrict interstate consumption in order to promote in-state use. Federal legislation has been enacted to achieve the latter objective. This article examines the validity of these attempts in light of the commerce clause and concludes that, by resort to the policies embodied in that constitutional provision and to a realistic approach regarding the effects of these mechanisms, the state actions will fall notwithstanding their motivation.

INTRODUCTION

GREATER COMPETITION among consumers—be they governmental, industrial, commercial, or residential—for increasingly scarce energy resources, together with environmental laws designed to promote clean utilization of energy, have given rise in the United States to attempts at economic balkanization—an outbreak of sophisticated protectionist legislation in, and on behalf of, states with significant energy resources. Such legislation generally is aimed at preserving a state’s energy resources for its citizens, or at profiting from a state’s natural abundance of energy supplies.

At the state level, these objectives have been sought through various taxation schemes, among other devices. Not surpris-
ingly, these actions have been challenged as violations of the commerce clause.\(^5\) Currently, two controversies have arisen regarding the validity of a state tax on an energy resource—a resource that will ultimately be placed in interstate commerce. In one, several states have attacked Louisiana’s First Use Tax on Natural Gas\(^6\) as unconstitutional.\(^7\) In the other, Montana’s Coal Severance Tax\(^8\) is being constitutionally challenged by a number of utilities and coal companies.\(^9\) Notably, both these cases raise interesting issues regarding the scope of commerce clause protections as well as the validity of judicially developed guidelines in light of the current political and economic realities in the area of energy resources.

Ohio has also sought to protect its natural energy resources. However, Ohio’s goals are different from most other states. Rather than seeking to protect its resources against out-of-state use, Ohio—because its coal has high sulfur content which renders the coal’s use environmentally unsound without expensive anti-pollution facilities\(^10\)—has sought to encourage in-state users to burn Ohio coal exclusively.\(^11\) To further this goal\(^12\) state legislation was enacted.\(^13\) This was successfully challenged on constitutional grounds.\(^14\) Yet, Ohio’s problems remain noteworthy not only because of its contrast with other forms of energy balkanization, but also because of the existence of federal legislation apparently designed to assist that state’s objectives.\(^15\)

This article first will discuss the validity of attempts to protect state energy resources, particularly in light of the commerce clause. After examining the historical context provided by decisions which have confronted previous protectionist attempts and which have promoted the commerce clause as a great obstacle to the validity of such attempts,\(^16\) this article focuses on the recent

\(^5\) U.S. CONST., art. 1, § 8, cl. 3.
\(^7\) Maryland v. Louisiana, Orig. Action No. 83 (U.S. S. Ct., filed March 29, 1979).
\(^10\) See note 171 infra.
\(^11\) See notes 171-92 infra and accompanying text.
\(^12\) See notes 171-74 infra and accompanying text.
\(^14\) Mapco., Inc. v. Grunder, 12 ENVIR. REP. CASE (BNA) 2025 (N.D. Ohio 1979).
\(^16\) See notes 25-65 infra and accompanying text. But see Marston & Moring, Federal Restraints on Interstate Natural Gas Supply and Market Expansion, 54 N. D. L. REV. 374
controversies in Louisiana\textsuperscript{17} and Montana.\textsuperscript{18} This discussion demonstrates that states may be able to enact balkanizing measures if the scope of the commerce clause may be avoided.\textsuperscript{19} Such an approach may be of limited utility and may be discarded when economic realities and case law are considered.\textsuperscript{20}

The focus then shifts to Ohio and consideration is given to the question of whether a state may erect barriers for the purpose of promoting exclusive in-state use of a state's resources.\textsuperscript{21} After concluding that the commerce clause would make no distinction regarding motivation,\textsuperscript{22} the article examines the validity of an attempt by Congress to accomplish similar goals.\textsuperscript{23} Again referring to economic and political realities, the analysis concludes that this congressional attempt may indeed be questioned.\textsuperscript{24}

I. HISTORICAL CONTEXT

The commerce clause has figured prominently in the past as a factor limiting the attempts by states to hoard or take special advantage of their native energy resources. A brief review of some past legal confrontations over energy supplies will demonstrate how the courts have applied the commerce clause and other legal principles to the problem and may illustrate some potential resolutions to current disputes.

Early in the twentieth century Oklahoma sought to hoard its supplies of natural gas by statutorily prohibiting the transportation of gas produced in Oklahoma to points outside the state.\textsuperscript{25} This unsophisticated power play was struck down by the Supreme Court in \textit{West v. Kansas Natural Gas Co.}\textsuperscript{26} as incompatible with the commerce clause. The Court noted that if the Oklahoma statute were to be upheld as a conservation measure enacted to promote state welfare, then "embargo may be retaliated by embargo; and commerce will be halted at State lines."\textsuperscript{27} The Court found

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\textsuperscript{17} See notes 66–109 infra and accompanying text.
\textsuperscript{18} See notes 110–51 infra and accompanying text.
\textsuperscript{19} See notes 151–70 infra.
\textsuperscript{20} See id.
\textsuperscript{21} See notes 171–92 infra and accompanying text.
\textsuperscript{22} See notes 181–92 infra and accompanying text.
\textsuperscript{23} See notes 193–235 infra and accompanying text.
\textsuperscript{24} See notes 226–35 infra and accompanying text.
\textsuperscript{25} See West v. Kansas Natural Gas Co., 221 U.S. 229, 239 n.1 (1911).
\textsuperscript{26} 221 U.S. 229 (1911).
\textsuperscript{27} Id. at 255.
that such a result, however, was contrary to the goal of the commerce clause, which was designed so that where "each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it."\textsuperscript{28}

A similar obstruction of interstate commerce was repudiated by the Supreme Court in \textit{Pennsylvania v. West Virginia}.\textsuperscript{29} In that case, Ohio and Pennsylvania brought original actions challenging a West Virginia statutory scheme\textsuperscript{30} that assured all West Virginia consumers that their natural gas requirements would be met before any of the state's natural gas could be shipped elsewhere. The Court had little trouble rejecting West Virginia's argument that the statute was an acceptable means of assuring that a quasi-public business (\textit{i.e.,} a utility) would furnish adequate service within reasonable territorial limits by noting that the business at issue went beyond the state's borders.\textsuperscript{31} Relying on \textit{West v. Kansas Natural Gas Co.},\textsuperscript{32} the Court also dismissed the argument that West Virginia had too little natural gas to satisfy its own needs as well as the needs of consumers in neighboring states.\textsuperscript{33}

Not surprisingly, states have also resorted to taxation as a way of profiting from, if not indirectly restricting, interstate commerce in energy supplies. In \textit{Michigan-Wisconsin Pipeline Co. v. Calvert},\textsuperscript{34} two natural gas companies challenged a Texas tax on "gathering gas"—\textit{i.e.,} a tax based on the amount of gas "taken" into the companies' transmission lines from the pipeline of the gas producer.\textsuperscript{35} The Court concluded that the tax was not on the local, physical collection of gas, but on the introduction of gas into interstate commerce.\textsuperscript{36} In addition, the Court reasoned that if the Texas tax were upheld, multiple tax burdens on the same gas

\textsuperscript{28} Id.
\textsuperscript{29} 262 U.S. 553 (1923).
\textsuperscript{30} 1919 W. VA. Acts, ch. 71 (1919) quoted in, 262 U.S. at 582 n.1.
\textsuperscript{31} 262 U.S. at 597.
\textsuperscript{32} 221 U.S. 229, 251 (1919). \textit{See} text accompanying notes 26–28 \textit{supra}.
\textsuperscript{33} Id. at 598.
\textsuperscript{34} 347 U.S. 157 (1954).
\textsuperscript{35} 1951 TEx. GEN. LAWS, ch. 402, § XXIII. This statute provided:
In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term 'gathering gas' means the first taking or the first retaining of possession of such gas for other processing or transmission . . . after such gas has passed through the outlet of such plant.
\textit{Id.} See 347 U.S. at 161.
\textsuperscript{36} 347 U.S. at 169–70.
might occur as other states imposed similar taxes. According to the Court, this tax interfered with interstate commerce.

The commerce clause has more recently been found to pose a formidable limitation on the power of states to exercise control over interstate use of in-state energy resources. In *Federal Power Commission v. Oklahoma Corporation Commission*, the Federal Power Commission sued to enjoin the Oklahoma Corporation Commission (OCC) from enforcing orders which prohibited natural gas sales below stated minimum prices. The OCC defended its orders arguing that "if the Orders accomplish their intended purpose, more gas will be available for consumption to all consumers including interstate consumers." The district court, however, held that the orders burdened interstate commerce "by indirectly fixing prices to interstate consumers." The Court further found that the orders were a burden on interstate commerce because they conflicted with rates fixed by the Federal Power Commission pursuant to its authority under the Natural Gas Act, and threatened "to withdraw a large volume of gas from an established interstate current" in violation of the commerce clause.

State efforts to affect the flow of energy resources through interstate commerce by protecting in-state reserves have also been invalidated on other than constitutional grounds. For example, in *Arizona Public Service Co. v. Snead*, the Supreme Court avoided constitutional arguments that attacked a New Mexico statute which taxed the generation of electricity by a utility, but allowed that tax to be credited in full against the utility's separate gross

38. Id.
40. Id. at 525–27.
41. Id. at 527.
42. Id. at 533.
44. 362 F. Supp. at 535.
45. 441 U.S. 141 (1979).
46. Several states which participated as *amicus curiae* on the side of the plaintiff-utilities had argued, for example, that a New Mexico Act, see note 41 infra, violated the commerce clause by subjecting exported electrical energy to double taxation, and by burdening interstate commerce. They further contended that the Act was actually an extraterritorial tax and therefore violated the due process clause. *Amicus Brief for Appellant, Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979).
receipts tax liability to New Mexico.\textsuperscript{47} To the extent that a public utility did not sell electricity generated in New Mexico to retail consumers within New Mexico, no gross receipts tax existed against which the tax imposed by the Act could be offset. The Court found the New Mexico scheme to be discriminatory state taxation on generation or transmission of electricity, and held it invalid under section 2121(a) of the Tax Reform Act of 1976.\textsuperscript{48} Addressing the only constitutional issue in its opinion, the Court relied on \textit{Wickard v. Filburn}\textsuperscript{49} and \textit{Katzenbach v. McClung}\textsuperscript{50} to dismiss New Mexico's contention that if section 2121(a) invalidated the Act, then that section exceeded congressional authority under the commerce clause.\textsuperscript{51}

\textsuperscript{47} The act in question in \textit{Arizona} imposed a tax of .4 mills on each kilowatt hour of electricity generated by a public utility, N. M. Stat. Ann. § 7-18-3 (1978), but allowed a full credit of the tax against a public utility's separate gross receipts tax liability to New Mexico. \textit{Id.} at § 7-9-80. To the extent that a public utility did not sell electricity generated in New Mexico to retail consumers within New Mexico, no gross receipts tax existed against which the tax imposed by the Act could be offset. 441 U.S. at 145.

\textsuperscript{48} \textit{Id.} at 149-50. See 15 U.S.C. § 391 (1976), which provides:

No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section, a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

\textsuperscript{49} 317 U.S. 111 (1942).

\textsuperscript{50} 379 U.S. 294 (1964).

\textsuperscript{51} 441 U.S. at 150. This dismissal was premised on the existence of the plenary commerce power given Congress under the commerce clause. See notes 193-235 infra and accompanying text.

Challenges to gross receipts taxes upon electric utilities are pending in Pennsylvania and West Virginia, both in early phases of litigation. The taxes in these cases are similar to the one struck down in \textit{Arizona}; thus both face strong challenges on constitutional grounds as well as with regard to consistency with § 2121(a). In \textit{Baltimore Gas & Elec. Co. v. Lopus}, Case No. 643 (Pa. Commw. Ct., filed March 31, 1978), twelve electric utilities have brought an action to have a Pennsylvania tax, Pa. Stat. Ann. tit. 72, § 8101(b)(2) (Purdon Supp. 1978), declared unconstitutional to the extent that it imposes a tax on gross receipts of electric utilities from sales of electricity generated within Pennsylvania to out-of-state consumers. The utilities rely in part on the commerce clause and on § 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. § 391, (repealed 1976). The case may never be decided because a bill to repeal the tax is pending in Pennsylvania's legislature. H.B. 852 (1979), subsequently enacted as Act 107 (1979), repealed the tax prospectively, effective as of January 1, 1980. S.B. 1322 (1980) would accomplish retroactive repeal by changing the effective date of Act 107 to January 1, 1977.

In \textit{Duquesne Light Co. v. State Tax Dep't}, Civ. Action No. CA-78 1789 (Kanawha Cir. Ct., filed May 29, 1978), seven electric utilities are contesting West Virginia's tax on generation of electricity. 4 W. Va. Code §§ 11-13-2d, 11-13-2m (Supp. 1979). Effective April 1, 1978, West Virginia reduced its tax on retail sales of electricity from 5.72 percent (for domestic and commercial purposes) and 4.29 percent (for all other purposes) to four percent,
In summary, the commerce clause has posed a formidable barrier against attempts by states to restrict interstate use of energy resources. These attempts have been invalidated either because they were inconsistent with the policies of the clause or because they were inconsistent with statutes designed to promote these policies.

Yet, states seeking to preserve or profit from their resources may still have options open to them to pursue such goals. First, a state might be able to design its tax to impose a levy on a purely local activity. If this were done, states might be within their constitutional authority, independent of any commerce clause limitations. Second, a question arises as to whether the need to protect interstate commerce—and enhance the national economy—might in some circumstances be outweighed by legitimate local interests (which excludes any local interest aimed at deriving pecuniary gain by direct obstruction of interstate commerce). Courts have traditionally balanced the legitimate local ends served by state regulations against the burden such activities impose on interstate commerce. In *Pike v. Bruce Church, Inc.*, the Supreme Court summarized the law in this area:

Where the statute regulates even-handedly to effectuate a legiti-

and imposed a four percent tax on generation of electricity which is not subject to the retail sales tax. *Id.*

52. See notes 25–44 *supra* and accompanying text. Specifically, the framers of the Constitution envisioned that no state would inhibit the free trade encouraged by the clause. *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953, 956 n.8 (1962).

53. See notes 45–51 *supra* and accompanying text.

54. See notes 59–192 *infra* and accompanying text.

55. See Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945). One commentator has noted that such balancing is based on the idea that congressional will controls:

If the Court sustains the state action as not an unreasonable burden on interstate commerce, and Congress concurs, no subsequent action is required. If Congress concludes that state action is undesirable, it retains the power to terminate its dormant state, and assert its will pursuant to its Commerce Clause power. Similarly, if the Court invalidates the state regulation, Congress can consequently resurrect the state law by expressing its consent to such state action.

J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 252 (1978). Such balancing also necessarily involves a determination of whether the measure discriminates against interstate (or out-of-state) commerce. If the measure is not discriminatory, then its legitimacy is enhanced, for if it were not warranted, state citizens would have acted to repeal or modify the provision. *Id.* at 254. *But see Developments in the Law—Federal Limitations on State Taxation of Interstate Business, supra* note 52, at 957, which notes that since the relation of any one state's action to popular response is so attenuated, the political accountability to state voters should be deemphasized as a guiding principle in determining the validity of state activities with regard to interstate commerce.

mate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to legitimate local putative benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court had candidly undertaken a balancing approach in resolving these issues.

In non-constitutional contexts, the policies seeking to alleviate energy crises have been deemed to be important and thus have prompted different treatment for energy related matters. Consequently, it may be argued that such policies at the state level serve legitimate local needs and are so important that they offset incidental burdens on interstate commerce. Although the case law in this area seems settled, troubling questions such as these remain.

II. RECENT BALKANIZATION ATTEMPTS: LOOKING TO REALITIES?

The commerce clause is a major obstacle to state balkanization of energy resources. Recent cases, however, highlight different emphases in dealing with the commerce clause. Will courts look to economic realities in defining what burdens interstate commerce?

57. Id. at 142 (citations omitted, emphasis added).

58. For example, several of the first cases decided by the Temporary Emergency Court of Appeals (which was established pursuant to the Economic Stabilization Act of 1970 § 211(b)(l), P.L. No. 91-379, 84 Stat. 796 (1970)) under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-60h (1976), recognized that the national crisis of energy shortages precipitated arguably different treatment of the matters before it. See, e.g., Nader v. Sawhill, 514 F.2d 1064 (Temp. Emer. Ct. App. 1975) (amended petroleum price regulations which increased sales prices were permitted to be implemented without thirty-day notice or good cause explanation as required by section 4(e) of the Administrative Procedure Act, 5 U.S.C. § 553(d) (1976)); California v. Simon, 504 F.2d 340 (Temp. Emer. Ct. App. 1975) (an amendment to petroleum sale price regulations, which deleted an exemption for state government proprietary sales and which was first considered by the Cost of Living Council and delegated to the Federal Energy Office as part of the implementation of the Emergency Petroleum Allocation Act of 1973, was permitted to go in effect without complying to the procedures required by the Administrative Procedure Act, 5 U.S.C. § 553(d) (1976)); Gulf Oil v. Simon, 502 F.2d 1154 (Temp. Emer. Ct. App. 1974) (NEPA need not be followed in implementing regulations required by the Emergency Petroleum Allocation Act of 1973, notwithstanding the fact that there was no express statutory conflict as required by case law); Mandel v. Simon, 493 F.2d 1239 (Temp. Emer. Ct. App. 1974) (an order based on admittedly erroneous information was upheld because the order was not "arbitrary or capricious," notwithstanding the fact that the court was statutorily required to review the order pursuant to the "substantial evidence" test).
The federal courts, at least, do consider such realities in applying the commerce clause. Recently, in *Complete Auto Transit, Inc. v. Brady*, the Supreme Court eschewed formalistic approaches which sought to determine whether the state action directly or indirectly burdened interstate commerce. Emphasizing the real effects of state actions, the Court developed a four-part standard by which it suggested that state tax provisions be judged in light of the commerce clause. Under this standard, courts should sustain a tax under the commerce clause 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." While this formulation was predicated on the idea that "the purpose of the commerce clause [was not] to relieve those engaged in interstate commerce from their just share of state tax burden . . . ," it may work in favor or against the state. Although a state may now directly tax an activity in interstate commerce, it may not tax an activity which is not in interstate commerce if these tests are not satisfied.

This four-part standard is now discussed in the context of recent challenges to balkanization attempts in the pending cases of *Maryland v. Louisiana* and *Commonwealth Edison Co. v. Montana*.

A. *Maryland v. Louisiana*

In *Maryland v. Louisiana*, eight states are seeking to invoke...
the original jurisdiction of the Supreme Court over controversies between states\textsuperscript{68} in order to obtain a declaratory judgment that Louisiana's First Use Tax on Natural Gas ("First Use Tax")\textsuperscript{69} violates several constitutional and statutory provisions.

The First Use Tax is a tax of seven cents per thousand cubic feet (MCF) on any use of natural gas within Louisiana upon which no severance or production tax has been paid or levied by any state or territory, or upon which no import tax or tariff is assessed by the United States.\textsuperscript{70} The term "use" is broadly defined to include consumption and any processing or transportation in or through Louisiana.\textsuperscript{71} The ostensible purpose of the First Use Tax is to conserve various state natural resources, especially "the state's waterbottoms, barrier reefs, and sensitive shorelands" through which natural gas from the Outer Continental Shelf (OCS) is introduced into Louisiana for distribution.\textsuperscript{72} It has been estimated that based on the volume of OCS gas entering Louisiana in interstate commerce in 1977, the annual burden of the First Use Tax on interstate consumers will be $225 million.\textsuperscript{73}

Because Louisiana imposes a severance tax on intrastate production of natural gas,\textsuperscript{74} the First Use Tax by its terms applies solely to natural gas produced outside Louisiana.\textsuperscript{75} Moreover, since Louisiana grants a severance tax credit\textsuperscript{76} from First Use Tax accrued, Louisiana producers have a dollar-for-dollar credit of their First Use Tax liability against their severance tax liability.\textsuperscript{77}

Among other issues,\textsuperscript{78} the plaintiffs raise a potent commerce

\textsuperscript{68} Motion for Leave to File Complaint and Complaint, Maryland v. Louisiana, \textit{Id}. U.S. CONST. art. III, \S 2, cl. 2; 28 U.S.C. \S 1251(a)(1) (1976).

\textsuperscript{69} \textit{Id}. \S 47:1301(7) (West Supp. 1980).

\textsuperscript{70} \textit{Id}. \S 47:1303A.

\textsuperscript{71} \textit{Id}. \S 47:1303(8).

\textsuperscript{72} \textit{Id}. \S 47:1301C.

\textsuperscript{73} Maryland Complaint, Maryland v. Louisiana, Orig. Action No. 83 (U.S. S.Ct. filed March 29, 1979), ¶ XIV, at p. 12.

\textsuperscript{74} \textit{Id}. \S 47:631-46 (West 1970), which imposes a tax of seven cents per MCF.

\textsuperscript{75} See text accompanying note 70 supra.

\textsuperscript{76} \textit{Id}. \S 47:647 (West Supp. 1980).

\textsuperscript{77} \textit{Id}.

\textsuperscript{78} Seemingly, the plaintiffs face a substantial obstacle regarding their standing to bring this original action. In Arizona v. New Mexico, 425 U.S. 794 (1976), the Court declined to accept an original action brought by Arizona to challenge the New Mexico statute which was subsequently successfully challenged in Arizona Pub. Serv. Co. v. Snead, 441 U.S. 141 (1979). 425 U.S. at 797-98. For a discussion of Snead, see notes 45-51 supra and accompanying text. The Court rejected the states' arguments that they had standing by virtue of proprietary interests or as \textit{parens patriae} for their citizens, 425 U.S. at 796, and noted that original jurisdiction "should only be invoked sparingly," giving consideration to
clause argument. Addressing the four-part standard of *Complete Auto Transit*, plaintiffs first contend that the commerce clause is violated because, as a tax on interstate commerce, the First Use Tax is applied to "uses" which lack a sufficient nexus to Louisiana. Second, they posit that the tax is not fairly apportioned. Third, the plaintiffs argue that the tax discriminates against interstate commerce by subjecting natural gas to the threat of multiple taxation, failing to impose an equivalent tax on gas produced in Louisiana or transported into Louisiana from a state that imposes a severance tax, favoring Louisiana producers of natural gas by giving them a 100 percent credit against their Louisiana severance tax liability, and exempting natural gas consumed for specified purposes only within Louisiana. Finally, the states assert that the tax is not fairly related to services provided by Louisiana. They contend that the estimated $225 million in annual gross revenues, which the tax would generate, far exceeds the cost of the burdens upon, and protections afforded by, Louisiana.

Louisiana defends its tax, arguing that it satisfies each of the *Complete Auto Transit* criteria. First, it asserts that its tax is applied to activities having a substantial nexus with the taxing state because the "uses" being taxed are all events which occur in Louisiana. These "uses" include "numerous activities occurring to the gas prior to its being in a commercially accepted stage."

"the seriousness and the dignity of the claim, ... the availability of another forum ... where the issues may be raised, and where appropriate relief may be had." *Id.* at 796–97 (quoting Illinois v. City of Milwaukee, 406 U.S. 91, 93–94 (1972)).

Notably, the Court emphasized the fact that other, private litigation pending in state court would effectively litigate the merits of the plaintiffs' claims. *Id.* at 797. Thus, a factual distinction could be made between *Arizona v. New Mexico* and *Maryland v. Louisiana* since no concurrent private, state litigation has been brought. Yet, the Court in *Arizona v. New Mexico* concluded with a "cautionary note" which expressed a desire by the Court to avoid holding itself out for potential controversies involving the increasing number of disputes between states. *Id.* at 798 (quoting Ohio v. Wyandotte Chem. Corp., 401 U.S. 493, 497 (1971)).

The plaintiffs also raise several constitutional arguments, which are not based on the commerce clause. See notes 91–106 infra and accompanying text.

80. See note 71 supra and accompanying text.
82. *Id.*
83. *Id.*
84. *Id.*
86. *Id.* at 21.
ana also maintains that the tax is fairly apportioned because it
does not reach any activity occurring outside of the state.\footnote{Id. at 22.}

Louisiana further argues that the tax does not discriminate
against interstate commerce. It contends that no multiple taxation

can result since the "uses" upon which the tax is levied are all
activities occurring within the state. It is also asserted that no
commercial advantage is given to local producers of natural gas,
who are required to pay a severance tax\footnote{See note 74 supra.} at a rate equal to the
First Use Tax.\footnote{Louisiana Brief supra note 85, at 22-23.}

The defendant also maintains that the tax is fairly related to
services provided, and therefore does not violate the fourth part of
the \textit{Complete Auto Transit} test. It claims that forty percent of the
$800 million annual cost of shoreline and barrier island erosion is
attributable to "canals, trenches and spoil banks which serve the
marketers" of OCS.\footnote{Id. at 24.} It is unclear, however, whether the land being eroded is owned by the state. Even if it is Louisiana land, the
question remains whether making land available for erosion is the
kind of state service which would justify the tax.

The plaintiffs have raised three other constitutional arguments.
First, they claim that the First Use Tax violates the supremacy
clause\footnote{U.S. CONST. art. VI, cl. 2.} since the Natural Gas Act,\footnote{15 U.S.C. §§ 717-717w (1976).} Natural Gas Policy Act of
provide for a federal scheme of regulation of interstate commerce\footnote{Maryland Brief, supra note 81, at 26-28.} and since
certificates of public convenience and necessity, issued pursuant to
these acts by the Federal Energy Regulatory Commission
(FERC),\footnote{15 U.S.C. § 717f(c) (1976); see generally 61 AM. JURIS. 2D Pipelines § 6 (1972).} conflict with the part of the First Use Tax which pro-
vides that certain pipeline-producer contractual provisions (estab-
lished in these certificates) are void.\footnote{Maryland Brief, supra note 81, at 26-28.} The plaintiffs also contend
that the tax is negated by operation of the supremacy clause be-
cause the economic impact of the tax falls within the prohibition
of section 4 of the Outer Continental Shelf Lands Act, which pro-
vides "[s]tate taxation laws shall not apply to the outer Continen-

Louisiana rejects these arguments on the ground that no federal statutes create a regulatory scheme that prohibits a state from taxing "natural gas activities" within the boundaries of the state.\(^9\)

Second, the plaintiffs argue that the tax violates the import-export clause, which forbids states from levying duties on imports or exports except as necessary for the execution of state inspection laws.\(^{100}\) In seeking to avoid the obvious rebuttal argument that Louisiana's statute avoids federal authority in this area by exempting any gas upon which a duty has been levied,\(^{101}\) the plaintiffs contend that the First Use Tax violates the import-export clause by preventing the federal government from dealing uniformly with foreign trade, and disturbs harmony among the states by permitting Louisiana to exploit its coastal location.\(^{102}\)

Third, the plaintiffs argue that the First Use Tax violates the contracts clause\(^{103}\) because it attempts to nullify reimbursement provisions of existing contracts.\(^{104}\) Fourth, they also argue that the tax violates the equal protection clause\(^{105}\) because, when applied in conjunction with the Severance Tax Credit, it arbitrarily discriminates against taxpayers who engage in interstate commerce of natural gas produced solely in jurisdictions having no severance tax.\(^{106}\)

Perhaps most significant to the outcome of this case is the resolution of how to characterize the activities upon which the tax is imposed. As part of its commerce clause argument Louisiana includes the following curious statement: "The tax is imposed upon uses of natural gas after having entered the State of Louisiana all

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100. U.S. Const. art. I, § 10, cl. 2.
101. Note that this rebuttal argument assumes that since only the federal government may impose duties on imports and exports, U.S. Const. art. I, § 10, cl. 2, the avoidance of any conflict with this authority ipso facto makes any state tax not a duty.
102. Maryland Brief, supra note 81, at 32–35. This argument is based on Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976). In Michelin, the Court stated that the Framers of the Constitution had three purposes for the import-export clause: to permit the federal government to regulate commercial relations with foreign governments without disruptive state-imposed tariffs, to prevent diversion of import revenue from the federal government to the state governments, and to preserve harmony among the states which might otherwise be disturbed if coastal states could levy taxes on goods destined for inland states. Id. at 285–86.
104. Maryland Brief, supra note 81, at 32–34. See text accompanying note 97 supra.
105. U.S. Const. amend. XIV, § 1, cl. 4.
106. Maryland Brief, supra note 81, at 32–35.
within the ambit of the First Use Tax. The tax incidence occurs in Louisiana prior to the flow of the natural gas in interstate commerce. It is difficult to understand, however, how the tax can be imposed upon uses of natural gas after it has entered Louisiana, and at the same time prior to its flow in interstate commerce. Since OCS gas is coming from outside Louisiana, the flow of the gas in interstate commerce begins at the Outer Continental Shelf. At best, Louisiana must contend that the flow of gas in interstate commerce stops in Louisiana when the various taxed "uses" occur, and resumes when the gas is transported outside the state to consumers in other states. However, since Louisiana defines "uses" of natural gas to include sale, transportation to a processing plant or measuring or storage facility, transfer of possession, and processing, it is probable that a number of activities will be taxed which are an integral part of the continuing flow of OCS gas in interstate commerce.

Ultimately, it seems likely that Louisiana will not be allowed to impose this substantial tax burden upon interstate commerce simply by defining as local "uses" certain segments of the journey of natural gas in interstate commerce.

Note, however, that even if the taxed activities could be construed as "local," this determination would not avoid analysis under the Complete Auto Transit standard. Such a determination would not be conclusive since Complete Auto Transit contemplates an examination of the economic realities of the state's tax—the extent of the burden on interstate commerce and the correlation with legitimate state interests. A decision on the merits of the plaintiffs' commerce clause challenge will probably result in a finding of discrimination attributable at least to the danger of multiple taxation similar to that found in Michigan-Wisconsin Pipe Line Co. v. Calvert. Also, a finding is probable that the extraordinary revenues being raised by the First Use Tax are not justified by the services which Louisiana provides.

B. Commonwealth Edison Co. v. Montana

In Commonwealth Edison Co. v. Montana, various utilities and coal companies have challenged the constitutionality of Mon-
tana's Coal Severance Tax. As amended in 1975, the tax is based on a percentage of the value of coal as extracted and prepared for shipment from the mine. The tax varies from twenty percent to thirty percent for surface-mined coal and from three percent to four percent for deep-mined coal. As an additional factor, the greater the heating value (measured in British Thermal Units or "BTU's") of coal, the higher is the percentage rate of the tax.

As the plaintiffs did in *Maryland v. Louisiana*, the plaintiffs here have attacked the Coal Severance Tax as inconsistent with the tests of *Complete Auto Transit*. Focusing on the third and fourth criteria, the plaintiffs contend that the tax discriminates against interstate commerce because—since a majority of Montana's coal is transported out of state—it deliberately places the major portion of the tax burden on out-of-state consumers who must pay the tax in the form of higher prices for coal and the energy produced from that coal. The plaintiffs also argue that the Coal Severance Tax, considered both in isolation and in conjunction with other Montana taxes on the coal industry and revenues paid to Montana by the federal government under the Mineral Lands Leasing Act of 1920, is grossly disproportionate.

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112. Id. at § 15-35-103.
113. See notes 79-84 supra and accompanying text.
114. Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss, Commonwealth Edison Co. v. Montana, No. 42657 (Mont. 1st Judicial Dist.) [hereinafter cited as Opposition Memorandum], at 37-39. See 430 U.S. at 279; and text accompanying note 62 supra.
115. See text accompanying note 62 supra.
116. Plaintiffs further note that the traditional political check against excessive taxation is largely inoperable here. Because the tax burden is paid mostly by out-of-state taxpayers, Montana voters are content to watch Montana's coffers be filled by those non-residents. Opposition Memorandum, supra note 114, at 11. As one commentator has noted:

To the extent that a state enjoys a monopolistic position with regard to raw materials, . . . it may find it advantageous to subject these activities to relatively high taxes in order to be able to confer tax benefits on industries that it wishes to foster. Thus a state rich in oil might levy a very high tax on oil production and a correspondingly low one in manufacturing. By raising the price of goods leaving the state, such taxes reduce the volume of trade insofar as demand is sensitive to price; consumption shifts to theretofore more expensive goods of other producers, and resources are correspondingly shifted from their optimum allocation. To the extent that the out-of-state demand is inelastic, the burden of the tax will almost surely fall on out-of-state consumers, who would seem generally to have little influence in the state legislature.

to the services and protection provided by the State. Montana answers these challenges by arguing, first, that since the same tax is imposed on coal consumed within Montana as well as on coal shipped out-of-state, there is no discrimination against interstate commerce as a matter of law. Second, Montana responds that so long as the state provides some significant benefit to the taxpayer, it is not for the courts to engage in a cost-benefit analysis to determine whether the tax is fairly related to services provided.

Though Montana's approach on this point has the merit of avoiding the "slippery slope" problem of how much tax is too much, it also emasculates the fourth element of the Complete Auto Transit test by permitting heavy tax burdens to be justified by only marginally significant benefits conferred by the taxing state. Implicitly recognizing this problem, Montana includes as benefits conferred "the privileges of operating in an organized society" and "enjoying the benefits of a valuable resource extracted from the earth of Montana." The problem with this argument is that Montana expended nothing to put the coal in the ground. Merely allowing companies to mine the coal hardly seems to be a service provided by the state, especially since a prohibition against the mining of coal on plaintiffs' property would probably be a deprivation of property in violation of the fourteenth amendment's due process clause. The coal, therefore, is viewed more properly as a resource, and not a service provided by the state.

Similarly to the Maryland v. Louisiana plaintiffs, the plaintiffs

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118. Opposition Memorandum, supra note 114, at 4-11. Montana received $34 million in tax revenues in the fiscal year ending June 30, 1978, and expected to receive no less than $40 million in the fiscal year ending June 30, 1979. Brief of Plaintiffs-Appellants Before the Supreme Court of Montana at 9, Commonwealth Edison Co. v. Montana, Case No. 14982 (Nov. 15, 1979) [hereinafter cited as Plaintiffs' Montana Supreme Court Brief].

119. Defendant's Reply Brief and Brief in Oposition to Plaintiff's Motion to [sic] Summary Judgment, Commonwealth v. Montana, [hereinafter cited as Defendant's Reply Brief], at 20. The same argument was attempted by the State of Ohio in Mapco, Inc. v. Grunder, 12 ENVIR. REP. CAS. (BNA) 2025 (N.D. Ohio 1979); see notes 175-92 infra and accompanying text. In that case, Ohio imposed a Coal Use Tax which varied inversely with the amount of sulfur in the coal. Ohio, however, produces virtually no low-sulfur coal, and the District Court declared the tax unconstitutional in part because "[t]he practical operation of the tax is to discriminate against out-of-state coal . . . ." 12 ENVIR. REP. CAS. (BNA) at 2032. See also Nippert v. City of Richmond, 327 U.S. 416, 431 (1946).

120. Defendant's Reply Brief, supra note 119, at 21.

121. Id. at 23.

122. Note, however, that Montana's argument may have some support in Complete Auto Transit. There, the Court refused to rule that a tax on the privilege of doing business—a claim similar to Montana's contention that coal users consume the coal under its soil—was per se unconstitutional. 430 U.S. at 289.
here contend that the tax is preempted by a number of federal statutes which comprise a comprehensive federal regulatory scheme regarding the use and regulation of coal. Among these statutes are the Power Plant and Industrial Fuel Use Act of 1978, the Energy Policy and Conservation Act of 1975, the Clean Air Act Amendments of 1977, and the Federal Mineral Lands Leasing Act of 1920. Yet, Montana effectively rebuts this argument by noting: 1) that no statute cited expressly prohibits state regulation or taxation of coal; 2) that these statutes have not sought directly or exclusively to regulate coal mining; and 3) that the 1920 Act expressly disclaims any intent to restrict the power of the states to tax the output of mines. Yet, the question remains whether Montana’s arguments accurately reflect congressional desires when a state’s tax is so burdensome that it substitutes a new federal-economic arrangement for the one originally devised by Congress.

No doubt the most significant argument made by either party is Montana’s attempt, without reference to the Complete Auto Transit test, to support the severance tax under the commerce clause, arguably independent of any Complete Auto Transit analysis. In essence, Montana uses an approach similar to that taken by Louisiana in Maryland v. Louisiana—to construe the activity upon which a tax is imposed as local, thereby avoiding any association with interstate commerce. To this end, Montana relies on a trilogy of cases: Heisler v. Thomas Colliery Co., Oliver Iron Mining Co. v. Lord, and Hope Natural Gas Co. v. Hall (the “Heisler trilogy”). These cases may be read to support the proposition that the commerce clause cannot be invoked to invalidate a state severance tax, which is simply a tax on the local activity of extracting minerals or other natural resources from the soil. In

123. Plaintiff’s Montana Supreme Court Brief, supra note 118, at 67-76.
129. See notes 152-67 infra and accompanying text.
130. See notes 107-09 supra and accompanying text.
132. 262 U.S. 172 (1923).
133. 274 U.S. 284 (1927).
134. Defendant’s First Brief, supra note 128, at 3-7.
Heisler, the Court considered the constitutionality of a Pennsylvania tax on anthracite coal that was mined, washed, screened, or otherwise readied for market in Pennsylvania.\textsuperscript{135} Writing for the Court, Justice McKenna stated that if the possibility or certainty of exportation of a product from a state meant that the product would be in interstate commerce before it left the state, then the product would be in interstate commerce "from the instant of its growth or production, and in the case of coals, as they lie in the ground."\textsuperscript{136} He believed such a concept was absurd because:

It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control . . . the fruits unpicked, the cotton and wheat ungathered . . . and coal yet unmined because they are in varying percentages destined for and surely to be exported to States other than those of their production.\textsuperscript{137}

A year later the Court reaffirmed this position in Oliver Iron and upheld a Minnesota tax on the occupation of mining iron ore.\textsuperscript{138} Despite the fact that most of Minnesota's iron ore was destined for out-of-state consumers, Justice Van Devanter, for the Court, concluded that the ore "does not enter interstate commerce until after the mining is done."\textsuperscript{139} To complete the trilogy, Hope Natural Gas upheld a West Virginia mining tax that was challenged by a West Virginia natural gas producer which shipped most of its production to Pennsylvania and Ohio.\textsuperscript{140} Four years after it had been rebuffed by the Court in its attempt to hoard natural gas for intrastate consumers in Pennsylvania v. West Virginia,\textsuperscript{141} West Virginia promulgated the mining tax through which it could profit from, and perhaps discourage, the sale of West Virginia natural gas in interstate commerce. In his perfunctory analysis of the tax for the Court,\textsuperscript{142} Justice McReynolds cited Heisler, Oliver Iron, and an earlier Supreme Court case, American Manufacturing Co. v. City of St. Louis.\textsuperscript{143} The Court thus established that, in protecting from commerce clause intrusion the states' power to tax native natural resources, it would not allow

\begin{itemize}
\item \textsuperscript{135} 260 U.S. at 253-54.
\item \textsuperscript{136} Id. at 259.
\item \textsuperscript{137} Id. at 259-60.
\item \textsuperscript{138} 262 U.S. 172 (1923).
\item \textsuperscript{139} Id. at 179.
\item \textsuperscript{140} 274 U.S. 284 (1927).
\item \textsuperscript{141} 262 U.S. 553 (1923). See notes 29-33 supra and accompanying text.
\item \textsuperscript{142} 274 U.S. at 640.
\item \textsuperscript{143} 250 U.S. 459 (1919).
\end{itemize}
commercial reality and a case-by-case evaluation of the facts to weigh heavily in its reasoning.

In essence, Montana's position is that even if Congress could regulate the taxation of mining activities by affirmatively exercising its power under the commerce clause—an assertion of authority which would be entirely inconsistent with the rationale of the Heisler trilogy that mining simply is not interstate commerce—the states are free to tax mining absent such congressional regulation.

The plaintiffs, however, argue that the Heisler trilogy is no longer applicable to commerce clause challenges to a state severance tax. They assert that since most of the coal mined in Montana is shipped out of state under long-term contracts, it is unrealistic to view the act of mining as separate from the activity in interstate commerce which is certain to follow.\textsuperscript{144} Moreover, the plaintiffs correctly point out that the "value" upon which the tax is assessed is more than just the value of the coal after it has been mined. The statute defines "value" to mean the price of coal, excluding taxes, as extracted from the mine and prepared for shipment; such preparation involves crushing the coal and transporting it to a nearby rail siding for subsequent shipment out-of-state.\textsuperscript{145} Thus, even if the act of mining is conceded to be only intrastate commerce, the tax falls on activity arguably occurring after interstate commerce has begun.

Moreover, the plaintiffs assert that numerous commerce clause cases decided by the Supreme Court since 1937 have discarded the Heisler rationale.\textsuperscript{146}

The trial court was not persuaded by the plaintiffs' commerce clause arguments, which were based on the Complete Auto Transit standard. In granting Montana's motion to dismiss the complaint, it decided that the activity subject to the Coal Severance Tax is local and not within the scope of the commerce clause. The Court followed the Heisler trilogy and asserted that a "mechanical test" is to be applied to determine "whether the local activity is an act of commerce." It rejected the "substantial effect on commerce" test propounded by the plaintiffs, but noted that if the latter test were applicable, the motion to dismiss would have been denied.\textsuperscript{147}

The trial court also dismissed the plaintiffs' federal preemption

\textsuperscript{144} Opposition Memorandum, supra note 114, at 11.
\textsuperscript{145} Id. at 11-15.
\textsuperscript{146} See notes 167-70 infra and accompanying text.
\textsuperscript{147} Order, Commonwealth Edison Co. v. Montana, No. 42657 (Mont. 1st Judicial Dist., filed July 27, 1979) at 5, 17-18.
arguments. Noting that national energy policy encourages the use of coal as a substitute for oil, it nevertheless found that this policy does not require the limitation or elimination of state coal severance taxes.\(^{148}\) The court found support for its conclusion in federal environmental, safety, and health measures which operate to restrict coal production.\(^{149}\) The court also dismissed the plaintiffs' federal preemption argument based on the Mineral Lands Leasing Act of 1920. It concluded that the Act's specific provision preserving the right of the states to levy and collect taxes on mine output required such an outcome.\(^{150}\)

The plaintiffs have appealed the trial court's rejection of their commerce and supremacy clause arguments.\(^{151}\) It is true that, if the \textit{Heisler} trilogy is valid, then mining is intrastate commerce and state regulation of it may not have to be evaluated under the four-part standard of \textit{Complete Auto Transit}. Increasing burdens on commerce in other energy sources might also be approved under a \textit{Heisler} rationale. For example, Alaska, using a scheme similar to Montana's, is capitalizing on its vast oil and gas reserves by imposing a special income tax on corporations engaged in producing crude oil or natural gas or transporting them by pipeline.\(^{152}\) As a result, seventy-three percent of Alaska's tax burden falls on the oil companies, whose pipelines transport the oil and natural gas—ninety-eight percent of which is sold or otherwise disposed of in interstate commerce.\(^{153}\) Assuming \textit{Heisler} may be used to authorize taxation of the physical collection (and perhaps production) of the oil and gas, the plaintiffs who are challenging Alaska's scheme could raise three preemption arguments. First, under the Natural Gas Act,\(^{154}\) the Federal Power Commission (FPC) has the authority to regulate the interstate transportation of natural gas.\(^{155}\) Yet, production—defined narrowly as the "physical activities, processes and facilities of production or gathering"\(^{156}\)—are specifically excluded from FPC jurisdiction\(^{157}\) and

\(^{148}\) \textit{Id.} at 19–28.
\(^{149}\) \textit{Id.}
\(^{150}\) \textit{Id.} at 28–31.
\(^{151}\) Case No. 14982 (Mont., filed Aug. 24, 1979).
\(^{152}\) ALASKA STAT. §§ 43.21.010–120 (Supp. 1979).
\(^{155}\) \textit{Id.} § 717(b).
\(^{156}\) Shell Oil Co. v. Federal Energy Regulatory Comm'n, 566 F.2d 536, 539 (5th Cir. 1978).
left for state regulation. However, under the Emergency Petroleum Allocation Act allocations of petroleum products are required to be made on an equitable basis. Arguably, any tax which places a greater burden on interstate commerce may be viewed as inequitable and thus specifically voided by the Act. In contrast, it may be argued that Alaska’s tax does not place a relatively greater burden on interstate commerce than it does on intrastate commerce. Lastly, under the Federal Energy Administration Act, the Administrator of the Federal Energy Administration (now part of the Energy Regulatory Administration of the Department of Energy) is empowered to “direct and conduct programs related to the production, conservation, use, control, distribution, rationing, and allocation of all forms of energy” as appropriate with regard to functions delegated to him or her by the President and Congress. Arguably, any state tax on gas or oil production may interfere in such programs and as such the tax could be invalidated. Yet, one could rebut this contention—that these federal statutes (and their amendments and predecessors) did not specifically prohibit taxation by states.

In any event, the validity of the Heisler trilogy as a guide in this area must be questioned. Seemingly, the Court has abandoned the practice of trying to delineate what is or is not interstate commerce. In the context of deciding the scope of congressional commerce power, the Court has disregarded the “stream of commerce” analysis which determined the validity of a congressional act if the subject of the legislation was in “the stream of com-

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159. 15 U.S.C. §§ 751-60h (1976). This Act applies to “crude oil, residual fuel oil and refined petroleum products.” Id. § 751(b). See id. § 752(5), (6).
160. Id. § 753(a).
161. Id. § 753(b)(1)(F).
162. Id. § 755(b). This section provides:
   The regulation under [the provision requiring allocations] . . . and any order issued thereunder shall preempt any provision for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

Id.
166. See text accompanying note 128 supra.
merce."\textsuperscript{167} The Court instead has looked more pragmatically at congressional enactments and now examines whether the subject involved "affects interstate commerce."\textsuperscript{168} Even if these cases are distinguishable regarding the determination of whether a state act burdens interstate commerce, the Court's opinion in \textit{Complete Auto Transit} must be viewed as a rejection of the local-interstate dichotomy promoted by \textit{Heisler}, \textit{Oliver Iron}, and \textit{Hope Natural Gas}, in favor of a more realistic examination of the practical incidents of a state's activity. Use of the \textit{Heisler} trilogy is not only defective because its analysis (as to what activities are local) ignores the realities of exactly what goods (because of heavy out-of-state consumption) must be considered almost inherently as interstate commerce, but also because (as noted previously)\textsuperscript{169} that even if an activity could be considered as "local," resort to \textit{Complete Auto Transit} is not foreclosed. A determination that an activity is local is merely one factor to consider in applying the \textit{Complete Auto Transit} analysis and is not conclusive regarding the validity of a state statute. Certainly under the facts of \textit{Commonwealth Edison Co. v. Montana}, for example, the fact that the tax includes value gained by preparing coal for out-of-state shipment\textsuperscript{170} must be considered.

The question of whether state attempts to preserve or profit from its energy resources are valid and may survive attacks based on the commerce clause may be answered negatively, but not without reservation. While these attempts have historically been rejected on commerce clause grounds, the resurrection of \textit{Heisler} may provide states with a method to avoid such attacks. However, attempts by states to profit from their energy resources traveling in interstate commerce, or to prevent such commerce, logically seem to fail the \textit{Complete Auto Transit} tests since these are designed to assess accurately the burden on interstate commerce that any challenged state activity would impose. Ultimately, \textit{Complete Auto Transit}'s approach of economic realism should win out over \textit{Heisler}'s mechanical test.

\textsuperscript{169} See notes 107-09 \textit{supra} and accompanying text.
\textsuperscript{170} See note 145 \textit{supra} and accompanying text.
III. The Ohio Coal Industry

It seems apparent that state attempts to restrict interstate use of energy resources for the purpose of conserving or profiting from those resources will fail under the standard of Complete Auto Transit. However, because of the conflict between environmental regulations and energy needs, a similar issue has arisen concerning attempts to obstruct commerce for the purpose of promoting use of in-state resources. In Ohio, where high sulfur coal is abundant, utilities and other facilities burning coal have realized that because high-sulfur coal produces large quantities of sulfur dioxide—a hazardous pollutant—relatively expensive anti-pollution devices would have to be installed to meet sulfur dioxide emission limitations if the Ohio coal were used. As a more cost-effective alternative, coal-burning facilities decided to burn out-of-state, low-sulfur coal and thus meet aid quality standards without elaborate anti-pollution equipment. Consequently, demand for Ohio's coal declined, creating a risk of local unemployment with adverse effects on the state economy. Such a turn of events was also arguably contrary to any nationally-oriented energy policy which would desire equitable use of all available resources. Both the Ohio General Assembly and the Congress of the United States established mechanisms designed to promote the exclusive use of in-state resources by in-state consumers. As these mechanisms prevent consumers from receiving the benefits of energy resources in other states, these schemes present constitutional questions similar to those raised by states which seek to preserve their own resources. The Ohio and congressional legislation are discussed below.

A. Mapco, Inc. v. Grunder

Ohio coal producers, concerned about the utilities' switch to low-sulfur coal, were able to convince the Ohio legislature to enact a Coal Use Tax which taxed the consumption of coal "used directly for generating steam or electric power." The rate of tax

173. Id.
176. Id. § 5571.02(A).
was inversely proportional to the sulfur content of the coal. Coal with a sulfur content of less than 0.5 percent was taxed at forty cents per ton, and coal with a sulfur content of 1.5 percent or more was taxed at fifteen cents per ton.\textsuperscript{177} Virtually all Ohio coal avoided, and all Kentucky and West Virginia low-sulfur coal suffered, the higher rates of tax.\textsuperscript{178}

Shortly after the first assessment under the Coal Use Tax, a Kentucky low-sulfur coal producer, Mapco, Inc., and an Ohio electric utility, the Cleveland Electric Illuminating Company, challenged the validity of the Coal Use Tax under the commerce clause in federal court.\textsuperscript{179} At the same time, other Ohio utilities challenged the tax in administrative proceedings before the Ohio Department of Taxation, with the outcome ultimately decided by the Ohio Supreme Court.\textsuperscript{180}

On March 21, 1979, the district court enjoined the State of Ohio from enforcing the Coal Use Tax.\textsuperscript{181} The court, looking to the practical effects of the tax, reasoned that the tax operated to burden out-of-state coal in favor of Ohio coal:

Though the language of the Coal Use Tax does not in so many words impose a burden on out-of-state coal to the favor of Ohio coal, the operation of the act does. Virtually all Ohio coal enjoys the tax rate of 15 percent per ton because Ohio coal does not have any significant low-sulfur coal production. Though out-of-state high-sulfur coal is subject to only the 15 cents per ton rate, the low-sulfur coal, which is necessarily out-of-state coal, is subjected to the higher tax rates of up to 40 cents per ton.\textsuperscript{182}

The court concluded that "the tax burdens and penalizes the inter-state movement of low-sulfur coal" and that "such a discriminatory tax is a \textit{prima facie} violation of the Commerce Clause."\textsuperscript{183}

In defense of its Coal Use Tax, Ohio had argued that the tax was not repugnant to the commerce clause because it merely discriminated against low-sulfur coal without regard to the geographic location of the mine that produced the coal.\textsuperscript{184} The court

\begin{footnotes}
\item[177] \textit{Id.}
\item[179] \textit{Id.}
\item[180] Dayton Power & Light Co. v. Lindley, 58 Ohio St. 2d 465, 391 N.E.2d 716 (1979).
\item[181] See text accompanying notes 189–92 \textit{infra}.
\item[182] \textit{Id.} at 2030.
\item[183] \textit{Id.}
\item[184] Memorandum in Support of Defendants' Cross-Motion for Summary Judgment,
quickly rejected that argument because it “blinks at the undisputed fact that Ohio produces no significant amount of low-sulfur coal.”

Ohio also had asserted that even if the Coal Use Tax were found to burden interstate commerce, that burden was “incidental” and clearly outweighed by the legitimate interests of the State of Ohio in the tax. While agreeing that the raising of revenue was “a legitimate state legislative function,” the court nevertheless believed that Ohio could have accomplished this objective by the “even-handed alternative of taxing all coal at the same rate.”

The court concluded:

As a revenue raising measure, the tax is violative of the Commerce Clause for failing to employ a scheme of taxation whose impact upon intrastate and interstate commerce is even-handed.

In addition, the act’s plain intent is to preserve the jobs of Ohio coal miners at the expense of the jobs of coal miners in other states, an understandable purpose, but a local interest that is inconsistent with the Commerce Clause.

Soon thereafter, the Ohio Supreme Court also ruled that the Ohio Coal Use Tax was unconstitutional. It found that the tax was discriminatory because the “practical effects” of the tax were to divert business away from non-Ohio producers of low-sulfur coal. As a result, it was not a uniform or even-handed tax as required by the commerce clause.

These decisions make clear the fact that state attempts to erect barriers to interstate commerce must be invalidated, notwithstanding their motivation. Such a result is consistent with Complete Auto Transit, whose four-part standard would not have been met by Ohio’s statute.

Mapco, Inc. v. Grunder, 12 ENVIR. REP. CAS. (BNA) 2025 (N.D. Ohio 1979) [hereinafter cited as Cross-Motion Memorandum], at 4–5.

185. 12 ENVIR. REP. CAS. (BNA) at 2032.
187. 12 ENVIR. REP. CAS. (BNA) at 2033.
188. Id. at 2034–35.
190. Id. at 474, 391 N.E.2d at 721.
191. Id. at 476, 391 N.E.2d at 722. After the Ohio Supreme Court rendered its decision, Ohio voluntarily dismissed its appeal from the district court’s decision.
192. Examining Ohio’s tax, see notes 175–78 supra and accompanying text, under the Complete Auto Transit standard, see text accompanying note 62 supra, the statute would most likely be invalid. Although it could be argued that a tax on consumption of coal has a substantial nexus to the state, it may not be so readily conceded that the tax is fairly appor-
B. Federal Regulation—Section 125 of the Clean Air Act

Congress has recognized that meeting federal air pollution standards causes problems such as those facing the Ohio coal industry. In August 1977, in an effort to ameliorate the situation, it amended the Clean Air Act to add section 125. Entitled “Measures to prevent economic disruption or unemployment”, this section empowers the President to “prohibit any . . . major fuel burning stationary source . . . from using fuels other than locally or regionally available coal or coal derivatives to comply with . . . [air quality] . . . requirements.” In addition to the President’s prohibitory powers, section 125 gives the Administrator of the United States Environmental Protection Agency (EPA) the power to dictate where a major fuel burning source may purchase fuel. Before these extraordinary measures can be implemented. While the tax does reach in-state consumption only, it indirectly affects interstate (low-sulfur coal) sales by placing a larger burden on those purchasing out-of-state coal. As both Ohio and federal courts noted, see notes 183 & 190 supra, the tax does by its practical effect discriminate against interstate commerce. Lastly, the tax may arguably be unrelated to the state by the fact that its tax structure imposes more liability on interstate sales and consumption than it does on similar in-state activities.

193. Senator Howard Metzenbaum (D-Ohio), the sponsor of section 125, indicated during the Senate floor debate that the legislation was offered for the benefit of states like Ohio, in which utilities were electing to come into compliance with sulfur dioxide regulation by switching from in-state sources of high-sulfur coal to out-of-state sources of low-sulfur coal. Senator Metzenbaum pointed out: “Our amendment only seeks to prevent noncomplying utilities from needlessly disrupting the social and economic fabric of those mining communities which have historically supplied coal to these power plants. . . .” 123 CONG. REC. 18487 (1977).

Although appearing in Clean Air Act Amendatory legislation, section 125 was not an environmental measure, but was aimed instead at local economic protection, according to Senator Metzenbaum: “There is nothing in this legislation that is anything more than economic self-preservation. It only becomes applicable, can only be used in those instances where economic disruption or unemployment would be a reality of life.” Id. at S9457.

Senator Muskie, the floor manager of the Clean Air Act amendments, opposed section 125. Regretting that it was being offered as an amendment in clean air legislation, he viewed it as the same kind of regional trade barrier among the states that gave rise to the need for a Constitutional Convention in 1789. Id. at S9458.

196. Id. § 7425(b). Subsection (d) limits the application of this section to those fuel burning stationary sources which the Administrator has determined to have a design capacity of 25,000,000 BTU’s per hour, (approximately equivalent to a 73 megawatt electric utility boiler). Id. § 7425(d). The definition of what constitutes the “local or regional area” for purposes of section 125 is to be “as determined by the Administrator of EPA.” Id. § 7425(h).
197. Id. § 7425(c). This subsection allows EPA to require a major fuel burning installation to “enter into long-term contracts of at least ten years in duration . . . for supplies of regionally available coal or coal derivatives.” Id.
voked, section 125(a)(3) requires EPA to determine that these actions are:

necessary to prevent or minimize significant local or regional economic disruption or unemployment which would otherwise result from use by [one or more major fuel burning stationary sources] of . . . coal or coal derivatives other than locally or regionally available coal . . . . . to comply with the requirements of a State implementation plan.¹⁹⁸

In short, section 125 was enacted, at least in part, to insulate Ohio's high-sulfur coal mining industry from competition from non-Ohio low-sulfur coal.¹⁹⁹ Nevertheless, it was not invoked until the sulfur dioxide regulations for Ohio²⁰⁰ were upheld by the Sixth Circuit on February 13, 1978.²⁰¹ On the same day, District 6 of the United Mine Workers of America petitioned the EPA to initiate section 125 proceedings in Ohio, i.e., to begin the process of making the necessary findings for the use of executive power under section 125. Shortly thereafter, Governor Rhodes of Ohio, the Ohio Mining and Reclamation Association (an association of Ohio coal producers), and Senator Metzenbaum filed similar petitions.²⁰²

Much opposition was raised to these section 125 petitions.²⁰³ The United States Department of Energy (DOE) questioned the wisdom of any attempt by EPA to limit Ohio's electric utilities to Ohio coal. Characterizing EPA's intended move as "balkanization" of the steam coal market, DOE asserted that the restriction of utility fuel sources to one state would jeopardize the ability of the utilities "to deal with potential fuel supply disruption." The DOE remarked that "diversity of both fuel type (i.e., generation mix) and fuel source (i.e., market dependency) is an essential fac-

¹⁹⁸ Id. § 7425(a).
¹⁹⁹ See note 193 supra.
²⁰³ For example, at a public hearing held in Cleveland in August 1978, the Consumer's Counsel of the Public Utilities Commission of Ohio suggested that the Ohio utilities preferred to meet air quality standards by switching to low sulfur coal than by installing pollution control equipment. Transcript, EPA Public Hearing, Cleveland, Ohio (Aug. 15, 1978) [hereinafter cited as EPA Hearing], at 125–44. This was because the Ohio Revised Code would permit the utilities to obtain quicker recovery of the increased costs of compliance that way than would be possible in the more complicated and time consuming rate case that would be required to recover costs for scrubbers. See OHIO REV. CODE ANN. § 4909.191 (Page 1977). See EPA Hearing, supra, at 125–44.
tor in emergency preparedness." Similarly, the President’s Council on Wage and Price Stability opposed EPA’s contemplated partitioning of coal markets along state lines because it thought that such a measure would give undue protection to a small sector of the economy from competitive forces, needlessly raise electric rates and adversely affect energy-intensive industries in the state.

The Ohio utilities, and some low-sulfur coal producers from Appalachia, contended that coal from West Virginia and Kentucky should be deemed “locally or regionally available coal” within the meaning of section 125. They questioned the wisdom of limiting the utilities to the coal of a federally sanctioned but unregulated monopoly of Ohio coal producers. The Ohio utilities maintained that such action would increase both their costs to their customers, and would jeopardize the reliability of their generation systems.

On December 20, 1978, EPA issued a “proposed determination” under section 125(a). The Agency found that the proposed switch by fourteen Ohio electric utility plants to out-of-state low-sulfur coal (predominantly from Kentucky and West Virginia) as their means of compliance with emissions standards would produce “significant economic disruption or unemployment” in the Ohio coal fields. The Agency indicated that it might be necessary to prohibit certain of these Ohio utility plants from using non-Ohio coal and require them to install scrubbers and enter into long-term contracts for high-sulfur Ohio coal.

One low-sulfur coal producer from Kentucky, McCoy Elkhorn

205. 9 ENVIR. REP. (BNA) 2067-68 (1979).
206. A group of such producers was formed under the name of the Committee to Preserve the Appalachian Coal Market. Additional Factual Submission and Brief of the Cleveland Electric Illuminating Company, Before the Environmental Protection Agency, October 16, 1978, at 28-49.
207. Id.
208. For example, the Cleveland Electric Illuminating Company estimated that the use of scrubbers to clean Ohio’s high-sulfur coal would cost it and its customers approximately $152,000,000 more per year than if the Company used low-sulfur coal. The Company also estimated that the use of scrubbers would lead to an estimated 20% increase in the average residential customer’s electric bill, in contrast to the estimated 6% increase that would be incurred if the company could burn low-sulfur coal from adjoining states. Additional Factual Submission and Brief, supra note 184, at 15-18.
210. Id.
211. Id.
Coal Corporation, instituted litigation to challenge section 125 and EPA's proceedings thereunder.\(^{212}\) The company contended that the trade barrier created by section 125 which protected local business from interstate competition violated the commerce clause because "state lines cannot be made barriers to the free flow of both raw material and finished goods in response to the economic laws of supply and demand."\(^{213}\) McCoy Elkhorn recognized that Congress could prohibit interstate commerce under certain circumstances, but argued that in each instance where the Supreme Court has upheld the right of Congress to do so, the prohibition was non-discriminatory.\(^{214}\) In no prior case had Congress excluded a product from interstate commerce solely because of the geographic origin of the product.\(^{215}\)

EPA responded that the commerce clause is broad enough to support section 125 even if the effect is to discriminate in favor of Ohio coal producers. It also argued that the discrimination inherent in section 125 was proper because it advanced national energy goals.\(^{216}\)

On May 7, 1979, the district court upheld the constitutionality of section 125\(^{217}\) in *McCoy Elkhorn Coal Corp. v. EPA*,\(^{218}\) noting that Congress was granted plenary power under the commerce clause and that any limit on that power must come from other constitutional provisions.\(^{219}\) Since section 125 does not employ a suspect classification subject to special scrutiny, "any discrimination engendered . . . is forbidden by the implicit Fifth Amendment Equal Protection Provision only if it is not rationally related to a valid Congressional purpose."\(^{220}\) The court concluded that

\(^{212}\) McCoy Elkhorn Coal Corp. v. EPA, 13 ENVIR. REP. CAS. (BNA) 1025 (E.D. Ky. 1979). The institution of this litigation prompted intervention by Kentucky and the Ohio Edison Company on the side of McCoy Elkhorn, and Ohio and the United Mine Workers of America, District 6 on the side of EPA. In addition, three Congressman from West Virginia, Kentucky and Ohio (John Slack, Carl Perkins, and Thomas Ashley) appeared as *amicus curiae* in opposition to EPA's actions in the Ohio section 125 proceedings.


\(^{214}\) Id.

\(^{215}\) Cf. United States v. Darby Lumber, 312 U.S. 100 (1941).

\(^{216}\) EPA Trial Memorandum at 29-45, McCoy Elkhorn Coal Corp. v. EPA, 13 ENVIR. REP. CAS. (BNA) 1025 (E.D. Ky. 1979).

\(^{217}\) McCoy Elkhorn Coal Corp. v. EPA, 13 ENVIR. REP. CAS. (BNA) 1025, 1030 (E.D. Ky. 1979).

\(^{218}\) Id.

\(^{219}\) Id. at 1028 (citing Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1949)).

\(^{220}\) Id. at 1029.
section 125 is rationally related to a valid congressional interest in repairing the damage done to normal coal market competition by the enactment of clean air statutes. The court acknowledged the potential economic harm about which McCoy Elkhorn complained, but concluded that its remedy was with Congress, not the courts.221

Thus, section 125 has been upheld in the only adjudicated challenge to its validity to date. The Sixth Circuit affirmed the lower court’s decision.222

After that decision, EPA proposed an alternate determination under section 125(a).223 It found that the plans of certain Ohio utilities to switch to low-sulfur coal in order to comply with sulfur dioxide emissions limitations would not cause such significant economic disruption or unemployment as to necessitate further action under subsections 125(b) and (c) of the Act.224 This retraction of the earlier proposed determination was predicated upon EPA’s reanalysis of the actual effect of the Ohio utilities’ plans in light of EPA’s action which made sulfur dioxide regulations less stringent, thereby permitting greater use of Ohio coal than EPA previously had projected.225

As a result of EPA’s actions, the effectiveness of congressional attempts at promoting exclusive in-state use of a state’s resources may remain unclear. Doctrinally, the district court in McCoy Elkhorn Coal Corp. v. EPA seems correct. Congress certainly has the power to prohibit interstate commerce to effectuate national policy as part of its constitutionally authorized commerce power.226 This power is no doubt premised on the belief that Congress as a body is accountable to, and therefore acts in the best interests of, all the states.227 In contrast, a state cannot block interstate commerce since it would not be accountable to citizens of other states.228

However, it is uncertain whether Congress enacted section 125

221. Id. at 1029-30.
222. McCoy Elkhorn Coal Corp. v. EPA, Nos. 79–3326, 79–3327, 79–3398 (decided June 2, 1980).
224. Id.
226. See United States v. Darby Lumber, 312 U.S. 100 (1941).
228. See note 55 supra.
to effectuate a national energy policy, or simply to benefit the parochial interests of one state. Although it may arguably further a national policy of air quality improvement by forcing users to develop better pollution control technology, as an energy measure it has no national focus. The brief legislative history indicates that the impetus of this legislation was definitely toward local concerns.

If Congress did not act to effectuate a national policy, the desirability of section 125 is questionable. First, such an action would contravene the purpose of the commerce clause. Section 125 attempted to accomplish what the Ohio legislature unsuccessfully tried. Congress, acting for the same reasons that a state would, could do what a state could not, simply because it was Congress. The justification for granting to Congress the power to regulate interstate commerce—that Congress would act in the best interests of all the states, and not in favor of one against another—would be absent. Second, section 125 could not be justified by the fact that it was an attempt to promote exclusive in-state use of a state’s resources—i.e., it does not prevent out-of-state consumers access to in-state resources for the purpose of conservation or profit; rather, it promotes in-state use of a state’s resources. Such a scheme produces barriers to interstate commerce. Instead of preventing out-of-state consumers from coming into the state, these schemes prevent consumers from getting out. Barriers to interstate commerce for whatever purpose inhibit an open national economy, which was a potent motivation behind the com-

229. See note 193 supra.
231. Section 125 was introduced on the floor of the Senate. Consequently, the debates on this amendment are the only legislative history available.
232. See note 193 supra. Many Senators felt that this measure would result in economic balkanization. See, e.g., 123 Cong. Rec. 18490 (1977) (remarks of Senator Baker). The amendment passed by one vote, 45 to 44. Congressional Quarterly Weekly Reports, at 1266 (June 18, 1977).
233. See notes 175–92 supra and accompanying text.
234. Wechsler, supra note 227.
235. This argument seemingly contradicts Professor Wechsler’s analysis. Because of the inherent institutional safeguards in the federal system to protect state interests, Professor Wechsler concluded “the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interests of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress.” Id. at 559. Yet, the Court, with its decision in National League of Cities v. Usery, 426 U.S. 833 (1976), may indicate that it is not prepared to give Congress as great deference as would be warranted by Wechsler’s theory. See also J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 159–63 (1978).
merce clause. In addition, attempts at such balkanization for exclusive promotional purposes are not neutral. By compelling in-state consumers to use in-state resources, out-of-state producers are harmed.

Thus, although section 125 may be distinguished from early attempts by states to restrict interstate use of state resources—because of its federal nature and because of its motivation—such distinctions may prove meaningless in light of the purpose of the commerce clause.

IV. CONCLUSION

The foregoing survey of conflicts over the possession and use of critical energy resources falls into two broad categories. First, some resource-rich states have manipulated the availability and price of their resources to profit at the expense of other states. The fortuitous location of coal or gas deposits can also generate internal political leverage. State and local officials have attempted to exploit the presence of resources to achieve political goals without increasing burdens upon their constituencies.

Another set of energy-related conflicts has been stimulated by the attempts of states to shelter local energy producers and consumers from the disadvantageous effects of national and international environmental policies. Adversely affected parties will naturally continue to pressure local officials for relief. For so long as legislatures and executives remain more responsive to adversely affected constituencies than to national environmental policies, they probably will continue to favor locally attractive, protectionist schemes.

The existence of these powerful local motivations indicate the likelihood of intensified pressures to "balkanize" energy markets and environmental policy in the 1980's. Increasing scarcity of energy supplies will augment the political and economic power which accompanies the control of resources. State and local officials will be induced to exercise taxing and regulatory authority to further their own advantage rather than the most propitious use of resources.

However, the force of the commerce clause may deter, if not invalidate, many of these activities—the policy of promoting a unified, national economy directly contradicts the spirit of these attempts. Only if states are allowed to escape the legitimate reach of the commerce clause by resort to formalistic, outdated analysis,
will serious disruptions of the national economy occur. However, such analysis appears to have been discarded by the Supreme Court in *Complete Auto Transit*. Scrutiny of state schemes under this pragmatic rationale seems more compatible with the goal of enhancing the national economy. In addition, use of this realistic framework would ignore ostensible motivations and look only to the impact on interstate commerce.

A more difficult problem of legal analysis and national policy is posed by the involvement of the federal government in such locally protective schemes. When localized interests utilize the national forum to accomplish their narrow purposes, the constitutional restraints on such action are not as clear as in the case of action by the individual states. Careful attention must be paid by both legislators and jurists to the underlying purposes of the commerce clause as it may relate to the activities of the federal government when those activities restrict the free flow of interstate commerce as envisioned by the authors of the commerce clause. It should be clear that if attempted balkanization is a poor policy for individual states to pursue, it is no less pernicious when attempted by the same interests acting through the federal government itself.