Natural Resources - Constitutional Law

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NATURAL RESOURCES—CONSTITUTIONAL LAW

NATURAL RESOURCES/CONSTITUTIONAL LAW: A state statute banning the export out of state of hydroelectric power generated within the state, absent any Congressional authorization, is "precisely the sort of protectionist regulation" prohibited the states by the commerce clause. New England Power Co. v. New Hampshire, 455 U.S. 331, 339 (1982).

BACKGROUND

A New Hampshire statute enacted in 1913 prohibits exportation of electric power generated inside New Hampshire without prior permission of the State Public Utilities Commission (PUC, Commission). Until 1980, the New England Power Company (NEPC, Company) had routinely applied for and received such permission. In 1980 the PUC refused NEPC permission to export hydroelectric power generated within New Hampshire. Instead, the Commission ordered NEPC to make arrangements to sell the Company's New Hampshire-generated hydroelectric power inside the state. In accordance with a Commission report accompanying the order, the PUC found that doing so would save New Hampshire consumers approximately $25 million a year due to the lower cost of water-generated electricity. The Commission therefore concluded that NEPC's hydroelectric energy was "required for use within the State of New Hampshire," language which quoted the exportation statute and which provided justification for the Commission's embargo order by invoking the State's police power.

NEPC, the Commonwealth of Massachusetts, and the Attorney General of Rhode Island all appealed the New Hampshire PUC's order to the New Hampshire Supreme Court. Their claims were: 1) that the Commission's order was preempted by the Federal Power Act; and 2) that the order imposed impermissible burdens on interstate commerce in violation of the commerce clause of the U.S. Constitution. The New Hampshire Supreme Court upheld the PUC's order. The state Supreme Court found

1. N.H. REV. STAT. ANN. §374:35 (1966): "No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention so to do with the public utilities commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use."


that a "savings clause", § 201(b) of the Federal Power Act granted New Hampshire authority to restrict interstate transportation of hydroelectric power generated within the state.

On NEPC's appeal to the U.S. Supreme Court the issue was "whether a State can constitutionally prohibit the exportation of hydroelectric energy produced within its borders by a federally licensed facility, or otherwise reserve for its own citizens the 'economic benefit' of such hydroelectric power." In its Opinion, the court characterized the dispositive question as whether the Federal Power Act protects New Hampshire's statute from attack under the commerce clause.

The U.S. Supreme Court held that New Hampshire's statute violates the commerce clause because its purpose is to gain an economic advantage for New Hampshire residents at the expense of out-of-state power customers. In doing so the statute places a direct and substantial burden on interstate commerce. The Court based its holding on the determination that the state statute was not protected by § 201(b) of the Federal Power Act.

New England Power Company is a wholesale generating subsidiary of New England Electric System (NEES), a public utility holding company headquartered in Massachusetts. New England Power Company supplies electricity to three major retail subsidiaries of NEES which distribute electricity to 1.1 million customers in Massachusetts, Rhode Island and New Hampshire. Among other generating facilities, NEPC owns and operates 43 hydroelectric units, 21 of which are located in New Hampshire. The hydroelectric and "alternate" cheap fuel facilities produce approximately 10 percent of NEPC's total output. NEPC's total service to New Hampshire through its wholesale customers reaches less than six percent of New Hampshire's population.

NEPC is also a member of the New England Power Pool, whose almost 40 utility members individually own approximately 98 percent of the total

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4. § 201(b) was codified as 16 U.S.C. § 824(b) (1976). "The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State of State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."

5. 455 U.S. 331, 333 (1982). The Court's characterization of the issue predetermined the outcome.


7. Id.

8. Id.; See 455 U.S. at 333. "Alternate" facilities are non-coal, oil, nuclear or hydro generating facilities; they include wind and solid waste combustion.

9. 455 U.S. at 333.
generating capacity and virtually all of the transmission and distribution network in a six-state area. 10 All of the electricity generated by the Power Pool's members goes into a "power grid" for distribution through a centralized dispatch system on an as-needed basis.11

The effect of the Power Pool is to assure a reliable supply of electricity to its members at the lowest possible cost. A computerized central dispatch system sets operating schedules that utilize lowest-generation-cost facilities first, then bringing on-line successively higher-cost plants, regardless of owner or location so that the cheapest available power is always used first. The central dispatch system also calculates the cost of generation (4/MW) for each generating unit in the Pool. The cost of power to each Pool member is arrived at by averaging the generation cost per unit of each facility that was available to produce power during the time period being measured. Billing to each member of the pool is then calculated on the "amount it would have cost the utility to meet its own load requirements using only its own generating sources, minus that member's share of the savings resulting from the centralized dispatch system."12 These savings can be considerable. The actual production of a member company is measured against that company's actual consumption in a given time period to determine whether the company was a net seller or a net buyer of electricity in any given time period.

In the instant case, New Hampshire wanted to be billed solely on the basis of the cost of power production from the hydro plants within its borders, instead of the average cost of all NEPC's plants. New Hampshire hoped thereby to procure an economic benefit for its citizens in the form of lower-cost electricity at the same time it enjoyed the greater reliability of service derived from NEPC's membership in the Power Pool.

ANALYSIS

Historically, the Supreme Court has always been concerned that state laws which preserve economic benefits for its own citizens at the expense of citizens of other states may contradict the values implicit in the dormant commerce power of the federal government. From 1911 until 1970 the Court consistently held that, absent express Congressional provision to the contrary, the states lack authority to regulate interstate trade in natural resources located within the state's boundaries.13 The policy behind this

10. The Power Pool's members operate in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut. Id. at 334.
11. A "power grid" is a regional transmission network.
12. 455 U.S. at 334.
13. In 1911 and 1928 the Supreme Court prohibited states from according their own inhabitants a preferred right of access over consumers in other states to natural resources located within their borders. West v. Kansas Natural Gas, 221 U.S. 229 (1911); Foster-Fountain Packing Co. v. Haydel,
"If the states have such power [to control access to natural resources] a singular situation might result: Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals... Thus enlarged... its influence on interstate commerce need not be pointed out. To what consequence does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines..."

At the same time, the Court recognized the need of States to exercise legitimate police powers to protect the health and safety of their citizens. The early commerce clause cases can therefore be characterized as groping, case by case, toward a satisfactory test of permissible state-imposed restrictions on interstate trade in natural resources. The early cases, however, took a mechanistic approach. Rules were endorsed and inflexibly applied in each case. Inevitably the rules laid down had to be changed periodically to account for new circumstances presented in subsequent cases. Then in 1970, in *Pike v. Bruce Church, Inc.*, the Court finally enunciated a test which has since become a consistently applicable standard:

"Where the statute [1] regulates evenhandedly to [2] effectuate a legitimate local public interest, and [3] its effects on interstate commerce are only incidental, it will be upheld unless [4] the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

*Pike* announced the arrival of the modern, less mechanistic, balancing approach.

The modern doctrine of resource protectionism had its roots in the early commerce clause cases. After *Pike* the emerging doctrine was further developed in *Philadelphia v. New Jersey* and *Hughes v. Oklahoma*.

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278 U.S. 1 (1928). In 1927 the Court held that a state is restrained by the commerce clause from the imposition of a direct burden on interstate commerce and that any state statute, regardless of its purpose, which imposes such a burden must necessarily fall. Public Utility Commission of Rhode Island v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927). In 1932 the Supreme Court held that "while conversion and transmission [of electricity] are substantially instantaneous they are... essentially separable and distinct operations." Utah Power & Light Co. v. Pfost, 286 U.S. 163, 179 (1932). Under this rule a state may tax the generation of electricity without interfering with interstate Commerce. See also, Pennsylvania v. West Virginia, 262 U.S. 553 (1923); Prudential Insurance v. Benjamin, 328 U.S. 408 (1946); Philadelphia v. New Jersey, 437 U.S. 617 (1978); Hughes v. Oklahoma, 441 U.S. 322 (1979).

14. 262 U.S. at 599 (1923).
The rule enunciated in *Philadelphia* is that a state law violates the commerce clause if the state "attempt(s) . . . to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." Thus, the Supreme Court rejects state laws whose sole or primary purpose is economic protectionism. In *Hughes* the Court established the "least discriminatory alternative" test when it refused to allow a state to conserve minnows by limiting their transportation for sale when "equally effective non-discriminatory conservation measures are available." 

*New England Power Co.* is actually an application of the *Pike* test, modified by *Hughes* and *Philadelphia*, even though *Pike* is not cited. First, the Court confronted the question whether the hydroelectric energy that was the subject of this case is an article of commerce, since under *Philadelphia* only articles of commerce are subject to the *Pike* test of commerce clause permissibility. Citing *Utah Power and Light Co. v. Pfost*, the Court decided that the energy generated in NEPC's New Hampshire hydroelectric stations is a privately-owned article of trade, "a product entirely distinct from the river waters used to produce it."

The balancing of the *Pike* elements was not enumerated in the decision, but clearly the New Hampshire PUC order failed the *Pike* test:

1) it was discriminatory against other states on its face;
2) under *Philadelphia* protection of a state's economic benefits for its own citizens is not a legitimate public interest;
3) the effects on interstate commerce would not have been only incidental; and
4) the local benefits that would have been derived from the action did not outweigh the burden imposed upon interstate commerce.

The Court summarized its *Pike* analysis as follows:

The Commission has made clear that its order is designed to gain an economic advantage for New Hampshire citizens at the expense of New England Power's customers in neighboring States. Moreover, it cannot be disputed that the Commission's "exportation ban" places direct and substantial burdens on transactions in interstate commerce.

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18. 437 U.S. 617, 628 (1978). The court seems to have carved out one exception to this rule: *Reeves v. Stake*, 447 U.S. 429 (1980), gave a state (Sough Dakota) the right to confine its residents to the sale of products (cement) manufactured by the state itself from natural resources (limestone) found within its borders. The Court decided that when a state enters the marketplace as a participant instead of a regulator, there is no constitutional restriction on the state's right to choose the parties with whom it will deal. Thus the state may choose to deal only with its own residents when it is itself a producer of goods. But if *Reeves* had involved packaging and sale of limestone only, instead of cement, the result might have been different. See *White v. Massachusetts Council of Construction Employees*, 103 S.Ct. 1042 (1983).

22. 455 U.S. at 339.
The Court then held, "Such state-imposed burdens cannot be squared with the commerce clause when they only serve to advance 'simple economic protectionism.'"23 Once it was decided that the Commission order was a protectionist burden on interstate commerce, the outcome of the debate was foreclosed.

A secondary argument raised by the State of New Hampshire was that Congress, by its failure to act, had consented to the New Hampshire statute.24 Congress may consent to state regulation of interstate commerce which would otherwise be impermissible,25 but the question whether that consent may be implied or must be expressed had been debated widely without conclusive decision until New England Power Co. Even after Prudential Insurance Co. v. Benjamin,26 which addressed the as yet unexplored theory behind the assumed Congressional power to consent to otherwise impermissible state regulation, there was still debate over the nature and expression of that power.27

A "bright line" has finally emerged in New England Power Co. regarding the implied/expressed argument. The Court has made clear that no consent will be implied. Consent to state regulation of interstate commerce must be express.28 By its terms, 16 U.S.C. § 201(b) saves from preemption only such state authority as was otherwise lawful. It does not specifically exempt any state statute, including the 1913 New Hampshire statute, from preemption. The Court concluded:

"Indeed, given that the commerce clause—independently of the Federal Power Act—restricts the ability of the States to regulate matters affecting interstate trade in hydroelectric energy, § 201(b) may in fact save little in the way of 'lawful' state authority."29

SIGNIFICANCE

New England Power Co. reaffirms Congressional authority under the commerce clause to regulate interstate trade in natural resources. The

23. Id.
24. New Hampshire argued that § 201(b) of the Federal Power Act is a "savings clause" preserving the state's authority to regulate the hydroelectric power produced within its borders. New Hampshire cited what the Court called an "isolated fragment" of legislative history in which a congressional Representative from New Hampshire recognized that an effect of the 1935 amendment to the Federal Power Act would be to deprive certain states of the control then exercised over the exportation of hydroelectric energy, and expressing "hope" that New Hampshire would be granted "the privilege to continue" such control. The Court found this argument unpersuasive and did not find any other evidence of Congressional intent to consent to such state regulation.
28. 455 U.S. at 343 (1982). In Sporhase a better consent argument was rejected.
29. Id.
Supreme Court has consistently held that states cannot restrict to their own citizens the benefits of natural resources located within state boundaries. As a result, a state's control over such resources is largely limited to taxing their generation or extraction. New England Power Co. reiterates the Court's adamant stand against economic protectionism, especially when natural resources are concerned.

Secondarily, this case establishes that Congressional consent to otherwise impermissible state regulation of interstate commerce must be express; the Court will not infer such consent.

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