NOTE

SUPREME COURT STANDING REQUIREMENTS: HAS *WYOMING v. OKLAHOMA* SET THE STAGE FOR FUTURE CONFLICT?

I. INTRODUCTION

In *Wyoming v. Oklahoma,*[1] an Oklahoma law requiring its coal-fired electric utilities to burn a minimum ten percent mixture of Oklahoma-mined coal was struck down by the United States Supreme Court. Describing the law as "protectionist and discriminatory,"[2] the Court struck it down as a violation of the Commerce Clause.

The majority opinion[3] first focused on the issues of Wyoming's standing to sue and the Supreme Court's power to assert its original jurisdiction. Then the majority performed a textbook Dormant Commerce Clause analysis of the Oklahoma statute, finding it virtually *per se* invalid.

II. THE CASE BACKGROUND

The State of Wyoming, a major coal-producing state, does not engage in the sale of coal itself but does impose a severance tax on all who extract coal within its borders.[4] During the years 1981 to 1986, Wyoming was virtually the sole source of coal for four Oklahoma electric utilities and an Oklahoma state agency, the Grand River Dam Authority (GRDA).[5] Then, in 1986, the Oklahoma Legislature passed an Act[6] requiring coal-fired electric utilities to burn a mixture containing at least ten percent Oklahoma-mined coal. Oklahoma's purchase of Wyoming coal subsequently declined, thereby reducing Wyoming's severance tax revenues.[7] Wyoming challenged the Act as violative of the Commerce Clause of the United States Constitution and sought

1. 112 S. Ct. 789 (1992).

2. *Id.* at 801.

3. Justice White delivered the opinion of the Court, in which Justices Blackmun, Stevens, O'Connor, Kennedy, and Souter joined.

4. *Wyoming*, 112 S. Ct. at 790.

5. *Id.*

6. OKLA. STAT. tit. 45, § 939 (Supp. 1992) (effective Jan. 1, 1987). The Act provides:

> All entities providing electric power for sale to the consumer in Oklahoma shall burn a mixture of coal that contains a mixture of coal that contains a minimum of ten percent (10%) Oklahoma-mined coal, as calculated on a BTU basis.

Section 939.1 addresses cost increase to consumers by stating:

> The cost to the entity shall not increase the cost to the consumer by more than the preference given Oklahoma vendors as provided in § 85.32 of tit. 74 of the Oklahoma statutes or exceed the cost of existing long-term contracts for out-of-state coal by more than the preference given Oklahoma vendors as provided in § 85.32 of tit. 74 of the Oklahoma statutes.

7. *Wyoming*, 112 S. Ct. at 790.

an injunction permanently enjoining enforcement of the Act.[8] The Supreme Court granted Wyoming leave to invoke the Court's original jurisdiction over Oklahoma's objections that Wyoming lacked standing.[9] Both parties ultimately moved for summary judgment. Wyoming argued that the Act is a *per se* violation of the Commerce Clause of the United States Constitution, while Oklahoma reasserted its arguments on standing and the appropriateness of the Court's exercise of original jurisdiction, submitting as well that the Act was constitutional.[10]

III. AN OVERVIEW OF SUPREME COURT STANDING AND ORIGINAL JURISDICTIONAL REQUIREMENTS AND THE COMMERCE CLAUSE'S "DORMANT" POWER TO LIMIT STATE REGULATION

A. Standing

Article III of the United States Constitution grants the Supreme Court original jurisdiction in all cases "in which a State shall be a party."[11] Congress codified this grant of authority in 28 U.S.C. § 1251, providing the Supreme Court with "original and exclusive jurisdiction of all controversies between two or more States."[12] The "controversy" requirement is satisfied when the "complaining State has suffered a wrong through the action of the other State, furnishing grounds for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the Common Law or equity systems of jurisprudence."[13]

B. Original Jurisdiction

In recent years, the Supreme Court has interpreted section 1251 as providing the Court with "substantial discretion"[14] in determining the "appropriateness in an original action between States on a case-by-case basis."[15] It has long been the Court's philosophy that its "original jurisdiction should be invoked sparingly."[16] Thus, the Court has imposed specific limitations upon its exercise of original jurisdiction.[17] The Court has construed section 1251 and Article III as making its original jurisdiction "obligatory only in appropriate cases."[18] The question of what is appropriate is a function of the "seriousness and dignity of the claims; yet beyond that it necessarily involves the

8. *Id.* at 793.
9. *Id.*
10. *Id.*
11. U.S. CONST. art. III, § 2, cl. 2.
12. 28 U.S.C. § 1251(a) (1988).
13. Massachusetts v. Missouri, 308 U.S. 1, 15 (1939).
14. *Wyoming*, 112 S.Ct. at 798.
15. *Id.* (quoting Maryland v. Louisiana, 451 U.S. 725, 743 (1981)).
16. Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972) (quoting Utah v. United States, 394 U.S. 89, 95 (1969)).
17. *Wyoming*, 112 S. Ct. at 798.
18. *Illinois*, 406 U.S. at 93.

availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had."[19]

C. *The Dormant Commerce Clause*

The Commerce Clause of the United States Constitution states that "the Congress shall have power . . . to regulate Commerce . . . among the several States . . . ."[20] A literal reading of the Commerce Clause only grants Congress the power to regulate Commerce. In addition, it has long been established that an implicit reading of the Commerce Clause directly limits the power of the states to discriminate against interstate commerce.[21] However, this "negative" or "dormant" power to limit state action, known as the Dormant Commerce Clause, does not absolutely preclude state power to affect commerce; "[t]he States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected."[22] The Supreme Court has recognized the state's interest in protecting its environment and wildlife within its borders,[23] as well as public health and safety.[24] Generally, if a state statute regulates evenhandedly to effectuate a legitimate public interest, produces only incidental effects on interstate commerce, and the burdens on commerce do not outweigh the putative local benefits, it will be upheld under the Commerce Clause.[25]

On the other hand, a statute that discriminates against interstate commerce on its face or in practical effect will be set aside unless it has a legitimate local purpose that cannot be accomplished by any less discriminatory alternatives.[26] To meet this stricter scrutiny, the state must demonstrate both the importance of the local purpose and that less discriminatory alternatives are not feasible.[27]

Moreover, state regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors are viewed as "economic protectionism" and are rarely upheld under the Commerce Clause.[28] "Indeed, when the state statute amounts to simple economic protectionism, a 'virtually *per se* rule of invalidity' has applied."[29]

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19. *Id.*

20. U.S. CONST. art. I, § 8, cl. 3.

21. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

22. Lewis v. BT Inv. Managers, 447 U.S. 27, 36 (1980).

23. *See* Maine v. Taylor, 477 U.S. 131 (1986). The Supreme Court upheld a state statute banning the importation of live baitfish into Maine, ruling there were no non-discriminatory alternatives available to protect Maine's aquatic ecosystem against possible harm.

24. *See* Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 442 (1960).

25. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). The two questions derived from the *Pike* holding are: (1) does the state regulation impermissibly discriminate against interstate commerce or, (2) are the incidental burdens imposed on interstate commerce "clearly excessive in relation to the putative local benefits." *Id.* at 142. If the answer to either question is "yes," the state law is unconstitutional. *Id.*

26. Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). *See also Maine*, 477 U.S. 131.

27. Hunt v. Washington State Apples Advertising Comm'n, 432 U.S. 333, 353 (1977).

28. Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203 (1986). *See also* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).

29. *Wyoming*, 112 S. Ct. at 800 (quoting Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).

III. THE WYOMING DECISION

A. *Standing*

The Supreme Court accepted the Special Master's finding that Wyoming had standing because its lost severance tax revenues were "fairly traceable to the Act."[30] The Court further reasoned that the lost revenues "directly affected" Wyoming in a "substantial and real way."[31] In making his finding, the Special Master concluded that cases where standing had been denied to states claiming a decline in *general* tax revenues due to actions taken by United States government agencies[32] were inapposite because they did not involve a loss of *specific* tax revenue.[33]

Oklahoma argued that because Wyoming is not itself engaged in the commerce affected, it is not affected as a consumer and therefore has not suffered a direct injury cognizable under a Commerce Clause action.[34] However, the authorities relied on by Oklahoma were rejected because they involved claims of *parens patriae*[35] standing rather than allegations of direct injury.[36] Moreover, the Supreme Court had fairly recently rejected a similar argument in *Hunt v. Washington State Apples Advertising Commission*.[37]

In *Hunt*, the Washington Apple Advertising Commission (Commission) challenged a North Carolina statute as violative of the Commerce Clause for requiring all apples sold or shipped into North Carolina in closed containers to be identified by the applicable federal grade or a designation that the apples were not graded. The Commission, a statutory agency formed to promote and protect the Washington State apple industry, is composed of thirteen state growers and dealers chosen to represent various districts, all of which finance the Commission's operations through mandatory assessments. North Carolina contested the Commission's standing, arguing it lacked a "personal stake" in the litigation because, as a state agency, it was "not itself engaged in the

30. *Id.* at 796. The Court stated:

> The effect of the Oklahoma statute has been to deprive Wyoming of severance tax revenues. It is undisputed that since January 1, 1987, the effective date of the Act, purchases by Oklahoma electric utilities of Wyoming-mined coal, as a percentage of their total coal purchases, have declined. The decline came when, in response to the adoption of the Act, those utilities began purchasing Oklahoma-mined coal. The coal that, in the absence of the Act, would have been sold to Oklahoma utilities by a Wyoming producer would have been subject to the tax when extracted. Wyoming's loss of severance tax revenues 'fairly can be traced' to the Act. (quoting Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41-42 (1976)).

31. *Id.* at 796-797, n.9 (quoting Maryland v. Louisiana, 451 U.S. 725, 737 (1981)). *See also* Texas v. Florida, 306 U.S. 398, 407-408 (1939).

32. *See* Pennsylvania v. Kleppe, 533 F.2d 668, *cert. denied*, 429 U.S. 977 (1976); State of Iowa ex rel. Miller v. Block, 771 F.2d 347 (CA8 1985), *cert. denied*, 478 U.S. 1012 (1986).

33. *Wyoming*, 112 S. Ct. at 797.

34. *Id.*

35. The literal meaning of which is, "parent of the country," referring traditionally to the role of the State as sovereign and guardian of persons under legal disability. It is a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state, etc. BLACK'S LAW DICTIONARY 1003 (5th 3d. 1979).

36. *See* Oklahoma v. A. T., & S. F. R. Co., 220 U.S. 277, 287-289 (1911); Louisiana v. Texas, 176 U.S. 1, 16-22 (1900).

37. 432 U.S. 333 (1977).

production and sale of Washington apples or their shipments into North Carolina."[38] The Court found the Commission to have associational standing and held that its interests may be affected by the outcome of the litigation, because the annual assessments paid to the Commission are tied to the volume of apples grown and packaged as Washington apples. If the North Carolina statute affects the market for Washington apples, it would in turn affect the Commission's assessments.[39] Likewise, in the present case, the Court held Wyoming had standing against Oklahoma "where its severance tax revenues are directly linked to the extraction and sale of coal and have been demonstrably affected by the Act."[40]

B. Original Jurisdiction

The Supreme Court found it was beyond peradventure that Wyoming had raised a claim of "sufficient seriousness and dignity."[41] Acting within its sovereign capacity, Oklahoma had passed an Act[42] which directly affected Wyoming's sovereign capacity in its ability to collect severance tax revenues.[43] As such, the Court held that "Wyoming's challenge under the Commerce Clause precisely 'implicates serious and important concerns of federalism fully in accord with the purpose and reach of our original jurisdiction.' "[44]

Oklahoma argued that the effected mining companies should bring suit raising the Commerce Clause challenge on their own behalf.[45] At the time, Wyoming's mining companies had not brought their own private action,[46] and therefore, there was no pending action to which adjudication on this particular issue could be referred.[47]

In response, the Court noted that Wyoming's interests would not be directly represented in any pending action to which this issue could be referred.[48] Thus, this case was found to be similar to *Maryland v. Louisiana*,[49] in which the Court held that the exercise of its exclusive jurisdiction was

38. *Id.* at 341.

39. *Id.* at 345.

40. *Wyoming*, 112 S. Ct. at 798.

41. *Id.*

42. OKLA. STAT. tit. 45, § 939. *See supra* text accompanying note 6.

43. *Wyoming*, 112 S. Ct. at 798.

44. *Id.* (quoting Maryland v. Louisiana, 451 U.S. 725, 744, where the Court found it was not a waste of its time to consider the validity of one state's first-use tax "which served, in effect, as a severance tax on gas extracted from areas belonging to the people at large to the detriment of other states to whose consumers the tax was passed.").

45. *Id. But cf. Hunt*, 432 U.S. 333.

46. Although the Wyoming mining companies did not seek relief on their own behalf, Oklahoma utilities did. A lawsuit was filed on May 13, 1988, by Northeast Oklahoma Electric Cooperative Inc. and Robert L. Thorton against The Grand River Dam Authority (GRDA), Case No. C-88-127 (Dist. Ct. Craig Cty., Okla., Sept. 2, 1988), claiming that GRDA would suffer increased costs if it complied with the Act. The Oklahoma Attorney General argued that the suit should be dismissed on the grounds that plaintiff lacked legal standing because the Act said that electricity consumers could not be financially harmed when Oklahoma coal is purchased. OKLA. STAT. tit. 45, § 939. The dismissal motion was sustained.

47. *Wyoming*, 112 S. Ct. at 798. *See, e.g.*, Illinois v. City of Milwaukee, 406 U.S. 91, 98, 108 (1971); Washington v. General Motors Corp., 406 U.S. 109, 114 (1972).

48. *Id.* at 799.

49. 451 U.S. 725, 743 (1980).

appropriate, even though state-court actions were pending because of the constitutional issues raised.[50] The Court also rejected Oklahoma's argument that Wyoming's interest is *de minimis* because its loss of severance tax revenues accounted for less than one percent of total taxes collected.[51] In declining "any invitation to key the exercise of this Court's original jurisdiction on the amount in controversy,"[52] the Court stated:

> The practical effect of [Oklahoma's] statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of the other states and what affect would arise if not one, but many or every, state adopted similar legislation.[53]

C. *The Supreme Court's Application of the Commerce Clause*

The Supreme Court upheld the Special Master's finding that Oklahoma's statute was discriminatory both on its face and in practical effect against interstate commerce.[54] The Court stated:

> Section 939 of the Act expressly reserves a segment of the Oklahoma coal market for Oklahoma-mined coal, to the exclusion of coal mined in other states. Such a preference for coal from domestic sources cannot be characterized as anything other than protectionist and discriminatory, for the Act purports to exclude coal mined in other states based solely on its origin."[55]

IV. THE DISSENT

Writing for the first portion of the dissent,[56] Justice Scalia strongly disagreed that its consequential loss of severance tax revenues gave Wyoming standing to bring a negative Commerce Clause action.[57] Specifically, Justice Scalia found that Wyoming had failed to clearly demonstrate that it suffered an "injury in fact:"[58]

> To establish injury . . . Wyoming had to show not merely that the statute caused

50. *Id. But see* Arizona v. New Mexico, 425 U.S. 794 (1976), where a state court action raised the same constitutional issues that would be presented to the Supreme Court. The Court held that the pending state action provided an "appropriate forum in which the *issues* tendered here may be litigated. If on appeal the New Mexico Supreme Court should hold the electrical energy tax unconstitutional, Arizona will have been vindicated. If, on the other hand, the tax is held to be constitutional, the issues raised now may be brought to this Court by way of direct appeal under 28 U.S.C. § 1257(2)." *Id.* at 797.

51. Oklahoma relied on authority suggesting that before the Supreme Court can exercise its jurisdiction, a state's harm must be of "serious magnitude and established by clear and convincing evidence." New York v. New Jersey, 256 U.S. 296, 309 (1921). *See also* Connecticut v. Massachusetts, 282 U.S. 660, 669 (1931).

52. *Wyoming*, 112 S. Ct. at 799.

53. *Id.* (citing Healy v. Beer Institution, Inc., 491 U.S. 324, 336 (1989)).

54. *Id.*

55. *Id.* The stipulated facts confirmed that from 1981 to 1986, Wyoming provided virtually 100% of the coal purchased by Oklahoma utilities. In 1987 and 1988, following the effective date of the Act, the utilities filled 3.4% to 7.4% of their needs by purchasing Oklahoma coal, with a corresponding reduction in purchases of Wyoming coal. *Id.*

56. Justice Scalia was joined in his dissenting opinion by Chief Justice Rehnquist and Justice Thomas.

57. *Wyoming*, 112 S. Ct. at 804.

58. *Id.* at 806.

> Oklahoma sales to be lost, but that it prevented Wyoming "severances" of coal from occurring. Wyoming does not tax sales of coal to Oklahoma utilities; it taxes severances. The loss of a particular Oklahoma sale would not hurt Wyoming's treasury at all unless (1) the coal that was the subject of that sale was not severed to be sold elsewhere, or (2) if it was severed to be sold elsewhere, that latter sale (and severance) would have occurred even if the Oklahoma sale had been made.[59]

Scalia argued that Wyoming could not show that the coal subject to lost sales to Oklahoma electric generators was not severed to be sold elsewhere,[60] because Wyoming's significant excess mining capacity[61] may well have been the result of Wyoming's mines being uncompetitive or facing shut-down due to a less-than-anticipated general demand. Thus, it may not have been economically possible for Wyoming's producers to make an additional sale.[62]

Scalia further argued that Wyoming had failed to " 'establish that [its] injury complain[ed] of . . . falls within the zone-of-interests sought to be protected by the statute [or constitutional guarantee] whose violation forms the legal basis for [its] complaint.' "[63] This zone-of-interests test " 'denies a right of review if the plaintiff's interests are . . . marginally related to or inconsistent with the purposes implicit in the [constitutional provision].' "[64] Although Wyoming's coal companies were within the Commerce Clause's zone-of-interests test, the dissent argued that the State of Wyoming was not, because as a sovereign, it does not buy or sell coal or otherwise participate directly in the coal market. Therefore, its interests, i.e., the right to collect taxes, are only marginally related to the Commerce Clause's guaranteed right to engage in free-from-interference interstate trade.[65] Although the majority relied upon *Hunt*[66] in response to the dissent's zone-of-interests argument, Justice Scalia noted that the *Hunt* Court did not purport to apply the zone-of-interests test, and that "only *after* finding [the Commission had] associational standing did we speculate . . . that the Commission itself may be adversely affected . . . ."[67] Scalia concluded that *Hunt* provides no grounds for disregarding the application of the zone-of-interests test to the present case.[68]

Writing the second portion of the dissent,[69] Justice Thomas disagreed

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59. *Id.* (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

60. *Id.* at 806-807.

61. Wyoming's expert, a coal market analyst from Virginia, averred by affidavit that, " 'in [his] opinion,' the lost sales could not be made up. Affidavit of Seth Schwartz 3." *Id.* at 807 n.1. This conclusion was based on an economic analysis of the coal industry reflecting that in 1987, "the Wyoming Powder River Basin had an annual production capacity of 186.4 million tons, versus actual 1987 production of 127.1 million tons. Affidavit of Seth Schwartz (App. to Wyoming's Response to Motion to Dismiss A-2)." *Id.* at 795 n.8. The dissent argued Schwartz did not, as FED. R. CIV. P. 56(c) requires, set forth the facts upon which his opinion was based. *See infra* text accompanying note 80.

62. *Wyoming*, 112 S. Ct. at 807.

63. *Id.* at 808. (quoting Air Courier Conference of America v. American Postal Workers Union, 111 S. Ct. 913, 918 (1991)).

64. *Id.* (quoting Clark v. Securities Industry Assn., 479 U.S. 388, 394, 399 (1987)).

65. *Id.*

66. *Hunt*, 432 U.S. 333.

67. *Wyoming*, 112 S. Ct. at 809 (emphasis added).

68. *Id.*

69. Chief Justice Rehnquist and Justice Scalia joined in the second portion of the dissent as well.

with the Court's exercise of its original jurisdiction.[70] He argued that the dispute at bar is primarily between Wyoming's private mining companies and the State of Oklahoma.[71] In Thomas' view, "an entirely derivative injury of the type alleged by Wyoming here—even if it met minimal standing requirements—would not justify the exercise of discretionary original jurisdiction."[72] In addition, Thomas noted that "Wyoming has advanced no reason why the affected mining companies [themselves] did not . . . challenge the Oklahoma statute in another, more convenient forum."[73]

V. ANALYSIS: DOES *WYOMING V. OKLAHOMA* DILUTE STANDING REQUIREMENTS FOR COMMERCE CLAUSE VIOLATIONS?

A. Standing

Wyoming provided expert affidavits supporting its "injury-in-fact" by demonstrating that since the effective date of the Act, it had lost severance tax revenues.[74] Oklahoma did not contradict this evidence, but instead introduced expert opinion that Wyoming experienced a loss in severance tax revenues due to its reduction of the severance tax rate and a decline in coal market prices.[75] The majority stated that, "[a]t best, Oklahoma's counter-affidavit suggests that the estimate of lost severance tax revenues is a bit too high . . . ."[76] Wyoming further submitted expert opinion regarding its excess mining capacity, such that "the loss of any market cannot be made up by sales elsewhere . . . ."[77] Although Oklahoma did not rebut this opinion, as the dissent pointed out, Wyoming's excess mining capacity could be due to any number of reasons.[78] However, based on these submissions, the Court held that Wyoming clearly had standing to bring this action.[79] Although the dissent conceded that were this a trial on the record, it might conclude that more likely than not Wyoming was injured, it found Wyoming's affidavits insufficient to establish injury-in-fact as required by Rule 56.[80] There are genuine issues of material fact as to whether "Wyoming coal producers would have sold coal in addition to that diverted from the (presumably) lost Oklahoma

70. *Wyoming*, 112 S. Ct. at 810.
71. *Id.* at 811.
72. *Id.*
73. *Id.* at 812.
74. *Id.* at 795.
75. *Id.* at 795 n.6.
76. *Id.*
77. *Id.* at 795.
78. *Id.* at 807.
79. *Id.* at 796.
80. FED. R. CIV. P. 56. Rule 56(c) states that a party is entitled to summary judgment in his favor "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(e) further provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

sales . . . Wyoming's motion for summary judgment must be rejected."[81]

The dissent relied upon *Lujan v. National Wildlife Federation*[82] to review the standard set forth in Rule 56 for determining when a party is entitled to summary judgment in his favor. The *Lujan* Court stated:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Where no such showing is made, the moving party is entitled to judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.[83]

The *Lujan* Court then decided whether respondent's affidavits raised a genuine issue of fact sufficient to withstand a summary judgment motion.[84] The Court held that the court of appeals erred in "assuming that general averments embrace the specific facts needed to sustain the complaint."[85] Ideally, the object of Rule 56 is "not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."[86] The Court concluded by stating that facts missing from affidavits cannot be presumed because without them, the affidavits do not establish the injury generally alleged.

B. The Commerce Clause Violation

Oklahoma argued that discrimination imposed on commerce by the Act was *de minimis*, because the Act mandated only a "small portion" of Oklahoma's coal requirements be supplied with Oklahoma coal.[87] Justice White noted that in previous decisions, the Court had found the volume of commerce affected was of little importance in the determination of whether a state's statute is discriminatory; it measures only the extent of the discrimination.[88] White explained:

> Only recently reaffirmed, the Court has stated, "[o]ur cases . . . indicate that where discrimination is patent, as it is here, neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown . . . varying the strength of the bar against economic protectionism according to the size and number of in-state and out-of-state firms affected would serve no purpose except the creation of new uncertainties in an already complex field."[89]

Therefore, because the Court ruled Oklahoma's statute was discriminatory on its face and in practical effect, Oklahoma had the burden of justifying the Act both in terms of the putative local benefits that would flow from the

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81. *Wyoming*, 112 S. Ct. at 807.

82. 497 U.S. 871 (1990).

83. *Id.* (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

84. *Lujan*, 497 U.S. at 885.

85. *Id.* at 888.

86. *Id.*

87. *Wyoming*, 112 S. Ct. at 801.

88. Id. (citing Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984); Maryland v. Louisiana, 451 U.S. 725 (1981); Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980)).

89. *Id.* (quoting New Energy of Indiana v. Limbach, 486 U.S. 269, 276-277 (1980)).

statute, as well as the unavailability of alternative nondiscriminatory actions that could achieve the same result. Oklahoma attempted to overcome this higher standard of review by arguing "quite briefly" that it is in the state's best interest to sustain the Oklahoma coal-mining industry by lessening the state's reliance on a single source of coal delivered over a single rail line.[90] In making this argument, however, Oklahoma ignored cases where the court had refused to recognize economic stability justifications,[91] and cases where the statute sought to pursue a "presumably legitimate goal" by "the illegitimate means of isolating the State from the national economy."[92]

Oklahoma embellished this argument somewhat by suggesting that the Act would help conserve Wyoming's cleaner coal, since it required the ten percent substitution of Oklahoma's higher sulfur content coal.[93] The Court rejected this argument on the basis of Wyoming's unrebutted factual response that Powder River Basin reserves of low-sulfur, clean-burning, sub-bituminous coal are estimated to be in excess of 110 billion tons, which at present extraction rates, would provide Wyoming with coal for the next several hundred years.[94] Moreover, the Court noted that Oklahoma's argument, which was raised for the first time in the brief on the merits, lacked any support in the records of the case.[95] The Court compared this case with *Hughes v. Oklahoma,*[96] a similar case where Oklahoma's argument lacked record support for factual assumptions and was referred to as a *post hoc* rationalization, certainly inadequate to survive the heightened scrutiny given facially discriminatory statutes.[97]

Oklahoma again attempted to argue for the state's best interest in reference to the "savings clause" of the Federal Power Act,[98] claiming that the Act

90. *Id.* at 801. However, the Commerce Clause does not restrict the state's action as a free market participant. In deciding the issue of severability, the Court held the Oklahoma legislature could decide to apply in-state purchase requirements to state-owned electric utilities, though this intention could not be implied from the plain meaning of the statute. *Id.* at 803. Therefore, the Court declined to sever the Act and apply it only to the GRDA, leaving this decision for the Oklahoma Legislature. *Id.*

91. *See* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935). A New York statute prohibiting the sale of milk imported from another state unless the price paid for said milk met the minimum prescribed by statute for purchases from local producers was held in violation of the Commerce Clause. Though the State argued that ensuring the economic security of the dairyman would guarantee the sanitary security of the community by ensuring an adequate supply and a wholesome quality of a necessary food was an exercise of its police power, the statute was found to be violative of the Commerce Clause. *Id.* (*see also* H.P. Hood & Sons, Inc., v. DuMond, 336 U.S. 525 (1949)).

92. Philadelphia v. New Jersey, 437 U.S. 617, 627 (1980). A New Jersey statute prohibiting the importation of most "solid or liquid waste which originated or was collected outside the territorial limits of the state. . ." was held violative of the Commerce Clause, whether its ultimate purpose was to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution. New Jersey may pursue those ends by slowing the flow of *all* waste into the state's remaining landfills, even though interstate commerce may incidentally be affected, but it cannot discriminate against outside state waste unless there is some reason, apart from their origin, to treat them differently. *Id.*

93. *Wyoming*, 112 S. Ct. at 801.

94. *Id.* (citing *Geological Survey of Wyoming, Guidebook of the Coal Geology of the Powder River Basin*, Public Information Circular No. 14, at 126 (1980)).

95. *Wyoming*, 112 S. Ct. at 802.

96. 441 U.S. 332, 338 n.20 (1979).

97. *Id.*

98. 16 U.S.C. § 824(b)(1) (1988). Section 824(b)(1) provides:

gives permission to adopt methods of setting local retail rates that may be burdensome to commerce. Oklahoma argued that the Act's discriminatory impact on the movement of Wyoming coal in interstate commerce was permissible because it "has determined that effective and helpful ways of ensuring lower local utility rates include: (1) reducing over-dependence on a single source of supply and a single fuel transporter, and (2) conserving needed low-sulfur coal for the future."[99]

The Court again rejected the argument, stating that, "[w]e have already examined § 824(b)(1) in *New England Power Co. v. New Hampshire*[100] . . . and found nothing in the statute or legislative history to alter the limits of state power otherwise imposed by the Commerce Clause."[101] "There is no hint in that opinion, as suggested by Oklahoma, that a partial — instead of a total — ban would have been permissible, or that in-state purchasing quotas imposed on utilities in an effort to regulate utility rates are within the lawful authority of the states under § 824(b)(1)."[102] Instead, the decision was based on the recognition that "Congress did no more than leave standing whatever valid state laws then existed related to the exportation of hydroelectric energy; by its plain terms [§ 824(b)(1)] simply saves from pre-emption under Part II of the Federal Power Act such state authority as was otherwise lawful."[103] The Court concluded by stating that Commerce Clause cases implicating the Federal Power Act have been uniformly scrutinized on the merits, and that Oklahoma had not met its burden of demonstrating a clear and unambiguous Congressional intent to permit this type of Commerce Clause interference.[104]

VII. CONCLUSION

In *Wyoming*, the Court seems to retreat somewhat from its holding in *Lujan* by recognizing Wyoming's injury-in-fact, and thus granting its summary judgment motion, although genuine issues of material fact exist.

Furthermore, the Court seems to abandon the zone-of-interests qualification by not applying the test to Wyoming to determine whether a state's interest in collecting severance taxes falls within the zone-of-interests of the Commerce Clause.[105]

"The zone-of-interests test, as opposed to the injury-in-fact requirement, turns on the type of interest asserted and not on its speculativeness or its

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The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in ¶(2), shall not apply to any other sale of electric energy or deprive a State or State Commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a state line.

99. *Wyoming*, 112 S. Ct. at 802.

100. 455 U.S. 331 (1982).

101. *Id.* at 341 (quoting United States v. Public Utilities Comm'n of California, 345 U.S. 295, 304 (1953)).

102. *Wyoming*, 112 S. Ct. at 802.

103. *Id.*

104. *Id.*

105. *Id.* at 808.

degree of attenuation from its alleged source."[106] Therefore, as Justice Scalia points out, if the state interest in collecting severance taxes is within the zone-of-interests necessary for a Commerce Clause action, so must every other state taxing interest.[107] If the Court has chosen to abandon the zone-of-interests test, there exists an implicit erosion of the general principle that, in the field of constitutional litigation, "the judicial remedy cannot encompass every conceivable harm that can be traced to an alleged wrongdoing."[108] Indeed, as Justice Scalia concludes, unless the zone-of-interests test is adhered to as any other judge-made law that limits the availability of judicial review, exposure to liability becomes immeasurable and the scope of litigation endless.[109]

Jennifer L. Walls

106. *Id.* at 809.
107. *Id.*
108. *Id.* at 810.
109. *Id.*