

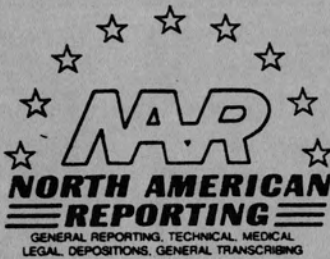
In the

Supreme Court of the United States

COMMONWEALTH EDISON COMPANY)
ET AL.,)
)
) APPELLANTS,) No. 80-581
)
) V.)
)
MONTANA ET AL.)

Washington, D.C.
March 30, 1981

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IN THE SUPREME COURT OF THE UNITED STATES

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: COMMONWEALTH EDISON COMPANY ET AL., :
: Appellants, : No. 80-581
: v. :
: MONTANA ET AL. :
----- :

Washington, D. C.
Monday, March 30, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:55 o'clock p.m.

APPEARANCES:

WILLIAM P. ROGERS, ESQ., Rogers & Wells, 200 Park Avenue, New York, New York 10166; on behalf of the Appellants.

MICHAEL T. GREELY, ESQ., Attorney General of Montana, State Capitol, Helena, Montana 59601; on behalf of the Appellees.

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P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: We'll hear arguments
3 next in Commonwealth Edison et al. v. Montana.

4 Mr. Rogers, I think you may now proceed whenever
5 you wish.

6 ORAL ARGUMENT OF WILLIAM P. ROGERS, ESQ.,

7 ON BEHALF OF THE APPELLANTS

8 MR. ROGERS: Mr. Chief Justice, and may it please
9 the Court:

10 This is a challenge to a Montana tax based on the
11 Commerce Clause and the Supremacy Clause. The tax was
12 enacted in 1975. Prior to 1975 there was an array of taxes
13 in Montana, including a net proceeds tax, a property tax,
14 license tax, and a severance tax. In addition, the state
15 received royalties from the Federal Government to cover the
16 impact of mining coal in Montana. And the coal companies --
17 mindful of the problems they had with Anaconda Copper and
18 earlier, provided that the coal companies had to reclaim the
19 land as they mined and they had to post substantial bonds to
20 guarantee that the land would be properly reclaimed.

21 So presumably, the taxes on the books at that time
22 were sufficient to meet the cost of the services provided by
23 Montana. In fact -- and I point out that this tax was a 1975
24 tax -- in 1973 the severance tax had been increased from
25 10 cents a ton, based on BTU, to approximately 34 cents a ton.

1 Shortly thereafter, the Arab oil embargo occurred
2 and it became clear that the nation was facing a very serious
3 energy crisis. So Montana saw an opportunity. Montana has
4 more than 25 percent of the coal reserves in the United States
5 and it started to plan how it could maximize its taxes.
6 The spirit in which it was done was exemplified by one of its
7 sponsors in the House of Representatives when he said, the
8 Arabs have the oil but we have the coal.

9 Most of this coal is shipped out of the state; 90
10 percent of it, in fact. And the coal is leased under long-
11 term contracts, so the discussion in the Legislature for the
12 most part involved the question, how much would the market
13 bear? The Legislature was advised that the amount of the tax
14 would not be subject to any judicial review.

15 QUESTION: Well, Mr. Rogers, are you suggesting
16 that the State of Montana could not have doubled its severance
17 tax at any particular time?

18 MR. ROGERS: No, we're not. We're claiming that,
19 actually, Montana in this cases did not meet the tests of
20 Complete Auto and Washington Stevedoring. We don't claim
21 that they're not entitled to tax. We think that the tax be-
22 cause it was specifically tailored to fall on customers out-
23 side the state has to be fairly related to the services pro-
24 vided by Montana. The result of this tax --

25 QUESTION: In any event, there was no challenge to

1 the lower rate periods?

2 MR. ROGERS: None. And I might say, parentheti-
3 cally, there would not have been. It was the amount of this
4 tax that --

5 QUESTION: According to the courts below, have you
6 conceded that a 50 percent tax would be -- ?

7 MR. ROGERS: No, we have not, Your Honor. That is
8 a misstatement. We said that we could not imagine that a tax,
9 that a severance tax of 12-1/2 percent would ever be more
10 than enough. We think that probably in this case a tax --
11 well, my studies show that no matter how they figured the
12 cost of the services that might be necessary to provide for ad-
13 ditional mining of coal, that it could never amount to more
14 than 10 cents a ton additional.

15 QUESTION: But then isn't that going to make it a
16 case-by-case adjudication in every situation where the federal
17 courts decide whether a tax is or is not -- ?

18 MR. ROGERS: No, I would not think so, Your Honor.
19 We think that in a case like this -- and I'll come to this in
20 just a moment -- that it was deliberately tailored to fall on
21 people outside the state and it's under long-term contracts
22 -- the coal companies couldn't get out of those contracts --
23 plus the fact that Montana has 25 percent of all the nation's
24 coal resources and it has over 50 percent of the low sulfur
25 coal in the United States.

1 Now, we say, under those circumstances, because it's
2 a tailored tax and because it falls to a large extent -- 90
3 percent of the tax is paid for by people in other states --
4 that we are entitled to a trial to show that by no stretch
5 of the imagination can Montana show that they need this money
6 for the services that are provided by Montana.

7 QUESTION: That's really all you want, is a chance
8 to prove your case?

9 MR. ROGERS: That is all. Now, it's interesting,
10 too, that the -- let me say before I get to that, so far this
11 tax has amounted -- this tax; not the other taxes; this tax --
12 has amounted to about \$200 million. They expect the tax will
13 amount to over a billion dollars in the next ten years and
14 several billions of dollars in the next 20 years. And we're
15 prepared to prove these things. We have had a comprehensive
16 study made which showed to our satisfaction that there's no
17 justification for this tax.

18 QUESTION: But wouldn't the same have been true
19 20 or 30 or 40 years ago in Oklahoma or Texas with respect to
20 a severance tax on oil?

21 MR. ROGERS: Well, I really can't answer that ques-
22 tion, Your Honor. I can't imagine that any state would have
23 attempted to do what they've done here. Let me say, too,
24 that Montana amended their constitution to provide a trust
25 fund to put the money in, and they're putting one-half of all

1 this money in a trust fund. They don't make any real effort
2 to claim that they need the money.

3 QUESTION: Does a state have to make a claim that
4 it needs the money in order to exercise the taxing power?

5 MR. ROGERS: Well, as we read Complete Auto, and
6 Washington Stevedoring, the Court has held that there are
7 four prongs to the test: one, the nexus test; one, the appor-
8 tionment test, neither of which come into play here; third,
9 the discrimination test, and this case clearly shows the
10 discrimination here.

11 Let me just read what the Senator said who proposed
12 the tax, if I can find it. But anyway, he pointed out that
13 -- and this is in the legislative history, that this tax was
14 going to be paid for initially by the coal companies but be-
15 cause of the contracts it would be immediately paid for by
16 the utilities, who in turn under the law passed that on to the
17 customers. So, the tax is being paid for by the customers in
18 Chicago, in Detroit, Minneapolis, and other cities and towns.

19 QUESTION: Well, why isn't it being paid by Montana
20 consumers too?

21 MR. ROGERS: Well, it is to some extent, of
22 course, but it's -- they get so much money back from the re-
23 mainder of the tax, it's for -- let me say this, Justice
24 White. This is the most popular tax in the history of
25 Montana, believe me.

1 QUESTION: Well, it's probably resulted in lowering
2 of some other taxes or at least --

3 MR. ROGERS: It has --

4 QUESTION: -- they've had some increases?

5 MR. ROGERS: It has resulted in considerable lower-
6 ing of taxes, and they plan in the years ahead not to have to
7 pay any taxes at all. Now, if Complete Auto and Washington
8 Stevedoring mean anything -- and I think this Court intended
9 those cases to mean something -- it means for the state, once
10 it decides to tax interstate commerce, has to do it in a
11 nondiscriminatory way, in a way that's fairly related to the
12 services of protection provided by the state. We're prepared
13 to show that this tax amounts to between \$2 and \$4 a ton and
14 that the state by no stretch of the imagination can justify
15 more than 20 cents a ton, if they take into account schools
16 and roads and hospitals and everything else they might claim.

17 Furthermore, because of the trust fund, they know
18 they can't establish that. I mean, the papers in Montana are
19 full of how do they spend the other 50 percent? They haven't
20 found out a way to spend the other 50 percent in any manner
21 that's consistent with the --

22 QUESTION: What if we agreed with you? What would
23 you contemplate we would say if we agreed with you? Namely,
24 that under Brady and the Auto case that that fourth category
25 assumes that a tax can be too high on interstate commerce?

1 MR. ROGERS: Yes.

2 QUESTION: And that therefore you ought to have a
3 chance to prove that it's too high?

4 MR. ROGERS: That's exactly right.

5 QUESTION: But then, the premise for that is that it
6 may be that 30 percent is too high. We have to at least
7 decide that.

8 MR. ROGERS: That's right.

9 QUESTION: And how do we know that?

10 MR. ROGERS: Well, we'll --

11 QUESTION: You're going to -- you would convince
12 the Court of that?

13 MR. ROGERS: We're going to convince the Court of
14 that. Secondly, I don't think that the legislatures of the
15 states will defy the standards established by this Court.

16 QUESTION: Well, the question is, what standards
17 can we establish?

18 MR. ROGERS: Oh, I think, Your Honor, that you have
19 established a standard, a fairly related standard. You say
20 in Complete Auto that if a state -- first, you say clearly
21 that the state has the right to tax interstate commerce, and
22 in Complete Auto you wipe away the distinctions about labels.
23 And you said, let's consider the practical effect of a tax,
24 which seems to most lawyers, it's a very sensible position.

25 Now, the practical effects of this tax -- and you

1 don't have to take my word for it, you can look at the legis-
2 lative history -- is, in the first instance, to transfer the
3 tax from people in Montana to out-of-state taxpayers who ob-
4 viously were not part of the political process. Second --

5 QUESTION: There are people in Montana who are
6 paying taxes.

7 MR. ROGERS: Yes, of course, but they get back so
8 much in the rest of it that, as I said, they've very happy to
9 pay for it.

10 QUESTION: Mr. Rogers, I agree with what I think
11 you're arguing. I mean, I thoroughly agree with you, but I
12 don't know how I can sustain it, and that is that I can decide
13 what the tax is going to be on me. I mean, I'm for that, but
14 I can't sustain it, and is that not what you are arguing?

15 MR. ROGERS: No, Your Honor --

16 QUESTION: You want a hearing which will determine
17 how much your tax is to be?

18 MR. ROGERS: No, Justice Marshall, that is not. My
19 argument is that when a tax, as this one does, affects inter-
20 state commerce --

21 QUESTION: Assuming that's true --

22 MR. ROGERS: -- that it should be fairly related to
23 the cost and services provided by the states, a rough equiva-
24 lence. We don't say that --

25 QUESTION: Will the Court be asked to fix a rate?

1 MR. ROGERS: No, Your Honor, we think that --

2 QUESTION: Well, will the Court be asked to fix a
3 line?

4 MR. ROGERS: Well, what we would expect, Your Honor,
5 is as follows. In this case the Legislature has no record --

6 QUESTION: I'd love to have the right to fix my own
7 rate of taxes.

8 MR. ROGERS: I guess we all would.

9 QUESTION: Mine would be on a scale of one to ten
10 minus two.

11 MR. ROGERS: In this case there was no legislative
12 history, no attempt by the Legislature, really, to justify
13 the amount of the tax. Secondly, they really tailored it, as
14 I've said, to fall on people outside the state. Third, they
15 realized there was a national emergency and they could take
16 advantage of the crisis.

17 Now, we would expect that if we tried the case we
18 can show these things. We would expect the Court merely to
19 say that the Legislature had not followed the standards laid
20 down by this Court, that in this kind of a case, where the
21 facts are specifically tailored, there should be special
22 scrutiny given --

23 QUESTION: Isn't there some language in the Supreme
24 Court's opinion about its fear of the consequences of strip
25 mining and of the process of restoration?

1 MR. ROGERS: Yes, but in this case, as I have said,
2 the state has already provided for reclamation cost, plus
3 the fact that the amount of land that's involved in this is
4 very small. Montana has 145,000 square miles. The amount of
5 land that's involved in this strip mining is five square
6 miles.

7 QUESTION: Well, a fair proportion of it doesn't
8 belong to Montana anyway, does it?

9 MR. ROGERS: No, about 75 percent of this coal is
10 federal coal.

11 QUESTION: And so the restoration is performed
12 under federal leases?

13 MR. ROGERS: Yes. That's correct, Your Honor. In
14 other words, the fact is, Justice Rehnquist, there is no jus-
15 tification for this tax. Now, we say that under those circum-
16 stances, constitutionally, that the taxpayers are entitled to
17 a trial to prove that.

18 QUESTION: You can say that under the Commerce Clause
19 that the tax may well be invalid, but to say there's no
20 "justification" for the tax strikes me as a misapplication
21 of constitutional principles, to say they have to justify
22 a tax.

23 MR. ROGERS: Maybe I should amend that to say that
24 there was no justification made for it in the Legislature.
25 Maybe they can justify it at a trial, and we have no objection

1 to that. We intended to get discovery in this case and we
2 were enjoined from any discovery. So, if Montana has a jus-
3 tification, and I'm certainly prepared to accept that there
4 is a possibility of it, they certainly didn't make it in the
5 legislative history. If they could justify it at a trial,
6 fine, but I think the courts are too --

7 QUESTION: Mr. Rogers, what sort of expenditures in
8 your judgment would justify it? What if they want to build
9 a couple of hundred very large parks, municipal zoos, and all
10 sorts of public things they never have done before, would
11 that be justifiable?

12 MR. ROGERS: Well, I think that because of the other
13 taxes that they've already imposed on the mining of coal, the
14 taxes would have to be in some way related to the impact of
15 additional mining. But we would be prepared to say that all
16 direct costs, all indirect costs --

17 QUESTION: You'd say that the limiting principle is
18 that the tax revenues must somehow or other be related to
19 the expenditures of the state that are fairly related to
20 mining, but the tax may not support any other public purpose
21 like unemployment compensation or public parks, environmental
22 matters, or -- ?

23 MR. ROGERS: No, Justice Stevens, I would not say
24 that. I think that they would be entitled to consider those
25 things but not such a large impact. Montana has about

1 880 million people. There are only 1,500 people involved
2 in this mining.

3 QUESTION: 880 thousand.

4 MR. ROGERS: What'd I say? I'm thinking of govern-
5 ment expenditures.

6 QUESTION: That's how many people there'll be there
7 if they can keep all this money.

8 MR. ROGERS: That's right. So, there are only
9 1,500 people involved in this mining. It's a very low labor
10 intensive operation, so they have very few people connected
11 with mining. Now, certainly they should pay their share and
12 even more than their share. We'd be willing to concede ten
13 times their share of libraries and hospitals and all the other
14 indirect costs you can think of. The difficulty Montana has
15 with the case is they can't think of any reasons. Now, we'd
16 like to try it. We don't want to try it here. We'd like to
17 have a trial and I can assure the Court, if the Court says, in
18 effect that a state under these circumstances can tax without
19 limit, then it's just a matter of time before the other states
20 that have minerals would be right in line. So we believe
21 that there should be some standard, even if it's a rough
22 equivalence, that a state has to use in passing statutes
23 designed to tax people outside of the state.

24 As to the Supremacy Clause, we have made, I think,
25 a substantial argument in the brief. I don't have anything

1 to add to that at the moment.

2 QUESTION: Before you sit down, though, let me
3 ask one other question. What is your response to the
4 Solicitor General's argument that the best arm of government
5 to draft the right standard is Congress rather than this
6 Court?

7 MR. ROGERS: Well, there are two arguments, I think,
8 Justice Stevens. One, although we recognize that Congress has
9 a part to play, we think that the constitutional issue should
10 be decided by the Court and secondly, if that was the rule,
11 it would be very difficult for Congress to anticipate and
12 preempt all the schemes that the states could dream up in
13 advance.

14 QUESTION: But don't you agree that if Congress
15 passed a statute that specifically approved the Montana tax,
16 that you would lose this case? Suppose someone sent a message
17 over today and it said that Congress has just passed a law
18 and the President has just signed it approving the Montana
19 tax?

20 MR. ROGERS: Yes, I sure wouldn't be here; yes.
21 But I can't imagine that Congress is going to --

22 QUESTION: No, probably not.

23 MR. ROGERS: Do you think so?

24 QUESTION: But Congress can certainly eliminate the
25 constitutional issue if it wants to.

1 MR. ROGERS: Oh, yes; surely, surely. But what
2 I'm saying is, it would be very difficult to eliminate the
3 constitutional issues in advance, Justice White, and we don't
4 think that's the way to do it. As I say, one of the problems
5 here was that the Legislature in Montana was advised that
6 they would have no legal problems, that the courts would not
7 challenge this tax, and if -- I am satisfied that if the
8 Legislature had been advised that this tax was going to be
9 subject to judicial scrutiny, that we wouldn't be here today
10 because the tax would have been much less.

11 When Montana imposed this tax it was four times as
12 large as any severance tax in the nation. So this is an ex-
13 cessive, exorbitant tax, and we would like to have a trial
14 to prove it. Thank you.

15 MR. CHIEF JUSTICE BURGER: Mr. Attorney General.

16 ORAL ARGUMENT OF MICHAEL T. GREELY, ESQ.,

17 ON BEHALF OF THE APPELLEES

18 MR. GREELY: Mr. Chief Justice, and may it please
19 the Court:

20 I'd like to focus the Court's attention today on
21 the actual allegations that the appellants declared in their
22 complaint because there have been a lot of facts bandied
23 about both in the briefs and suggested today by counsel for
24 the appellants as to what the allegations were and what kind
25 of facts the appellants could prove if they'd gone to trial.

1 First of all, I think it's important to note that
2 basically under the Commerce Clause the appellants have
3 alleged that the mined coal in Montana is destined for out-
4 side the state, that the coal is taxed at 20 to 30 percent of
5 the value. Actually the effective rate of the tax is 22
6 percent, since the production costs, the taxes on production
7 costs are backed out before the severance tax applies.

8 And thirdly, they've alleged that the revenues that
9 are anticipated by Montana in the fiscal years '78 and '79
10 are \$34 million and \$40 million respectively for all coal,
11 not just the coal that they're mining, but for all coal that
12 will be mined in Montana in those years.

13 And then they say, therefore, that our tax is not
14 fairly related to the services and protections provided by the
15 State of Montana, but in their briefs and today in oral argu-
16 ment we hear that Montana's legitimate needs have already
17 been met, and we hear that the local impact costs from
18 appellants' activities only amount to two cents a ton whereas
19 our tax amounts to \$2 or more a ton.

20 And we also hear that the tax bears no relationship
21 to the legitimate needs of the people of the State of Montana.

22 QUESTION: Mr. Greely, does Montana follow the pro-
23 cedures of most federal civil rules for the states, all well-
24 pleaded allegations in the complaint are deemed true on a
25 motion to dismiss?

1 MR. GREELY: That's true, but that's the allega-
2 tions in the complaint. What I'm suggesting here is some
3 of these things that have been made in statements but not
4 alleged in the complaint.

5 QUESTION: But you would have to concede that all
6 of the allegations in the complaint well-pleaded are true
7 since the --

8 MR. GREELY: All factual allegations --

9 QUESTION: Facts; facts.

10 MR. GREELY: -- but not conclusions of law.

11 Essentially, what the district court held, as I would -- under
12 Montana law, would be that under the allegations in the
13 complaint no facts that the plaintiffs could have proved
14 would have given them a right for a trial under the Commerce
15 Clause claims.

16 QUESTION: Mr. Attorney General, let me put a hypo-
17 thetical question to you. Suppose the Legislature passed an
18 act declared on its face to be a substitute, in terms of
19 revenue, for all other taxes levied in the state -- state in-
20 come taxes, state real estate taxes, sales taxes, so that the
21 locals would pay no taxes at all, and all of it would, all
22 the cost of government would be put on one category of tax-
23 payers. Do you think the courts could inquire into that?

24 MR. GREELY: Are you talking about a state tax as
25 a substitute for all other state taxes? I think there's

1 broad discretion in the Legislature as to how to raise money.
2 I think the constitutional challenge to that type of a tax
3 would be the same that we have on other areas, whether there
4 is a due process question or whether there was a Commerce
5 Clause, possibly a Commerce Clause question. I think the
6 fact that the Legislature decides to have one tax is not by
7 itself significant.

8 QUESTION: But one tax on just one category of tax-
9 payers. That's the thrust of --

10 MR. GREELY: Well, assuming there was no other dis-
11 criminations or anything else, I think that that would be
12 something that could feasibly, if that was the decision of the
13 legislature, could feasibly be upheld. It depends upon
14 what the constitutional challenge was.

15 QUESTION: Well, the courts can inquire into it.
16 Could there be some judicial inquiry into whether this was a
17 discriminatory tax aimed at one category of people?

18 MR. GREELY: Oh, I suppose that that's possible,
19 certainly. I guess it depends on what the basis for the
20 challenge would be. Certainly if it was suggested that the
21 distinction, the taxpayer distinction, the class distinctions
22 were not proper, it might be an equal protection question or
23 something which the courts could certainly take a look at.

24 QUESTION: Well, it would be not an abnormal pro-
25 cess for legislators of a state, particularly, to say, let's

1 put as much as the traffic will bear on the outsiders and
2 relieve the local citizens of our state. And my hypothetical
3 is an extreme one but they are relieved of all taxes because
4 of the windfall they would get out of taxing one particular
5 industry or one particular category of taxpayers.

6 MR. GREELY: Well, that's true. And certainly if
7 that was done on just on one industry there may be a question.
8 But if you're suggesting that this tax is such a tax, the
9 severance tax in Montana applies equally to any coal that's
10 mined in Montana whether it's to be consumed in Montana or
11 without of Montana, there's no Commerce Clause discrimination
12 question about the severance tax on our coal since it applies
13 equally.

14 QUESTION: In other words, in that respect it's
15 different from the case that was argued previously, where
16 there's a difference in the tax on the material taken out of
17 the state?

18 MR. GREELY: Yes, absolutely. That sounds -- if
19 that's the factual situation in that case, there could be a
20 commerce clause discrimination problem which I don't believe
21 is present here in this case.

22 QUESTION: Well, Mr. Attorney General, under
23 the Complete Auto case, would a tax be subject to judicial
24 review of any kind at some point as it got larger and larger
25 and larger? What if this were twice as large as it is?

1 MR. GREELY: It's understandable that the Complete
2 Auto test and the Commerce Clause test have nothing to do with
3 the rates of the tax, and we have contended, as we did in the
4 lower courts, that we could tax 100 percent, 1,000 percent,
5 not because we want to or that that would be an intelligent
6 thing to do, because obviously there's market limitations and
7 there's other limitations. What we're talking about is as a
8 Commerce Clause matter that the rate of a tax is not impor-
9 tant. There could be some point when the tax, for instance,
10 will quit --

11 QUESTION: Is that because you --

12 MR. GREELY: -- bringing in revenue -- quit bringing
13 in revenue and actually maybe precluded the activity, where
14 you might possibly have a due process clause.

15 QUESTION: But you think this is just a local activi-
16 ty that you then --

17 MR. GREELY: Absolutely.

18 QUESTION: -- and that Complete Auto isn't even im-
19 plicated because this isn't a tax on commerce?

20 MR. GREELY: Well, if Complete Auto is --

21 QUESTION: Yes.

22 MR. GREELY: Yes, that's essentially correct. That's
23 our position, where we're relying on Heisler.

24 QUESTION: But if we disagreed with you on that, as
25 -- I take it the United States doesn't agree with you on that.

1 MR. GREELY: Well, we're citing Heisler for the
2 proposition that essentially that a severance tax which is a
3 local activity is not a burden on interstate commerce.
4 Obviously, at that time there was a per se rule that has pos-
5 sibly been somewhat eroded to date, but the basic holding
6 there was that mining because of the nature of the activity
7 was not a burden on interstate commerce.

8 QUESTION: The United States suggests that Complete
9 Auto does apply but the test is just satisfied.

10 MR. GREELY: Well, I think if you apply the facts
11 of our case to Complete Auto, that we meet the tests of Com-
12 plete Auto, in fact, the appellants have conceded that; for
13 the fact that they say that we do meet that test, and that
14 our rate, if we had a rate, a lower rate, that there wouldn't
15 be a problem whatsoever. The only thing that distinguishes
16 this from Complete Auto is that it has a much higher rate.
17 And then in addition to that they say, okay, the fair relation
18 test. Well, I guess the question we're saying is that I'm
19 not absolutely certain what the fair relation test means but
20 I know what it doesn't mean and I know it doesn't mean what
21 the plaintiffs say it does. And that is that under a fairly
22 related test under Complete Auto that the courts will somehow
23 adjudicate the rate of our tax and put a dollar-to-dollar
24 figure. In other words, the courts are supposed to add up
25 our trained work force, the number of roads we have in the

1 state, especially those that may be applying to the appel-
2 lants at the mine sites; that we figure out how much fire pro-
3 tection, we figure out what the social consequences will
4 be. It seems to me that this is a mammoth judicial under-
5 taking and all the cases essentially say, this is a legisla-
6 tive prerogative, this is a political question.

7 QUESTION: Mr. Greely, couldn't a state decide in
8 connection with purely local activity not to actually forbid
9 it, but that it simply didn't like the activity and taxed it,
10 say, at a rate of 75 percent?

11 MR. GREELY: I think that certainly taxes are a way
12 of discouraging activities. I think the Magnano case that
13 had to do with oleomargarine and the Pittsburgh parking case,
14 I think that there are cases in which taxes are used to dis-
15 courage activities. But I don't think it becomes a Commerce
16 Clause question unless the activities actually stop or the
17 product is prohibited from being distributed.

18 QUESTION: In Complete Auto, the tax there was a
19 state tax imposed -- as I remember, and you correct me if I'm
20 mistaken -- upon what was concededly an instrumentality of
21 interstate commerce.

22 MR. GREELY: Correct.

23 QUESTION: And the question was the constitutional
24 permissibility of any tax at all, was it not?

25 MR. GREELY: It was a question of whether or not

1 the states could tax involving interstate commerce.

2 QUESTION: Tax it at all; at all.

3 MR. GREELY: Right. That activity --

4 QUESTION: And here, as I understand it, the
5 petitioner concedes the constitutional power of the state to
6 impose a severance tax.

7 MR. GREELY: That's correct.

8 QUESTION: And the question is how much.

9 MR. GREELY: That's the question they're asking
10 this Court to determine.

11 QUESTION: And it's a different question or maybe --

12 MR. GREELY: But they're asking this Court to de-
13 termine that question. And the courts, to my knowledge,
14 have never done that because to tax is an assessment of bene-
15 fits, and there's no cases that I'm aware of that say that
16 you have to have a quid pro quo tax -- that the amount of the
17 activities of the plaintiffs in the State of Montana and their
18 mining activities, whatever damage they're doing. And the
19 problem we have, of course, with even going to trial on that
20 is that the damages that they are doing and could be done
21 could be things that we couldn't make a factual determination
22 on: the esthetic value, what's going to happen to the wild-
23 life, what's going to happen 30 years from now, at what point
24 in time do we start adding up all these things? Do we wait
25 for a few years and see what happens or do we do it now?

1 And what we're saying is, is that the Commerce Clause does
2 not require any such quid pro quo tax. that a tax is an
3 assessment of benefits; that if a corporation doesn't have
4 school children, it doesn't mean that they don't have to pay
5 school bonds.

6 QUESTION: General Greely, let me just take a step
7 further the question the Chief Justice asked you. Supposing
8 your opponent's assessment is generally correct, that this is
9 an extremely profitable tax in a way for the state and after
10 you win this case, assuming you do, you then reassess your
11 budgetary consideration and decide you don't need any other
12 taxes at all, you repeal all your other taxes and leave your
13 present tax standing in effect. Would that raise any consti-
14 tutional question in your judgment?

15 MR. GREELY: I don't know. I guess it would depend
16 on how that particular tax which -- I'm assuming that the tax
17 would be constitutional if there were no other taxes. The
18 fact that you would repeal all other taxes and just leave
19 one, I don't see how that by itself could be a constitutional
20 question. I guess I don't know what the challenge to that
21 would be. Assuming that it's otherwise constitutional --

22 QUESTION: Well, it would be precisely the same
23 challenge here, that under the last prong of the Complete
24 Auto Transit case that there is some integrity, that require-
25 ment of some relationship between the tax and something the

1 state does and I don't know exactly what that prong means
2 either, but if it means something --

3 MR. GREELY: Yes, in answer to your question, I
4 think that even though we can't say maybe exactly what it
5 means, I don't think that it would be a meaningless test.
6 For instance, the Court could have intended by that that the
7 states must impose, if they impose taxes they must allow the
8 taxpayers to avail themselves of the services, and the
9 appellants in this case haven't alleged that they don't --
10 that they're not capable of benefiting from the services that
11 Montana provides. Perhaps the Court meant that the tax must
12 somehow be related to the activities of the taxpayer in the
13 state. And I think clearly that's the case when you attach
14 the tax to the percentage of the value of the mined coal.
15 Now, I suppose -- another thing, they suggested that all the
16 states could meet this test, and I suggest to this Court
17 that that's probably true, because I think most of the state
18 taxes, certainly those that are a severance tax, would meet
19 this kind of a fairly related test and that unless the Court
20 were to find, for instance, that Montana taxed the net
21 federal income of the coal companies as opposed to anything
22 that relates to coal, maybe that wouldn't be related to what
23 the activities were.

24 But getting back to our main point, the fact is
25 that the fairly related test does not require a balancing of

1 benefits and burdens of providing certain services for the
2 taxpayers other than the ones that they would generally be
3 entitled to by living in the State of Montana.

4 QUESTION: Suppose -- hypothetically, again -- it
5 could be shown that the entire cost of the services which
6 the state gave to five taxpayers engaged in extracting natural
7 resources was \$500,000 and that the taxes imposed on them
8 were \$100 million. Do you think there could be some judicial
9 curiosity about that?

10 MR. GREELY: There possibly could be judicial curi-
11 osity but I don't believe that that factual a situation would
12 require a striking of the tax under the Commerce Clause.
13 It wouldn't require a striking of the tax under the Commerce
14 Clause.

15 QUESTION: Well, what about --

16 MR. GREELY: And no tax, to my knowledge -- I mean,
17 there's general, this is a general excise tax, this is for
18 the general -- there's no, there has been no indication by
19 the state Legislature that the reason for this tax is just
20 to take care of those dangerous things that may happen to the
21 State of Montana because of the impact of coal mining.
22 Clearly, that is one of the factors that was considered. It's
23 also to raise general revenue for the State of Montana.

24 Their concern about the impacts -- we're still
25 concerned about the impacts of strip mining in the State of

1 Montana but that's not the only purpose of the tax. We use
2 some of it for general fund, we use some of it for general
3 education, alternative energy sources, and so forth.

4 QUESTION: Then add to my hypothetical what Mr. Jus-
5 tice Stevens suggested, that all other taxes on all other
6 residents of Montana were repealed and Montanans paid no
7 tax and all the tax was thrust upon five companies or six
8 companies engaged in extracting coal and oil. Any judicial
9 inquiry then, on any clause? Not just the Commerce clause.

10 MR. GREELY: Well, I would suggest that if the tax
11 could not otherwise be questioned, when all the rest of the
12 taxes -- I don't believe that by eliminating other taxes that
13 you suddenly make one tax unconstitutional; I don't know
14 exactly what the connection would be.

15 QUESTION: You might have an Equal Protection Clause
16 problem.

17 MR. GREELY: Possibly. Possibly, that you're going
18 to ask one group of taxpayers to shoulder the burden of taxes
19 throughout the state. However, it's not necessarily -- in
20 the Carmichael case, for instance, the corporations who hap-
21 pened to have full employment were, in essence were paying a
22 tax that they didn't need to benefit from, because they kept
23 their employees on the job. But some of the other corporations
24 who had to pay less of the tax because they had some of their
25 people were unemployed, so then they did it on the basis of

1 how many workers you had in your plant, actually ended up
2 benefiting because they paid less tax but their unemployed
3 people got more benefits.

4 I think the key thing here is that this tax is not
5 a benefits-burdens or a tit-for-tat quid-pro-quo tax. The
6 fairly related test doesn't require this. A tax is a general
7 assessment, it's for the common good of government. I think
8 if this Court were to look into rates of taxes under the
9 Commerce Clause, that you would be going against the funda-
10 mental proposition as I understand the taxing laws and the
11 ability of the state to tax, and that is that they raise taxes
12 for the common good, and that the courts don't normally go
13 into an inquiry as to what the Legislature based its decision
14 on.

15 QUESTION: General Greely, help me out on one
16 detail. I take it that this tax flows into the general cof-
17 fers of the state; it is not allocated to the various counties
18 and districts as is true, say, in Alaska.

19 MR. GREELY: There is a -- we have what we call the
20 Coal Board, which is a Board appointed by the Governor, and
21 they have authority to distribute a certain amount of money,
22 and applications are made from the local governments in the
23 area where the strip mining takes place, and those applica-
24 tions for grant monies are determined by the Board and money
25 would be given to those localities for various things such as

1 schools, fire and police protection, education, or whatever.
2 But there is no direct grant. There is a percentage of the
3 fund that's set aside for local impacts, and that percentage
4 is 8.75 percent. I believe my time has expired.

5 MR. CHIEF JUSTICE BURGER: No, your time has not
6 expired, Mr. Attorney General, but this is your -- Mr. Rogers.

7 ORAL ARGUMENT OF WILLIAM P. ROGERS, ESQ.,

8 ON BEHALF OF THE APPELLANTS -- REBUTTAL

9 MR. ROGERS: Well, I'll just take a minute. I think
10 that this discussion has focused on the issue, and that is
11 whether the Complete Auto test and the Washington Stevedoring
12 test have any meaning. It's our position that they do have
13 meaning, and that the Court intended that they have meaning.
14 This, it seems to us, is a classic case because we've been denied
15 a trial and the position of Montana and the Solicitor General
16 both is that there is no limit to the tax that Montana may
17 impose. As the Attorney General said today, that they may
18 impose, that they would be entitled constitutionally to
19 impose a tax of 1,000 percent, and in the Montana court it was
20 argued that the tax would be without limit.

21 So, this is a situation where 75 percent of this
22 coal is owned by the Federal Government. Montana could not
23 impose a tax on that coal without running into the Supremacy
24 Clause, so it has taxed 30 percent allegedly on the
25 severance of the coal. And I think it's admitted by --

1 as Justice Rehnquist pointed out, by the Solicitor General,
2 that Heisler does not apply here. The Supreme Court of
3 Montana rested its case on Heisler.

4 So, we believe that we are entitled to a trial.
5 I think the questions that the Chief Justice and Justice
6 Stevens asked were most appropriate because the fact is that
7 because the tax revenues are so great as a result of this tax,
8 that other taxes are being reduced, and as the taxes continue
9 to grow and as this trust fund continues to grow, it already
10 has \$200 million, so the interest on -- I don't mean the
11 trust fund has; I mean the tax is \$200 million, so the trust
12 fund is getting up, \$100 million, and as time goes on it will
13 be in the billions, and Montana won't need any other taxes.

14 This tax already is amounting to almost, it's
15 approaching 20 percent of the total tax revenues of the state,
16 so it's only a matter of time that there will be no necessity
17 for taxes in Montana. And under these circumstances, if
18 Complete Auto means anything -- and we think it does --
19 in Washington Stevedoring case the Court pointed out that
20 there was no trial, that the appellants had not made their
21 claim of not-fairly-related. So we think the Complete Auto
22 test requires a trial, and in this case, when it was so
23 clearly tailored to fall on taxpayers outside the state, we
24 believe that we are entitled to a trial.

25 If the Court should decide in favor of Montana, that

1 we are not entitled to a trial, that means that under these
2 circumstances in the future any state could tax without limit,
3 and I think the without-limit concept would have the effect
4 of balkanizing this nation. There are mineral resources and
5 there are timber resources and all kinds of resources, and
6 if each state may tax without limit, disregarding the needs
7 of the nation and that the only remedy will be to go to
8 Congress each time and ask for Congress to preempt the tax,
9 it will be very difficult.

10 We don't think that this Court would want to create
11 that type of result. We believe that after a trial that
12 Montana will realize that this tax is excessive. Already the
13 people in Montana -- I notice some Senators are saying the
14 tax is excessive, and I think once this Court lays down some
15 general guidelines for the states, that the state legislatures
16 will tend to comply with those guidelines. We do not suggest
17 that the courts, any courts, set the tax. We say the tax
18 should be set by the state legislatures, but they should be
19 fairly related to the services and protection provided to the
20 taxpayer by the state. Thank you very much.

21 QUESTION: Mr. Rogers, may I ask you a question
22 before you conclude? You haven't had a chance to introduce
23 evidence but are there public records that would show which
24 states have the minerals that are essential to the operation
25 of our country? For example, how many states have uranium?

1 MR. ROGERS: Well, I don't know the answer specifi-
2 cally to uranium but the answer to your question is, yes,
3 there are records. For example, Montana and Wyoming together
4 have 40 percent of the coal reserves of the total country.

5 QUESTION: How many states control the copper of the
6 United States?

7 MR. ROGERS: I don't happen to know that, but they
8 are not so many. There are a few states that control the
9 copper. I think they're --

10 QUESTION: What about sulfur?

11 MR. ROGERS: -- mostly western states; Nevada and
12 Utah and a few others like that. But it would be a small
13 number of states.

14 QUESTION: What about sulfur?

15 MR. ROGERS: I would think the same thing is true
16 in the case of sulfur.

17 QUESTION: Texas and Louisiana? Maybe Florida.

18 MR. ROGERS: Yes.

19 QUESTION: What is the basic purpose of the Commerce
20 Clause, Mr. Rogers?

21 MR. ROGERS: The basic purpose of the Commerce
22 Clause is to permit a free market for goods in commerce so
23 that no state may impose an undue burden on that commerce,
24 and that the Federal Government should guard against states
25 imposing undue burdens on that commerce. And we believe that

1 in this case that's exactly what Montana has done.

2 Thank you very much.

3 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

4 The case is submitted.

5 (Whereupon, at 2:38 o'clock p.m. the case in the
6 above-entitled matter was submitted.)

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CERTIFICATE

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North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 80-581

COMMONWEALTH EDISON COMPANY ET AL.

V.

MONTANA ET AL.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: Will J. G. G. G.

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