NOTES

SEVERANCE TAXES AND SOIL DEPLETION: IS GRAIN A NATURAL RESOURCE AMENABLE TO SEVERANCE TAXATION?

I. INTRODUCTION

Severance taxation and its effect on interstate commerce is becoming a subject of increased concern for state government. In light of present energy shortages and resulting higher prices experienced in the United States and abroad, the use of severance taxes by states abundant in energy resources has aroused increased cognizance of the burden exorbitant severance taxation places on the states lacking significant energy resources. The burden lies in the energy producers exporting not only their energy resources, but also, their tax burdens.[1] The charge of exorbitancy is bolstered by the United States Supreme Court recent holding that a thirty percent severance tax on coal is *not* an unconstitutional burden on interstate commerce.[2] This question of constitutional constraints on severance taxation and levying such taxes on non-traditional resources is the focus of this Note. States such as Iowa maintain wealth in other natural resources such as grain.[3] Subjecting this resource to severance taxation may be the leverage necessary to demonstrate to Congress the need for a ceiling on such taxation,[4] without which, the struggle between the West energy-rich and the North and Mid-

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1. The concept of tax exporting is found in a state having a substantial degree of dominance in the relevant market. A dominance of the market permits exportation of the tax in the form of higher prices to the consumer. McLure, *Economic Constraints on State and Local Taxation of Energy Resources*, 31 NAT'L TAX J. 257, 257 (1978).

2. Commonwealth Edison Co. v. Montana, 101 S. Ct. 2946 (1981). Montana's variable severance tax of up to 30% was held not to unconstitutionally burden the commerce clause. *Id.* at 2960. The commerce clause: "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. CONST. art. I, § 8, cl. 3.

3. Grain harvested in Iowa in 1980 included 1.46 billion bushels of corn, and 322.5 million bushels of soybeans. Letter from Iowa Crop and Livestock Reporting Service to Cameron Willey (Nov. 23, 1981)(statistics drawn from Annual Crop Survey 1980, prepared in cooperation with Iowa Department of Agriculture). Forecast for 1981 indicates an increase in corn production to 1.73 billion bushels and an increase in soybeans to 342.3 million bushels. *Id.*

4. For a commentary on the need for congressional imposition of a national severance tax ceiling see, Note, *The Increasing Conflict Between State Coal Severance Taxation and Federal Energy Policy*, 57 TEX. L. REV. 675, 690 (1979).

west energy-poor,[5] may only escalate as fossil fuel becomes more scarce.

Severance taxes are duties assessed by a government on the severance or extraction of natural resources from the water or soil.[6] Such taxes are rated[7] either by the physical amount removed or the value of the natural resource.[8] Traditionally, severance taxes have been imposed on oil, natural gas, coal, or other non-renewable resources.[9] The definition of a natural resource, however, is not determinative of its susceptibility to severance taxation.[10] Validity of the imposition of severance taxes hinges on, inter alia, the legitimacy of the local interests.[11] Judicial scrutiny of severance taxation is directed at burdens on interstate commerce and attendant constitutional constraints.[12] The limitations accompanying this form of taxation are discussed below.

II. Types of Severance Taxes and Their Use

Generally, severance taxes are imposed upon the person or entity that severs the resource, regardless of the owner of the resource.[13] Basically, there are two forms of severance taxes: per unit and ad valorem.[14] Per unit severance taxes are described as a specific tax of X dollars per unit of resources extracted.[15] Applying such a method to grain production would result in difficulty in measuring the amount extracted, because of the difficulty in measuring the amount of soil depletion.[16] Conversely, ad valorem sever-

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5. Comment, *An Outline For Development of Cost-Based State Severance Taxes*, 20 Nat. Resources J. 913, 913 (1980).

6. Severance taxes are traditionally used to tax resources such as fossil fuels upon their removal from the soil. *See, e.g.*, Hellerstein, *Constitutional Constraints on State and Local Taxation of Energy Resources*, 31 Nat'l Tax J. 245, 245 (1978).

7. *Id. See also* text accompanying notes 13-49 *infra*.

8. *See, e.g.*, Mont. Code Ann. tit. 15, ch. 35 (1981). *See also* N.M. Stat. Ann. tit. 7, ch. 26 (Supp. 1981).

9. *See* note 6 *supra*.

10. *See, e.g.*, Cities Serv. Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179 (1950). The Supreme Court stated: "A state is justifiably concerned with preventing rapid and uneconomic dissipation of one of its chief natural resources." *Id.* at 187. *Compare* Heisler v. Thomas Colliery Co., 260 U.S. 245, 259-60 (1922) *with* Green v. Frazier, 253 U.S. 233 (1920).

11. *Compare* Commonwealth Edison Co. v. Montana, 101 S. Ct. 2496 (1981) *and* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1976) *with* Cities Serv. Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179 (1950).

12. *See* note 11 *supra*.

13. *See, e.g.*, Mont. Code Ann. tit. 15, ch. 35 (1981).

14. *See generally* H. Steele, Natural Resource Taxation: Resource Allocation and Distribution Implications, Extractive Resources and Taxation (1967).

15. *Id.*

16. Tests are complex and "results are only as good as the sample taken from the field, [and] the laboratory analysis . . . ." The Fertilizer Institute, The Fertilizer Handbook 117 (2d ed. 1976). Soil samples are usually taken from the cultivated plow depth, consequently, only a part of the total supply of nutrients present is represented by the sample. *Id.* at 118. Query whether present soil-testing methods employed to aid farmers would be adaptable to

ance taxes are a tax of X percent of the value of the resource severed.[17] This value is most easily determined as the sales price.[18] The use of either form is based upon the simplification of administration of the tax.[19]

Historically, states have imposed relatively low severance taxes because of the political effects that attached. The states have an interest in revenues, but to over-burden the local activity subject to the tax may lead to failure of a tax proposal caused by political influence.[20] This factor may be of even greater significance when proposing to subject agricultural production to severance taxation. In a state such as Iowa, with a large constituency of farmers and grain distributors, the legislature may face strict opposition if the market prohibits passing the tax to the consumer, and yet, if it is passed to the consumer, what of the consumers within the state?[21] Since states abundant in energy resources are beginning to refuse to absorb the burden of extraction,[22] the increased cost (when higher taxes are assessed) generally results in higher prices to the consumer.[23] Assuming a grain producer could pass the burden of higher costs of extraction, particularly to the out-of-state consumer, consideration must be directed to the form of severance tax to be used and its effect.

Specific severance taxes (per unit) will discriminate against the producer cultivating less fertile soil.[24] This discrimination is undesirable from an economic point of view. The effect may be less than complete use of farm land available for grain production.[25] An ad valorem tax based upon a percent of the sales price avoids this discrimination,[26] but will discourage operations that have higher costs of grain production.[27] The effect, again, may be incomplete use of all available farm land.[28] Accordingly, assessment of either form of tax will result in higher prices because prices will increase as the cost of extraction increases.[29] Alternatively, proposing a graduated tax in proportion to the costs of the complete operation would be difficult to ad-

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measuring nutrient depletion for the purposes of severance taxation.

17. *See* H. STEELE, *supra* note 14, at 246.

18. *Id.*

19. Comment, *supra* note 5, at 915. *See also* text accompanying notes 24-30 *infra*.

20. Link, *Political Constraint and North Dakota's Coal Severance Tax*, 31 NAT'L TAX J. 263 (1978).

21. Many of the "consumers" bearing the tax may be the farmers planting for next year's crop and the farmers using the grain in their feed lots.

22. Comment, *supra* note 5, at 915.

23. *Id.*

24. *See* H. STEELE, *supra* note 14, at 246. A per unit tax would be levied irrespective of *actual* mineral depletion.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 247.

minister.[30] The use of severance taxes as a means to conserve valuable natural resources is effective only if the market is unwilling to pay the resultant price increase.[31] Regardless of the form of tax used, the taxation must be related to the costs of state government.[32] The impact of the price increase generates the claims of an unconstitutional burden on interstate commerce.[33]

As previously discussed,[34] a question of particular political significance is the ultimate effect severance taxes have on consumers. The consumer may pay it in the form of higher prices;[35] consequently, the tax burden relies on the consumer's willingness to pay it.[36] In the event the incidence of the tax cannot be transferred, it will be borne by the operation "extracting" the resource.[37] A tax burdening the activity at the local level may be the opposite result sought by the state.

These costs of state government[38] to which severance tax revenues are to be applied consist of several categories.[39] One apparent cost is the provision of present and future services required in the nature of the activity taxed.[40] Examples may include: state responsibility for local highways, environmental impact of the activity, and the need for additional schools, hospitals, police and fire protection. These services more clearly result from an activity such as coal mining[41] than would be required of states concerned with agricultural production. The influx of people and industry followed by growth-required services is absent in an agricultural setting. Agriculture, a rural activity by nature, requires acreage void of buildings and people, and a low number of people are needed per unit of commodity produced.

Another cost associated with extraction of natural resources is the aesthetic losses created by activities such as strip mining or oil production.[42]

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30. *Id. See also* Comment, *supra* note 5, at 918 n.27 (determination of cost may be analogous to determination of income; regulations comparable to the Internal Revenue Code may result).

31. Comment, *supra* note 5, at 918.

32. *See* text accompanying note 99 *infra*.

33. *See* text accompanying notes 50-114 *infra*.

34. *See* text accompanying note 23 *supra*.

35. Comment, *supra* note 5, at 921.

36. *See* note 31 and accompanying text *supra*.

37. McLure, *supra* note 1, at 258-59. Indeed, the farmer may ultimately pay both the coal severance taxes of other states as well as grain severance taxes of the state wherein the grain is produced. *See* text accompanying notes 144-45 *infra*.

38. *See* text accompanying note 99 *supra*.

39. Comment, *supra* note 5, at 922. The author therein finds authority in a study prepared for the New Mexico Energy Institute by Professor Charles T. DuMars of the University of New Mexico Law School and Dr. Lee Brown, Director of the Bureau of Business and Economic Research at the University of New Mexico. *Id.* at n.50-53.

40. *Id.*

41. *Id.*

42. *Id.*

One arguing non-existence of such losses from grain production would readily avail himself of the rolling countryside as proof of gain rather than loss.

Costs of replacement of the asset are another burden imposed on the state whose resources are being severed from the soil.[43] The claim is based upon the fact that a permanent reduction in a state's wealth has followed the extraction of natural resources.[44] Whether an agricultural state can analogize topsoil depletion to fossil fuel reserves will depend on the mechanics of replacing depleted topsoil.[45]

States that have imposed severance taxes as a means of generating revenue to satisfy various state costs have realized tremendous dollar amounts from collection of the tax.[46] These revenues have enabled the energy producing states to maintain relatively low incidents of other taxation, such as personal property taxes and corporate income taxes.[47] This places the energy consuming states, particularly the North and Midwest, in a position to rationalize the advantage given to the energy producing states in attracting industry.[48] Is this shifting of industry, people and wealth the seed of economic Balkanization against which the framers of the Constitution sought to protect?[49]

III. Constitutional Limitations on Severance Taxation

The modern history of commerce clause interpretation embraces an approach indicative of a judicial sense that comparison of state interests with national concerns is most appropriate in present-day economic reality.[50] Examination of treatises and casebooks[51] reveals that commerce clause challenges generally arrive on the coat-tails of state regulation, as opposed to taxation.[52] The distinction can be found in two recent United States Supreme Court decisions.[53] The case of *Hughes v. Oklahoma*[54] addressed the issue of state *regulation* and its effect on interstate commerce.[55] *Complete*

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43. *Id.*
44. *Id.* at 926 n.82.
45. *See* note 16 *supra.*
46. *See* table 1 *infra.*
47. *See* table 1 *infra.*
48. N.Y. Times, Oct. 15, 1981, at C12, col. 1.
49. Hughes v. Oklahoma, 441 U.S. 322, 325 (1979).
50. *See, e.g.,* Comment, *Constitutional Limitations on State Severance Taxes,* 20 Nat. Resources J. 887, 894-95 (1980); Hellerstein, *supra* note 6; Note, *supra* note 4. *See also* notes 91-114 *infra.*
51. *See, e.g.,* G. Gunther, Constitutional Law, Cases and Materials 341 (10th ed. 1979); L. Tribe, American Constitutional Law 342 (1978).
52. *Id.*
53. *Compare* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) *with* Hughes v. Oklahoma, 441 U.S. 322 (1979).
54. Hughes v. Oklahoma, 441 U.S. 322 (1979).
55. *Id.* at 326.

Auto Transit, Inc. v. Brady[56] addressed the issue of state *taxation* and its effect on interstate commerce.[57] *Hughes* involved an Oklahoma statute that prohibited interstate transportation for sale of minnows taken from waters within the state.[58] The Supreme Court found the statute repugnant to the commerce clause,[59] balancing legitimate state interests against burdens to interstate commerce.[60]

Complete Auto Transit arose out of a state sales tax for the privilege of doing business in the state.[61] The tax in *Complete Auto Transit* was assessed upon a Michigan corporation transporting automobiles manufactured outside the state to points within the state.[62] The Michigan corporation challenged the assessment as unconstitutional as applied to operations in interstate commerce.[63] The taxpayer argued that interstate commerce is immune from state taxation,[64] but the Court refused to go so far and acknowledged that " 'interstate commerce may be made to pay its way.' "[65] In a unanimous opinion, the Court denied a claim made by those engaged in interstate commerce that such taxation is *per se* unconstitutional,[66] and required proof of, inter alia, economic consequences[67] rather than the balancing tests found in state regulation cases.[68]

Before this constitutional limitation on state severance taxation is examined in detail, consideration must first be afforded the constitutionality of a severance tax on grain. *Heisler v. Thomas Colliery Co.*[69] indicates that states have definite local interests in more than just energy resources such as coal.[70] Included in this local interest is control over such items as fruits, wheat and cotton.[71] *Heisler* was spawned by a Pennsylvania severance tax on coal which prompted suit by a shareholder of Thomas Colliery Company seeking an injunction against payment of the tax.[72] The Supreme Court up-

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56. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

57. *Id.* at 278.

58. Hughes v. Oklahoma, 441 U.S. at 323-24.

59. *Id.* at 338.

60. *Id.* at 336.

61. Complete Auto Transit, Inc. v. Brady, 430 U.S. at 275. *Complete Auto Transit* was heavily relied on in *Commonwealth Edison Co. v. Montana*. 101 S. Ct. 2946 (1981).

62. Complete Auto Transit, Inc. v. Brady, 430 U.S. at 276.

63. *Id.* at 277.

64. *Id.* at 278.

65. *Id.* at 281 (quoting without citation to authority).

66. *Id.* at 289.

67. *Id.* at 288.

68. *See also* Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?*, 75 MICH. L. REV. 1426 (1977); *cf.*, Comment, *supra* note 50, at 898 (even the Supreme Court has difficulty in making a distinction).

69. Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922).

70. *Id.* at 259.

71. *Id.*

72. *Id.* at 253.

held the tax against a challenge of unconstitutional burdens on interstate commerce[73] noting the legitimate interests of states in controlling local production and growth.[74] *Heisler* was preceded by *Green v. Frazier*[75] in which a state's entry into the business of manufacturing and marketing farm products[76] was held to be within constitutional bounds.[77] Clearly, the Court recognized the legitimate state interest in farm products and their manufacture.[78]

More recently the Court addressed the concern of states' conservation of their natural resources in *Cities Service Gas Co. v. Peerless Oil & Gas Co.*[79] *Cities Service* arose out of Oklahoma's fixing minimum well-head prices on natural gas produced within the state and sold interstate.[80] Although *Cities Service* addressed the question of state *regulation,* the Court recognized the state's legitimate concern with the prevention of "rapid and uneconomic dissipation of one of its chief natural resources."[81] No longer is the constitutional authority of a state to conserve its natural resources an issue; rather, the limit on such state action is the commerce clause.[82]

The ownership of the resource, whether public or private, is not determinative of a state's concern for its preservation.[83] *Hughes v. Oklahoma*[84] involved a commerce clause challenge to state regulation of the sale of minnows,[85] and under prior Supreme Court analysis[86] a fiction of state "ownership" of wild animals as a representative of the people was a keystone in commerce clause scrutiny of state regulation.[87] The *Hughes* Court discarded this fiction and extinguished the "ownership" element of permissible state regulation within the commerce clause.[88] "Ownership" of the natural resources and a legitimate state interest in preserving natural resources[89] ap-

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73. *Id.* at 261.
74. *Id.* at 259-60.
75. Green v. Frazier, 253 U.S. 233 (1920).
76. *Id.* at 236.
77. The legislation was challenged as an unconstitutional deprivation of property in violation of the 14th amendment to the United States Constitution. *Id.* at 234.
78. *Id.* at 240.
79. 340 U.S. 179 (1950).
80. *Id.* at 180.
81. *Id.* at 187.
82. *Id.* at 186-87.
83. Hughes v. Oklahoma, 441 U.S. 322 (1979).
84. *Id.*
85. *Id.* at 323.
86. Geer v. Connecticut, 161 U.S. 519 (1896) (expressly *overruled* by Hughes v. Oklahoma, 441 U.S. 322, 335 (1978)).
87. Geer v. Connecticut, 161 U.S. at 529.
88. Hughes v. Oklahoma, 441 U.S. at 335-36.
89. There is indeed a federal interest in soil as a natural resource worthy of conservation. *See, e.g.,* Soil Conservation and Domestic Allotment Act, 16 U.S.C. § 590 (1976). The Act specifically refers to soil as a natural resource and seeks to prevent its loss due to erosion. *Id.* at § 590(a). *See also* Agricultural Adjustment Act of 1938, 7 U.S.C. § 1282 (1976); Bankhead Jones

pear to construct no barrier to state taxation of locally produced grain.[90] Accordingly, the inquiry must shift to the constitutional limitations that *are* imposed on state severance taxation.

Commonwealth Edison Co. v. Montana[91] is the most recent definitive analysis of severance taxation and commerce clause restraints confronting state attempts to conserve natural resources.[92] *Commonwealth Edison* arose out of Montana's severance tax on coal mined in the state.[93] Suit was brought by certain in-state coal producers and their utility customers situated outside the state.[94] The plaintiffs founded their challenge on the supremacy clause[95] and the commerce clause[96] seeking a declaration that the tax was unconstitutional.[97] The supremacy clause claim arose out of the assessment of the tax upon coal mined upon federally owned land.[98]

The Supreme Court's evaluation of the Montana tax and its effect on interstate commerce centered upon the four-part test of *Complete Auto Transit*[99] wherein a state tax was found not to offend 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."[100] Montana's severance tax satisfied this four-part test.[101] First, the tax was indisputably levied upon an activity having a substantial nexus with the state in that it was assessed only upon the severance of coal within the state.[102] Second, the tax was fairly apportioned because " 'the severance can occur in no other state' and 'no other state can tax the severance.' "[103] No discrimination against interstate commerce was found even though ninety percent of Montana coal was claimed to have been shipped to other states, thereby shifting the tax bur-

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Farm Tenant Act, 7 U.S.C. § 1010 (1976).

90. *See* text accompanying notes 69-88 *supra*.

91. Commonwealth Edison Co. v. Montana, 101 S. Ct. 2946 (1981).

92. *Id.* (decided July 2, 1981).

93. *Id.* at 2951; *see* MONT. CODE ANN. § 15-35-101 (1981).

94. Commonwealth Edison Co. v. Montana, 101 S. Ct. at 2951.

95. "[The] Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . ." U.S. CONST. art. VI, cl. 2.

96. *See* note 2 *supra*.

97. Commonwealth Edison Co. v. Montana, 101 S. Ct. at 2951.

98. *Id.* at 2960.

99. *Id.* at 2953.

100. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1976). This Note is not analyzing the Court's opinion in that case, but rather is attending to the amenability of severance taxation to grain. Accordingly, close examination of the Court's findings in *Complete Auto Transit* may be found elsewhere. *See, e.g.*, Comment, *supra* note 50, at 900; Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?*, 75 MICH. L. REV. 1426, 1441 (1977).

101. Commonwealth Edison Co. v. Montana, 101 S. Ct. at 2960.

102. *Id.* at 2954.

103. *Id.* (quoting the Montana Supreme Court in Commonwealth Edison Co. v. State, 615 P.2d 847, 855 (Mont. 1980)).

den to non-residents.[104] The Court stated that discrimination may lie in an uneven administration of the tax,[105] but not when the tax is "computed at the same rate regardless of the final destination of the coal."[106] As the Court noted,[107] this "discrimination" argument based upon out-of-state consumers bearing the tax burden was rejected as early as *Heisler*.[108]

The fourth prong of *Complete Auto Transit*, that the tax be "fairly related to services provided by the State,"[109] was satisfied even though Montana places fifty percent of the severance tax revenue into a trust fund.[110] The Court stated there exists no constitutional prohibition against "allocat[ing] a portion of current tax revenues for use by future generations."[111]

> When . . . [the] tax does not discriminate against interstate commerce and is apportioned to activities occurring within the state, the state "is free to pursue its own fiscal policies, unembarassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society."[112]

Accordingly, this fourth prong limits state taxation by requiring the measure of assessment to "be reasonably related to the extent of the contact."[113] State government expenses of providing police and fire protection, trained workers, and "the advantages of a civilized society" are the costs upon which the reasonableness of the tax hinges.[114]

This is the gauntlet laid down to other states seeking to impose a tax such as Montana's severance tax on coal. Can the energy-lean states withstand judicial scrutiny if severance taxation of non-energy resources is the local legislative response, hoping to compensate for the exportation of tax burdens by the energy-rich states?

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104. Commonwealth Edison Co. v. Montana, 101 S. Ct. at 2954. This tax shifting argument is articulated in more detail in the text accompanying note 1 *supra*.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id. See* text accompanying notes 69-74 *supra*.

109. Complete Auto Transit, Inc. v. Brady, 430 U.S. at 279.

110. MONT. CODE ANN. § 15-35-108 (1981).

111. Commonwealth Edison Co. v. Montana, 101 S. Ct. at 2956 n.11.

112. *Id.* at 2957-58 (quoting Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940) wherein a challenge to state income taxation on local earnings of an out-of-state corporation carrying on business within the state was held valid).

113. Commonwealth Edison Co. v. Montana, 101 S. Ct. at 2958.

114. *Id.* at 2959. The Court found that the "appropriate level or rate of taxation is essentially a matter for legislative and not judicial resolution." *Id.* One wonders whether the Court is calling for Congress to act.

IV. Proposing a Severance Tax on Grain that Will Withstand a Commerce Clause Challenge

In light of the most recent posture of the Supreme Court in reviewing state severance taxation, the assessment of such a tax will surely be examined according to those criteria. For severance tax imposition to withstand a commerce clause challenge the four-prong test adopted in *Commonwealth Edison Co. v. Montana* is of primary importance. State legislatures would be well advised to adhere closely to those criteria to reduce the risk of a finding of unconstitutional burdens on interstate commerce.

The facts required to successfully defend a claim of unconstitutionality are enigmatic. *Commonwealth Edison* was adjudicated only to the stage of the state's motion to dismiss the action for failure to state a claim upon which relief could be granted.[115] The case was before the Montana Supreme Court appealing the district court's grant of that motion and dismissal of the claim.[116] The Montana Supreme Court affirmed the dismissal as a matter of law,[117] as did the United States Supreme Court.[118] Accordingly, the claims of the plaintiff, when examined as if true, were insufficient.[119] This ruling placed the defendant-state in a position not requiring proof of facts to satisfy the *Complete Auto Transit* four-prong test. As both higher courts noted,[120] the first prong was satisfied because the assessment was imposed on intrastate activity.[121] The second prong was satisfied as the tax was fairly apportioned.[122] The third prong was satisfied because the tax was calculated at the same rate without consideration of the destination of the subject of the tax.[123] The fourth and final prong was satisfied because of the taxpayer's benefits received as a party doing business within the state.[124]

This fourth requirement, that the measure of assessment "be reasonably related to the extent of the contact"[125] is the basis for the label of "enigmatic." In the motion to dismiss included in Montana's brief to the United States Supreme Court,[126] the state offered no proof of facts that the severance tax was fairly related to the benefits provided to the taxpayer by the

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115. Commonwealth Edison Co. v. State, 615 P.2d 847, 848-49 (Mont. 1980). This limited guidance expressed by the Court may position a challenger to state severance taxation such that a claim that will survive a motion to dismiss may not be possible to draft.

116. *Id.*

117. *Id.* at 863.

118. Commonwealth Edison Co. v. Montana, 101 S. Ct. at 2964.

119. Commonwealth Edison Co. v. State, 615 P.2d at 849.

120. *See* text accompanying notes 100-14 *supra.*

121. *See* text accompanying note 102 *supra.*

122. *See* text accompanying note 103 *supra.*

123. *See* text accompanying note 106 *supra.*

124. *See* text accompanying notes 109-14 *supra.*

125. Commonwealth Edison Co. v. Montana, 101 S. Ct. at 2958.

126. *See* Appellee's Brief for Motion to Dismiss, Commonwealth Edison Co. v. Montana, 101 S. Ct. 2946 (1981).

state.[127] Montana alleged the provision of police and fire protection, benefits of an educated work force and benefits of roads and waterways.[128] Another of the state's offer of benefits was that of "an organized government and an orderly system of laws."[129] These benefits were categorized by the state as the "benefits of a civilized society."[130] The final benefit alleged[131] was the benefit received by the taxpayer from removing the resource itself.[132] Although Montana provided the Court with ample authority that these benefits of "incalculable value"[133] satisfy this fairly-related-benefits test without detailed factual proof[134] and the Supreme Court agreed with that position,[135] the Court provided virtually no guidance to a state attempting to promulgate severance taxation potentially affecting interstate commerce. Indeed, the Court deferred that determination to the legislature.[136] Therefore, a state legislature seeking to apply severance taxation to resources other than coal, oil, copper, etc., may erroneously commit itself to reliance upon *Commonwealth Edison Co. v. Montana* only to have the Court distinguish coal from nontraditional resources subject to severance taxation and find a burden on interstate commerce rising to an unconstitutional level. States unwilling to take this risk may be well-advised to undertake development of a legislative record that would provide proof of the benefits the "extractor of the resource" receives, thereby more clearly establishing the reasonableness of the assessment when juxtaposed with the extent of the taxpayer's contact with the state.[137]

V. The Political Realities

More than just the political ramifications of severance taxation in general,[138] severance taxation utilized in agricultural states on commodities such as grain may have a greater political impact dependant upon the inci-

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127. *Id.* at 14-16.

128. *Id.* at 14.

129. *Id.*

130. *Id.*

131. Perhaps the only alleged benefit that is not a question of fact.

132. Appellee's Brief for Motion to Dismiss at 15, Commonwealth Edison Co. v. Montana, 101 S. Ct. 2946 (1981).

133. *Id.*

134. *Id.*

135. Commonwealth Edison Co. v. Montana, 101 S. Ct. at 2957.

136. *Id.* at 2959 n.16.

137. In establishing a legislative record less likely to succumb to a constitutional challenge a state might consider cultivating facts including the direct costs incurred by the extraction of the resource. Comment, *supra* note 5, at 923. Legislative attention may also examine the costs of extraction to the public in general and resultant physical damages to the countryside. *Id.* at 924. The cost of future state responsibility in maintaining the area should be included, as well as the opportunities lost for future economic benefit as a nonrenewable resource is depleted. *Id.* at 925.

138. *See* text accompanying notes 13-49 *supra*.

dence of the tax.[139] The impact of the tax is of primary concern from a political point of view. Is the structure of the grain market within the United States and abroad such that the farmer, as the producer, will bear the added tax burden rather than the intended target: the out-of-state consumer?[140] Will severance taxation of corn reduce an Iowa grain producer's market share by adding another variable to be calculated in a market of fierce competition?[141] One factor enabling energy resource extractors to shift their severance tax burden is the limited supply in relation to demand.[142] Are grain supplies similarly situated, or will an increase in price encourage large volume consumers to seek alternate suppliers?[143] Although a de minimis severance tax from one-half to one and a half percent may have no noticeable impact on state or national exports, the cost, "almost certainly paid by the producer,"[144] is not the desired result. The Iowa farmer then would find himself paying not only the energy resource severance tax exported from the west,[145] but also paying the locally imposed severance tax on grain. This result, unattractive from a common sense point of view, may be incapable of defense from a political point of view. The constitutional limitations on severance taxation embraced by the commerce clause are capable of adherence.[146] The political realities necessarily contingent on the anatomy of the grain market may preclude the strategically disadvantaged energy-lean states from diffusing the energy resource severance tax burden.

VI. Conclusion

The strain between the states abundant in energy resources and the states importing to fulfill their energy needs has been likened to a civil

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139. Of particular political concern is the party ultimately bearing the tax burden. *See* notes 20-23 *supra.*

140. A study group consisting of Iowa's farm, soil conservation, commodity marketing, energy and legislative community (hereinafter cited as Corn Severance Tax Study Group) concluded that an attempt by grain producers to shift a severance tax burden to consumers would trickle back to the farmer. Letter from Doug Gross to Cameron Willey (Sept. 30, 1981). Mr. Gross is an advisor to Iowa's Governor Robert Ray. Special thanks is extended to Mr. Gross for his assistance. It should also be noted that the Office of the Governor has not taken a position upon the conclusions of the Corn Severance Tax Study Group.

141. The intense competition of international grain markets makes even small price increases prohibitive. *Id.; see also* note 143 *infra.*

142. *See* text and accompanying notes 22-23, 35 *supra.*

143. Indeed, an increase in the price of grain precipitated by a severance tax would provide overseas buyers an incentive to increase purchases from producers other than the United States. Corn Severance Tax Study Group, *supra* note 140. This incentive would, over time, encourage those producers to expand their production; perhaps permanently reducing the market shares of domestic producers. *Id.*

144. *Id.*

145. *See* text accompanying note 1 *supra.*

146. *See* text accompanying notes 115-37 *supra.*

war.[147] The United States Supreme Court may have faltered in the opportunity to intervene in this economic battle by implying institutional inadequacy.[148] If the Constitution does indeed impose the responsibility on legislatures, perhaps Congress should act as soon as possible. Since severance taxation can be assessed on more than the traditional subterranean treasures,[149] grain producing states may be but the first to defend against increased severance taxes found in the west. Other states may stretch the concept of severance taxation as a tool to conserve natural resources to the point of ridiculousness[150] in order to achieve economic parity. Rather than such a demonstrative signal to Congress, the solution may lie in efforts by the state officials to lobby on a national level for a reasonable ceiling on the taxation of sorely needed energy resources.[151] "[The Constitution] was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[152]

Cameron Willey

147. *See Wars Between the States*, TIME, Aug. 24, 1981. *See also* N.Y. Times, Oct. 15, 1981, at C12, col. 1 (the Northeast-Midwest Institute is quoted as labeling the energy producing states as a group of "United American emirates").

148. *See* text accompanying notes 135-36 *supra*.

149. *See* text accompanying note 10 *supra*.

150. *See Wars Between the States*, TIME, Aug. 24, 1981 (quoting former New Jersey Governor Byrne who suggested severance taxation upon Ivy League educations).

151. Such is the reccommendation to Iowa Governor Ray from the Corn Severance Tax Study Group. *See* note 140 *supra*. *See also* Hellerstein, *supra* note 6, at 252.

152. Baldwin v. Seelig, 294 U.S. 511, 523 (1935).

STATE SUMMARY*

Table 1. State Government Tax Revenue, by Type of Tax: 1980

(Thousands of dollars)

State	Corporation net income		Property		Severance
Number of States using tax	46		44		33
All States	13,321,381		2,892,105		4,167,399
Alabama	109,238		44,287		32,410
Alaska	565,329		169,016		506,469
Arizona	117,764		121,990		(X)
Arkansas	83,714		3,932		18,051
California	2,507,183		677,238		25,954
Colorado	110,607		3,652		31,121
Connecticut	246,139		12		(X)
Delaware	40,553		(X)		(X)
Florida	371,405		86,091		121,254
Georgia	239,713		9,565		(X)
Hawaii	50,259		(X)		(X)
Idaho	42,604		175		1,905
Illinois	797,927		103,979		(X)
Indiana	179,191		30,313		1,582
Iowa	138,564		(X)		(X)
Kansas	149,517		18,832		1,100
Kentucky	158,846		176,759		177,244
Louisiana	249,338		32		525,297
Maine	45,086		15,198		(X)
Maryland	165,857		83,597		(X)
Massachusetts	532,383		812		(X)
Michigan	910,732		133,412		43,525
Minnesota	381,217		4,281		83,459
Mississippi	64,369		4,723		52,514
Missouri	135,103		5,038		46
Montana	45,623		18,129		94,636
Nebraska	57,579		2,502		2,948
Nevada	(X)		21,024		23
New Hampshire	62,786		8,218		311
New Jersey	497,205		73,932		(X)
New Mexico	46,272		24,341		213,643
New York	1,235,340		6,520		(X)
North Carolina	291,752		45,908		1,292
North Dakota	36,348		2,174		43,927
Ohio	517,394		141,980		4,596
Oklahoma	89,869		(X)		436,098
Oregon	177,425		77		50,592
Pennsylvania	861,682		181,287		(X)
Rhode Island	53,620		6,280		(X)
South Carolina	153,475		6,042		(X)
South Dakota	3,292		(X)		2,423
Tennessee	198,222		(X)		2,204
Texas	(X)		47,351		1,525,118
Utah	40,377		147		10,584
Vermont	22,425		327		(X)
Virginia	193,847		23,505		1,012
Washington	(X)		471,559		49,924
West Virginia	32,889		713		(X)
Wisconsin	311,321		94,075		437
Wyoming	(X)		23,080		105,700
EXHIBIT: District of Columbia	66,548		219,395		(X)

X Not applicable.

* Bureau of Census, State Government Tax Collections in 1980, Table 3.

Table 2. Western Energy Producing States

(Table to be used in conjunction with Table #1.)

State	Type of Severance Tax	Rate	Allocation of Revenue	Authority
Alaska	ad valorem	12.25% max.	general fund	ALASKA STAT. tit. 43, ch. 55 (1977).
Colorado	per unit & ad valorem	5% max.	general fund & severance tax trust fund	COLO. REV. STAT. tit. 39, ch. 29 (Supp. 1981).
Montana	ad valorem	30% max.	general fund & severance tax trust fund	MONT. CODE ANN. tit. 15, ch. 35 (1981).
New Mexico	per unit & ad valorem	$.57/short ton	severance tax trust fund	N.M. STAT. ANN. ch. 7, art. 26 (1980).
North Dakota	per unit	2.5% max.	general fund & severance tax trust fund	N.D. CENT. CODE tit. 57, ch. 57-61 (Supp. 1980).
Oklahoma	ad valorem	7% max.	general fund & severance tax trust fund	OKLA. STAT. ANN. tit. 68, art. 10 (West 1981).
South Dakota	ad valorem	4.5% max.	general fund & severance tax trust fund	S.D. CODIFIED LAWS ANN. § 10-39A (Supp. 1981).
Utah	ad valorem	2%	general fund	UTAH CODE ANN. tit. 59, ch. 5, art. 7 (Supp. 1981).
Wyoming	ad valorem	6.5%	general fund & severance tax trust fund	WYO. STAT. ANN. tit. 39, ch. 6, art. 3 (Supp. 1981).