NOTE

GENERAL MOTORS CORPORATION v. TRACY

I. INTRODUCTION

The dormant Commerce Clause doctrine has been criticized vigorously. It has been called "a silent killer of state laws affecting interstate commerce."[1] Courts have characterized the doctrine as a "quagmire"[2] and "hopelessly confused,"[3] while others have claimed that its application "often appears to turn more on ad hoc reactions to particular cases than on any consistent application of coherent principles."[4]

Despite its unpopularity, this doctrine is unquestionably constitutionally founded.[5] Article I, section 8, of the United States Constitution gives Congress the power to regulate interstate commerce.[6] Broadly stated, the dormant Commerce Clause doctrine prohibits state taxation or regulation that unduly interferes with—or discriminates against—interstate commerce and thereby impedes private trade in the national marketplace.[7] The Framers of the Constitution considered free trade between the states essential to the success and prosperity of the new nation.

In *General Motors*, the United States Supreme Court decided a dormant Commerce Clause case involving the natural gas industry. The Court was reluctant to apply the dormant Commerce Clause doctrine, thereby permitting an apparent impairment of interstate commerce. The future effects of the Court's decision may be far-reaching and could affect competition not only in the natural gas industry, but in other energy markets as well. As the natural gas industry becomes more competitive, and greater unbundling and deregulation occurs, the "faces" of the players in the industry will likely be altered. The industry will be restructured so that the classic "natural gas company" may be difficult to find. With this restructuring, there will be more questions as to whom the states may properly tax and who they may exempt. Certainly, more litigation will arise involving public utilities in the future dealing with these same questions. It is, therefore, important to understand *General Motors Corp. v. Tracy*[8] and just how narrowly the United States Supreme Court will construe the dormant Commerce Clause doctrine in the public utility arena. Additionally, examining arguments made by General Motors Corporation (GM), and the reaction of the Court to those arguments, may be helpful to those addressing state regulations under the

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1. Paul E. Mcgreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191, 1191 (1998).

2. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 210 (1994) (Scalia, J., concurring); *see also* Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 259-260 (1987) (Scalia, J., dissenting).

3. Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting).

4. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 439 (2d ed. 1988).

5. U.S. CONST. art. I, §8, cl. 3.

6. *Id.* Specifically, that provision provides that: "The Congress shall have Power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . " *Id.*

7. Mcgreal, *supra* note 1.

8. General Motors Corp. v. Tracy, 519 U.S. 278 (1997).

dormant Commerce Clause in the future.

The issue in *General Motors* arose because one out-of-state, unregulated supplier of natural gas, was being taxed while an in-state supplier (a regulated local distribution company (LDC)) was exempt from the tax. GM argued that the tax violated the dormant Commerce Clause because it was impeding private trade in the national marketplace. The United States Supreme Court did not agree.

This note postulates that the Supreme Court has narrowed the application of the dormant Commerce Clause doctrine in the public utility arena with its decision in *General Motors*. Section II of this note includes a brief history of the natural gas industry and a discussion of three important public utility cases that have preceded *General Motors*. Section III discusses the facts and procedural history of the case. Section IV analyzes the rationale of and offers some criticism of the decision. Section V discusses the dissent by Justice Stevens. Section VI offers comments about how this decision may impact the application of the dormant Commerce Clause in the natural gas marketplace.

II. BACKGROUND

A. *In General*

The buying and selling of natural gas originated as a free market. Difficulties, however, soon arose. It became apparent how inefficient it was for several companies to each lay their own pipelines to transport natural gas from the well to the consumer, and over time, practical experience showed that State regulation of local natural gas markets was necessary.[9] The nation soon became connected with a system of interstate pipelines.[10] Further problems arose when the operators of these interstate pipelines were subjected to conflicting regulation by multiple states. In deciding a series of three cases, the Supreme Court crafted a solution to this problem and set forth its initial interpretation of the dormant Commerce Clause as it applied to public utilities.

B. *The Dormant Commerce Clause Cases*

The first conflict came before the United States Supreme Court in 1923, in *Pennsylvania v. West Virginia.*[11] Natural gas was produced in West Virginia, and certain producers had established a pipeline system going from West Virginia to Pennsylvania. Then West Virginia passed a law that essentially cut off Pennsylvania's natural gas supply. The Court held that "[a] state law, whether of the state where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs or burdens such transmission is a regula-

9. *General Motors*, 519 U.S. at 288. *See also* Welch, *The Odyssey of Gas—A record of Industrial Courage*, 24 PUB. UTILS. FORT. 500 (1939) (explaining that regulation became necessary early in the 20th Century, as the natural gas free market created municipal chaos).

10. For a more detailed description and analysis of these developments and their impact that was also cited by the Court, see Mogel & Gregg, *Appropriateness of Imposing Common Carrier Status on Interstate Natural Gas Pipelines*, 4 ENERGY L.J. 155, 157 (1983).

11. Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

tion of interstate commerce—a prohibited interference."[12] Despite the *Pennsylvania* decision there remained unexplored and uncertain legal territory regarding the relationship between the individual states and the commerce clause.

Less than two years later, the Supreme Court revisited the issue in *Missouri v. Kansas Natural Gas Co.*[13] Kansas Natural Gas Co. (Supply Company) operated pipelines that originated in Oklahoma, and ran through Kansas to Missouri. Conflict arose because the Supply Company had raised its rates in Missouri from 35 to 40 cents per 1,000 cubic feet without the consent of the Missouri Public Service Commission. The Supply Company argued that the matter was beyond the state's power under the dormant Commerce Clause of the Constitution. The Court recognized the difficulty in distinguishing between cases when a state is authorized to act "in the absence of congressional action," and "those where state action is precluded by mere force of the [C]ommerce [C]lause of the Constitution."[14] It further articulated the doctrine by noting that in the absence of congressional legislation, states may constitutionally use their powers to assess taxes and impose "laws of internal police," even if such actions have an incidental impact on interstate commerce.[15] The Court distinguished between those state actions having a direct burden on interstate commerce and those having only an incidental effect—the former being unconstitutional and the latter being permissible.

The last case in the dormant Commerce Clause utility trilogy is *Public Utilities Commission of Rhode Island v. Attleboro Steam and Electric Co.*[16] The Narragansett Electric Lighting Company (Narragansett) generated electricity in Rhode Island. In 1917, it entered into a twenty-year agreement with Attleboro Steam and Electric Co. (Attleboro), located in Massachusetts, to sell all the electricity required by Attleboro. A specific base rate was set. Seven years later, Narragansett sought to get a rate increase by filing a new rate schedule with the Rhode Island Public Utilities Commission. The new schedule would increase rates "for electric current supplied, in specified minimum quantities, to electric lighting companies for their own use or sale to their customers and delivered either in Rhode Island or at the state line."[17] Because of Narragansett's operational structure, this new schedule would only apply to Attleboro in Massachusetts. The state commission granted the rate increase. The case questioned the validity of this state action. The Supreme Court held that the order of the Rhode Island Commission did not have an incidental effect on interstate commerce but that it "place[d] a direct burden on interstate commerce."[18]

III. STATEMENT OF THE CASE

GM has a plant located in Ohio and is a large natural gas consumer. During

12. *Id.* at 596-97.
13. Missouri ex rel. Barrett v. Kansas Natural Gas Co., 265 U.S. 298 (1924).
14. *Id.* at 307.
15. *Kansas Natural Gas Co.*, 265 U.S. at 307.
16. Public Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83, 47 S. Ct. 294 (1927).
17. *Id.* at 85.
18. *Attleboro*, 273 U.S. at 89.

the time period in question, GM had bypassed the LDC and was purchasing gas directly from an out-of-state marketer, Access Energy Corporation (Access), at a lower price than the LDC. At an earlier time, Ohio had implemented a 5% sales and use tax on the in-state sale or consumption of goods, including natural gas. This tax, however, exempted any natural gas sales made by "natural gas compan[ies]."[19] Ohio statutorily defined a "natural gas company" as anyone who is "engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state."[20] In a previous case, *Chrysler Corp. v. Tracy*,[21] Access had unsuccessfully argued that it also should have been exempt from the tax because it was a natural gas company that was in the business of supplying natural gas. The Ohio Supreme Court disagreed and excluded Access from qualifying as a "natural gas company" as defined by Ohio statute.[22] The Ohio Supreme Court found what it considered important differences between LDCs and independent marketers. The court noted that marketers do "not own or control any physical assets to produce, transport, or distribute natural gas."[23] From this, the court concluded that Access was not "supplying" natural gas and, therefore, was not a natural gas company. The Ohio Supreme Court construed the statutory term "natural gas company" as including LDCs but excluding any non-LDC sellers, such as producers and independent suppliers.

On being billed for the use tax, and faced with Ohio's apparent differential tax, GM initiated administrative action to challenge the tax, followed by judicial review, arguing that the differential tax unduly burdened interstate commerce and violated the dormant Commerce Clause. The Ohio Supreme Court upheld the state tax, and the Supreme Court accepted review.

IV. ANALYSIS

A. *The Court's Rationale*[24]

"The negative or dormant implication of the Commerce Clause prohibits State taxation that discriminates against or unduly burdens interstate commerce and thereby imped[es] free private trade in the national marketplace."[25] GM probably believed that it had an exemplary case of taxation that unduly burdened and impeded interstate commerce and claimed that this constituted "facial" or

19. OHIO REV. CODE § 5734.02(3)(7) (1998).

20. OHIO REV. CODE § 5727.01(D)(4) (1996).

21. Chysler Corp. v. Tracy, 652 N.E.2d 185 (Ohio 1995).

22. *Id.* at 186-87. Access "purchased natural gas, taking title to it. . ., arranged to transport it through pipelines, and sold it to contract customers. Accordingly, Access is [not a] natural gas company because it is not engaged in the business of supplying natural gas to Chrysler, and its sales of natural gas to Chrysler are taxable." *Chrysler*, 652 N.E.2d at 187.

23. *Chrysler*, 652 N.E.2d at 186.

24. The Court addressed an argument on standing and an argument on equal protection, both of which are beyond the scope of this note.

25. Quill Corp. v. North Dakota, 504 U.S. 298 (1992). *See, e.g.*, Reeves, Inc. v. Stake, 447 U.S. 429, 437 (1980); *Kansas Natural Gas Co.*, 265 U.S. 298 (holding that the Dormant Commerce Clause prevents the states from regulating interstate transportation or sales for resale of natural gas); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986).

"patent" discrimination in violation of the dormant Commerce Clause.

From GM's view, Access and the LDC were likely perceived as two natural gas suppliers competing for its business within the state of Ohio, and Ohio's tax unfairly restrained only one of the two competitors in the race for natural gas customers.[26] This seemed to be easily classified as unfair discrimination in the marketplace and a violation of the dormant Commerce Clause. Rejecting this argument, the Supreme Court stated that "any notion of discrimination assumes a comparison of substantially similar entities."[27] The case then turned on whether or not Access and the LDCs were similar entities offering a similar product and competing in the same market.[28] The Court held they were not.

For the dormant Commerce Clause to apply, these two entities must be similarly situated. The Court held that the suppliers were not similarly situated entities because they served (at least partially) two distinct markets, namely captive (sometimes termed the "core" market) and noncaptive, and thus did not compete with each other. It held "in the absence of actual or prospective competition . . . there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply."[29]

The captive market consists of users who appear to have no meaningful alternative to LDC-supplied natural gas.[30] This usually refers to residential and other customers who utilize small quantities of natural gas.[31] The regulated utilities obligation of service is to provide natural gas service to all customers within a certain geographic area, whether such service is economically enticing or not.[32] The regulated LDCs must have a backup supply available to ensure that no one seeking gas service within the area goes without gas.[33] Captive buyers are usually on tight budgets and they cannot "readily bear the risk of losing a fuel supply in harsh natural or economic weather."[34] If the captive user's gas supply is interrupted, the user is in no position to switch fuel supplies or find alternative methods to compensate for the loss of gas.[35] "Purchasing gas service

26. *See, e.g.*, H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949) (requiring that all producers have free access to the national marketplace, and prohibiting states from excluding by way of duties or regulations); Wyoming v. Oklahoma, 502 U.S. 437 (1992); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977).

27. *General Motors*, 519 U.S. at 298.

28. *See, e.g.*, Associated Indus. of Mo. v. Lohman, 511 U.S. 641 (1994) (differentiating between the bundled products of local utilities and the unbundled gas of the marketers).

29. *General Motors*, 519 U.S. at 300.

30. Frank P. Darr, *A State Regulatory Strategy for the Transitional Phase of Gas Regulation*, 12 YALE J. ON REG. 69 (1995).

31. The size of the customer does not always determine whether a customer is classified as captive or noncaptive. The key is whether or not they have alternative methods to get natural gas.

32. *See generally* Industrial Gas Co. v. Public Util. Comm'n of Ohio, 21 N.E.2d 166 (1939) (allowing states to require LDCs to serve all members of the public without discrimination, throughout their fields of operations).

33. *Id.*

34. *General Motors*, 519 U.S. at 301 (citing Consolidated Edison Co. of N.Y. v. FERC, 676 F.2d 763 (D.C. Cir. 1982)).

35. Adam D. Samuels, *Reliability of Natural Gas Service for Captive End-users Under the Federal En-*

[from marketers] requires considerable time and expertise,"[36] and the captive market consumer usually has neither. The captive market may pay more per unit for the gas, but the gas that is bought comes protectively bundled.

The other market available to natural gas suppliers is the noncaptive market. Included therein are users who have the expertise and resources to find alternatives to the LDC supply. Large industries and corporations, like GM, often fall into this category. They usually consume much more natural gas than do captive users.[37] The noncaptive customers usually have more capital at their disposal and can more easily deal with an interruption in natural gas service, should one occur. They often can reduce operating costs through bypassing the LDC and buying gas directly from the independent marketer, who may offer an unbundled supply of natural gas.

The Court stated that the LDC competed in both the captive and noncaptive markets. It then determined that Access, as an independent marketer, competed only in the noncaptive market. Since there was at least one market in which they did not compete (the captive market), the Court determined that these two entities served separate markets. Thus, the dormant Commerce Clause would be inapplicable. To support its decision the Court relied on *Alaska v. Arctic Maid*.[38] *Arctic Maid* presented a tax disparity on the value of salmon taken from territorial waters. The salmon that was frozen on board, taken to be canned, and sold outside the state was taxed 4%, while the salmon that was brought back to the Alaska shoreline to be canned and sold was only taxed 1%. The Court upheld Alaska's tax and explained that the "claimants and the cold storage facilities served separate markets, did not compete with one another, and thus could not properly be compared for Commerce Clause purposes."[39]

In GM's case the Court determined that since the independent marketer and the LDC functioned in two separate markets, the elimination of the tax imposed on non-LDC suppliers would not increase competition between the two in the captive market; thus the dormant Commerce Clause was not applicable.[40] What about the noncaptive market in which they do compete? Which relationship should be given controlling significance?[41] The Court outlined three reasons why greater weight should be given to the parties' relationship in the captive market. First, the Court determined that it had an obligation "to proceed cautiously lest we imperil the delivery by regulated LDCs of bundled gas to the noncompetitive market."[42] Second, the Court said it lacked the expertise and resources necessary "to predict the effects of judicial intervention."[43] Third, the

ergy Regulatory Commission's Order No. 636, 62 GEO. WASH. L. REV. 718 (1994).

36. Richard J. Pierce, Jr., *Intrastate Natural Gas Regulation: An Alternative Perspective*, 9 YALE J. ON REG. 407 (1992). (asserting that residential users do not have the high volume requirements needed to make purchases on the market economically feasible).

37. *Id.*

38. Alaska v. Arctic Maid, 336 U.S. 199 (1961).

39. *General Motors*, 519 U.S. at 300 (citing *Arctic Maid*, 336 U.S. 199).

40. *General Motors*, 519 U.S. at 300.

41. *Id.* at 303.

42. *General Motors*, 519 U.S. at 304.

43. *Id.* at 304.

Court essentially determined that if its decision not to implement the dormant Commerce Clause was wrong, then Congress could always intervene and correct the problem. The Court's rationale was that since greater significance should be given to the captive market, the two entities were really not competitors for that market; therefore, it reasoned, the tax was constitutional.

B. Analysis of the Court's Rationale

The Court's reasoning may be more critically analyzed. First, while certainly not dispositive of the legal relationships, it would appear factually clear that the independent and regulated suppliers competed aggressively within the noncaptive market. Next, the *Arctic Maid* case used by the Court to support its decision might be distinguishable upon close analysis. The State of Alaska was taxing one salmon producer at a higher rate than another salmon producer. However, in that case one salmon packer was selling in-state and the other was selling out-of-state. There was no overlap in buyers and, therefore, no competition between the two producers. In the *General Motors* case, there was substantial overlap in buyers. In fact, both the LDC and Access were in direct competition for GM's business.

The Court then determined that the LDC and Access competed in the noncompetitive market and not in the captive market. It is unclear why the Court chose to emphasize the captive market, in which the two entities did not compete, rather than the noncaptive market, in which they do compete, and which was the subject of the case. The Court offered three justifications for doing so. First, expressing concern that it could imperil the delivery of natural gas by the LDC, the Court stated that it must "proceed cautiously." It is unclear, however, why this criterion held greater wight than protecting the national free market which was envisioned in the Constitution.[44]

The second reason the Court gave as to why it afforded controlling significance to the captive market is that the Court lacks the "expertness" and the "institutional resources" needed to predict the impact that invalidating the tax would have on the captive market. While desirable to consider the impact on individuals that the Court's decision might have, it is again unclear that this rationale should outweigh upholding Constitutional provisions.

Finally, the Court expressed concern that if judicial intervention was required, and no decision to enforce the dormant Commerce Clause was made, Congress had the resources to step in and "strike the balance between the needs of the competitive and captive markets."[45]

Clearly Congress has resources to analyze markets and competition, but the

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44. In Justice Jackson's now-famous words:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs, duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons, 336 U.S. at 539. *See, e.g., Wyoming v. Oklahoma*, 502 U.S. at 469.

45. *General Motors*, 519 U.S. at 304.

argument goes both ways. If the Court did intervene to the detriment of the LDCs and small consumers, Congress should similarly be able to intervene to strike the same balance.[46]

In mustering more support for its decision, the Court cites the factually dissimilar case of *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*.[47] The Court cited this case to illustrate the proposition that states may impose regulations to protect their captive markets and the users therein. In *Panhandle*, the Ford Motor Company plant in Michigan had bypassed the LDC and was buying gas from an interstate pipeline. The Michigan Public Service Commission refused to allow the pipeline to sell natural gas within the state without first obtaining a certificate of public convenience and necessity, as did the LDC. Presumably, this requirement was to protect the natural gas consumers within the state of Michigan. The Court upheld this state regulation, even though it meant the exclusion of a competitor from the natural gas market. In that case, Michigan was setting a standard for its direct in-state sales of natural gas. If Panhandle wanted to sell in state, it also had to obtain a certificate of public convenience. Although characterized as "remarkably similar,"[48] *Panhandle's* facts would more closely resemble those in *General Motors* if Michigan had required a certificate of public convenience from the interstate pipeline but not from the LDC. In *Panhandle*, the entities were treated similarly. In *General Motors*, the two entities were treated differently.

The Court then reasoned that states have a right to regulate for health and safety "though the legislation might indirectly affect the commerce of the country."[49] The Court cited *Huron Portland Cement Co. v. Detroit*[50] to support its position. *Huron* appears to more closely resemble the facts in *Arctic Maid*[51] than the situation in *General Motors*. Huron Portland Cement Company (Huron) is a corporation engaged in the manufacture and sale of cement and owned five ships used to transport cement. Two of the ships were equipped with "handfired Scotch marine boilers."[52] While loading and unloading, it was necessary to clean the flues periodically. When the flues were cleaned, the stacks emitted a dense smoke. This density exceeded the maximum standards set by the State of Michigan. The state instituted criminal proceedings to stop these unlawful emissions. Huron argued that its ships had been properly federally licensed to operate in interstate commerce, and accordingly, Michigan's legislation unduly burdened interstate commerce in violation of the dormant Commerce Clause. The Supreme Court upheld the state legislation. It stated, "the Constitution when conferring upon Congress the regulation of commerce, . . .never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the com-

46. *Id.*

47. Panhandle E. Pipe Line Co. v. Michigan Pub. Serv. Comm'n, 341 U.S. 329 (1951).

48. *General Motors*, 519 U.S. at 305.

49. *Id.* at 306.

50. Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443-44 (1960) (quoting Sherlock v. Alling, 93 U.S. 99, 103 (1876)).

51. *See* discussion *infra* Part IV.B.

52. *Huron*, 362 U.S. at 441

merce of. . .the country."[53]

Huron and *General* appear to involve different types of state regulations. The Michigan regulations addressed in *Huron* were to maintain air quality in the state and presented an obvious direct connection to health and safety. The Ohio regulation in *General Motors*, on the other hand, appears to have a more tenuous immediate connection to health and safety. The Court constructed hypothetical situations to make the connection to health and safety, and acknowledged that it did not know what would happen if Access and the LDC were allowed to compete in the noncaptive market.[54] The Court indicated that it was possible that Access could take away the "cream of the volume business,"[55] negatively impact the LDC, and ultimately impact the health and welfare of the captive users. After suggesting these hypothetical situations, the Court noted that it is "institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them."[56] The better course of action might have been to determine that the Ohio regulation did not affect health and safety.

However, even assuming the state regulation did affect health and safety, *Huron* still is more like *Arctic Maid* than *General Motors*. In both *Arctic Maid* and *Huron*, the state set a standard that applied to anyone who wanted to operate within its borders. The Court, in both cases, held the regulations to be valid because of their connection with the state police powers. These two cases would be more persuasive if the facts were more similar to the facts in *General Motors*. For example, the decisions would be more closely on point if the emission regulation in *Huron* only applied to out-of-state vessels, or if the higher tax on salmon, as in *Arctic Maid*, applied only to out-of-state producers who made in-state sales.

Next, the Court recognized that "[o]f course, if a State discriminates against out-of-state interests by drawing geographical distinctions between entities that are otherwise similarly situated, such facial discrimination will be subject to a high level of judicial scrutiny even if it is directed toward a legitimate health and safety goal."[57] Is this tax imposed according to geographical divisions or economic divisions? The Court determined that the divisions were based on economics. The Court implied that the tax is imposed on suppliers that do not serve the captive market, while those that do serve the captive market are exempt. On its face, the tax appears to discriminate according to different economic markets. However, GM noted in its brief that the ultimate result is that the tax exemption applies only to LDCs which are, in fact, all located in the State of Ohio.[58] In reality, this is geographical discrimination couched in economic terms. Such a tax should be subject to a "high level of judicial scrutiny."[59]

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53. *Id.* at 443-44.

54. *General Motors*, 519 U.S. at 307.

55. *Id.* at 305

56. *General Motors*, 519 U.S. at 308.

57. *General Motors*, 519 U.S. at 307, n.15. *See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617, 626-628 (1978); Dean Milk Co. v. Madison, 340 U.S. 349, 353-354 (1951).

58. *General Motors*, 519 U.S. at 288.

59. *Id.* at 307, n.15.

V. THE DISSENT

The decision in this case was not unanimous. Justice Stevens contributed a thorough dissent. He agreed that bundled gas and unbundled gas were two separate and distinct products. As two different products, they have two separate markets. For example, an LDC operates in a monopolistic market (captive) as well as in a competitive market (noncaptive). He argued that Ohio may rightfully impede or restrict entry and exit from the monopolistic market, but it should not be able to burden or restrict competitors in the competitive market.

In the monopolistic market (or captive market) the state regulates the local natural gas distribution in order to protect the small consumers rather than to benefit the LDCs.[60] Justice Stevens argued that by its decision, the Supreme Court was subsidizing the LDC by requiring large-volume consumers to purchase gas from them rather than allowing the consumer to negotiate a better price elsewhere.

In the competitive market large customers would be able to seek alternative supplies. Justice Stevens did not contest Ohio's ability to regulate the sales of natural gas within its borders to protect those who require bundled service.[61] Large volume consumers like GM may not need the protection of the state at the same level as smaller customers. The government sparingly approves the creation of a monopoly, and only does so to protect certain consumers from exploitation. Government-regulated monopolies are created for a purpose. When that purpose disappears, so should the monopoly. Certainly GM would benefit more if allowed to search for a gas service that better fit their needs.

The majority suggested that if these large volume consumers were lured away by independent marketers, the LDCs would suffer economically. Stevens reasoned that the LDCs are operating in two separate markets, one where a monopoly is necessary (captive) and the other where a monopoly is not necessary (noncaptive). The LDC is permitted to participate in both markets. However, Justice Stevens indicated that the fact that the LDC is heavily regulated in one market does not justify granting it special preference in the other. It is not uncommon for a firm with a monopolistic position in one market to sell a second product in a competitive market.[62] To defend this assertion, he relied on the holding in *Cantor v. Detroit Edison Co.*,[63] a previous U.S. Supreme Court opinion he delivered in 1976. In that case, Detroit Edison, a state regulated natural monopoly, was giving out light bulbs "free" with its electrical service. Detroit Edison subsequently found itself participating in both a noncompetitive electricity market and a competitive light bulb market. The court held that there was no logical inconsistency with requiring the firm to comply with certain regulatory criteria when acting in the noncompetitive market while requiring it to be subject to unrestrained competition when acting in the competitive market.[64] Justice

60. *General Motors*, 519 U.S. at 314.

61. *Id.*

62. IBM Corp. v. United States, 298 U.S. 131 (1936). In that case, IBM was trying to require those leasing their tabulating machines to purchase only IBM tabulating cards.

63. Cantor v. Detroit Edison Co., 428 U.S. 529 (1976).

64. *Id.*

Stevens asserted that the concept of "two products, two markets" should prevail. This approach would make the captive and noncaptive markets separate and distinct, instead of allowing the markets to overlap, as the majority does. Under his analysis, the fact that a company is regulated in one market does not mean that it should be given an advantage in another competitive market. Stevens would protect the LDC in the captive market, but would allow competition in the noncaptive market.

Additionally, Justice Stevens noted, the majority was refusing to reverse the decision of the Supreme Court of Ohio partly because without this tax, LDCs would lose business to the independent marketers, and the LDCs would be forced to pass the loss in margin on to the small local consumers in the form of higher rates for their natural gas service. Not convinced, Justice Stevens believed that if rates were to increase unfairly, the responsibility would be on the state to find new and nondiscriminatory methods of ensuring the protection of the small local consumers. He placed the burden on the states, not on the court, for fixing the problem, should one occur.

Justice Stevens stressed the word "if." Both the majority and Justice Stevens recognized that there was a significant amount of speculation involved in deciding what would happen if this disparate tax were removed. Fear of the unknown seemed to prompt the majority not to disturb the current tax exemption. Justice Stevens maintained that this tax discriminates against interstate commerce and should not be tolerated, even in the face of uncertainty and speculation.[65]

VI. CONCLUSION

On its face, *General Motors* appeared to be the ideal opportunity to implement the dormant Commerce Clause doctrine and to strike down state regulation that unduly burdens interstate commerce, but the Court refused to do so. The Court appeared concerned with the unknown competitive effect its decision might have. It appears that the majority sensed what was constitutionally correct but hesitated because of the perceived negative impact the decision might have on the small consumer. In this situation, Justice Stevens may be correct in maintaining that the protection of the small consumer should be evaluated and addressed by Congress or legislatures rather than by the courts. It is the courts that should decide the constitutionality of the state's action. The rationale that the independent marketers and the LDCs are not similar enough to compare them under the dormant Commerce Clause seems to be the means necessary to arrive at an acceptable result. Had the direction of the Court's analysis been fully anticipated, an argument that sharpened the distinction between the noncaptive and captive markets and a demonstration that they were separate and distinct markets might have focused increased attention on the noncaptive market and persuaded other members of the Court that the case was more like *Cantor* as the dissent asserted. Instead, the Court classified the captive and noncaptive markets as two "sub-markets" within the natural gas market. It would be more troublesome to

65. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) (explaining that difficulty in determining real world effects is not sufficient justification for a tax exemption that discriminates against interstate commerce).

justify the same result if the markets were perceived as separate and distinct. Concern arises from this case because of the narrowness of the dormant Commerce Clause application, the Court's reluctance to enforce and uphold the Clause, and the nature of the analysis employed by the Court to arrive at a specific decision. Instead of clearing the murky waters of the dormant Commerce Clause, the Supreme Court may have only stirred an already cloudy mixture.

C. Adam Buck