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RIGHT OF A STATE TO RESTRICT EXPORTATION
OF NATURAL RESOURCES

BY W. LEWIS ROBERTS*

The Constitution gives Congress power to regulate commerce among the several states. The recent decision in the Schechter case emphasizes the fact that this power of Congress extends only to regulation of transactions which are directly part of interstate commerce and not to matters that are indirectly connected with such commerce. That raises the question as to how far a state may go in preventing its products from entering into interstate commerce. Can it forbid the exportation of its natural resources?

The purpose of giving Congress this power has been stated by Mr. Justice McKenna in West v. Kansas Natural Gas Co. The state of Oklahoma had enacted a statute designed to prevent the exportation of natural gas from the state by denying the power of eminent domain and the privilege of using the highways of the state for building the necessary pipe lines. In considering whether a state has the power to conserve to its own people such a natural resource as natural gas, the learned judge said: "If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that 'in matters of foreign and interstate commerce there are no state lines.' In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Con-

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1 Article 1, Sec. 8, Clause 3.
3 (1911), 221 U. S. 229, 255; 31 Sup. Ct. 564.
stitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court."

In the Schechter case the court pointed out that where the effect of intrastate transactions is merely indirect, such transactions remain within the domain of the state. An indirect effect upon interstate commerce was not enough to give Congress control. "The precise line," the chief justice said, "can be drawn only as individual cases arise, but the distinction is clear in principle." He also stated that the fact that the local regulation tended to cut down the volume of interstate commerce would not necessarily render the regulation invalid.

The late Mr. Justice Holmes took a definite stand in favor of a state's right to control the exportation of its natural products in his dissenting opinion in Pennsylvania v. West Virginia. In that case the state of West Virginia attempted to withdraw a large volume of natural gas from the supply sent through pipes to other states and to give preference in its use to its own citizens. The Supreme Court held the statute unconstitutional. Mr. Justice Van Devanter in speaking for the majority of the court quoted with approval the language of Mr. Justice McKenna in West v. Kansas Natural Gas Co. Mr. Justice Holmes based his dissent on the fact that the statute in question sought to reach natural gas before it had begun to move in commerce. "I think," he said, "that 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."

It is submitted that the position of Mr. Justice Holmes seems sound when he says that the products of a state until they are actually started to a point outside the state are not in interstate commerce and therefore not within the regulatory power of

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5 Supra, n. 4, p. 602.
Congress, granted by the commerce clause. In view of present-day tendencies to extend national control, it seems worthwhile to review the decisions of the courts that have any bearing on the question of the right of a state to regulate the exportation of its natural resources, and see whether the position of the majority can be vindicated.

**Fish and Game**

The question whether a state could prevent the transportation of fish and game caught or killed within its borders, to points outside the state, did not arise until late in the nineteenth century. This may be accounted for by the fact that in the earlier days there was an abundance of fish and game to be found on vast areas of wild land, and there was little or no market value for them. There was also a lack of means for rapid transportation. The earliest reported cases are *State v. Saunders* and *Territory v. Evans*. The first was decided in 1877 and the latter in 1890. In the first the validity of a Kansas statute forbidding the transportation of prairie chickens from the state was questioned and the court held it void on the ground that it was an attempt of a state to regulate interstate commerce. In *Territory v. Evans*, a territory statute to prevent the exportation of fish from the territory was held void on the ground that it was a regulation of commerce between the states.

The leading case on the subject of transporting fish and game beyond the borders of the state in which they are reduced to possession, is *Geer v. Connecticut*, decided by the Supreme Court of the United States in 1896. The statute under consideration in that case made it a criminal matter to have in possession for the purpose of transportation beyond the state, game lawfully killed within the state. In overruling *State v. Saunders* and *Territory v. Evans*, the court said that the reasoning controlling the decision of those cases was inconclusive, "from the fact that it did not consider the fundamental distinction between the qualified ownership of game and the perfect nature of ownership in other property, and thus overlooked the authority of the State over property in game killed within its confines,

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*19 Kansas, 127.*

*2 Idaho, 634, 23 Pac. 115.*

* (1896), 161 U. S. 519, 16 Sup. Ct. 600.*
and the consequent power of the State to follow such property into whatever hands it might pass with the conditions and restrictions deemed necessary for the public interest.’” As this language shows the Court sustained the Connecticut statute on the theory that ownership of wild game is in the state in trust for inhabitants thereof and that the state has the right under its police power to preserve game as a food supply. Mr. Justice White stated in his opinion that “the source of the police power as to game birds flows from the duty of the State to preserve for its people a valuable food supply.” This power in his opinion was sufficient to warrant a state in retaining for its citizens articles of food which are acquired in a qualified way and “can never be the object of commerce except with the consent of the State and subject to the conditions which it may deem best to impose for the public good.” Since the state has the right to forbid killing game, it can qualify its permission to kill. It can permit the killing subject to the condition that it shall not be transported beyond the state lines. Mr. Justice Field dissenting, said that “when any animal, whether living in the waters of the State or in the air above, is lawfully killed for the purposes of food or other uses of man, it becomes an article of commerce, and its use cannot be limited to the citizens of one State to the exclusion of another State.”

The case of Geer v. Connecticut seems to have settled the question as to the right of a state to fix the conditions under which fish and game may be taken. Since that decision, statutes restricting the taking of fish or game for transportation outside the state have been upheld in every case. Prior to Geer v. Connecticut there had been similar decisions in state courts. Acts forbidding having game in possession during the closed season are upheld, although they deprive a person from im-

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9 McDonald v. Southern Express Co. (1904), 134 Fed. 282; ex parte Fritz (1905), 86 Miss. 219, 38 So. 722 (fish); Cameron v. Territory (1906), 16 Okla. 534, 86 Pac. 68 (game birds); Wells, Fargo & Co. Express v. State (1906), 88 Ark. 571, 115 S. W. 385 (game fish); Carey v. South Dakota (1919), 250 U. S. 118, 39 Sup. Ct. 403 (wild ducks); Bayside Fish Flour Co. v. Zellerback (1922), 124 Cal. App. 564, 12 Pac. (2d) 961 (fish).

10 State v. Northern Pac. Exp. Co. (1894), 58 Minn. 403, 59 N. W. 1100 (fish); Magnier v. People (1881), 97 Ill. 320 (quail); Organ v. State (1892), 56 Ark. 267, 19 S. W. 840 (fish).
porting game killed in another state, and also acts making it an offense for carriers to have possession of deer, unaccompanied by owner. A state has been held to have the same power over fish and game brought within its borders as it has over fish and game found within its limits. This right is supported under a federal law known as the Lacey Act. A California statute prohibiting the shipping by parcel post of wild game was held not to unlawfully interfere with interstate commerce even though game could be lawfully shipped out of the state if other means were used. Statutes requiring license fees of those engaged in exporting lobsters from the state and in packing oysters for sale or transportation have been sustained. A state tax on fur and hides of wild animals captured under permission of the state and intended for shipment to other states, however, was deemed a burden on interstate commerce and therefore invalid. Also a California statute forbidding exportation of abalone shells outside the state was bad, and a similar statute in Louisiana which forbade the exportation of shrimps from which the heads and "hulls" or shells had not been removed, was void. The purpose of the act was to keep the shrimp canning business within the state of Louisiana. None of these three cases involved the right of a state to conserve its food supply. The first was an attempt to tax an interstate industry and the last two were attempts to build up the industries of the states involved. The enforcement of the last statute would have forced the removal of a canning factory from the state of Mississippi to Louisiana.

**Taxation Cases**

States have made use of the taxing power to accomplish the object sought in these last three cases as well as to derive a

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14 Re Phoeavlius (1918), 177 Cal. 238, 170 Pac. 412.
15 State v. Dodge (1918), 117 Me. 269, 104 Atl. 5.
17 Ex parte Florence (1930), 107 Cal. App. 607, 290 Pac. 652.
18 Foster-Fountain Packing Co. v. Hoydel (1928), 278 U. S. 1, 49 Sup. Ct. 1.
revenue from interstate commerce. In an early case in Michigan, a tonnage tax was imposed on all iron ore or minerals exported before smelting. Ores smelted within the state were exempted from the tax. The object clearly was to keep the smelting business within the state. The court held the statute invalid as a burden on interstate commerce. Likewise a state statute requiring the payment of a license fee on buyers of wheat for interstate shipment and also imposing certain regulations as to grading, inspection, etc. has been deemed invalid as a burden on interstate commerce. A Pennsylvania statute levying a tax on all anthracite coal mined within the state was sustained, although the evidence showed that eighty per cent of the coal coming under the tax was shipped to other states. In meeting the contention that this was a tax on interstate commerce, Mr. Justice McKenna said: "If the possibility, or, indeed, certainty of exportation of a product or article from a State determines it to be in interstate commerce before the commencement of its movement from the State, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof', wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to States other than of their production."

An occupation tax upon the mining of iron ore has been supported although substantially all the ore was shipped out of the state and was put upon cars for that purpose by the same operation that severed it from the soil. Wheat sold but wait-

21 Lemke v. Farmers’ Grain Co. (1922), 258 U. S. 50, 42 Sup. Ct. 244.
ing interstate shipment is subject to a tax as part of the general mass of property of the state, and in the important case of Coe v. Errol it was likewise held that logs cut and hauled to a landing place with the intention of later driving them down a river to lumber mills located in another state, were subject to taxation. The following excerpt from the opinion is often quoted: "It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is by its owner, intended for exportation. If such were the rule, in many States there would be nothing but the lands and real estate to bear the taxes. Some of the Western states produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern states. Certainly as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State."

A review of these cases shows that the Supreme Court of the United States has kept a watchful eye on the states to see that they do not use their taxing power for the purpose of regulating the exportation of their natural products.

**Water**

Analogous to the ease of wild game is that of water. The same result is there reached in regard to the right of a state to prohibit taking water from its streams and lakes for the purpose of transporting it to other states. The leading case on the subject is *Hudson County Water Co. v. McCarter,* in which a New Jersey statute making it unlawful "to transport or carry through pipes, conduits, ditches or canals, the waters of any fresh water lake, pond, brook, creek, river or streams of this state into any other state for use therein," was held not an impairment of the commerce clause. The court's decision rests on two grounds; (1) the power of the state to regulate the use of water in its streams because of its importance as part of its natural resources, and (2) the fact the common law denied the riparian owner the right to divert water from a stream for

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* (1908), 209 U. S. 349, 28 Sup. Ct. 529.*
commercial purposes. Mr. Justice Holmes, however, expressed it in broader terms. He said: "But we prefer to put the authority which cannot be denied to the State upon a broader ground than that which was emphasized below, since in our opinion it is independent of the more or less attenuated residuum of title that the State may be said to possess. . . . . . It is recognized that the State as quasi-sovereign and representative of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned."

In a later case arising in New Jersey, Mr. Justice Butler, in speaking for the court, said: "The State undoubtedly has power, and it is its duty, to control and conserve the use of its water resources for the benefit of all its inhabitants, and the Act of 1907 was passed pursuant to the policy of the State to prevent waste and to economize its water resources." The Nebraska court, in sustaining the right of the state to confine the use of water taken from public streams for irrigation purposes to the confines of the state, said: "In this state water is publici juris. Its use belongs to the public and is controlled by the state in its sovereign capacity." Still more emphatic language to the same effect was used by a Federal judge in *Bergman v. Kearney*, that the right of the state to regulate the use of water can no longer be challenged. And the same view was expressed in a still more recent Federal Court case.

**Natural Gas**

Nearly fifty years ago it was held that the natural gas was so far a commercial commodity that a state could not prohibit its transportation to another state by direct legislation; that

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27 City of Trenton v. New Jersey (1923), 262 U. S. 182, 185, 43 Sup. Ct. 534.
29 (1917), 241 Fed. 884, 893.
30 Middlesex Water Co. v. Board of Public Utility Commissioners (1928), 16 Fed. (2d) 519, 525.
31 For an excellent discussion of the right of a state to regulate the exportation of gas and electricity, see an article on that subject by Professor R. L. Howard in 18 Minn. L. Rev. 611–707.
32 Jamieson v. Indiana Natural Gas Co. (1891), 128 Ind. 555, 28 N. E. 76.
if it can be taken from the well and transported to another state under a safe pressure, the state cannot prevent its transportation by establishing one standard of pressure for gas piped to its own citizens and another standard for that piped to citizens of another state;33 that where Congress has not as yet acted, a state may make reasonable regulations over transportation of natural gas for the protection of the life and health of its citizens, provided such regulations do not directly affect interstate commerce;34 and that a state, since it controls the right of eminent domain, may confine its use to companies supplying citizens of its own state with natural gas.35 However, when the state of Indiana passed a statute making it unlawful to transport natural gas outside its borders, its highest court of appeal immediately held it unconstitutional.36 In the course of its opinion, the court said although the public has the ownership of wild animals before they are reduced to possession, it does not have title or control over the gas in the ground but that the qualified owners of the superincumbent lands have a limited and qualified ownership in it to the entire exclusion of the public. Likewise in 1912 when the Supreme Court of the United States was called upon to decide the validity of a Kansas statute forbidding the transportation of gas beyond the state line, it held it a violation of the interstate commerce clause.37

The two most outstanding cases on the question of the right of a state to prohibit the exportation of natural gas beyond its boundaries are West v. Kansas Natural Gas Co.38 and Pennsylvania v. West Virginia.39 In the former the state of Kansas attempted to prevent the exportation of natural gas by denying to foreign corporations the power of eminent domain or the privilege of using the highways for laying the necessary pipes. At the same time such rights were freely granted to com-

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33 Corwin v. Indiana & Ohio Oil, Gas and Mining Co. (1889), 120 Ind. 575, 22 N. E. 778.
34 Benedict v. Columbus Construction Co. (1891), 49 N. J. Eq. 23, 23 Atl. 485.
35 Consumers' Gas Trust Co. v. Horless (1891), 131 Ind. 446, 29 N. E. 1062.
36 Manufacturers' Gas & Oil Co. v. Indiana Natural Gas Co. (1900), 155 Ind. 545, 58 N. E. 706.
38 (1911), 221 U. S. 229, 31 Sup. Ct. 564.

K. L. J.—3
panies restricting their enterprise within the confines of the state. The Supreme Court of the United States, in frustrating this effort to interfere with interstate commerce laid down the rule that "no State, by the exercise of, or by the refusal to exercise any or all of its powers, may substantially discriminate against or directly regulate interstate commerce, or the right to carry it on." While the court likened oil and gas to animals *ferae naturae*, they pointed out that they were not identical as in the case of oil and gas the owners of the surface cannot be deprived of the right to reduce them to possession as they may be in the case of wild animals. Also in the case of oil and gas, only owners of the soil have the right to dispose of the same. In *Pennsylvania v. West Virginia*, the Supreme Court followed its holding in the West case and refused to allow a state to give its own citizens a preference in natural gas produced in the state. The purpose of the drafters of the Constitution was emphasized, namely, to make the resources of one state available for the citizens of another state. Mr. Justice Holmes’ view, set forth in his dissenting opinion, has already been commented on at the beginning of this article, that the statute sought to reach the gas before it had entered into interstate commerce and was therefore valid.

Two years prior to the Pennsylvania case the Supreme Court had held a licensing fee on corporations engaged in collecting and transporting natural gas through pipe lines, invalid as a burden on interstate commerce. The state sought to levy an occupation tax measured by the volume of the traffic. Most of the gas transported through the company’s lines started at points outside the state and was carried to points beyond the state line. From these cases it is clear that a state cannot conserve its natural gas for the use of its own citizens.

**Electricity**

It may be open to question whether the exportation of electric current from a state should be dealt with under the subject being considered. While it is not a natural product or resource, it would seem to be subject to the same limitations and rules as natural gas in regard to the right of a state to prohibit its trans-

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portation beyond its boundaries. There are few decisions affecting the right to limit the exportation of electricity. In *Public Utility Commission v. Attleboro Steam & Electric Co.*\(^1\), a Rhode Island company contracted to deliver, at the state line, all the electric current a Massachusetts company should require for a period of twenty years. The Rhode Island commission authorized a new schedule of rates which affected the carrying out of this contract. The increase was held invalid since it placed a direct burden on interstate commerce.

Since, as we have seen under the *Hudson County Water Co.* case,\(^2\) a state can restrict the use of water to its own territory, states have availed themselves of that power to restrain the exportation of electric current generated on their water courses.\(^3\) The statute considered in the Nebraska case already cited,\(^4\) was of that nature. That statute provided that "the use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section." The section referred to provided that the use for power purposes should be deemed a public use and should never be alienated but might be leased or developed as prescribed by law. The Nebraska court has sustained the validity of this act on more than one occasion.\(^5\) Maine, New Hampshire, West Virginia and Wisconsin also have statutes to prevent or to limit the exportation of electricity,\(^6\) but none of these laws have been passed upon by our highest Court, nor have grants by state commissions to power companies conditioned upon the use of the power generated in the states granting the franchises.

It may be argued that since hydroelectric power is a product of the streams of a state and the courts concede the right of a state to prohibit the exportation of the water from these streams, it necessarily should follow that a state should have the right to prevent taking from the state the electric power generated

\(^1\) (1927), 273 U. S. 83, 47 Sup. Ct. 294.

\(^2\) Supra, n. 25.

\(^3\) Supra, n. 27.


\(^5\) Maine Rev. Stat., 1930, Ch. 68, Sec. 1; N. H. Laws, 1929, Ch. 106; W. Va. Acts, 1929, Ch. 63; Wis. Stat., 1931, Sec. 31.27.
by the waters of these same streams. This does not follow because the common law did not regard water in rivers and lakes as subject to ownership before it was reduced to possession by being put in some receptacle. Furthermore, a riparian owner had no right to make water an article of commerce and sell it for use off the land, even though he gained title to it by putting it in a pipe or receptacle. Whereas electric current has always been regarded as something that is marketable and therefore subject to the rules of commerce. It is possible that the reason why wild animals and water are both subject to the control of the state where found, is a historical matter. Possibly, if the question of the right of a state to prevent their transportation beyond its borders were to come before the courts today for the first time, a different result would be reached in each case. The tendency has been more and more to break down the idea of fettering property rights by state lines.

The case of natural gas bears out this contention. In most states where natural gas is a natural resource, it is regarded as not subject to ownership while in place in the underlying pools. It is not subject to ownership until pumped into pipes and thus reduced to possession. Nevertheless, after gas is once reduced to ownership, we have seen that it is subject to commerce and the state cannot conserve it for its own citizens. If a state is not allowed to so restrict the use of natural gas, there seems no reason to believe the Supreme Court of the United States will make a different rule in regard to electric current.

It does not seem necessary to consider whether a state may limit the exportation of the lumber from its forests, the coal and iron from its mines, nor the grain from its fields. This is not as strong a case for state control as that of natural gas, where the power is denied. Furthermore, the court has inferentially denied that right in its opinion in the Heisler case.

CONCLUSION

A survey of the decisions bearing upon the question whether a state may restrict or prohibit the exportation of its natural products shows that only in two instances does a state have such a right. It may conserve for its own citizens fish and game

47 Summers: Oil & Gas, 128.
48 Supra, n. 26.
reduced to possession within its limits and it may control the use of water in its streams and lakes. It is clear that in the case of natural gas and mineral resources, a state cannot prevent them from being transported to other states. In regard to electric current generated by the use of water power on their streams, states are today putting restrictions on its use beyond their borders, but it still remains for the Supreme Court of the United States to pass upon the validity of these restrictions.

At first thought, the line drawn by the courts between wild animals and water on the one hand and natural gas and other natural products on the other; may seem arbitrary. The position of Mr. Justice Holmes in his dissenting opinion in the Pennsylvania case, that the state may control natural gas before it has entered into interstate commerce, seems sound; but the result reached by the majority of the Court seems the more desirable and more in harmony with the purpose of the commerce clause, namely: that any one state should have the benefit of any natural product of any other state. Is not this line based upon the commercial importance of the product? In the early development of our law game fish and game did not figure very large in the interchange of products between the states. At the time the business of market hunting was at its height, the conservation movement was started and had the tendency to discourage the idea that game fish and game birds were proper articles of commerce. Laws passed for the conservation of them were sustained. Furthermore, ownership of wild animals under the common law, was not recognized until they were reduced to possession. The state, under its police power, could prevent the capture of fish and game during limited periods or for all time, and consequently it could fix the conditions under which they could be taken. Ownership in water, too, was not recognized at common law unless it were reduced to possession and it did not acquire a commercial importance before the law became crystallized that states could prevent its exportation. On the other hand, natural gas and electricity have always been regarded as commercially important, consequently they properly come within the purview of the commerce clause of the Constitution and states cannot or should not prevent their transportation beyond their own borders.