April 1941

The West Virginia Public Service Commission: III The Power of the State to Prohibit the Export of Its Natural Resources

C. A. Peairs Jr.
Northeastern University

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Natural Resources Law Commons, Oil, Gas, and Mineral Law Commons, and the State and Local Government Law Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol47/iss3/3

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
III. THE POWER OF THE STATE TO PROHIBIT THE EXPORT OF ITS NATURAL RESOURCES.

1. The Problem. West Virginia is a state which must depend for its livelihood and future prosperity on its "natural resources", which include 12,000 square miles of productive coal area (over half the total area of the state), as the most important. Among the others are timber, petroleum, natural gas and water power. If these (or the power to develop and exploit them) are taken from the state, little will remain. To be sure, a large portion of the output must be exported to produce a profit, but the power to control and to grant or withhold such exports, in order to secure a better price for them, or to draw valuable consumer investments into the state, is invaluable to it.

In the years following 1910 there was a tremendous development in the fields of natural gas production and of development of hydroelectric energy in West Virginia. The need for West Virginia preference, expressed above, was recognized; there would have been no occasion for governmental action had not the controlling business interests in these fields, as in so many in the state, been owned by foreign or absentee capital. The general public impression was that most, if not all, the power or energy proposed to be generated by the development of the Cheat and the New-Kanawha rivers would be transmitted to another state for the benefit of foreign interests, and it was a known fact that the natural gas production of the state was monopolized by eight companies which discriminated against West Virginia consumers in their distribution practices.

Due to the great development of the gas fields around the turn of the century and to the seemingly inexhaustible supply, the people of the state had turned more and more to gas as a fuel, and had come by the time of the war to depend on it as the general and almost exclusive fuel for both domestic and industrial purposes.

---

*The first and second installments of this article appeared in the April and June issues (1940) 46 W. Va. L. Q. 201, 292.
**Member of the Monongalia County Bar; now instructor in law, Northeastern University, Boston, Massachusetts.

128 About 250,000,000,000 cubic feet of gas in 1916; over 300,000,000,000 in 1917; the assumed maximum of hydroelectric energy capable of development is over 1,000,000 horsepower, and much of this was being developed by the construction of dams from 1910 to 1930.
all over the state. Much of the industrial growth of the state was attributed to the abundance and cheapness of this fuel. It was felt that the loss or depletion of such a source of general prosperity would be irreparable, and the unreliable and interrupted supply during the later war years caused considerable economic injury and great worry throughout the state as to the future. Industries were disorganized, and general public discomfort and suffering attended the shortages of 1916 and 1917. The loss to factories in Charleston during the winter of 1916 was estimated at a million dollars, and several times that amount was lost by the abandonment of new industrial projects and the closing of existing factories in the state because of the present and prospective lack.

The chief cause of this shortage was the monopoly enjoyed by eight large companies, operating under the Public Service Commission and exercising rights of eminent domain and exclusive service franchises granted by the state. These companies controlled almost ninety per cent of the total production of the state; the supply was controlled by their ownership of all pipe lines and pump stations and their refusal to transport for other producers. The doctrine of the Pipe Line cases was of no practical benefit here, because the rights of others to use the transportation facilities were of course subordinated to the right of the owner in each case to carry his own gas, and if the owner carried his own gas first, the others lost all their gas by drainage. The market monopoly consisted of the sole opportunity to sell and of the fact that the demand exceeded the total supply.

The discrimination resulted from the fact that the owners of the pipe lines and pump stations could sell far or near, as they chose, and that rates for gas were so much higher in Ohio and Pennsylvania, and so much more eagerly paid, that the profits were considerably greater from sales abroad than from those to domestic consumers. The net result was that in 1915 domestic consumers received about fifteen per cent of the total production of those companies, and that that percentage dropped almost half in the following years. In every case where there were two markets, the foreign one prevailed, because of the discrepancies in rates.130

As time went on the legislature saw the "handwriting" and realized that neither adjustment of rates nor any other action of

---

the West Virginia Public Service Commission would remedy the situation, and there seemed to be no hope of congressional action; the remaining alternative was a direct compulsion of an adequate supply to domestic consumers, and that alternative was finally adopted.

2. **The Gas Embargo.** The "gas embargo" act was introduced into and passed by the house of delegates in January, 1917, at the regular session, again at the second extraordinary session of 1917, and was finally passed by the legislature on February 10, 1919, and approved by Governor Cornwell on February 17, 1919. Because of the long pendency of the bill before passage, its opponents were ready and waiting for it when it got out and commenced legal proceedings so promptly that the act never really went into effect.

The heart of the act of 1919\(^{131}\) was contained in section 1, which provided that every person furnishing natural gas for public use or for domestic or industrial consumption within the state should be required to furnish an adequate supply of gas for the purposes for which West Virginia consumers should apply for it, to the extent of his supply of such gas produced in this state by him or by anyone else. The effect of this was to extend the duty of every gas company to serve any consumer within the state who should apply for service, whether such consumer was within the radius of the company's previous undertaking or not, and to forbid extrastate sales until all West Virginia consumers were satisfied. There was no direct prohibition of gas export, and, as a matter of fact, there would probably not have been any very great change in the amount of gas exported; prices would have changed, and West Virginia consumers would have suffered no more gas shortages, but extrastate consumers would probably not have felt the effect of the statute for several years—perhaps not until the fields began to be seriously depleted. Since the foreign use was many times that in West Virginia, the ratios would have had to shift but slightly in order to produce the desired result.

The second section provided for the procedure by which the gas supply guaranteed by the act might be obtained. The Public Service Commission was granted authority to order any gas producer or other gas utility to furnish natural gas to supply any deficiency of any other gas company; such order might be made on application either by a utility with insufficient supply, or by any

consumer in the state. This provision limited the condition for gas export not only to a surplus above the amount necessary to satisfy the exporter’s own intrastate customers, but also above that necessary to satisfy any deficiency existing in the state. The commission was empowered under that section to prescribe the rates for such intercompany service, as well as the other terms upon which it should be rendered. After suitable hearings and process the commission might provide for and compel the establishment of pipe connections between the conduits of persons having an excess of gas and those of persons having a deficiency, in order to remedy the deficiency, and apportion the cost of such construction. The provisos in this section limit its effect to those having an excess, who were not willing to serve the consumers of the insufficiently-supplied company themselves.

The third section extended the jurisdiction of the Public Service Commission under the act of 1913 to all matters under this act. The fourth section provided for enforcement by the commission on complaint. Either the Public Service Commission or any person aggrieved might apply to any court for mandamus, injunction, or any other proper relief, in case of violation of the act or of a commission order under it. The fifth section provided a criminal sanction for enforcement of the act, while the sixth provided for civil actions for damages by persons injured by violation of the act.

The eighth section of the act provided for its separability in case any part of it should be decided to be unconstitutional—indicating the grave doubts entertained by the enacting legislature as to the validity of the measure and their desire to remedy the situation in spite of such doubts.

3. Pennsylvania and Ohio v. West Virginia. The determination of the constitutionality of the West Virginia act was a hard fought battle, taking four long years, even though it was between two big states and one little state. The case was twice sent back by the Supreme Court for reargument after the initial presentation, and after the opinion was handed down a rehearing was granted and had before the final disposition of the case. Three justices dissented from the ruling in the case—Holmes, McReynolds, and Brandeis. It is difficult to say how much this apparent hesitancy in deciding the case depended on the strength of West Virginia’s argument, which had been in preparation for six years prior to the hearing in the case.

The West Virginia argument rested heavily on the proposition
that the gas companies were public utilities which had been granted the right of eminent domain, had exercised it, and had in each petition for condemnation relied on their status as servants of the West Virginia public, that property may be taken for public use by eminent domain only if the use is in and for the benefit of the state from which the power is derived, and that therefore the first duty of these companies,complemental to their special privileges, was that of adequate service to consumers within the state. It is true that condemnation rights in West Virginia rest on the ground that the property so taken will be devoted to public use. In Carnegie Natural Gas Co. v. Swiger, the court said "we observe that the legislature, by general law, has conferred upon pipe line companies ... the right of eminent domain, and has necessarily imposed on them, as public service companies, the right and duty of performing a public service. That right and duty is fixed as firmly as if written into the statute... Pipe line companies organized for transporting gas must serve the people with gas... along the line traversed... the rights of the people are thus protected in nearly every case where the public is served by public service corporations, furnishing gas, water, or electricity." In Pittsburg Hydro-Electric Co. v. Liston, it was held that a foreign corporation might exercise the right of eminent domain "to be exercised for the public use of the citizens of West Virginia." It is not so clear that merely because a corporation exercises the right of eminent domain, it must therefore devote all its property to public use, as it is that the property so taken is forever impressed with a preferred obligation to the people of the state under whose sanction it was taken. To borrow a property term, it is not so clear that the public service corporation in exercising the right of eminent domain assumed an obligation to West Virginia citizens, as that it took subject to their rights. This distinction is, however, of little moment if the pipe lines which these companies were

---

132 On this point see 1 Lewis, EMINENT DOMAIN (3d ed. 1909) §§ 22, 310; Kohl v. United States, 91 U. S. 367, 23 L. Ed. 449 (1876), in which the court said "the proper view of the right of eminent domain is that it is a right belonging to a sovereignty to take property for its own public uses, and not for those of another"; and Washington Water Power Co. v. Waters, 19 Idaho 595, 115 Pac. 682 (1911), in which the court said (at p. 603), "where the use for which the condemnation is sought is a public use in this state, and will serve the citizens of this state... the fact that it may incidentally also benefit the citizens and industries of a neighboring state will not defeat the right"; from which the inference is fairly clear that rights within the state would take precedence over extrastate rights as to the use of such property. 133 72 W. Va. 557, 571, 79 S. E. 3, 9 (1913). 134 70 W. Va. 33, 91, 73 S. E. 86, 90 (1911).
using to export the gas were themselves obtained by condemnation, a fact which does not appear, but which is probable.

The subordinate point as to the completeness of the duty asserts that upon no pretext can these companies renounce it, once having undertaken it. This again is good law within the limits of its application, and is supported by the Gibbs case, where it was said that "a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests." This is probably applicable to the case, since the companies in the principal case were public utilities in West Virginia, and not in Pennsylvania, at least as to the West Virginia pipe lines, in so far as the West Virginia pipe lines are concerned, the Pennsylvania consumers were "private interests" of the companies. The only difficulty is the power of West Virginia to enforce this rule against the Pennsylvania consumers.

The minor premise in this argument was that if there was a duty corresponding to the grant of a special right such as eminent domain, then the right of the state to declare and enforce such duty must follow. This follows from cases declaring the extent of the state police power, and is really more a matter of political philosophy than of law; it is not intended here to attempt to delimit that power, even as to this field, but merely to indicate the decisions on which the argument was rested, and to point out how they fit the case, if at all. In a Supreme Court case upholding a state requirement of an additional train within the state to be operated by an interstate railroad, it was said: "Where a duty which a corporation is obliged to render is a necessary consequence of its acceptance and continued enjoyment of its corporate rights...it cannot be said that an order compelling the performance of such a duty at a pecuniary loss is unreasonable." And, it would seem, so as to the right of eminent domain. It is pointless here to discuss the large group of cases on state police power adduced on this point, since there can be little direct application of another case involving different facts. An interesting analogy was drawn

---

186 Gibbs v. Consolidated Gas Co., 130 U. S. 396, 32 L. Ed. 979 (1889). See also Attorney General v. Haverhill Gaslight Co., 215 Mass. 394, 101 N. E. 1061 (1913), where the gas company was not permitted to sell its power to perform its public duties.

to the cases involving the prohibition of export of green lemons, in order to protect local business, and similar measures, as police regulations. It is indeed clear that if the business interests involved in the green lemon case could be protected in this way, those involved in the West Virginia case could be the object of such a measure as that involved. The only essential difference is that they are different cases.

A discussion of the police power point introduces a consideration of the second proposition relied on by the proponents of the statute, which was that it was a police measure, admittedly proper as to purpose and process, and that its effect on interstate commerce was indirect and incidental, and not to be overthrown as a "direct burden on interstate commerce." The statute here was enacted merely to require local public service companies to perform a service which they were obligated to render. The fact that such companies might in performing that service disable themselves to perform contracts with extrastate consumers was not a necessary result of the statute, nor was it its object; nothing could be on its face more clearly an indirect and incidental effect as to interstate commerce. That it was more seems to have been the conclusion of the court; the opinion will be dealt with below. It was pointed out in behalf of the statute that many cases have upheld statutes regulating matters of primarily local concern, and not requiring a uniform national system of regulation, and that under the cases the gas business is such a local matter.

It was also contended that the cases of Hudson County Water Co. v. McCarter, and Geer v. Connecticut, were authorities in favor of this statute. This contention must be divided into two parts: first, that the two cases cited were inconsistent with West v. Kansas Natural Gas Co., and that the latter should therefore be overruled; and secondly that even if the three previous cases were followed, the West Virginia statute was distinguishable from that in the Oklahoma case.

In Geer v. Connecticut, the Supreme Court held that a state could prohibit the exportation of game killed within its boundaries, and also prohibit (as a matter of penumbral enforcement) the sale within its boundaries of game imported from another state.

---

139 209 U. S. 349, 28 S. Ct. 529, 52 L. Ed. 828 (1908).  
140 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793 (1896).  
141 221 U. S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911).
In *Hudson County Water Co. v. McCarter*, it was held that the state might prevent water from being transported therefrom. In *West v. Kansas Natural Gas Co.*, it was held that an Oklahoma statute forbidding the exportation of gas was constitutional. There was no very clear ground of distinction between the earlier cases and the *West* case, although the court refused to overrule the early cases in the *West* case. Holmes, Hughes, and Lurton, a respectable minority, dissented in the latter. This fact is important, for we may because of it discard much of the argument based on Holmes' language in the *Hudson County* opinion, since the extension of that language to natural gas has been refused by the court (especially as we know the result in the principal case, and that Holmes again dissented).

It was argued that no distinction ought to be made because of the state's "property right" in running water and game, as opposed to private ownership of West Virginia gas. The proprietary right of the state in running water and game is no more than that of any individual to reduce to possession. The state has no rights of exclusion of enjoyment of others, such as we normally associate with property. (*Quaere* as to this, but also as to gas.) The activities of the state in connection with game and running water are broadly classed as governmental, rather than proprietary. The argument against such a distinction is supported by the fact that in Oklahoma fugacious minerals are not owned, but possess the same status as *ferae naturae* and running water.

The alternative ground for this argument was that the regulations in the wild animal and fresh water cases were based on public interest, not on a special right of the state, and that there was at least such a public interest in West Virginia's case, in an adequate gas supply for local consumers. This contention classed the animal and water cases generally with the *German Alliance* case, and with similar decisions where the general public interest in the subject matter regulated was held to justify the state action. The same point was stated from the property angle in saying that the state, not as proprietor, but as sovereign or quasi-sovereign, has jurisdiction over all such things as wild animals, running water, and natural gas, not reduced to private possession, even where as in West Virginia the individual rights granted are technically complete, in the cases of coal, oil, gas, or timber. This argument was well supported by cases permitting state regulation of various

---

enterprises on the ground of public necessity, except that in none of the other cases did the language approach so closely a direct restriction on the free flow of commerce—and on that language differential hung the fate of this statute.

The second argument as to the Geer, McCarter, and West cases, that the circumstances in West Virginia justified the act in question here, while those in the West case indicated a violation of the Constitution not shown in West Virginia, seems to have been much more tenable than the first, especially in the light of the other natural gas cases. The differences pointed out were that in the West case there was plenty of gas for all, while in West Virginia there had been a shortage within the state, and that in the West case exportation was completely forbidden, while in West Virginia it was permitted after the utilities had rendered adequate service to their West Virginia consumers. An analogy to the Geer case was noted in the first difference because there was a game shortage in Connecticut at that time and that consideration probably bore some weight in the decision.

Cases lending support to this view were those permitting other regulations by states of interstate commerce in natural gas, even if the effect would be the same as that of the regulation here, or greater. In Jamieson v. Indiana Natural Gas Co., a regulation limiting the pressure of pipe lines, practically preventing transportation out of the state, was upheld. In Public Utilities Commission v. Landon, the Supreme Court held natural gas transportation to be commerce of a character admitting of local regulation, rather than requiring a uniform national system, and that state regulation of rates was proper (reversing the lower court on the point). And so, it was contended, since the very nature of gas transportation, in its methods, difficulties, dangers, and effects, varies so much from point to point that a uniform national system of regulation would not be feasible, the business should be classed as local, where nothing more than the commerce clause stands in the way, and a state public utility regulation should not be overturned because of its indirect interstate effect. Indeed, it was clearly indicated in Manufacturer's Light & Heat Co. v. Ott.
that West Virginia rate regulations setting rates which would make interstate sales unprofitable, and thus prevent them, would be upheld, and it seems that if a mere change in the language of a statute may make a difference as to constitutionality, there is a deficiency in the logical interpretation of that Constitution, in spite of the argument that that is the lawyer's job, to select the proper language to reach the desired result. To be sure, rate regulation is quite a different thing from forced priority of service, but it springs from the same authority, is subject to the same substantive and procedural limitations, and as to interstate commerce, may produce the same result. The two are treated together for due process purposes, and should be for commerce clause purposes. If the act in this case had not been entitled "An act to inhibit persons ... from transporting natural gas out of this state" but rather "An act to provide for the better enforcement of the duty of public utilities to render adequate service", it might well have been held valid. It is submitted that as a matter of statesmanship, the determination of the constitutionality of a statute should be on the basis of its actual political, economic, or social effect, rather than on the purpose and language of its enactment. On such a basis this statute might have been held invalid, but so would many of the others cited.

The case of In re Pennsylvania Gas Co.,147 which held that New York might regulate the rates of interstate sales to New York consumers, was cited as showing the continuous regulation of interstate commerce by some authority. It is manifest that the mode of transportation of this gas while in Pennsylvania could not have been affected by a New York law. This case, and others concerning transportation across state lines, such as the bridge and ferry cases,148 do not settle clearly which state may regulate such matters in all cases; but in them the basic question for determination seems to be which state may regulate this particular phase of the activity, if it is susceptible of local regulation, rather than whether state power may attach at all. The West Virginia measure in this case operated on a sphere not within the jurisdiction of any other state, and did so with a purpose and for an effect admittedly within its own power — to promote the comfort and economic welfare

147 225 N. Y. 397, 122 N. E. 260 (1919).
148 Port Richmond Ferry Co. v. Hudson County, 234 U. S. 317, 34 S. Ct. 821, 58 L. Ed. 1330 (1914); Covington Bridge Co. v. Kentucky, 154 U. S. 204, 14 S. Ct. 1087, 38 L. Ed. 962 (1894), and related cases.
of its own citizens. It seems that an imposing brief could have been written for the statute along these lines.

A distinction was suggested between the other embargo cases and this one, on the ground that in the other cases the state was conserving assets of the state, and that the power of conservation did not extend to private property. This was met by the argument that even had this been a conservation measure, such laws are not based on public ownership, but on public interest, and that there is a public interest in an undepleted supply of natural gas just as there is in an undepleted supply of wild game. The analogy was drawn to timber and coal conservation measures and to statutes which forbid permissive waste of natural gas, and which were judicially approved. The conservation argument is similar to that relating to the state's proprietary activities or general police regulation, but the cases under it point to a separate ground of argument.

The last contention in favor of the statute to be noted here was that since the effect of the statute might be reached by a judicial decision forcing the utilities in question to render adequate service, and since such a judicial decision would be constitutional even though operating on an article of interstate commerce, the act of the state through the legislature ought to be upheld as well. This contention seems to lack weight because in it sight is lost of the fact that such a judicial decision would theoretically be merely enforcing a common-law obligation, and not creating a new one, and that the state would therefore not be regulating interstate commerce, but merely enforcing the common law as to a utility, even though such utility might be engaged in interstate commerce.

The decision in the case of Pennsylvania v. West Virginia was handed down on June 11, 1923. Mr. Justice Van Devanter de-

---

149 Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. Ed. 729 (1900).
151 Citing Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92, 21 S. Ct. 561, 45 L. Ed. 705 (1901), which held a state common-law decision as to tort liability proper even though the parties were engaged in interstate commerce.
152 See, for statements of the various arguments discussed, Blue, supra n. 130; Steptoe & Hoffman, supra n. 130; Hardman, The Right of a State to Restrain the Exportation of Its Natural Resources (1919) 26 W. Va. L. Q. 1; Hardman, The Right of a State to Restrain the Exportation of Natural Resources — Another Theory (1920) 26 W. Va. L. Q. 224; Notes (1921) 27 W. Va. L. Q. 180, 255, where they are probably better stated than here, and at considerably greater length.
livered the majority opinion; three justices (Holmes, McReynolds, and Brandeis) wrote dissenting opinions. The case was a combination of two injunction suits, one by Ohio and one by Pennsylvania, to restrain the enforcement of the act in question, and was decided by the court as a matter of original jurisdiction.

The statement of the case by Van Devanter proceeded about as follows. Natural gas is stored under high pressure in rock strata at considerable depths, and must not only be drawn out fairly rapidly, but must also be used promptly, because it can’t be stored. West Virginia has been an important producing state for many years, and the state sanctioned the effort to find foreign markets for the surplus production, granted developing corporations special privileges, encouraged their activities, and never mentioned preference for West Virginia consumers. The state profited by the development, and over 150,000,000 dollars was invested in the state in that business by foreign capitalists. There is a tremendous system of interstate pipe lines in connection with it, which lines are operated as public utilities in all three states concerned. Gas going out of the state does so under a prior contract of sale. West Virginia’s gas fields are now being exhausted, though they are good for several years yet. Present consumption takes care of all present production, and there is still a shortage in West Virginia. The gas taken into Pennsylvania and Ohio is a very important element in the economy of those states, and a change to another fuel would cause a loss of over 100,000,000 dollars. This act was passed in February, 1919, and interlocutory injunctions saved the question till now (over four years). The suits involved a justiciable controversy between states, since they present a direct issue as to the power of a state to withdraw a commercial product from an established stream of commerce flowing into the territory of the complainants. This is a judicial question, whether in a private controversy or in a suit between states. The acts of West Virginia’s enforcing officers may be imputed to the state for the purposes of this suit, since those acts would be done for the state. The plaintiffs are both interested parties, since both will be injured in proprietary interests if the act is enforced, and also because a grave question of public health will be raised in those states if the gas supply is cut off. The suits were not premature, if it appeared that the injuries apprehended would occur, even though they were brought when the act had been in operation for only a few days.

The act was summarized and its probable effect considered, and the conclusion was reached that the suits were brought at the proper time. Neither the gas companies nor West Virginia consumers need be joined in the suits, since the former have assumed no position adverse to either party, and the latter are represented by their state.

The discussion of the principal question in the opinion was "relatively brief", because "notwithstanding the importance of the question, its solution is not difficult." The question is stated to be, in the last analysis, "whether the enforced withdrawal of gas from interstate commerce for the benefit of local consumers is such an interference with interstate commerce as is forbidden to a state by the Constitution." The question is answered in three easy steps: by the Constitution, the power to regulate commerce is expressly committed to Congress and therefore impliedly forbidden to the states; natural gas is an article of commerce, and its transmission from one state to another is interstate commerce; a state law which by its necessary operation prevents, obstructs, or burdens such transmission is a regulation of interstate commerce—a prohibited interference; the West Virginia act is such a law, and must necessarily compel the diversion to local consumers of a large and increasing part of the gas heretofore and now going to consumers in the complainant states; therefore the West Virginia act is bad.

Having settled the question involved to his own satisfaction, Van Devanter turns to the contention of the defendant that there are special considerations which take the act out of the general rule. The first consideration urged was the public utility nature of the business of the pipe line companies, and the fact that the statute merely required them to furnish adequate service in West Virginia. Of this point the court said: "It is true that the business is of a quasi-public character, but it is so in Pennsylvania and Ohio as well as in West Virginia. The obligations inhering in it and the power to insist on an adequate service are the same in all three states . . . much of the business is interstate . . . West Virginia encouraged and sanctioned the development of that part of the business, and has profited greatly by it. Her present effort is in effect . . . an attempt to regulate the interstate business to the advantage of local consumers. But this she may not do." Which seems to boil down to answering an argument with the conclusion, perhaps influenced by a feeling as to the equities of a state encouraging a practice, then forbidding it—a sort of estoppel to regulate interstate commerce being worked out.
The second special consideration urged was that the act was a legitimate conservation measure for a natural resource, the supply of which was waning. It was answered by the court that that afforded "no ground for the assumption by the state of the power to regulate interstate commerce, which is what the act seeks to do." The court then referred to the West case, and quoted the reasoning in that case on the point, to the effect that to permit such statutes would cause each region to hoard its resources and to refuse to permit their export—a rather remote contingency, it seems, so long as such export proved properly profitable. It seems that on this point the court could not, or would not, see beyond the fact that this regulation would affect interstate commerce, to any other consideration which might be urged. As has been pointed out above (although a better answer is not offered), the problem is not nearly so simple as that, and for a satisfactory solution all the other arguments must be met.

The final contention was that the court could not apportion the rights of the various states to gas, and hence should dismiss the bill. That argument fell almost of its own weight, although it was incorporated into a dissent, since that issue was not involved in this suit for simple injunctive relief. As to any needed regulation, the parties were politely referred by the Court to Congress, "in which the power resides".

Mr. Justice Holmes dissented on the ground that the statute affected the gas before it had become an article of commerce, or had begun to move in any kind of commerce: "the products of a state, until they are actually started to a point outside it, may be regulated by the state, notwithstanding the commerce clause." Therefore a regulation affecting gas to be collected in the future, and stating the uses to which it must be applied first, without touching matters after such first use, was quite proper, under *Oliver Iron Mining Co. v. Lord*[^154^] where a state occupation tax on iron ore extraction was upheld, although the ore left the state in a practically continuous process following its extraction. Holmes also thought *Stigh v. Kirkwood*, and *Geer v. Connecticut* authority for sustaining this measure, since in all three cases the state for reasons of local policy interrupted what would have been interstate commerce before it became so, and thus indirectly affected that commerce. No proper distinction as to the state's property right in wild game and that in natural gas was admitted by Holmes.

since the regulations were based on local policy, similar to that exercised in *Walls v. Midland Carbon Co.*,\(^{155}\) not on property, but to prevent waste. Such regulations are valid under either the commerce clause or the Fourteenth Amendment, since they rest on police power definitions, and seem to fall within the group of approved regulations without straining analogy. Holmes also supported the right of a state to give its citizens a reasonable preference in the enjoyment of its natural advantages, and he repeated his disagreement with the doctrine of the *West* case, saying that there seemed to him to be no reason why each region might not keep its own resources, if it saw fit, since the owners of those resources could do so, and the state could provide them with motives for doing so, by any reasonable step, even if the effect would be to keep within the state’s boundaries what otherwise would have left it, as in the *Hudson County* case.

Mr. Justice McReynolds dissented on the ground that the case presented no justiciable controversy, seemingly because he thought the controversy ought to have been decided the other way. West Virginia could forbid the drilling of new wells, and complainants could not plead the effect of such a measure on interstate commerce, so they may not do so in the case of any police measure taking effect on the article before it becomes commerce. When gas contracts are broken the pipe line companies may be sued in a proper forum, but this state may not be enjoined from enforcing its statute because its effect will probably be to cause such failure; "vindication of the freedom of interstate commerce is not committed to any state as *parens patriae*." Therefore the court should not hear the case.

Mr. Justice Brandeis in considering the question wrote a dissent equal in length to the majority opinion and the other two dissents combined. After a detailed consideration of the history of the act and of the circumstances leading to its passage, he concluded that the bills presented neither a case nor a controversy under the Federal Constitution, since they were brought merely for a declaration that the act was unconstitutional, without any showing that injury would result to complainants from the mere enforcement of the statute, since under it the commission might never be called on to compel a company to stop exporting gas, and it might refuse to do so if called upon, and there was no present danger of the irreparable injury complained of as the necessary result of such enforcement; secondly, there was a fatal lack of

\(^{155}\) 254 U. S. 300, 41 S. Ct. 118, 65 L. Ed. 276 (1921).
necessary parties, since it would be the rights of the pipe line companies, if of anyone, that the statute would directly invade, and they had made no complaint, and there was no showing that the direct effect of the statute was not entirely proper; and thirdly, the court could not grant proper relief, which would be an affirmative decree preventing unfair discrimination against any class of consumers by the pipe line companies, a matter which would call for the continuing attention of a board of experts, such as the Public Service Commission. Therefore the matter should be left to be worked out by such properly qualified agencies.

As to the last point, it seems proper to point out that the mere probability of an unsatisfactory result if the statute were thrown out should not lead a court to refuse to consider, or to decide correctly, a constitutional issue properly raised. Whether it should bar an injunction suit as the proper means of raising such an issue is beyond the scope of this study. The first point of Brandeis' dissent, however, seems unanswerable: that this proceeding was, in effect, "jumping the gun", because there was no way to show that the statute would itself have any effect on the complainants in the suit. The second point is, of course, subordinate to the first, in pointing out that the statute's effect was not one to be complained of in this suit.

Following the decision in Pennsylvania v. West Virginia, it seems that a distinction must be made today in the law as to a state's powers of conservation, between mineral resources and fish or game or water. As to mineral resources, a state prohibition of export is invalid as an interference with interstate commerce, even if enacted to preserve such resources for the prior enjoyment of the people of the state in the present (this case) or in the future (West case), or if passed as a temporary emergency measure. However, various indirect restrictions on such export may be valid; a tax on the development of the resource, even though it is used exclusively outside the state, may be permitted, as are discriminatory taxation of coal "ready for shipment or market", and prohibitions of extraction, or of extraction for certain named uses, and other regulations to prevent waste. As to fish or game, how-

---

159 Lindsley v. Natural Carbonic Gas Co., Hathorn v. Natural Carbonic Gas Co., both supra n. 150.
ever, the state is declared to have a special property in the resource (even though the nature of the property right is not clearly def-
finable or distinguishable from the sovereign right in things affected
with a public interest, as shown above) and may restrict its ex-
portation, even though such regulation affects interstate com-
merce. Water, of course, may be kept within the state, under
Hudson County Water Co. v. McCarter, until it is removed by
natural forces, such as evaporation, percolation, or gravitation.
This inconsistency in the law of the commerce clause is not a serious
one, from the standpoint of the statesman, because the paramount
interest in all these cases is one of conservation, which can be
accomplished in permissible ways in any of these cases (and must
be so done, if at all) by denial within the state as well as without.
The discrimination angle is not of great importance in cases affect-
ing articles and resources which are being so rapidly depleted.

(To be concluded.)

160 Geer v. Connecticut, 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793 (1896);
Carey v. South Dakota, 250 U. S. 118, 39 S. Ct. 403, 63 L. Ed. 886 (1918);
State v. Harrub, 95 Ala. 176, 10 So. 752 (1891).
161 Another example of the exercise by this state of its power over natural
resources is to be found in the Hydro-Electric Power Act, originally passed in
1913 (W. Va. Acts 1913, c. 11), amended in 1915 with an embargo provision
(W. Va. Acts 1915, c. 17), and extensively remodeled in 1929 (W. Va. Acts
1929, c. 58). See in connection with this subject, Simonton, The West Virginia
Water Power Act (1930) 37 W. Va. L. Q. 1; Simonton, The Power of a State
For a final disposition of the statute see Hodges v. Public Service Comm., 110
W. Va. 649, 159 S. E. 854 (1931), which is discussed by Davis, Judicial Review
in West Virginia — A Study in Separation of Powers (1938) 44 W. Va. L. Q.
270, and on which final words have been said by Donley, The Hodges Case and
Beyond (1939) 45 W. Va. L. Q. 291, and Davis, A Final Word on the Doctrine of
the Hodges Case (1939) 45 W. Va. L. Q. 316. The materials cited consider the
Water Power Act in such detail that much of the importance has been taken
from the question by the tendency of the present federal administration,
through the P. W. A. in West Virginia, and on a larger scale in other areas,
to take the whole field from the sphere of the state’s control.