7-24-1985

State Severance Taxes

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S. Hrg. 98-1154

STATE SEVERANCE TAXES

HEARING

BEFORE THE

SUBCOMMITTEE ON
ENERGY AND AGRICULTURAL TAXATION

OF THE

COMMITTEE ON FINANCE
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

S. 463

JULY 24, 1984

Printed for the use of the Committee on Finance

U.S. GOVERNMENT PRINTING OFFICE
40-325 O WASHINGTON : 1984

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The Dixon bill would reverse the Supreme Court and invite the taxpayers back into court to argue over precisely this point. Decisions on the appropriate level of a tax would be made in the isolation of the judicial proceeding, divorced from the realities of the political process and public involvement.

Finally, it is important to remember that tax revenues based on resource production are neither dependable nor assured. Severance tax revenues are a direct reflection of the health and productivity of the resource market. The U.S. energy market, at least where coal is concerned, is far from healthy. Our coal tax revenues have declined rather than increased over the past year and so have the resource-related revenues of other states. Together, state severance tax revenues were down by $433 million in fiscal year 1983 from the previous year. Because of a $124 million drop in severance tax revenues last year, Texas is looking at the need for major new taxes to support its educational system. Minnesota set up a special "rainy day" fund to cushion against the cyclical swings in state revenues, brought on partly as a result of the drop in state revenues from taconite mining.

While Montana enjoys revenues from energy production, we do not depend solely upon them and recognize that other sources of revenue will be needed to support the governmental activities and needs of the State today and in the long run.

I appreciate this opportunity to express Montana's viewpoint. I know this Committee will exercise the same caution that has been displayed in Congress over the past few years in regard to intruding on this aspect of state taxation.

If there are any questions, I will be happy to respond.

Senator WALLOP. Senator Baucus.

Senator BAUCUS. Stan, I want to thank you again. Also for drawing out another point, which really hasn't been raised very much here yet, and that is that Senator Dixon's bill would basically leave it to the courts to set these rates. And it would be a very, very lengthy and involved process. And, second, you are giving the decision to people who are not elected officials but who were appointed officials for life. And I don't think most people in this country would want nonelected officials to be making these kinds of decisions. It's just another whole level of problems that will be created with these kinds of approaches that are contained in this bill. And I want to thank you for drawing that out.

Senator STEPHENS. Thank you very much, Senator.

Senator WALLOP. To conclude this morning's hearing, we have a panel consisting of Dr. Walter Hellerstein, professor of law at the University of Georgia School of Law in Athens; and Mr. George Rifakes, vice president, Commonwealth Edison, Chicago, IL.

STATEMENT OF DR. WALTER HELLERSTEIN, PROFESSOR OF LAW, UNIVERSITY OF GEORGIA SCHOOL OF LAW, ATHENS, GA

Dr. HELLERSTEIN. I appreciate the opportunity to present my views on State severance taxation to this subcommittee. I have been deeply involved over the past 6 years in controversies involving State severance taxes. I assisted the State of Montana in preparing its defense of its coal severance tax in the case that culminated in the Supreme Court's decision in *Commonwealth Edison* v. *Montana*. I have worked with other States and with private industry in matters involving State severance taxes, and I have spent the better part of the past 2 years completing a book on State and local taxation of natural resources in the federal system.

Needless to say, the views that I am presenting to the subcommittee are entirely my own and do not necessarily represent the views of any of the public or private parties with whom I have worked.

While there is much to divide the various constituencies with an interest in State severance taxes, it may be useful to begin with several fundamental principles that do command and, in my judgment, should command virtually universal support. First, few question the right of producing States to single out natural resources for special taxes. The diversity of the individual State's tax structures has been characteristic of the American tax system from the very beginning and it is taken for granted that it will remain that way.

Second, few question the right of the producing States to recover the reasonable costs that are imposed by the extractive industries on the State. These costs include not only the costs of schools, roads, hospitals and the like, but also the environmental and social costs that natural resource development may impose on the State.

Finally, few question the proposition that those who benefit from natural resource extraction should bear the burden of the costs it generates, even if those beneficiaries are not residents of the taxing State.

The list of shared assumptions is short by comparison to the list of issues that separate the producing and consuming States. Although these sources of conflict are considered in some detail in my prepared statement, I will touch only briefly on them today because other witnesses have focused on them, and I would rather devote my few minutes of oral testimony to issues that are less likely to be fully aired at this hearing.

In connection with the issues that divide the resource producers from the resource consumers, it is helpful, I believe, to distinguish between conflicts over premises and conflict over facts. In the first category are such questions as whether severance taxes should be limited to the reasonable cost imposed by production activities on the State, and whether the producing State has a special claim for taxing their resources because they constitute their so-called natural birth right.

In the second category are such questions as the estimate of costs attributable to natural resource production, the extent to which State severance taxes are exported to residents of other States, and the significance in relative terms of the burden of such taxes on nonresident consumers.

When we turn to the question as to what role, if any, the Federal Government should play in forging a uniform national policy toward State severance taxes, we find that opinions are colored by one's views on the merits of the issues to which I have just referred. Nevertheless, there are a few general observations about the wisdom and form of legislation in this domain that I would like to leave with the subcommittee.

First, in considering the question of whether to impose Federal restraints on State severance taxes, Congress ought to proceed, in my judgment, with more than the usual caution than it should ordinarily exercise when it legislates to impose direct restrictions on State power. Beyond the general questions of State autonomy that have been raised in connection with proposals to legislate in this area, there are very significant differences among the States' approach to natural resource taxation that Congress should recognize before it embarks on a particular legislative course.

Many States, for example, impose severance taxes in lieu of any property taxes on their natural resources, a point that has already been mentioned today. Thus, 5 of the Nation's top 10 oil producing States—namely, Alaska, Louisiana, Oklahoma, Florida, and Mississippi, and 4 of the Nation's top 10 gas producing States—namely, Louisiana, Oklahoma, Alaska, and Michigan, impose their oil and gas severance taxes in lieu of any property taxes on their resources. In the Rocky Mountain West—I know the Senators are familiar with this—most States, including the major natural resource producers of Montana, New Mexico, and Wyoming, impose local property taxes based on some percentage of the proceeding year's proceeds, which may be a small percentage of the value of the underlying reserve if it were assessed like other property on a fair market value basis.

In other States, mineral reserves, especially nonproducing reserves, are largely ignored by local property tax assessors because of the difficulty of valuing such reserves.

The point of all of this is to suggest that Congress would be shortsighted to focus only on severance tax rates in making national policy in this area, for severance taxes may be seen as a counter balance in State and local revenue structures that omit, limit or ignore the value of natural resources in their ad valorem property tax base. Broad based congressional legislation limiting State severance taxes that failed to take account of the fact that many States undertax their natural resources in their ad valorem property tax bases might well be unfair from the standpoint of interstate equity and undesirable from the standpoint of national policy.

Second, I believe that if Congress chooses to legislate with regard to State severance taxes it should be evenhanded in its legislation. In this respect at least, S. 463, which applies to oil, gas, and coal, is preferable to legislation that has been introduced into Congress in the past which has been directed specifically at coal alone.

Finally, before Congress does take the significant step of restraining State power to impose severance taxes, I think it would be worthwhile for it to consider less intrusive alternatives to achieving the same end. If Congress is concerned about the disparities in fiscal capacities that arise out of the adventitious location of our Nation's resources, it is certainly in a position to reallocate revenues disbursed to the States by various revenue sharing formulas that, in the eyes of some observers, presently favor the States with high severance tax yields.

Although the controversy surrounding these formulas may be no easier to resolve than the controversy surrounding Federal limitations on State severance taxes, it would be preferable, in my judgment, to reduce any perceived fiscal disparities between the States through modification of such formulas to take account of such disparities rather than by restricting State tax power in a way that could have unexpected and unwarranted consequences.

Thank you very much.

Senator WALLOP. Thank you very much, Dr. Hellerstein. We will have questions after Mr. Rifakes.

[The prepared written statement of Dr. Hellerstein follows:]

Prepared Statement of Walter Hellerstein Professor of Law University of Georgia

I appreciate the opportunity to present my views on state severance taxation to the Subcommittee. I have been deeply involved over the past six years in controversies involving state severance taxes. I assisted the State of Montana in preparing its defense of its coal severance tax in the case that culminated in the Supreme Court's decision in Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981). I have worked with other states and with private industry in matters involving state severance taxes. And I have spent the better part of the past two years completing the manuscript for a book entitled State and Local Taxation of Natural Resources in the Federal System: Legal, Economic, and Political Perspectives. Needless to say, the views that I am presenting to the Committee, which constitute a portion from the manuscript of my book, are entirely my own and do not necessarily represent the views of any of the public or private parties with whom I have worked.

The following excerpt from my manuscript examines the political struggle over state severance taxes as it has surfaced in the interregional conflicts between resource-rich and resource-poor states and in the debate over the role, if any, that the Federal Government should play in forging a coherent national policy in this area. It is not offered as a policy tract. Rather its fundamental aim is to elucidate the critical political issues that have been raised in this context. It will have achieved its purpose if it has identified and clarified the questions that ought to be addressed by those who would make national policy toward state severance taxes.

CHAPTER 6

POLITICAL PERSPECTIVES ON STATE AND LOCAL TAXATION OF NATURAL RESOURCES

It is in the political realm that the issues of federalism raised by state and local taxation of natural resources have captured the popular imagination. Political rhetoric from the Northeast and Midwest invokes images of "blue-eyed Arabs" in the energy-rich states exploiting their locational advantages to exact tribute from shivering energy consumers in New York and Chicago. Political oratory from resource-producing regions responds with visions of scarred landscapes, abandoned mining towns, and irretrievable resource losses for which taxes are but small recompense. And forebodings of a second War Between the States over state taxation of natural resources preoccupy the news media.

It is in the political realm as well that these conflicts will have to be resolved, if they are to be resolved at all. Whatever possibility may once have existed for disposing of them through the judicial process has been foreclosed by the Supreme Court's decision in Commonwealth Edison, which permanently removed them from its docket. The Court instead consigned their resolution to the political process "by state legislatures in the first instance, and, if necessary, by Congress when particular state taxes are thought to be contrary to federal interests."[1]

This chapter investigates the questions that have dominated the political debate over state and local taxation of natural resources in the federal system. In so doing, it seeks to identify areas of consensus, to clarify points of disagreement, and to examine proposals that could provide a basis for reconciling the competing concerns. Part I briefly considers the issues as they arise "in the first instance," i.e., within the framework of the individual state. Part II is addressed to interstate and inter-regional conflict. Part III turns to the dialogue over the role, if any, that the federal government should play in mediating the disputes.

I. Intrastate Politics

With all the attention that has been directed to the specter of interstate economic warfare over natural resource taxation, it is easy to forget that the state legislation underlying the controversy is itself the product of fierce political battles waged in individual states. In Chapters 2 and 3, we examined these struggles in tracing the historical development of natural resource taxation in a number of jurisdictions. In this section, we focus on similar experiences in a contemporary setting.

The widespread impression that resource-rich states are political monoliths acting without internal opposition to maximize their resource tax revenue is tempered if not belied by the facts. As the Governor of North Dakota described the political controversy over his commitment to a substantial coal severance tax:

> We have been opposed by the energy industry; we have been admonished by special interest groups in our own state who express concern that if the severance tax goes too high energy development will be stymied and North Dakota will lose great economic opportunities; we have been cajoled by our own energy consumers who worry that their industries, businesses and residences will have to absorb the cost of the severance tax through higher utility bills.[2]

The history of North Dakota's coal severance tax legislation reflects these pressures. In 1973, the legislature, with strong industry support, enacted a five cents per ton coal severance tax to become effective in July 1975. The Governor vetoed the bill on the ground that it was "unrealistically low"[3] and because of the postponement of the levy's effective date. In 1975, the Governor proposed instead a 33-1/3 percent coal severance tax. The legislature enacted a compromise bill of 50 cents per ton, with a one cent per ton increase for every three point rise in the wholesale price index. The base rate was increased to 65 cents in 1977 and to 85 cents in 1979, where it stands today,[4] still far below the value-based rate proposed by the Governor in 1975.

In Minnesota, political and economic pressures in the State combined to limit the power of the legislature to tax some of its natural resources. The demands of two world wars had taken their toll on the supply of iron ore from Minnesota's Mesabi range, and in the 1940's the iron mining industry undertook a world-wide search for alternative sources of supply.[5] Although Minnesota's iron ore industry still provided 83 percent of the nation's iron ore requirements in 1950, this percentage had fallen to 42 percent by 1960.[6] Moreover, the quality of Minnesota's iron ore (i.e., its natural iron ore content) was lower than that of competing foreign ores.

In addition to its iron ore, however, Minnesota possessed vast reserves of taconite, rock which contains iron-bearing particles but which is not merchantable as iron ore in its natural state and which requires extensive processing to make it merchantable.[7] Although development of Minnesota's taconite resources had become economically feasible, the State's historical pattern of heavy mineral taxation[8] was perceived as an obstacle to further development of its taconite industry. In 1961, a proposed constitutional amendment designed to create a healthier tax climate in the State by limiting taxes on taconite was introduced into the Minnesota Legislature. The amendment was defeated by the liberal majority.

The proposal for a taconite amendment soon became a major political issue in Minnesota. Conservatives argued that it was necessary to attract the taconite industry to the state. Liberals replied that such a restraint on the state's tax power would be selling its "birthright to its natural heritage."[9] In 1963, a conservative legislature adopted a proposed taconite amendment, and the following question was put to the voters of the State:

> Shall the constitution of the State of Minnesota be amended by . . . prohibiting the amendment, modification, or repeal for a period of 25 years of Laws of Minnesota 1963, Chapter 81 relating to the taxation of taconite and semitaconite, and the facilities for mining, production, and beneficiation thereof . . .?[10]

The liberal elements in the State represented by the Democratic Farm Labor Party initially opposed the amendment until Senator Hubert Humphrey induced the Party to change its stand. With both liberal and conservative backing, the amendment passed with a

majority of over 80 percent. Within 24 hours after the amendment's approval, the United States Steel Corporation and the Hanna Mining Company announced that new taconite plants would be under construction within two weeks. Taconite has since become Minnesota's commercially most significant mineral. In 1981, Minnesota produced 49.4 million tons of taconite yielding $12.7 million in occupation taxes; it produced a mere 1.7 million tons of iron ore yielding $1.2 million in occupation taxes.[11]

The specific issues at stake, the varying configuration of political forces involved, and the different economic circumstances in which particular states find themselves make generalizations about the intrastate politics of natural resource taxation hazardous at best. One point is clear, however. The political opposition to natural resource taxes in most states is more than token, and stories similar to those recounted about North Dakota and Minnesota could be told about other states. In 1983, for example, increased oil production taxes were proposed in 20 states. In twelve states they were defeated, in five they were enacted, and three proposals were pending at this writing.[12]

II. The Politics of Interstate Jealousy

Despite substantial internal political opposition, it remains true that many resource-rich states in recent years have increased the scope and level of their taxes on natural resources. In this part, we examine the interstate conflicts that these taxes have generated.

A. The Scope of the Problem

The public debate over the regional issues raised by state taxation of natural resources has been directed largely at production taxes. To be sure, concern has been expressed over the efforts of some resource-consuming states to single out the energy industry in their income[13] and gross receipts[14] taxes. But the issues of interstate conflict that they raise have not been a subject of intense national scrutiny, even though they have caught the eye of the organized bar.[15] Property taxes, despite the unique features of their application to natural resources, have likewise been ignored in the political dialogue, perhaps because they are perceived to be inherently local in nature, perhaps because the issues of interstate conflict they raise are poorly understood.[16] The ensuing discussion is therefore addressed almost exclusively to production taxes.

B. Shared Assumptions

Although the acrimonious exchanges between representatives of producing and consuming states might lead one to wonder whether they share any common ground, there are in fact several fundamental principles that command universal support. First, no one questions the right of producing states to single out natural resources for special taxes. The diversity of the individual states' tax structures has been characteristic of the American tax system from the very beginning, and it is taken for granted that it will remain that way. Second, no one questions the right of the producing states to recover the reasonable costs that are imposed by the extractive industries on the state. These include not only the costs of schools, roads, hospitals, and the like, but also the environmental and social costs that natural resource development may impose on the state. Finally, no one questions

the proposition that those who benefit from natural resource extraction should bear the burden of the costs it generates, even if those beneficiaries are not residents of the taxing state.

C. Sources of Conflict

The list of shared assumptions is short, especially by comparison to the list of issues that divide the producing and consuming states. For purposes of exposition, it will be useful to distinguish between disagreements over premises and disagreements over facts.

1. <u>Conflicts Over Premises</u>

a. Should a Natural Resource Production Tax Be Limited to the Reasonable Costs Imposed by Production Activities on the State?

Perhaps the most fundamental theoretical issue separating consuming and producing states is whether a natural resource production tax should be limited to the reasonable costs imposed on the state by production activities. Although the Supreme Court in <u>Commonwealth Edison</u> resolved the issue in favor of the producing states as a matter of constitutional law, it did nothing to solve the political question. In contending that resource production taxes are "excessive,"[17] "exploitative,"[18] and "exorbitant,"[19] consuming states' spokesmen implicitly or explicitly rely on the proposition that there is some level of taxation that would not inspire such epithets. Invariably this level is one that reflects a "fair return"[20] or one reasonably related to the "needs"[21] of the producing state, a standard defined in terms of the costs attributable to natural resource development. As the Mayor of Minneapolis put it in congressional testimony on coal severance taxes: "Our basic belief is that the levels of the severance tax are in excess of what is required to deal with the local impact of coal mining."[22] Indeed, spokesmen from consuming states consistently point to the allocation of production tax revenues to trust funds earmarked for future generations as irrefutable evidence that the production tax exceeds any justifiable norm.

Producing states' spokesmen reject this premise. In response to the Mayor of Minneapolis, the Governor of Montana replied: "I don't subscribe . . . to the arguments of Mayor Fraser that the only revenues we should derive from our severance tax is just to take care of the damage done to the State. . . . Every State that imposes a severance tax also gets money for the general support of government."[23] Producing state representatives claim that they are entitled to impose production taxes with the same freedom that they impose other taxes and that they may use the revenues not only for the general support of government but also for future generations who will populate the state when the resource is gone.

If framed as a general question of the appropriate limitations on state taxation in the federal system, the producing states would seem to have the better of the argument. One would be hard-pressed to find in the broad assumptions of economic and political unity underlying the federal system any commitment to the benefit principle[24] as a restraint on state tax power. This conclusion is reinforced when one recognizes the importance to the states' autonomy of the ability to fashion their tax structures to accommodate individual circumstances. As Alexander

Hamilton, writing in The Federalist, declared:

> the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants . . . . I affirm that (with the sole exception of duties on imports and exports) they would retain that authority in the most absolute and unqualified sense.[25]

But one need not frame the question so generally. One might ask more specifically whether there is something distinguishable about special taxes on natural resources that might warrant the application of the benefit principle as a restraint on such taxes, even though as a matter of general policy one would not impose a like restraint on broad-based property, income, and sales taxes imposed on natural resources in common with other subjects of taxation or on special excises imposed on such items as motor fuel, alcohol, tobacco, and amusements. An answer to that question depends on the answer to a series of other questions to which we now turn.

b. Natural Resources and the Natural Heritage Theory: Whose Birthright?

One of the early predicates for the imposition of production taxes in addition to the general ad valorem property tax on natural resources was the notion that natural resources constituted part of the state's natural heritage.[26] This was said to justify the state's exaction of a special levy on behalf of the states' citizens whose collective birthright these resources were thought to represent. Although this theory has been discredited on its own terms,[27] it has not lost its force in the political arena. In the context of interstate conflict over state taxation of natural resources in our federal system, however, it is by no means clear which way the natural heritage theory cuts.

In most nations, underground mineral rights are retained by the sovereign with private parties owning only the surface rights associated with mineral lands.[28] In the United States, by contrast, private ownership of the surface typically carries with it a correlative claim to any minerals lying beneath the surface.[29] Nevertheless, except for the area of the original thirteen colonies, Texas, and Hawaii, the federal government once owned all of the land within its present borders.[30] Although it has given away much of the public domain to private owners and, to a lesser extent, the states, the federal government still retains title to about one-third of the nation's land area, and it owns an additional 60 million acres of reserved mineral interests in the Western states. Furthermore, it has now been established that the federal government has a controlling interest in the natural resources of the outer continental shelf,[31] an area of some 860,000 miles extending from three miles offshore seaward to the edge of the geographic shelf. The states, by contrast, with the exception of those noted above, own only those lands (and mineral rights) that have been granted to them by the federal government or acquired by them independently.

All this has some rather interesting implications for the relationship of the natural heritage theory to state natural resource taxation. First, to the extent that the state is taxing resources that are owned by the federal government and leased to private enterprise, the natural heritage theory supports a <u>nat-</u>

<u>ional</u> rather than a state claim to collective ownership of the resource. This point has not been lost on spokesmen from resource-poor states who claim that producing states' taxing schemes are attempting to appropriate for their own citizens a resource that belongs to the entire nation. Thus, with respect to federally-owned minerals at least, the natural heritage theory lays the foundation for a externally-imposed limits on state natural resource taxation, perhaps related to the governmental costs attributable to resource development. The counter-argument of producing-state spokesmen that these minerals have been leased to private interests and therefore no longer carry a federal label does not undermine this position. After all, the natural heritage theory is only an inchoate claim to a collective popular interest in natural resources that is rooted in notions of sovereignty over such resources.[32] In this context, that sovereignty plainly must be regarded as more federal than state. Indeed, if the federal government had not leased its interest to private parties, the state would have been in no position to tax it in the first place.

With respect to privately-owned mineral lands acquired in fee from the federal government, the implications of the natural heritage theory are less clear. Although the birthright was initially a national one, the state might assert that, once property within its borders has been privatized, it possesses all the attributes of sovereignty with respect to such property, including the representative one of claiming the people's collective birthright. Such assertions of sovereign interests are somewhat attenuated, however, and may be accepted more readily as assertions of traditional police power over property within the state's jurisdiction.

With respect to privately-owned lands in the original thirteen states, Texas, and Hawaii, the state would be in a position similar to the federal government, except to the extent that private parties had directly succeeded to ownership interests of foreign sovereigns. Even with respect to those interests, however, the state might claim it succeeded to the sovereign claims of the foreign power to its natural resources, but here it might encounter a conflicting assertion of sovereignty by the federal government.[33] And if one really were interested in pursuing the natural heritage theory to its logical conclusion, one would have to take account of the claims of the Indian Tribes, a point that is more than academic.[34]

In sum, if the natural heritage theory proves anything, it proves that there is some basis for limiting state production taxes in the West where the nation can assert a common claim to hundreds of square miles of resource-rich lands that lie in federal ownership. On the other hand, the theory has uncertain implications for privately-owned lands originally acquired from the federal government, and it has some rather peculiar and complex implications for the original thirteen states, Texas, and Hawaii.

c. State Natural Resource Taxes in the Federal System: What Are the Criteria of Interstate Equity in State Tax Policy?

Few political questions raised by state natural resource taxation would not fit comfortably under this rubric, and it was

chosen in part for that reason. Literally hundreds of questions, many of them related or overlapping, have arisen in the course of efforts to define interstate equity in state natural resource taxation. These questions have been debated in congressional hearings, in conferences of state officials, and in the national news media. This section attempts to distill these debates without stripping them entirely of their color.

A common charge emanating from states without significant resource endowments is that the resource-rich states are "profiteering"[35] from their happy circumstances with a "beggar-thy-neighbor"[36] policy inconsistent with the tenets of political and economic unity on which the federal system was founded. Many of these assertions are merely a restatement, without more, of the proposition considered above, namely, that citizens of resource-poor states may be asked to pay their fair share of the costs of producing the resources they consume but "they ought not be charged billions of dollars over a period of years to support general governmental programs for citizens in other states."[37] Some of the contentions go further, however, and attempt to provide a substantive rationale for so limiting the producing states' tax power.

First, it is argued that resource-rich states should not be permitted to exploit unreasonably the advantages that accrue to them solely by virtue of their geologic good fortune. The argument has historical support if one is willing to analogize between different types of locational advantages. As James Madison explained in his Preface to the debates of the Constitutional

Convention of 1787, which detailed various sources of dissatisfaction with the Articles of Confederation:

> The other source of dissatisfaction was the peculiar situation of some of the States, which having no convenient ports for foreign commerce, were subject to be taxed by their neighbors, thro whose ports, their commerce was carryed on. New Jersey, placed between Phila. & N. York, was likened to a Cask tapped at both ends: and N. Carolina between Virga. & S. Carolina to a patient bleeding at both Arms. The Articles of Confederation provided no remedy for the complaint: which produced a strong protest on the part of N. Jersey; and never ceased to be a source of dissatisfaction & discord, until the new Constitution, superseded the old.[38]

More than twenty years ago, the Editors of the Harvard Law Review seized on the analogy likening a severance tax to "a tollgate lying athwart a trade route . . . [that] conditions access to natural resources."[39] Northeastern and Midwestern political representatives continue to sound that theme today in suggesting that excesive taxes on natural resources violate first principles of federalism.

Producing-state spokesmen respond by echoing the Supreme Court's conclusion that the Constitution does not "giv[e] residents of one State a right of access at 'reasonable' prices to resources located in another state."[40] They contend that "[i]t would be very bad politics . . . to grant the residents of one State, or one part of the country, the right to control the terms and conditions of resource development and depletion in their

sister states . . ."[41] They observe that the Framers adopted the Import-Export Clause and the related Duty of Tonnage prohibition---the only explicit limitations on state tax power in the Constitution[42]---to deal with the problem raised by Madison. And they claim that extending that principle to other special advantages the states may enjoy is not warranted by vague considerations of federalism. Moreover, they point out that the argument may prove too much. If the economic and political assumptions underlying federalism impose a benefit-related restraint on the states' power to tax activities associated with fortuitous locational advantages, it would cut a broad swath across state and local tax structures when one includes in the calculus such advantages as access to transportation, water, sunlight, and perhaps even skilled labor.

Retaliation, according to advocates from consumer states, is another likely consequence of unbridled natural resource taxation and one that in their view demonstrates the irreconcileability of such unrestrained tax power with the values underlying the federal system. The Northeast-Midwest Institute, the research arm of a congressional coalition representing that region, has warned of "a strong possibility that a dangerously divisive severance tax warfare will break out, with each state striving to tax a precious commodity just to preserve its competitive position."[43] In Iowa, reported a Congressman from that state, "there is talk of a severance tax on corn, soybeans, and other grain."[44] And Governor Byrne of New Jersey is said to have suggested in jest that "the Northeast can place a severance tax on Ivy League educations."[45]

However acute may be the theoretical dangers of the "economic civil war"[46] conjured up by such speculation, they are more a function of wishful thinking than of practical political concern. That is the lesson of Chapter 4. If Iowa were to impose a severance tax on corn, it would have no appreciable effect on the price of corn which farmers from Kansas and Nebraska would presumably continue to supply at the market price. The result would be an effective reduction in the income of Iowa farmers and, ultimately, of the value of corn land in Iowa. The enactment of a corn severance tax by Iowa would therefore be the legislative equivalent of shooting oneself in the foot. Similar consequences would ensue from Detroit's imposition of a "severance" tax on automobiles. This is not to suggest, however, that if permitted to tax without restraint (other than that imposed by the Constitution), consuming states might not identify some levies with which they can effectively retaliate against their sister producing states. Indeed, one can argue that they already do.[47]

In addition to arguments resting on the premise that the preservation of the Union depends on restraining "rapacious"[48] resource-rich states from acting in their narrow self-interest, there is a more positive strain of argument that stresses the collective self-interest of the nation. It relies on the premise well-expressed by Justice Cardozo that our "political philosophy . . . 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."[49] Even assuming that producing states have a legitimate concern in providing for future generations, the question, from the stand-

point of interstate equity, thus becomes whether "the present generation of people in Michigan and Illinois and Minneosta and Texas . . . [should] provide a trust fund for future generations of Montanans."[50] More generally, the question is whether the federal system can or should tolerate the massive shifts of wealth from one region to another that such tax policies will induce, a question to which we return in Part III below.

Finally, we return to a central theme in the historical development of natural resource production taxes, yet one which has maintained its significance in the interstate conflicts over such taxation, the exhaustibility issue. Defenders of producing states' severance tax policies constantly remind us that their resources are a "one time harvest"[51], which, when mined, will be lost forever. They vow not to repeat the "mistakes of the past,"[52] when, in the words of a representative of the Montana Democratic Party, "the state was exploited by the mining interests who removed enormous amounts of wealth from the state leaving little but the ruins of the Copper Kings' Mansion, and a shrunken boom town."[53] They also point to Appalachia for contemporary illustrations of the failure to provide adequately for the departure of the natural resource industry.

Although advocates for consuming state interests are not wholly unsympathetic to these considerations, they counter that the producing states ignore the benefits of economic development that will accrue to the states from exploitation of their resources. As Congressman Sharp of Indiana put it:

We understand the costs. We understand the reclamation prob-

> lems, the development costs, but we also know that enormous wealth comes with that. There are new incomes that pay income taxes. There is new value to land that pays automatically without the government having to make tough political decisions about raising the tax rates. It is not as if it is a one-way proposition and the only way it can be corrected is by taxing the coal shipped out of State.[54]

Moreover, some spokesmen for the industrial regions have questioned the very concept of a trust fund to tide the state through future bad times when its economic base may have lost its lustre:

> Should Detroit have established a trust fund, in advance, to mitigate the boom-town effects of unemployment and urban blight that are accompanying the failing automobile industry . . .? The answer of course is "no." A "contingency fund" in advance of unknown environmental or social impact costs suggests that we don't have adequate mechanisms at the national level to deal with these contingencies when they arise.[55]

2. Conflicts Over Facts.

a. What Are the Costs Reasonably Attributable to Natural Resource Production in the State?

Few questions stir more bitter controversy than those bearing on the scope and magnitude of the costs imposed on producing states by natural resource development. Consuming-state spokesmen, armed with economic studies, contend that such costs amount to only a small fraction of the enormous tax revenues that the producing states are collecting from natural resource production. Even while protesting the relevance of the inquiry, producing-

state representatives fiercely dissent from these assessments. Without rehearsing every point and counterpoint in this dialogue, the following discussion seeks to identify the principal issues that divide the contending parties over what constitutes a fair estimate of the costs that natural resource development imposes on a state.

First, there is the pedestrian but often critical question of assigning a dollar figure to costs that everyone agrees should be included in the analysis. An economic consulting firm hired by the plaintiffs in Commonwealth Edison attempted to measure in dollar terms the local impact costs of coal mining in Montana. It concluded that these impact costs amounted to two cents per ton---a "fact" that was said to demonstrate the excessiveness of Montana's tax which in some cases was 100 times the amount of such costs.[56] A state senator from Montana did the arithmentic differently:

> Based on five years of actual experience in Montana and figures used by the Congressional Budget Office . . . , I have compiled the actual costs of the limited impacts [the economic consulting firm] attempted to measure. They understated the impacts by a factor of 53 to 1.[57]

Second, there is the question of what impacts one should measure in assessing the costs that natural resource production imposes on a state. In criticizing the study referred to in the preceding paragraph, the same senator contended that it did not even "include any impacts for mine mouth generating systems, conversion facilities, synthetic fuel plants, construction work on both plants and mines, and roads."[58] A spokeswoman for the consulting firm took issue with this assertion,[59] but who is right is not the point. It is rather that in any debate over the measurement of impact costs, there will invariably be disputes over which costs should be embraced within the determininination and perhaps over whether they have in fact been accounted for at all.

Third, the claim is often made that producing states cannot justify production taxes to compensate them for the environmental damages allegedly caused by natural resource development because producers are already required by federal and state law to minimize environmental impacts and ultimately to restore the land to its original condition. As one witness testified before Congress:

> To open and operate a mine in Montana, thirty environmental laws must be complied with, and mining plans must be submitted and approved before mining begins . . . If any damage to the environment is suspected, mining plans are rejected. State mine inspectors, all environmental scientists, visit the mines every two weeks; federal inspectors come quarterly. Mines are required to install weather stations with air monitoring devices, stream gauging stations, and observation wells to monitor water quality. The soil is tested repeatedly by the U.S. Forest Service. If it appears that mines will threaten existing wells, plans are disapproved. If a well on someone's property is destroyed, the mining company is required to dig another. Mine operations must reclaim the land mined within two years after completion of mining activities. In 1979, reported reclamation costs averaged $5,000 per acre. . . . Two federal taxes levied on coal production provide funds that are funnelled back to states to offset potential deleterious effects of mineral production. The Surface Mining Control and Reclamation Act of 1977 levies a 35 cent tax on each ton of strip-mined coal and 50 percent of this money is returned to the state from which it originated for the purpose of reclaiming strip-mined land. An additional 20 percent of fees may become available to states under the Rural Abandoned Mine Program.[60]

As the witness succinctly concluded: "It appears that all of the known potential environmental damages that may occur as a result of strip mining have been subjected to a regulatory climate that has left 'no stone unreturned.'"[61]

The predictable rejoinder from defenders of the producing states' tax policies is that the unknown and presently unknowable environmental damages of mineral extraction are potentially of much greater magnitude than those we can currently identify. It is responsible fiscal policy, they maintain, to provide for these eventualities now before the source of revenues to deal with such problems have been exhausted. "The fact is," declared Governor Schwinden of Montana, "no one really knows the true cost of development. . . . No one can calculate the impact of soil loss, of erosion, of loss of habitat for wildlife."[62]

The point is by no means limited to environmental costs. "No one can put a real price tag on the social costs that are associated with the development of of the Powder River Basin, and the other mineral fields in the West. It is the same with the boom town atmosphere and increases in crime and domestic problems."[63] There is the countercharge that "the tears shed by some legislators for boom towns are crocodile tears"[64] because most of the revenues from state production taxes go into the state's general fund. Western state spokesmen insist, however, that the states through their general funds will inevitably bear the brunt of the massive burden of "human reclamation"[65] that will be thrust upon them when the mines are depleted. And, like Wyoming's Senator Wallop, they ask: "Who makes the judgment that it exceeds legitimate social costs? Have you been to Wyoming and seen those social costs?"[66] Furthermore, if production taxes are objectionable both because they <u>are</u> earmarked for the needs of future generations and because they <u>are not</u> earmarked for the local impact needs, the freedom of producing states to shape their own fiscal policy would be narrow indeed.

b. To What Extent Are State Production Taxes Exported to Nonresident Consumers?

Having considered this question at some length in the two preceding chapters,[67] we are now in a position to place the political debate over state tax exportation in some perspective. The battle lines over the issue have been drawn in familiar fashion. Consuming-state advocates routinely assume that natural resource production taxes are borne by the ultimate consumers of those resources. The complaint of Senator Bumpers of Arkansas, an energy-importing state, is typical: "All across the country, States are moving to enact new taxes on energy production . . . [and] to stick consumers in other States with the bill."[68] Proponents of producing states' interests, while not seriously denying the assertion that their jurisdictions export their taxes, are

quick to point out that tax exporting is a universal phenomenon in the federal system and that producing states are by no means the worst offenders. "I find it fascinating," observed Senator Simpson of Wyoming relying on figures prepared by the Department of Commerce, "that those states which have been the most successful . . . in exporting their tax burden to nonresidents are composed of those states [Illinois, Michigan, and Wisconsin] which rely chiefly on the coal from the states of Wyoming and Montana."[69] It is also observed that the issue is so mired in economic and factual complexities that it offers no guidance for sound interstate fiscal policy.

In the end, both sides are right in their allegations regarding the nature of state tax exportation in the federal system. The resource-rich states <u>do</u> export their tax burdens through production taxes, but so do other states through other taxes. The issue <u>is</u> complex, although perhaps less complex than meets the eye when one considers such institutional arrangements as long-term contracts with pass-through clauses and federal regulatory schemes that place the burden of production taxes squarely on the energy consumers' shoulders. The real issue, of course, is not tax exportation, but "excessive" tax exportation, which takes us back to the questions we have addressed above and anticipates the question we will address below, namely, whether natural resource tax exportation should be viewed as a discrete "problem" demanding a national solution or an endemic feature of our federal system whose fabric would be destroyed by serious efforts to curb it.

c. How Significant Is the Producing States' Tax Burden on Nonresident Consumers?

Although this is more an issue of characterization than of fact, the extensive and heated interchanges between spokesmen for consuming and producing states over this question may conveniently be considered at this juncture. Even if the producing states' severance taxes are in fact exported, the question is sometimes raised whether the amounts involved are of sufficient proportion to warrant our attention. It is suggested that there are so many other factors of greater individual and collective significance entering into the final price of the consumer product that production taxes are not worth our time, at least as compared to such other factors.

Transportation costs, for example, commonly dwarf production taxes as a percentage of the price of the delivered coal, oil, or, gas to the energy consumer. In 1981, Montana's 30 percent severance tax on coal amounted to about $2.30 per ton compared to rail rates of more than $20.00 per ton to Illinois and Texas, $17.50 to Iowa, and nearly $12 to Wisconsin.[70] Such taxes generally amounted to between two and three percent of a consumer's utility bill, which translates into no more than a few pennies a day, often substantially less than the sales tax imposed by the consumer's own state on his purchases of electricity.[71] The Congressional Research Service of the Library of Congress prepared a study that showed the impact of severance taxes on oil, gas, and coal on the cost of various end products to the consumer.[72] Employing March 1981 data and utilizing the highest severance tax rates then prevailing for the resources in question

(Louisiana's twelve and one-half percent rate for oil, Alaska's ten percent rate for natural gas, and Montana's 30 percent rate for coal), it found the following:

End product	Price at point of taxation	Amount of severance tax	End-use cost	Percentage of end-use cost as tax
Oil-fired powerplant (electric)	$38.00/bbl	$4.75/bbl	$.04/kw	11.8%
Home-heating oil	$38.00/bbl	$4.75/bbl	$1.30/gal	12.0%
Gasoline	$38.00/bbl	$4.75/bbl	$1.35/gal	8.1%
Residential Gas	$1.60/mcf	$0.16/mcf	$4.10/mcf	4.0%
Coal-fired powerplant (electricity)	$12.00/ton (F.O.B. MT; 9300btu.lb	$2.64/ton	$.046/kw	3.5%
Gas-fired (electricity)	$1.60/mcf	$0.16/mcf	$.058/kw	3.2%

One partisan observer concluded from all of this that "[t]he severance tax is peanuts, absolute peanuts."[73] What drives up the cost of the resource to the consumer "are items like mining costs, revegetation, reclamation, Federal taxes, labor contracts, labor pensions, freight rates, black lung payments, [and] return on investment."[74]

Politicians from consuming states prefer to focus on their constituents' aggregate severance tax bills, which can scarcely be characterized as de minimis. The Mayor of Minneapolis complained that consumers in his city paid $1.246 million in 1980 "in tribute to the State of Montana."[75] The Co-Chairman of the Northeast-Midwest Congressional Coalition's task force on energy taxation warned of the massive shifts of wealth from the energy-consuming to the energy-producing regions, with projected energy-tax revenues in the hundreds of billions of dollars, much of it derived from the pockets of energy consumers.[75] And energy consumers deny that they ignore the non-tax contributions to the increase of energy prices: "I would say to my friend," declared Senator Benstsen of Texas, whose oil-rich state is nonetheless a major consumer of Western coal, "I have been just as diligently fighting [the railroads]. They have done a job of raising the rates to an exorbitant level and we passed legislation here to put a limitation on that."[77]

III. The Federal Role in Limiting State and Local Taxation of Natural Resources

The interstate conflicts over state and local taxation of natural resources have stimulated pleas for a federal solution to the problem. Legislation has been introduced in Congress to impose a ceiling on state severance tax rates and to limit state severance taxes to costs imposed upon the state by natural resource production. Broader proposals have been advanced for a national severance tax and for a revision of revenue-sharing formulas to counterbalance the "fiscal disparities"[78] emerging from the shift in tax and economic wealth from resource-poor to resource-rich jurisdictions. These proposals have encountered predictable hostility from spokesmen for states well-endowed with natural resources. They accuse their proponents of disrespecting state sovereignty, creating a dangerous legislative precedent, and waging a "war on the West."[79]

In this section, we review the considerations supporting and counseling against federal intervention in this area, and we explore the merits of the various forms of intervention that have been proposed. The fundamental positions that the contending parties have staked out on these issues have been shaped in large part by their perspectives on the interstate conflicts we examined in the preceding section, and we will not retrace that discussion here. We will focus instead on questions we have yet to consider bearing specifically on whether and how the federal government should limit state and local taxation of natural resources.

A. The Advisability of Federal Intervention

The case for a federal solution to the problems raised by state and local taxation of natural resources rests on the grounds that they are significant in magnitude, national in character, and incapable of resolution by other means. The magnitude of the problem is reflected in the numbers associated with state natural resource taxation. State severance taxes, which amounted in 1972 to $758 million or 1.3 percent of state tax collections, had increased more than ten-fold by 1982 to $7.83 billion or 4.8 percent of state tax collections.[80] The United States Treasury Department estimated that the tax and royalty revenues accruing to states from oil-price decontrol alone could be as great as $128 billion from 1979 through 1990.[81] And the United States Advisory Commission on Intergovernmental Relations found that natural resource revenues were contributing to increasing disparities in the states fiscal capacities which in 1980 ranged from a low of $817 per capita in Mississippi to a high of $6,161 per capita in oil-rich Alaska.[82]

The problems spawned by state and local taxation of natural resources are also national in scope. The bulk of the revenue in question is derived from oil, gas, and coal, and the states' tax policies therefore implicate national energy policy. Indeed, the alleged "windfalls"[83] that the states are now reaping from taxes on increased energy resource values are attributable in part to federal energy policy. For example, federal oil price decontrol created a dramatic increase in domestic oil prices, and Congress contributed to the demand for coal by requiring its use by certain industrial and utility consumers.[84] It is only just, the argument continues, that the federal government limit the extent to which a few states are permitted to benefit from the federal government's own regulatory policies at the expense of their sister states.

The national character of the problem is reinforced by the fact that a substantial portion of the nation's natural resources are located under federal lands or have been reserved by the federal government. Wholly apart from technical questions of title to the resources at the moment they are severed and taxed, there is a federal interest in the revenues generated by such "national resources"[85] that may justify federal restraints on the states' power to tax them.

The political and economic Balkanization caused by state taxation of natural resources is a further matter of national concern. If the nation faces "economic warfare among the states"[86] over state and local natural resource taxation, it is certainly within the federal government's purview to attempt to prevent it. Indeed, one can argue that the federal government would be reneging upon its essential responsibility by failing to do so. Moreover, the fiscal disparities attributable to the differential access to natural resource tax revenues raise additional questions of national dimension.

Finally, proponents of federal action insist that there is no other avenue of relief from the problem. The judicial door was tightly shut by <u>Commonwealth Edison</u>. Despite the difference of opinion over the extent of intrastate political restraints,[87] the trend toward increased state revenues from natural resources is unmistakable, a fact that spokesmen from energy-poor states ascribe to "taxation without representation."[88] Only at the federal level, they contend, are the interests of all concerned parties adequately represented. As for economic constraints on state natural resource taxation, advocates of federal legislation point to the market dominance of the producing states, long-term contracts, and regulatory mechanisms that jointly and severally deprive the market of whatever restraining force it might otherwise exercise in this context.

There is nevertheless a case to be made against federal intervention in this domain. First, it is vigorously asserted that a federal limitation on state severance taxes would violate basic principles of state sovereignty thereby upsetting the settled relationship between state and national power in the federal system. Although there are some who regard invocations of state sovereignty as empty rhetoric, it is no mere shibboleth in many states, especially in the South and the West where the federal presence is often viewed with a jaundiced eye. Nor does anyone deny that the state's taxing power is critical to their independent existence in the federal system. One cannot wade through the volumes of testimony directed to this question without appreciating the sensitivity of the issue and the intensity of feeling surrounding it in states whose taxing authority is imperiled by federal legislation. The prediction that the passage of such legislation will make the Sagebrush Rebellion[89] "look like a garden party"[90] is no idle threat.

Opponents of federal legislation also point to the dangerous precedent it would set.

> [I]f Congress is able to restrict the amount of taxation which the mining States are able to levy . . . then why should not Congress also act under its commerce powers to restrict the level of State taxation in the farm belt States, in the manufacturing States, the timbering regions of America, and any other State which sustains within its borders a regional or national center of production.?[91]

Moreover, it is suggested that there is no equitable basis for limiting such a restriction to natural resources. If Congress is concerned about excessive state tax exportation based on locational advantages, why not impose like restrictions upon Florida's taxation of the tourist industry , Washington's taxation of stevedoring, and, perhaps, New York's taxation of stock transfers?

Opponents of federal restrictions on state natural resource taxation further assert that such a restraint is mischievous on its own terms, even assuming one were not concerned about its implications for state autonomy. They argue that the proposed legislation is an ill-conceived effort of the energy-poor states to reverse the market verdict against them through the political process.[92] They claim that imposing artificial restrictions on the energy-rich states' tax power or, worse yet, redistributing

their revenues to the decaying cities in the industrial heartland is to impede the adjustments that the nation must make in confronting the economic realities of the late twentieth century. They observe that South and the West have long consumed the products of the Northeast and the Midwest largely contributing to the once flourishing economies and ample tax bases of those regions. And they resent what they perceive to be the efforts of those regions to change the rules of the game now that resource-rich states are having their economic day in the sun.

Finally, opponents of congressional legislation limiting state natural resource taxes express their doubts about the constitutionality of such legislation. Such reservations are usually based on the Supreme Court's opinion in National League of Cities v. Usery[93], which held that Congress lacked the power under the Commerce Clause to prescribe minimum wages and maximum hours for state employees pursuant to the Fair Labor Standards Act. The Court's opinion was rooted in the constitutional policy, which is reflected in the Tenth Amendment,[94] that "there are limits upon the power of Congress to override state sovereignty, even when exercising its plenary powers . . . to regulate commerce."[95] The Court concluded that in attempting to exercise its commerce power to prescribe minimum wages and maximum hours for the states in their sovereign capacities, Congress had "sought to wield its power in a fashion that would impair the States' 'ability to function effectively in a federal system,'"[96] and that Congress may not exercise its commerce power "so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."[97]

It might be maintained that the states' ability to employ severance taxes to finance their integral governmental functions is essential to their separate existence and that any interference with such taxing power would impermissibly trench on state sovereignty under National League of Cities. After the Court's decision in Commonwealth Edison, however, it is difficult to credit such a contention, at least if Congress did not absolutely prohibit such levies. In Commonwealth Edison, the Court gave every indication that Congress possesses the power to limit state severance taxes without hinting that National League of Cities constitutes a roadblock to federal legislation. In declaring that the appropriate level of state taxes may be established "if necessary, by Congress, when particular state taxes are thought to be contrary to federal interests,"[98] the Court explictly noted that "the controversy over the Montana tax has not escaped the attention of Congress."[99] and referred to legislation that has been introduced in Congress "to limit the rate of state severance taxes."[100] Serious questions have been raised, however, whether Congress possesses the power under the Commerce Clause to impose an absolute ban on state severance taxes.[101]

B. Proposed Federal Legislative Responses to State and Local Taxation of Natural Resources

1. Limiting State Severance Tax Rates

The most widely supported form of federal intervention into the controversy over state and local natural resource taxation is a specific percentage limitation on state severance tax rates. A

number of bills have been introduced into Congress embodying such a limitation.[102] Indeed, a bill limiting coal severance taxes to 12.5 percent of the coal's value was approved by the House Subcommittee on Energy and Power in 1980,[103] but never went to the House floor for a vote. It was trapped in the backlog of legislative business that preceded the presidential election of 1980.[104]

If one is persuaded of the overall wisdom of a federal legislative solution to the problems raised by state and local natural resource taxation, a limitation on the rate of such taxation has several appealing features. The most prominent is its simplicity. A ceiling on tax rates requires little explanation and can be judicially enforced without difficulty so long as the definition of value to which the ceiling applies is clear and is pegged to readily accesssible data. Another virtue of a rate limitation is its relative lack of intrusiveness into state fiscal affairs, at least by comparison to the proposals we shall consider below. While the state's tax power is restricted, no additional federal aparatus need be created to administer the restriction. Finally, by placing the ceiling at an appropriate level, one can soften if not satisfy objections based on a state's right to recover the costs imposed on it by natural resource development.

Criticisms of the principle of a fixed rate limitation are usually leveled on two grounds. First, as is often the case with simple solutions, they are also arbitrary. The choice of a single rate as an approximation of a state's legitimate claims, however defined, to its natural resource tax base cannot conceivably account for the variations in the nature and extent of the costs imposed by different kinds of natural resource production. The costs of schools, roads, and hospitals, of environmental impacts, and of social services will vary dramatically depending on whether they stem from the extraction of oil from the fields of east Texas, the gathering of gas in the Louisiana wetlands, the production of coal from the underground mines in West Virginia, or the strip-mining of coal on the plains of eastern Montana.

Second, the use of a percentage limitation keyed to the value of production arguably bears unfairly on states with relatively low-value resources. For example, coal from coal Eastern and Midwestern states has been priced three times higher than Western coal because of its higher energy content or lower transportation costs.[105] Eastern and Midwestern coal producing states are therefore in a position to raise substantially greater revenues under a fixed ceiling than are their Western counterparts. Yet it is hard to see why the former should effectively be permitted greater taxing power than the latter. Moreover, in terms of the burden of the production tax on the ultimate consumer, which is a central concern of many legislators favoring federal legislation, the implications of an across-the-board rate limitation are unsettling. As the table reproduced on page ____ above demonstrates, a twelve and one-half percent severance tax on oil valued at $38 per barrel will comprise about twelve percent of the cost to the consumer of electricity generated by an oil-fired power plant or of the cost of home heating oil. A 30

percent coal severance tax,[106] on the other hand, will comprise a mere three and one-half percent of the cost to the consumer of electricity generated by a coal fired powerplant. Yet a flat fifteen percent limitation on the rate of production taxes based on the value of production at the well head or mine mouth would leave the oil severance taxes undisturbed while cutting the coal severance tax in half.[107] Such an outcome is hard to square with a concern for the ultimate resource consumer, let alone with notions of interstate equity.

The proposed legislation embracing a severance tax rate limitation that has actually been introduced into Congress raises further questions still. Most of the bills, including the one endorsed by the House Subcommittee on Energy and Power, have taken the form of an amendment to the Powerplant and Industrial Fuel Use Act of 1978.[108] The Act was a centerpiece of President Carter's National Energy Plan to achieve energy independence. As President Carter described that Plan:

> Coal, the nation's most abundant fossil energy resource, should be used in place of oil and gas wherever economically and environmentally feasible. Programs that increase the use of coal as a substitute for oil will receive the highest priority.[109]

In implementing this policy, the Act, among other things, called for the conversion of existing electric utility powerplants and major fuel burning installations to switch from oil to coal and for new plants to be built so as to utilize coal as the primary energy source. The severance tax limitation to be appended to the Act was couched in the following terms:

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(a) LIMITATION.---Notwithstanding any other provision of State or Federal law, with respect to any coal which is destined for shipment in interstate commerce for use in any powerplant or major fuel-burning installation, the sum of all severance taxes or fees, in respect of the any fiscal year, levied upon or collected from any taxpayer, by a State or any political subsdivision thereof on such coal or on any improvements or other rights, property, or assets produced, owned or utilized in connection with the production of such coal shall not exceed a total of 12-1/2 percent of the value of such coal produced during such fiscal year at the time it has been extracted and prepared for transportation free on board the production site, exclusive of all State and local taxes and fees.

(b) SEVERANCE TAXES OR FEES DEFINED.---For purposes of subsection (a), "severance taxes or fees" includes any tax or fee, by whatever name called, levied, or collected upon coal or upon any improvements or other rights, property, or assets produced, owned, or utilized in connection with the production of coal except for income, sales, property, or other similar taxes or fees of general application which are not disproportionately imposed thereon.[110]

Federal legislation narrowly directed at a particular resource plainly violates the concept of evenhandedness in restricting the states' power to tax natural resources. Still it may be be justified by the fact that it is rooted in a specific federal policy to encourage the use of that resource. The determination whether evenhandedness toward the states, on the one hand, or the effectuation of specific energy policies, on the other, should be the overriding objective in designing federal legislation limiting state and local natural resource taxation is, of course, a value judgment about which reasonable people will differ. There are two additional considerations, however, that ought to give us serious pause before adopting such a course.

First, in light of the general recognition that any federal limitation on state tax power should be viewed as matter of the greatest delicacy, we should view with more than the usual caution any legislation that singles out the taxes or resources of just a few jurisidictions that may lack the political muster to resist it. One wonders, for example, whether spokesmen from Texas who so avidly supported a limitation on coal severance taxes,[111] would have been as enthusiastic in their support of a limitation that included oil and gas.[112] And, if they would not have been, can we confidently assume that the difference is attributable to their commitment to a national policy to encourage use of coal rather than to the traditional political objective of looking out for one's own? Second, if there is to be a significant incursion on the states' power to tax natural resources, perhaps we should be reluctanct to predicate it on something as uncertain as national energy policy. With the weakening of OPEC, increased conservation efforts, and the impact of oil price decontrol, the national energy picture looked quite different in late 1983 than it did in 1980 and 1981 when efforts to impose restraints on state coal severance taxes may have reached their high water mark. Indeed, the National Energy Policy Plan sent to Congress in the fall of 1983 reflected a softening of the commitment to energy self-sufficiency, a de-emphasis of fossil fuels as the sole source of domestic energy, and reliance on a a more "'balanced' mix of resources, including solar, wind and hydroelectric energy and other renewable sources of power."[113] If excessive state taxation of natural resources is a threat to the federal system, a limitation upon it should be rooted in firmer soil than the shifting sands of national energy policy.

2. Limiting State Severance Taxes to Costs Incurred by the State Attributable to Natural Resource Production

The fundamental position that state taxes on natural resource production are excessive in relation to the costs that such activities impose upon the state is reflected in the proposed Severance Tax Equity Act introduced into Congress in 1982 and 1983 by Senator Dixon and Representative Hyde of Illinois.[114] The proposed legislation is more broadly based than that considered above, as it applies to oil, gas, and coal. It also comports more comfortably with the underlying rationale for such legislation, as it eschews arbitrary percentage limitations and instead limits state severance taxes to the "costs incurred by the State (and any political subdivision thereof) . . . which are directly attributable to the production within the State of crude oil, natural gas, or coal, as the case may be."[115]

At the same time, however, the proposed legislation is considerably more complex than the virtually self-executing percentage limitation. It would establish elaborate federal enforcement machinery, authorizing the United States Attorney General or an aggrieved taxpayer to bring suit in federal court against any

state in violation of the statute. It would generally place the burden of proof upon the plaintiff to prove that the aggregate revenue from the state severance tax exceeded the costs incurred by the state that are directly attributable to natural resource production. In the event, however, that a state's severance tax exceeds either its "adjusted 1978 State tax rate for such State for such fiscal year"[116] or the "adjusted 1978 national average tax rate for such fiscal year,"[117] terms defined with the labyrinthine detail we have come to expect from draftsmen of federal tax provisions, the burden of proof shifts to the defendant state.

In short, the legislation proposed by Messrs. Dixon and Hyde appears to offer gains from the standpoint of both interstate equity and consistency with legislative purpose by comparison to the simple rate limitation considered above. These gains must be weighed against the manifest losses it would entail, again by comparison to the simple rate limitation, in ease of understanding and implementation. Nor should one underestimate the increase in federal-state friction that might be occasioned by permitting taxpayers ready access to federal court to challenge state taxes, a practice contrary to general congressional policy in this area.[118]

3. A National Severance Tax

When we move beyond the concept of a federal restraint on state production taxes to the broader proposals that have been advanced for dealing with the fiscal disparities that are due to state natural resource tax revenues, we confront a vast array of legislative possibilities. Most of these have retained their character as casual suggestions. One exception is the proposal for a national severance tax levied either in conjunction with a limitation on state severance taxes or as a replacement for such taxes. Revenues from the federal tax would be earmarked for distribution in a manner more consonant with its proponents' views of national priorities than are revenues from existing natural resources taxes. For example, legislators from the Northeast-Midwest Congressional Coalition introduced a bill in Congress in 1982 proposing a federal severance tax on crude oil as well as a limitation on state severance taxes based on the "adjusted 1978 State tax rate"[119] or the "adjusted 1978 national average tax rate"[120] alluded to above. A portion of the revenues was to be allocated to the states under a complicated scheme designed to assure that a goodly portion of the funds made their way to the beleaguered economies of the Northeast and Midwest.

Columbia Law School Professor Lewis Kaden has suggested that Congress

> might consider replacing state severance taxes and royalties with an national levy on energy extracted from the mines, with the revenues shared nationally on a basis of a formula designed to serve the goals of fiscal balance, payment for impact costs, energy independence and rehabilitation of public infrastructure in the consuming regions.[121]

Mere statement of such an agenda for legislative consideration is sufficient to demonstrate why more suggestions of this kind have been advanced informally than have been articulated in the form of a legislative proposals.

The concept of a national severance tax is not solely a child of the energy crisis. The idea was actually put forward in 1969 before energy independence had become a national priority. Ironically in light of recent history, it was offered by Senator Metcalf from Montana for the purpose of encouraging states like his own to impose reasonable taxes upon their natural resources.[122] Senate Bill 910 sought to impose a five percent federal severance tax on the gross income from mining, with amounts paid as state severance taxes available as credits against the federal tax.[123] As Senator Metcalf explained his proposal on the Senate floor, many resource-rich states had failed to impose reasonable severance taxes upon mineral producers because

> [a] State acting alone runs the risk of placing some mining companies operating within the State at a competitive disadvantage relative to companies operating where there are no severance taxes. . . . Interstate competition, in other words, acts to keep severance taxes low.[124]

The purpose of the bill was therefore to encourage state legislatures to enact severance taxes at the minimum rate of five percent, which they could do without fear of offending local industry. Local producers would simply credit the tax against their federal severance tax liability. A virtually identical scheme has existed for years in the state death tax field, which has encouraged states to impose death taxes up the the limit of the maximum federal credit allowable.[127] There is a broader point suggested by this proposal than its particular merits: In considering both the wisdom and direction of federal legislation in this area, it is worth recalling that just fifteen years ago the issue was whether there should be a floor not a ceiling on state severance taxes.

4. Fiscal Disparities and Federal Revenue Sharing Formulas

Although it does not involve taxation as such, there is one final matter that merits brief attention here because it relates to the problem of fiscal disparities created by state natural resource revenues. This is the matter of the formulas that are employed by the federal government to allocate general revenue sharing and other federal funds among the states. The general question, whose scope extends far beyond the narrow issue addressed here,[126] is whether these formulas fairly reflect the fiscal capacities of the states to which the funds are being allocated. For our purposes, the particular question is whether these formulas adequately account for the massive influx of natural resource revenues enjoyed by a number of states.

Federal grants to state and local governments amounted to about $95 billion in fiscal year 1980.[127] Many of these grants are made pursuant to programs that recognize the differences among these jurisidictions in their ability to finance public services and are designed in part to equalize their post-grant fiscal condition. In allocating federal revenues among states and localities, the formulas therefore take account in many cases of the fiscal capacity (or the lack thereof) of the recipient state or locality. Fiscal capacity has always been measured by personal income in the federal grant programs that rely on such capacity as a guide to allocation of funds.[128] Another factor that has

been employed for this purpose, most notably in allocating the four to five billion dollars of general revenue sharing funds, is the state's general "tax effort," defined as "total state and local tax collections divided by the state's personal income."[129]

The critical issues raised by these allocation factors in light of the access of some states to substantial natural resource revenues are not difficult to appreciate. Under most circumstances, per capita income is an acceptable measure of a state's revenue-generating ability because tax yields tend to be dependent on the income of residents in the taxing state. Hence a formula that equates fiscal capacity with personal income and distributes federal funds in an inverse relationship to such capacity would appear to be unobjectionable. However, as Robert Rafuse of the United States Treasury Department has observed,

> the link between the availability of natural resources and the income of a State or locality is tenuous at best. The exploitation of such resources generates a potential source of revenues, but the demand for energy production depends largely upon national rather than State markets. This is one of the reasons it has been argued that the measure of fiscal capacity in the Revenue Sharing formula is imperfect. That is, it does not allow for the potential yield of severance taxes in the minority of States that are exceptionally endowed with natural resources, whose exploitation creates an unusually lucrative base for taxation.[130]

Natural resource revenues have an even more dramatic---some would say perverse---impact on federal revenue allocation formulas that take account of tax effort in the equation. Tax effort, which reflects the ratio of tax collections to per capita income, is assumed to be a proxy for the tax burden borne by residents of a particular state. The higher a state's tax effort (and the implied tax burden on state residents), the greater is that state's share of federal funds.[131] When natural resource production tax revenues increase the ratio of state tax collections to per capita income, the result is to allocate additional federal revenues to that state because of the assumption that such revenues reflect the residents' own tax effort. As we learned in Chapter 4, however, natural resource taxes are often exported to residents of other states. To the extent that they are, the tax effort factor has the bizarre effect of allocating revenues to some states on the basis of the tax effort of residents of other states. Of course, the same point can be made with respect to any tax that is exported, but the phenomenon appears to be particularly widespread in the context of natural resource taxation.

Identifying the problems associated with the impact of natural resource revenues on federal revenue allocation formulas is easier than identifying the solutions. If one were to abandon per capita income and tax effort as allocation factors, the question is what would replace them. The United States Advisory Commission on Intergovernmental Relations has developed an alternative measure of fical capacity, denominated the "representative tax system."[132]

> The representative tax system defines the tax capacity of a State and its local governments as the amount of revenue they could raise (relative to other State-local governments)

> if all 50 state-local systems applied the <u>identical tax</u> rates (national averages) to their respective tax bases. Fiscal capacity is thus viewed as an attribute of government derived from the economic strength inherent within a State's jurisdictional boundaries. The system is "representative" in the sense that potential revenues are determined by applying a uniform taxing systgem in a State which represents a cross section of State and local tax practice currently affecting most citizens.[133]

Even the Commission, which has advocated implementation of the representative tax system for years, recognizes that there are serious technical and political problems in its adoption. As the Commission's Assistant Director John Shannon has stated: "The replacement of the traditional per capita income measure with the tax capacity estimates is bound to be highly controversial because it would create a new set of winners and losers."[134]

There is no end is sight to the national debate over the question whether Congress should modify the traditional formulas for allocating the billions of dollars in federal revenues that are distributed to state and local governments. The possibility that it may do so, however, should alert us to the opportunity for reducing the fiscal disparities created by the states' power to tax natural resources without tampering with such power in restrictive federal legislation.

NOTES TO CHAPTER 6

1. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 628 (1981).

2. Arthur A. Link, "Political Constraint and North Dakota's Coal Severance Tax," National Tax Journal, 31 (September 1978): 263. The following discussion of the development of North Dakota's coal severance tax legislation is based on this source.

3. Ibid., p. 264.

4. N.D. Cent. Code § 57-61-03 (Supp. 1983).

5. George F. Weaton, "A History of Minnesota Mining as Influenced by Taxation," Symposium on Mine Taxation (Tucson, Ariz.: University of Arizona College of Mines, 1969), p. 7-26. The following discussion of the political background to Minnesota's taconite amendment is based on this source.

6. Ibid.; Howard D. Hamilton, "Taxes and Taconite: Iron Ore Tax Legislation in the Lake Superior Region," National Tax Journal, 7 (December 1954): 342.

7. Minn. Stat. § 298.23 (1982).

8. See Chapter 3, pp. ___-___ above.

9. Weaton, "A History of Minnesota Mining," p. 7-28.

10. Ibid., p. 7-29; see Minn. Const., art X, § 6.

11. Minnesota Department of Revenue, Minerals Tax Division, Minnesota Mining Tax Guide (Eveleth, Minn.: Minnesota Department of Revenue, Minerals Tax Division, 1982), p. 11.

12. Highway Users Federation, 1983 Legislative Action (Washington, D.C.: Highway Users Federation, 1983), p. 3.

13. See, e.g., Russell J. Adams, "State 'Oil-Only' Taxation: New Dangers in an Energy Troubled Society," Oil and Gas Tax Quarterly, 31 (December 1982): 413.

14. William M. Bloss, "Gross Receipts Taxes: Toward Parity in State Energy Taxation," American University Law Review, 32 (Spring 1983): 873.

15. See Chapter 5, pp. ___-___ and ___-___ above.

16. See Chapter 4, pp. ___-___ above.

17. See, e.g., Coal Severance Taxes: Hearings on H.R. 6625, H.R. 6654, and H.R. 7163 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 2nd Sess. (Washington, D.C.: United States Government Printing Office, 1980), p. 19 (testimony of Senator Riegle (D-Mich.))[hereinafter cited as 1980 House Coal Severance Tax Hearings].

18. Ibid., p. 12 (testimony of Representative Samuel L. Devine (R-Ohio)).

19. Coal Severance Tax Limitations: Hearings on H.R. 1313 Before the Subcomm. on Fossil and Synthetic Fuels of the House Comm. on Energy and Commerce, 97th Cong., 1st & 2nd Sess.

(Washington, D.C.: United States Government Printing Office, 1982), p. 19 (testimony of Representative Sam Gibbons (D-Fla.))[hereinafter cited as 1981-1982 House Coal Severance Tax Hearings].

20. 1980 House Coal Severance Tax Hearings, p. 25 (testimony of Representative James L. Oberstar (D-Minn.)).

21. Fiscal Disparities, Part 2, The Commerce Clause and the Severance Tax: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs, 97th Cong., 1st Sess. (Washington, D.C.: United States Government Printing Office, 1982), p. 17 (testimony of William P. Rogers, Rogers & Wells)[hereinafter cited has Senate Fiscal Disparities Hearings, Pt. 2].

22. Coal Severance Tax: Hearing on S. 2695 Before the Senate Comm. on Energy and Natural Resources, 96th Cong., 2nd Sess. (Washington, D.C.: United States Government Printing Office, 1980), p. 173 (testimony of Donald M. Fraser, Mayor of Minneapolis)[hereinafter cited as 1980 Senate Coal Severance Tax Hearing].

23. Ibid., p. 235 (testimony of Thomas L. Judge, Governor of Montana).

24. See Chapter 4, p.___ above.

25. The Federalist No. 32 (Alexander Hamilton), Benjamin F. Wright, ed. (Cambridge, Mass.: Belknap Press of Harvard University Press, 1961), p. 241.

26. See Chapter 2, p. __ below.

27. Ibid.

28. John H. Ashworth, "Continuity and Change in the U.S. Decision-Making Process in Raw Materials," in E. Beigie and Alfred O. Hero, Jr., eds., Natural Resources in U.S.-Canadian Relations, vol. 1 (Boulder, Colo.: Westview, 1980), p. 70.

29. Ibid.

30. George C. Coggins and Charles F. Wilkinson, Federal Public Lands and Resources Law (Mineola, N.Y.: Foundation Press, Inc., 1981), p. 1. The balance of this paragraph relies on this source.

31. See United States v. California, 332 U.S. 19 (1947).

32. George Elian, The Principle of Sovereignty over Natural Resources (Alphen aan den Rijn, The Netherlands: Sijthoff & Noordhoff, 1979), pp. 1-26.

33. Cf. United States v. Maine, 420 U.S. 515 (1975).

34. See generally "Symposium on Indian Law," Oregon Law Review, 62 (1983): 1-144.

35. 1980 House Coal Severance Tax Hearings, p. 255 (testimony of Representative Thomas A. Tauke (R-Iowa)).

36. Ibid., p. 277 (testimony of Irwin M. Stelzer, National Economic Research Associates).

37. United States Senate, Senate Report No. 127, 97th Cong., 1st Sess. (Washington, D.C.: United States Government Printing Office, 1981), p. 369 (statement of Senator Durenburger (R-Minn.)).

38. James Madison, "Preface to Debates in the Convention of 1787," in Max Farrand, ed., The Re ds of the Federal Constitution (New Haven, Conn.: Yale University Press, 1966), p. 542.

39. "Developments in the Law---Federal Limitations on State Taxation of Interstate Business," Harvard Law Review, 75 (April 1962): 970.

40. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 619 (1981).

41. Senate Fiscal Disparities Hearings, Pt. 2, p. 81 (testimony of Senator Max Baucus (D-Mont.)).

42. See Chapter 5, p. ___ and note ___ above.

43. Tom Cochran and J.R. Prestidge, The United American Emirates: State Revenues from Non-Renewable Energy Resources (Washington, D.C.: Northeast-Midwest Institute, 1981), p. 16.

44. 1981-1982 House Coal Severance Tax Hearings, p. 14 (testimony of Representative Thomas J. Tauke (R-Iowa)).

45. Ibid., p. 22 (testimony of Representative Sam Gibbons (D-Fla.)).

46. Ibid., p. 14 (testimony of Representative Anthony T. Moffett (D-Conn.)).

47. See p. ___ below.

48. 1981-1982 House Coal Severance Tax Hearings, p. 21 (testimony of Representative Sam Gibbons (D-Fla.)).

49. Baldwin v. G.A F. Seelig, Inc., 294 U.S. 511, 523 (1935).

50. 1980 House Coal Severance Tax Hearings, p. 94 (testimony of William P. Rogers, Rogers & Wells).

51. Link, "Political Constraint and North Dakota's Coal Severance Tax," p. 264.

52. 1980 House Coal Severance Tax Hearings, p. 374 (testimony of Dorothy Bradley, Montana Democratic Party).

53. Ibid.

54. Ibid., p. 247 (testimony of Representative Philip R. Sharp (D-Ind.)).

55. Ibid., p. 290 (testimony of Irwin M. Stelzer, National Economic Research Associates, Inc.).

56. 1980 Senate Coal Severance Tax Hearing, pp. 417, 420 (testimony of Sally Hunt Streiter, National Economic Research Associates, Inc.).

57. Ibid., p. 329 (testimony of Thomas E. Towe, Montana State Senator).

58. Ibid.

59. Ibid., pp. 433-435 (testimony of Sally Hunt Streiter, National Economic Research Associates, Inc.).

60. 1980 House Coal Severance Tax Hearings, pp. 286-288 (testimony of Irwin M. Stelzer, National Economic Research Associates, Inc.).

61. Ibid., p. 288.

62. 1981-1982 House Coal Severance Tax Hearings, p. 47 (testimony of Ted Schwinden, Governor of Montana).

63. Ibid.

64. David A. Gulley, "Severance Taxes and Market Failure," Natural Resources Journal, 22 (July 1982): 614.

65. 1980 House Coal Severance Tax Hearings, p. 201 (testimony of Senator Malcom Wallop (R-Wyo.)).

66. 1980 Senate Coal Severance Tax Hearing, p. 175 (testimony of Senator Malcom Wallop (R-Wyo)).

67. See Chapter 4, pp. ___-___ below; Chapter 5, pp. ___-___ above.

68. Senate Fiscal Disparities Hearings, Pt. 2, p. 213 (testimony of Senator Dale Bumpers (D-Ark.)).

69. 1980 House Coal Severance Tax Hearings, p. 171 (testimony of Senator Alan K. Simpson (R-Wyo.)).

70. 1981-1982 House Coal Severance Tax Hearings, pp. 54-55 (testimony of Ted Schwinden, Governor of Montana); Ibid., pp. 100-101 (testimony of Senator John Melcher (D-Mont.)).

71. Ibid., pp. 100-103 (testimony of Senator John Melcher (D-Mont.)).

72. Larry Parker, Energy: Limiting State Coal Severance Taxes, Issue Brief No. IB80060 (Washington, D.C.: Library of Congress Congressional Research Service, 1981), p. 6

73. 1980 House Coal Severance Tax Hearings, p. 168 (testimony of Sentator Alan K. Simpson (R-Wyo.)).

74. Ibid.

75. Senate Fiscal Disparities Hearings, Pt. 2, p. 273 (testimony of Donald M. Fraser, Mayor of Minneapolis).

76. 1981-1982 House Coal Severance Tax Hearings, pp. 170-171 (testimony of Representative Howard E. Wolpe (D-Mich.)).

77. 1980 Senate Coal Severance Tax Hearing, p. 12 (testimony of Senator Lloyd Bentsen (D-Tex.)).

78. The term "fiscal disparities" has become somewhat of a code word for the issues associated with the differentials in wealth and tax capacity of states and regions, particularly those arising from access to natural resources and natural resource

revenues.

79. 1980 House Coal Severance Tax Hearings, p. 36 (testimony of Representative Ron Marlanee (R-Mont.)).

80. United States Bureau of the Census, State Government Tax Collections in 1972, GF 72, no. 1 (Washington, D.C.: United States Government Printing Office, 1973), pp. 5, 7; United States Bureau of the Census, State Government Tax Collections in 1982, GF 82, no. 1 (Washington, D.C.: United States Government Printing Office, 1983), p. 5.

81. Peggy Cuciti, Harvey Galper, and Robert Lucke, "State Energy Revenues," in Charles E. McLure, Jr., and Peter Mieszkowski, Fiscal Federalism and the Taxation of Natural Resources (Lexington, Mass.: D.C. Heath and Co., 1983), p. 13.

82. United States Advisory Commission on Intergovernmental Relations, State Taxation of Energy Resources (Washington, D.C: United States Advisory Commission on Intergovernmental Relations, 1983)(mimeographed) pp. 4-7, 4-14.

83. 1980 House Coal Severance Tax Hearings, p. 21 (testimony of Representative Bruce F. Vento (D-Minn.)).

84. Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289, 42 U.S.C. § 8301 et seq. (Supp. V 1982).

85. 1980 Coal Severance Tax Hearings, p. 21 (testimony of Representative Bruce F. Vento (D-Minn.)).

86. 1980 Senate Coal Severance Tax Hearing, p. 41 (testimony of Senator David Durenburger (R-Minn.)).

87. See pages ___-___ below.

88. 1980 House Coal Severance Tax Hearings, p. 14 (testimony of Representative Samuel L. Devine (R-Ohio)).

89. The Sagebrush Rebellion is a political movement with widespread support in the Western states that seeks to force the transfer of federally-owned public lands to the states in which the lands lie. See Richard W. Mollison and Richard W. Eddy, "The Sagebrush Rebellion: A Simplistic Response to the Complex Problems of Federal Land Management," Harvard Journal on Legislation, 19 (Winter 1982): 97.

90. 1980 House Coal Severance Tax Hearings, p. 36 (testimony of Representative Ron Marlanee (D-Mont.)).

91. Ibid., p. 18 (testimony of Senator Alan K. Simpson (R-Wyo.)).

92. Christopher K. Leman, "Comparing Canadian and U.S. Regional Energy Conflicts: Contexts and Lessons," in Christopher K. Leman, ed., Regional Issues in Energy Development: A Dialogue of East and West (Cambridge, Mass.: University Consortium for Research on North America, 1981), p. 19.

93. 426 U.S. 833 (1976).

94. The Tenth Amendment provides: "The 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." U.S. Const., amend. X.

95. 426 U.S. at 842.

96. Ibid., p. 852.

97. Ibid., p. 855.

98. 453 U.S. at 628.

99. Ibid., p. 628, note 18.

100. Ibid.

101. Michael B. Browde and Charles T. DuMars, "State Taxation of Natural Resource Extraction and the Commerce Clause: Federalism's Modern Frontier," Oregon Law Review, 60 (1981): 54-56.

102. See, e.g., S. 178, 97th Cong., 1st Sess. (1981); H.R. 1313, 97th Cong., 1st Sess. (1981).

103. H.R. 6625, 96th Cong., 2nd Sess. (1980); see United States Congress, House of Representatives, Committee on Interstate and Foreign Commerce, Limitation on Coal Severance Taxes, H.R. Rep. No. 96-1527, Part. 1, to accompany H.R. 6625 (Washington, D.C.: United States House of Representatives, 1980)[hereinafter cited as H.R. Rep. No. 96-1527].

104. Cuciti, Galper, and Lucke, "State Energy Revenues," p. 15.

105. H.R. Rep. No. 96-1527, p. 22 (dissenting views of Representative Timothy E. Wirth (D-Colo.)).

106. The nominal rate of 30 percent employed in the Montana coal severance tax was adjusted for the credits for other taxes as permitted by the Montana statute. Parker, Energy: Limiting State Coal Severance Taxes, p. 5; see Chapter 5, note 35 above; Appendix (Montana) below.

107. To the extent that the effective rate of the tax was less than 30 percent of the tax, see note 106 above, the reduction effected by the fifteen percent limitation would be less.

108. Pub. Law No. 95-620, 92 Stat. 3289, 42 U.S.C. § 8301 et seq. (Supp. V 1982).

109. H.R. Rep. No. 96-1527, p. 3.

110. H.R. 6625, 96th Cong., 2nd Sess. (1980). H.R. 6654, 96th Cong., 2nd Sess. (1980), H.R. 7163, 96th Cong., 2nd Sess. (1980), and H.R. 1313, 97th Cong., 1st Sess. (1981) were identical to H.R. 6625. S. 2695, 96th Cong., 2nd Sess. (1980) and S. 178, 97th Cong., 1st Sess. (1981) were limited to "coal produced on Indian lands or lands owned by the Federal Government" but were otherwise identical to H.R. 6625. S. 1778, 96th Cong., 1st Sess. (1979) proposed a broader limitation in the following terms:

> [N]otwithstanding any other provision of law, with respect to coal, oil, natural gas, oil shale, or other energy re-

sources mined or produced from Indian lands or lands owned by the United States, the sum of all taxes or fees levied or collected by a State or within a State on such energy resources or on any improvements or other rights, property, or assets produced, owned, or utilized in connection with the production of such energy resources, shall not exceed a total of 12-1/2 percentum of the value of such resources at the time they have been extracted and prepared for transportation free on board the production site, exclusive of all State and local taxes and fees, unless such taxes or fees collected within that State are fairly related to services (1) provided by said State or its local authorities in connection with the production of such resources and (2) for which royalties under section 35 of the Mineral Leasing Act of 1920 do not provide adequate compensation.

111. See, e.g., 1980 Senate Coal Severance Tax Hearing, pp. 6-8 (testimony of Senator Bentsen (D-Tex.)); 1980 House Coal Severance Tax Hearings, pp. 85-91 (testimony of Mark W. White, Attorney General, State of Texas); 1981-1982 House Coal Severance Tax Hearings, pp. 172-178 (testimony of Representative J.J. Pickle (D-Tex.)).

112. In fairness to Senator Bentsen, see note 111 above, it should be pointed out that he introduced S. 178, quoted in note 110 above, that included oil, gas, and other energy resources within the scope of the rate limitation.

113. "Reagan Says Renewable-Energy Projects and Conservation Are Vital in Long Term," The Wall Street Journal, p. 2 (Oct. 5, 1983).

114. S. 2890, 97th Cong., 2nd Sess. (1982); S. 463, 98th Cong., 1st Sess. (1983); H.R. 2690, 98th Cong., 1st Sess. (1983).

115. S. 463, 98th Cong., 1st Sess. § 3(a) (1983).

116. Ibid., § 3(b)(3)(B)(i).

117. Ibid., § 3(b)(3)(B)(ii).

118. The Judicial Code of the United States provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341 (1976). As the Supreme Court has observed, the statute has its roots in equity practice, in principles of federalism, and in the recognition of the imperative need of a State to administer its own fiscal operations. Tully v. Griffin, 429 U.S. 68, 73 (1976).

119. H.R. 6330, 97th Cong., 2nd Sess. § 301(1) (1982).

120. Ibid., § 301(2).

121. Senate Fiscal Disparities Hearings, Pt. 2, p. 69 (testimony of Professor Lewis B. Kaden, Columbia University Law School).

122. Franklin Jones, "The Struggle for Equitable Taxation of Mines---The New Mexico Example," Proceedings of the Sixteenth

Annual Rocky Mountain Mineral Law Institute (New York, N.Y.: Matthew Bender, 1971), p. 479.

123. S. 910, 91st Cong., 1st Sess. (1969).

124. 115 Cong. Rec. 2583 (Feb. 4, 1969).

125. Jerome R. Hellerstein and Walter Hellerstein, State and Local Taxation, 4th ed. (St. Paul, Minn.: West Publishing Co., 1978), pp. 819-820.

126. See Fiscal Disparities, Part 1, Federal Allocation Formulas: Hearing Before the Subcomm. on Intergovernmental Affairs of the Senate Comm. on Governmental Affairs, 97th Cong., 1st Sess. (Washington, D.C.: United States Government Printing Office, 1981)[hereinafter cited as Senate Fiscal Diparities Hearings, Pt. 1].

127. United States Advisory Commission on Intergovernmental Relations, Tax Capacity of the Fifty States: Methodology and Estimates (Washington, D.C.: United States Advisory Commission on Intergovernmental Relations, 1982), p. 3.

128. Ibid.

129. Senate Fiscal Disparities Hearings, Pt. 1, p. 94 (testimony of Robert W. Rafuse, Jr., Deputy Assistant Secretary (State and Local Finance), United States Department of the Treasury).

130. Ibid., p. 95.

131. Ibid., p. 94.

131. Ibid., p. 94.

132. United States Advisory Commission on Intergovernmental Relations, Tax Capacity of the Fifty States, pp. 11-12.

133. D. Kent Halstead, Tax Wealth in Fifty States (Washington, D.C.: United States Government Printing Office, 1978), p. 4.

134. Senate Fiscal Disparities Hearings, Pt. 1, p. 61 (testimony of John Shannon, Assistant Director, United States Advisory Commission on Intergovernmental Relations).

STATEMENT OF MR. GEORGE RIFAKES, VICE PRESIDENT, COMMONWEALTH EDISON, CHICAGO, IL

Mr. RIFAKES. Thank you, Mr. Chairman.

Although my statement is short, I would ask that it be transcribed into the record in its entirety, and I would just like to stress a few points that were just discussed here.

Senator WALLOP. By all means, it will be.

Mr. RIFAKES. Since I am representing Commonwealth Edison, I guess it's expected that I would be in support of any bill that limits severance taxes. One of the statements that has been made over and over again is that this tax is not directly borne by the consumer. In the case of Commonwealth Edison at least, and in the case of most electric utilities with automatic fuel adjustment clauses, this isn't the truth. The fact is that all the costs of our fuel, increases in these costs, and decreases in these costs, are passed through directly to the consumer. This tax, over the years, has been an add-on to our fuel costs, and that has been passed directly through.

About 50 percent of the electricity we produce comes from coal and currently we are burning about 14 million tons of coal and about 11 million of these tons come from the States of Montana and Wyoming. Up until the late 1960's, most of the coal we burned was Midwestern coal, and the bulk of it was from Illinois. Because of sulfur dioxide concerns, we had to look for other means to generate electricity. Illinois coal averages about 3½ percent sulfur. And we studied a lot of alternatives, two of which were scrubbers and the use of Western coal. And Western coal proved to be the most economic answer to the problem.

Unfortunately the conditions that existed back in the late 1960's changed significantly. For example, back in the 1960's we were looking at long-term contracts with base prices of between $3 and $5 a ton. We were looking at severance taxes of from $0.10 a ton in Montana to 1 percent in Wyoming. Those severance taxes alone