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The United States Supreme Court Upholds Federal Use of State Resources to Further National Goals

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THE UNITED STATES SUPREME COURT UPHOLDS FEDERAL USE OF STATE RESOURCES TO FURTHER NATIONAL GOALS

UTILITY REGULATION—STATE SOVEREIGNTY: The United State Supreme Court held that requiring states to consider the adoption of rate designs and regulatory standards designed by the federal government to combat the energy crisis, as required by Public Utilities Regulatory Policies Act of 1978, is constitutional under the Commerce Clause and the Tenth Amendment. *Federal Energy Regulatory Commission v. Mississippi,* 102 S.Ct. 2126 (1982).

INTRODUCTION

As one means to alleviate the nationwide energy crisis, Congress passed the Public Utility Regulatory Policies Act of 1978 (PURPA).[1] To conserve the nation's energy resources, PURPA requires state public utility commissions and non-regulated utilities to consider specific federal proposals[2] under prescribed notice and comment procedures.[3] The commissions are also obligated to resolve disputes among traditional and non-traditional utilities in accord with newly prescribed federal regulations on power sales.[4]

In April 1979, the State of Mississippi and the Mississippi Public Service Commission sued the Federal Energy Regulatory Commission (FERC) and the Secretary of Energy.[5] They sought a declaratory judgment that Titles I and III and Section 210 of Title II of PURPA exceeded congressional power under the Commerce Clause and violated the Tenth Amendment.[6] The United States District Court for the Southern District of Mississippi granted summary judgment to the State of Mississippi and

1. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified in scattered sections of 15, 16, 30, 42 and 73 U.S.C.)

2. 16 U.S.C. §§ 2621(d), 2624 (Supp. IV 1980); 15 U.S.C. § 3203 (Supp. IV 1980).

3. 16 U.S.C. §§ 2621(b), (c)(2), 2623(a), (c); 15 U.S.C. §§ 3203(a), (c) (Supp. IV 1980).

4. 16 U.S.C. § 824a-3(f) (Supp. IV 1980). Nontraditional utilities are co-generation and small power production facilities. A co-generation facility produces electrical energy and some other form of usable energy. 16 U.S.C. § 796(18)(A) (Supp. IV 1980). A small power production facility has a production capacity of 80 megawatts or less of electric power and uses biomass, waste or renewable resources for production. 16 U.S.C. § 796(17)(A) (Supp. IV 1980).

5. 102 S. Ct. 2133 (1982).

6. *Id.*

the Mississippi Public Service Commission on both constitutional issues.[7] The Federal Energy Regulatory Commission and the Secretary of Energy appealed to the United States Supreme Court under 28 U.S.C. § 1252.[8] The United States Supreme Court reversed.[9]

PURPA easily met the Commerce Clause challenge by a unanimous decision of the Court.[10] However, only five justices found that this statute, which permits the federal government to use state regulatory machinery to achieve federal goals, does not violate the Tenth Amendment. At the same time, the majority reaffirmed the outcome of *National League of Cities v. Usery* which held that the federal government cannot regulate "States as States."[11] The majority opinion stated that PURPA does not regulate "States as States" because the states still play an active part in utility regulation.[12]

STATUTORY BACKGROUND

The challenged provisions of PURPA can be divided into two parts. Titles I and III, which relate to electricity and gas utilities respectively, are the mandatory consideration and procedural provisions of PURPA. The congressionally stated goals of Titles I and III are: conservation of energy supplied by electric and gas utilities; optimization of facility and resource efficiency of electric and gas utilities; and establishment of equitable rates to consumers.[13] These provisions require state utility regulatory commissions and private nonregulated utilities to consider the adoption of federally designated rate designs[14] and regulation standards.[15] The deadline for state commission decisions on adoption of the rate designs was November 11, 1981 and on adoption of the standards was November

7. *Id.*
8. *Id.* at 2134.
9. *Id.* at 2130.
10. *Id.* at 2136.
11. *Id.* at 2138, 2140.
12. *Id.* at 2140.
13. 16 U.S.C. § 2611, 15 U.S.C. § 3201(a) (Supp. IV 1980).
14. Commissions were directed to examine the rate designs at the first rate hearing initiated by the authority after Nov. 9, 1981. 16 U.S.C. § 2622(c) (Supp. IV 1980). The six specific rate designs are: (1) costs of service for separate classes of energy consumers; (3) declining block rates; (3) time of day rates; (4) seasonal rates; (5) interruptible rates; (6) load management rates; and (7) life line rates. 16 U.S.C. §§ 2621(d), 2624 (Supp. IV 1980).
15. Standards were to be examined at a public hearing after notice. 16 U.S.C. §§ 2621(b), (c)(2), 2623(a)(2) and 15 U.S.C. §§ 3203(a), (c) (Supp. IV 1980). The five electrical standards are: (1) prohibition of master-metering in new buildings; (2) restrictions on the use of automatic adjustment clauses; (3) disclosure to consumers of information regarding rate schedules; (4) promulgation of procedural requirements relating to termination of service; and (5) prohibition of the recovery of advertising costs from consumers. 16 U.S.C. § 2623 (Supp. IV 1980). The two gas utility standards are: procedures for termination of service and the nonrecovery of advertising costs. 15 U.S.C. § 3203 (Supp. IV 1980).

8, 1980.[16] Titles I and III further allow "any person" to bring an action in state court to enforce these obligations.[17] However, the statute provides no penalty for the failure to meet the deadlines or for non-compliance with the requirements.

The second challenged provision, § 210 of Title II, is designed to reduce the demand for traditional fossil fuels by encouraging the development of cogeneration and small power production facilities.[18] Section 210 requires each state regulatory authority and nonregulated utility to implement[19] regulations promulgated by FERC under this section and exempts these power facilities from state laws and regulations which conflict with FERC regulations.[20] State regulatory agencies must enforce FERC regulations by adjudicating disputes arising under § 210 or other actions devised by the states to execute the FERC rules.[21]

COMMERCE CLAUSE

Plaintiffs made a two-pronged challenge to these PURPA provisions, arguing on Commerce Clause and Tenth Amendment grounds. The Commerce Clause empowers Congress "[t]o regulate commerce with foreign nations and among the several States, and with the Indian Tribes."[22] The standard by which the court determines whether a Congressional action is valid under this power was reaffirmed in the recent case of *Hodel v. Virginia Surface Mining and Reclamation Association*.[23] The legislation must pass the scrutiny of the court under the rational basis test. The courts will defer to a congressional finding that a regulated activity affects interstate commerce "if there is any rational basis for such a finding."[24] Once established, the court will then determine if the "means chosen by [Congress] is reasonably adapted to the end permitted by the Constitution."[25]

Congress in § 2 of PURPA specifically stated that regulation of gas and electric utilities affects interstate commerce.[26] Congress determined that the protection of the nation's health, safety, welfare and national security requires the conservation and efficient use of electric and gas energy

16. 16 U.S.C. §§ 2622(b), (c) (Supp. IV 1980).
17. U.S.C. § 2633(c)(1); 15 U.S.C. § 3207(b)(1) (Supp. IV 1980).
18. 16 U.S.C. § 824a-3 (Supp. IV 1980).
19. *Id.* at § 824-a-3(f).
20. *Id.* at § 824-a-3(e).
21. 102 S.Ct. at 2137.
22. U.S. CONST. art I, § 8, cl. 2.
23. 452 U.S. 264, 276 (1981).
24. *Id.*
25. *Id.*
26. 102 S.Ct. at 2135.

sources and equitable rates to consumers for their use of these resources.[27] The Court found extensive support for these findings in the legislative history of PURPA.[28] Committee reports in both Houses of Congress demonstrated the need to reduce American reliance on oil from foreign nations as well as prevent projected shortages across the nation.[29] The Court held that Congress had a rational basis for finding that federal regulation of utilities affects interstate commerce.

Second, the Court held that the means, PURPA, was reasonably adapted to a permissible end, the protection of interstate commerce. Again, deferring to congressional findings, the Court stated, "[I]t is sufficient that Congress was not irrational in concluding that limited federal regulation of retail sales of electricity and natural gas, and of relationships between co-generators and electric utilities, was essential to protect interstate commerce.[30] The Court did not rule whether PURPA was the best means to protect interstate commerce but rather that it was rational for Congress to conclude that it would protect interstate commerce. The Court concluded that since this is an end permitted by the Constitution, the Act is valid under the Commerce Clause.[31]

TENTH AMENDMENT

In addition to the Commerce Clause challenge, the State of Mississippi and the Mississippi Public Service Commission claimed that PURPA violated the Tenth Amendment. Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[32] The Supreme Court recently held in *Hodel* that a federal act violates the Tenth Amendment if it has the following attributes:

> First,there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability to "structure integral operations in areas of traditional functions."[33]

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27. 16 U.S.C. § 2601 (Supp. IV 1980).
28. *See* legislative history *reprinted* in 1978 U.S. CODE CONG. & AD. NEWS 7659.
29. *Id.*
30. 102 S.Ct. at 2136.
31. *Id.*
32. U.S. CONST. amend. X.
33. 452 U.S. 264, 287–288 (1981) (quoting National League of Cities v. Usery, 426 U.S. 833, 854, 845, 852 (1976)).

Section 210

Section 210 preempts state laws which conflict with FERC regulations regarding power sales between utilities, small power production facilities and co-generators. The principle that Congress may usurp state regulations when the federal regulations do not violate the Commerce Clause was announced in *National League of Cities* and reaffirmed in *Hodel*.[34] Nine justices, basing their decision on these precedents, concurred that the application of FERC regulations to private utilities withstood the Tenth Amendment challenge.[35]

Section 210 further requires states to enforce the federal regulations. The Mississippi Public Service Commission enforced similar state regulations by resolving disputes between the utilities. However, it refused to adjudicate similar claims under PURPA. The Court found *Testa v. Katt* controlling.[36] In *Testa,* a state court refused to hear federal claims under the Emergency Price Control Act even though they heard similar state claims. The United States Supreme Court held in *Testa* that state courts which hear analogous state claims must adjudicate federal claims.[37] Thus, the Mississippi Public Service Commission was required to resolve the disputes arising under PURPA.

Titles I and III

The majority distinguished Titles I and III from the statutes construed in *National League of Cities* and *Hodel,* two cases relied on by the dissent.[38] The majority said that PURPA requires only the consideration, not the adoption of federal proposals. Further, it provides no clear alternative for non-compliance. In contrast, the Fair Labor Standards Act, challenged in *National League of Cities,* required the states to adopt and enforce a federal minimum wage and maximum hours law. The United States Supreme Court held that this federal law violated the Tenth Amendment because it regulated "States as States."[39] Justice Blackmun, in writing for the majority, explicitly reaffirmed this holding.[40]

Similarly, the Surface Mining Act, upheld in *Hodel,* requires the states to enact laws meeting federal environmental protection standards for all surface mining operations on "non-Federal lands."[41] If a state chooses

34. Usery, 426 U.S. at 833, 852; Hodel, 452 U.S. at 276.
35. 102 S.Ct. at 2136.
36. *Id.* at 2137.
37. 330 U.S. 386 (1947).
38. 102 S.Ct. at 2137.
39. Usery, 426 U.S. at 847.
40. 102 S.Ct. at 2138.
41. Hodel, 452 U.S. at 271.

not to adopt such a program or if a state's program does not meet the federal requirements, the federal government will implement and enforce federal laws for that state. The United States Supreme Court held that this act did not violate the Tenth Amendment because it did not regulate "States as States" but rather regulated the private mining industry.[42]

However, PURPA's Titles I and III do not require the implementation of federal regulations initially or in the alternative. Consequently, the majority did not apply the three-part *Hodel* Tenth Amendment analysis. Instead, the Court analyzed PURPA's scheme in light of three prior decisions upholding federal statutes which "directed state decision makers to take or refrain from taking certain actions."[43]

In the first decision cited, *Fry v. United States,* the United States Supreme Court upheld the application to state employees of wage and salary controls established by the Economic Stabilization Act of 1970.[44] These controls, designed to ameliorate inflation, were temporary.

The second cited decision, *Testa v. Katt,* upheld the Emergency Price Control Act which gave jurisdiction over claims under the Act to both state and federal courts. When Rhode Island's state court refused to hear the federal claims although they adjudicated state claims, the United States Supreme Court declared that "the policy of the federal Act is the prevailing policy in every state."[45] The Court held that a state court may not decline to enforce federal laws because such laws are made by the federal and not the state legislature.[46] The majority in *FERC v. Mississippi* relied on this principle from *Testa* to support their conclusion that Congress may impose federal responsibilities on state legislatures.

The third case cited by the *FERC v. Mississippi* majority is *Washington v. Fishing Vessel Association.*[47] The United States District Court for the Western District of Washington issued a decree to the State of Washington designed to protect the Indians' share of anadromous fish runs granted under a treaty.[48] Washington refused to enact and enforce the necessary regulations to execute the decree. The decree provided that if the state agency failed to perform this duty, various federal law enforcement agencies would enforce these rights under federal law.[49] The United States Supreme Court upheld this use of federal power which required a state agency to enact and enforce regulations protecting federally bestowed rights.[50]

42. *Id.* at 293.
43. 102 S.Ct. at 2138.
44. 421 U.S. 542 (1975).
45. 330 U.S. at 393.
46. *Id.* at 391.
47. 443 U.S. 658 (1979).
48. *Id.* at 672.
49. *Id.* at 673.
50. *Id.* at 695–96.

Justice Powell in *FERC v. Mississippi* wrote a short dissent on the Tenth Amendment challenge to the federal requirements in Titles I and III which preempt state administrative and judicial procedures.[51] Justice Powell reasoned that congressional power to replace state procedures with federal procedures in an area which can be preempted under the Commerce Clause should not be extended to congressional power limitations imposed by the Tenth Amendment. The Tenth Amendment requires a separate analysis under which this extension of federal power fails. "The reasoning of the majority," said Justice Powell, "could reduce the States to federal provinces."[52] Specifically, Justice Powell said the extension of power may allow the federal government to preempt state court rules of civil procedure and judicial review of cases which affect interstate commerce.

Justice O'Connor, with whom the Chief Justice and Justice Rehnquist joined, also limited her dissent to Titles I and III. Justice Powell did not join with them because he believed that the substantive provisions of the Act were constitutional. In her analysis, she directly applied the three-part test Tenth Amendment used in *Hodel*. The dissent, unlike the majority, reasoned that this test applied to all instances of federal action that may impair "a State's ability to function as a State."[53] The dissent viewed preemption as less intrusive than the commandeering of state resources.[54] When a subject of legislation is preempted by Congress, the States may nevertheless enact their own legislation which does not conflict with the federal legislation. States may enact laws which impose higher standards or may complement voids in the federal legislative scheme. Further, States may "simply devote their resources elsewhere."[55] This, said the dissent, is not allowed under PURPA because of its mandatory structure. Secondly, PURPA is more intrusive than preemption because it requires the consideration of proposals made by the federal, not state, government. PURPA requires states to expend their resources weighing federal standards, making written findings, and defending their decisions in court. Thus, the time needed to consider local proposals is lacking. Under PURPA the value of state experimentation and possible innovative approaches to national emergencies are lost.[56]

According to the dissent, PURPA fails each of the three *Hodel* criteria:

1) "States as States"—Justice O'Connor wrote that PURPA requires the use of state machinery to further federal goals and concluded, "It is

51. 102 S.Ct. at 2143.
52. *Id.* at 2144.
53. *Id.* at 2147.
54. *Id.* at 2151.
55. *Id.* at 2152.
56. *Id.* at 2153.

difficult to argue that a statute structuring the regulatory agenda of a state agency is not a regulation of the 'State'."[57]

2) "Attributes of state sovereignty"—PURPA requires consideration of 12 specific proposals with specific time frames.[58] The dissent concluded that these requirements diminish the state's sovereign right to determine what methods it decides are best to alleviate the energy crisis.

3) "Structure integral operations in areas of traditional governmental functions."—According to the dissent, gas and electric regulation are traditional state functions and state regulatory commissions are an integral part of that function. PURPA, concluded the dissent, impaired the use of these state functions to address local regulatory issues.[59]

Furthermore, the dissent viewed the three cases relied upon by the majority as being inapplicable to the PURPA scheme. The dissent explained that the principle in *Testa* that state courts must enforce federal laws when the state hears analogous state claims should not be extended to state legislative powers. The dissent noted that "[s]tate legislative bodies possess at least one attribute of sovereignty, the power to set an agenda, that trial courts lack."[60] In distinguishing *Fry v. United States,* the dissent said that the wage freeze in *Fry,* unlike the requirements in this case, was temporary.[61] Finally, in addressing *Washington,* the dissent noted that the power of federal courts to enforce federal law, if the state fails to do so, which was the principle upheld in *Washington* is far different from the power of Congress to demand state legislative action in the absence of any showing that a state has violated existing federal duties."[62]

ANALYSIS

The fundamental difference between the majority and dissenting opinions is their respective approaches in addressing the Tenth Amendment issue. The majority sees *FERC v. Mississippi* as a case of first impression.[63] PURPA goes one step further than the Surface Mining Act construed in *Hodel.* In both cases, Congress could have preempted utility and surface mining regulations but instead allowed the States to retain their regulatory role. However, the Surface Mining Act explicitly offered the states an alternative to adopting and implementing regulations consistent with federal standards.[64] The federal Office of Surface Mining

57. *Id.* at 2147.
58. *Id.*
59. *Id.* at 2148.
60. *Id.* at 2151 n. 14.
61. *Id.* at 2150 n. 13.
62. *Id.*
63. *Id.* at 2137.
64. *Id.* at 2140.

Reclamation and Enforcement will promulgate and enforce the surface mining requirements for the mining industry in the states. Under PURPA, a state's alternative is not clear. The Court suggests a forfeiture of utility regulation[65] and the legislative history suggests court action by a writ of mandamus.[66] This difference, and the fact that Congress required consideration, not adoption of federal proposals, led the majority to conclude that a different analysis, not the test announced in the *National League of Cities* and affirmed in *Hodel,* should be applied to PURPA.

The majority instead took on a role as arbiter between the possible approaches to combat a national problem and concluded that federal use of state resources rather than preemption of state functions will better serve both state and federal interests. Noting the difference between preemption-type statutes and PURPA, the majority held that "PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the states to continue regulating in the area with the added condition that they *consider* the suggested standards."[67]

PURPA allows the states to retain their regulatory role. Consequently, PURPA is viewed by the majority as being less intrusive than preemption. Thus, the majority concluded that PURPA is a valid exercise of Congressional power. However, a narrower holding suggested by Professor Laurence Tribe is that: "State agencies may be required to settle disputes about federal regulations that are analogous to those state disputes they already handle and to *consider* (not adopt) federal proposals in accord with federal procedures that simply broaden participation a bit beyond that prescribed by established state procedures, because such conditions are both minimally intrusive and fully consistent with federalism's underlying value of broader local participation in government."[68]

The dissent concluded that the *National League of Cities'* standard applies to all federal actions which condition a state's continuing regulatory role in a preemptible field. Under this standard, Congress cannot preempt if the legislation violates *Hodel's* three-part Tenth Amendment analysis. It views PURPA's scheme as more intrusive than federal preemption of state utility regulation because it "commandeers" state resources. This position is difficult to reconcile with two facts. First, the states under PURPA ultimately make the final decisions on regulation of utilities under Titles I and III. Second, Congress, realizing PURPA would require the

65. *Id.*

66. H.R. REP. No. 1750, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 7797, 7818.

67. 102 S.Ct. at 2140.

68. 51 U.S.L.W. 2248.

expenditure of funds, earmarked 40 million dollars to assist the states in complying with PURPA.[69]

The dissent seems to indicate that the test in *Hodel*, which PURPA failed in Justice O'Connor's analysis, supercedes the prior cases the majority relied on to reach their conclusion. However, PURPA's factual situation is more closely analogous to *Washington* than to *Hodel*, and *Hodel* did not override *Washington*. Thus, the dissent's argument is weakened because they did not distinguish the similar use of state resources required in *FERC v. Mississippi* and *Washington*.

CONCLUSION

A broad interpretation of the holding in *FERC v. Mississippi* would overrule *National League of Cities*, which the majority reaffirmed. Thus, it cannot be interpreted that Congress can impose any conditions upon a state regulatory commission to retain its regulatory role in the federally preemptible field of utility regulation. Rather, conditions such as consideration of federal proposals with specific procedures which are less intrusive than preemption are a valid exercise of congressional power. Under such a legislative scheme, the majority chose to balance federal and state interests from the standpoint of: how can this national problem be effectively addressed within the constraints of our federal system? There is no preemption issue when Congress chooses to allocate the burden of a national crisis among the states and the federal government, and consequently no application of the Tenth Amendment *Hodel* test.

The majority's holding allows Congress to address a crisis under a scheme superior to the alternatives: the complete usurpation of state power and stifling of states' creativity to meet their own needs or the federal government foregoing its responsibility by providing no guidance to the states—with the possibility of some states conserving and others wasting energy resources.

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69. 42 U.S.C. §§ 6807, 6808(1) (Supp. IV 1980).