The Loss of State Tax Revenue As a Basis for Standing: Economy, Energy Efficiency, and the Environment

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I. INTRODUCTION

The importance of the law of standing goes beyond the judicial determination that the constitutional “case or controversy” requirements of Article III have been satisfied.1 It extends past the “procedural”2 realm to resolve significant “substantive”3 issues facing modern society.

Recently, in Wyoming v. Oklahoma, the United States Supreme Court addressed the issue of standing.4 It determined that Wyoming had standing to challenge an Oklahoma statute requiring Oklahoma coal-fired electric generating plants producing power for sale in Oklahoma to burn a mixture of at least 10% Oklahoma-mined coal.5

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1. U.S. CONST. art. III, § 2, cl. 1:
The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . [and] to Controversies between two or more states.

2. “Procedural law” is defined as “that which prescribes method of enforcing rights or obtaining redress for their invasion.” BLACK'S LAW DICTIONARY 1083 (5th ed. 1979).

3. “Substantive law” is that part of law “which creates, defines, and regulates rights . . . .” Id. at 1281.


5. OKLA. STAT. tit. 45 § 939 (Supp. 1988)[hereinafter the Act]:
All entities providing electric power for sale to the consumer in Oklahoma and generating said power from coal-fired plants located in Oklahoma shall burn a mixture of coal.
The Court ruled Wyoming met the requirements for standing since its severance tax revenues, linked directly to the extraction and sale of coal, declined as a result of the Oklahoma statute. The "procedural" focus of this article's analysis is the loss of state tax revenue as a basis for standing in interstate disputes. Initially it reviews the "substantive" history of standing under Article III. Next it analyzes the three principal cases relied on by the Court in concluding Wyoming had standing to challenge the Oklahoma statute: Maryland v. Louisiana, Texas v. Florida, and Simon v. Eastern Kentucky Welfare Rights Organization. After discussing the opinion of the Court in Wyoming, the article turns to the complicated interplay of states' competing economic interests, balanced with the limitations of the Commerce Clause; the goal of efficient energy consumption; and the environmental repercussions of allowing loss of state tax revenue as a basis for standing in interstate disputes. The last section synthesizes the analysis of competing interests against the background that contains a minimum of ten percent (10%) Oklahoma mined coal, as calculated on a BTU (British Thermal Unit) basis.

7. Supra note 4.
8. Supra note 1.
12. See infra IV.
13. U.S. Const. art I, § 8, cl. 3. See infra V.A.
14. See Jess M. McCarty, Note, Coal, State Protectionism, and the 1990 Clean Air Act Amendments: Why Keeping Sears in Illinois Withstands Commerce Clause Scrutiny, But Keeping Coal Mining Jobs Does Not, 1992 U. Ill. L. Rev. 1119. The choice for midwestern states to comply with the 1990 Clean Air Act Amendments, 42 U.S.C. § 7651 (1992), is to install scrubbers and burn local high-sulfur coal or import low-sulfur coal from western states and burn it unscrubbed. The Illinois Coal Scrubber Act (ICSA) requires utilities to install scrubbers and seek state approval before making interstate coal purchases. McCarty argues that even if the 1990 CAAA does not preempt state laws, the ICSA is invalid under the dormant Commerce Clause because it discriminates against interstate commerce. He further urges midwestern states to re-examine the underlying goals of such statutes and concludes money should be spent on attracting new industries and retraining workers for new jobs instead of propping up declining high-sulfur coal industries. See also infra V.B.
15. See Gene R. Nichol Jr., Justice Scalia, Standing, and Public Law Litigation, 42 Duke L.J. 1142-43 (1992). Nichol considers the opinion of Justice Scalia in Lujan v. Defenders of Wildlife Fed'n, 497 U.S. 871 (1990), as marking a "transformation in the law of standing" "the law of "judicial control of public officers." Nichol, supra note, at 1142 (citing Louis L. Jaffe, Judicial Control of Administrative Action 459 (1965)). Nichol interprets Justice Scalia's opinion to hold that "legislatively pronounced" "public rights" cannot provide a basis for standing in federal courts unless they coincide with the Justices' views of discrete, concrete, and tangible injury. Id. (citing Lujan, 112 S. Ct. at 2142-46). Lujan denied standing to the environmental group challenging non-application of the Endangered Species Act overseas because its members, to show direct injury, demonstrated only an unspecified intent to return to overseas places they had previously visited. This demonstration did not constitute an "imminent injury." Lujan, 112 S. Ct. at 2135-38. Nichol finds the decision difficult to reconcile with the language and history of regulation regarding standing in federal court.
of "generational equity." The article concludes that a state's loss of
tax revenue as a "procedural" basis for standing in interstate disputes
must be balanced with the "substantive" policy issues discussed herein
to ensure that the courts strike a proper balance when considering
disputes.

II. HISTORY OF STANDING

A. Overview

To understand the implications of standing for sovereignty one
must step back and review the history behind the standing issue. With
that understanding, the focus can narrow to the loss of state tax reve-
nue as a basis for standing, and Wyoming vs. Oklahoma's impact on
other interstate disputes.

The history of sovereignty foreshadows the modern debate on
standing. The central authority's expansion of standing decreases a
state's sovereignty, by exposing its legislation and policy to legal at-
tack. In the past, if the balance of power rests with the states, the
nation becomes weak, as in Ancient Greece and the emerging
United States under the Articles of Confederation. However, history shows that when excessive power rests with a strong central au-
thority, people view it as oppressive, as shown in the Mayflower

16. See generally Edith Brown Weiss, Our Rights and Obligations to Future Generations for
the Environment, 84 AM. J. INT'L L. 198 (1990). See also infra V.F.

17. Richard Stillwell, Greece: the Birthplace of Science and Free Speech, in EVERYDAY
LIFE IN ANCIENT TIMES 185, 195 (Rhys Carpenter et al. eds., 5th ed. 1964). Sovereignty of the state
and nation is not a static concept, but constantly adapts to the needs of the times. In ancient
Greece, the city states retained the balance of power, which may have contributed to their eventu-
al downfall. Although Athens and Sparta united in 490 B.C. to turn back the Persian hordes
of Darius the Great at Marathon, those leagues and alliances were merely a temporary expedi-
cency, and there was no real amalgamation of the Greek states into a federation. Eventually, the
Greek states bowed to the destruction of Lucius Mummius in 146 B.C., when Corinth was de-
stroyed for leading the states against the Roman power. Id.

18. THE ARTICLES OF CONFEDERATION, art. IX, 6 2, (1781), reprinted in ROOTS OF THE
REPUBLIC, 240-41 (Stephen L. Schechter ed. 1990). It was not until the drafting of the Articles
of Confederation, however, that the first pronouncements came on the issue of sovereignty.
Those disputes between the states were to be resolved through a cumbersome procedure by "the
united states in congress assembled," a right that was given to the Supreme Court in Article III
in the United States Constitution of 1787. The Articles permitted each state to retain its sover-
eignty, leaving the national government purposefully weakened, to prevent the abuses of a
strong central government which led to the Revolution. STEPHEN B. PRESSER & JAMIL S.
ZAINALDIN, LAW AND AMERICAN HISTORY: CASES AND MATERIALS 139 (1980).
and the conflict between the Colonies and the British Empire. The framers of the Constitution in the Federalism debates attempted to strike a balance that would provide for a strong union and an empowered populace, particularly in the debate concerning the power of taxation and the role of the judiciary. This balance and

19. This supremacy of the sovereign led to the migration of the first colonists from Britain to America, who granted to themselves the important rights of enacting their own laws and constitutions. The Mayflower Compact, 62 (November 11, 1620), reprinted in Roots of the Republic, (Stephen L. Schechter ed. 1990) at 22-23:

Having undertaken, for the glorie of God, and advancements of the Christian faith and honour of our king and countrey, a voyage to plant the first Colonie in the Northern Parts of Virginia, doe by these presents solemnly & mutually in the presence of God, and one of another, covenant & combine our selves together into a civil body politic; for our better ordering, & preservation & furtherance of the ends aforesaid; and by vertue hearof to enacte, constitute, and frame, shuch just & equall lawes, ordinances, Acts, constitutions, & offices, from time to time, as shall be thought most meete & convenient for the generall good of the Colonie: unto which we promise all due submission and obedience. (emphasis added)

20. Later, the supreme power of taxation, which flowed from the rights of the British sovereign, led ultimately to American independence. Bernard Bailyn, The Ordeal of Thomas Hutchinson, in Law and American History 90 (Stephen B. Presser & Jamil S. Zainaldin eds., 1980). "Taxing? It was a necessary power of any government that sought to serve society ... . Taxing was simply an attribute of supreme authority, a mechanism necessary for its survival ... ." Id. at 92.

21. Extending jurisdiction to the judiciary in interstate disputes was not automatic. Mr. Randolph proposed in Resolution 9 on May 29, 1787 that: "[A] National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature. . . . to hear . . . all . . . cases in which foreigners or citizens of other States applying to such jurisdictions may be interested . . . ." Drafting the U.S. Constitution, at 1340-41 (Wilbourn E. Benton, ed. 1986) (emphasis added).

The issue of sovereignty was discussed on June 5, in the Committee of the Whole concerning establishment of inferior tribunals under national authority. Mr. Rutledge argued a national tribunal would infringe on the jurisdiction of the States. Mr. Madison argued "[a]n effective Judiciary establishment commensurate to the legislative authority, was essential. A government without a proper Executive and Judiciary would be the mere trunk of a body, without arms or legs to act or move." Id. at 1341. On August 6, the Report of the Committee of Detail extended jurisdiction "to controversies between two or more States . . ." for the first time. Id. at 1349. Resolution 9 was deleted, but the language "to controversies between two or more States . . ." was reinsiteted in the present form of Art. III, § 2, cl. 1 on August 27. Id. at 1352.

22. The Federalist No. 32, at 153 (Alexander Hamilton) (Bantam ed., 1982) (emphasis in original). "There is plainly no expression in the granting clause which makes that power [of taxation] exclusive in the Union. There is no independent clause or sentence which prohibits the States from exercising it." Id. See also, Alexander Hamilton, An Address to the Constitutional Convention of New York, on the Subject of the Federal Constitution (1788), reprinted in 11 Modern Eloquence, at 23, 26 (Ashley H. Thorndike ed., 1923).

23. The Federalist No. 80, at 404-05 (Alexander Hamilton) (Bantam ed. 1982). It states:

The power of determining causes between two States . . . is perhaps not less essential to the peace of the [U]nion than that which has been just examined [between the United States and foreign nations] . . . . Whatever practices may have a tendency to disturb the harmony between the States are proper objects of federal superintendence and control. Id. at 404-405.

In addition, the uniqueness of the American judicial system stands out for its ability to permit courts to challenge the constitutionality of a particular law through an individual case or controversy. I Alexis De Toqueville, Democracy in America, reprinted in Presser & Zainaldin, supra note 20, at 274-76. De Toqueville states:
the nation broke down in the war to determine whether the Union would prevail.\textsuperscript{24} How a nation strikes the balance of power between states and a central authority determines how national problems are solved.

B. \textit{Article III}

1. Background

Jurisdiction under Article III, section 2 of the Constitution is limited to “cases” and “controversies.”\textsuperscript{25} A case and controversy must be ripe, deal with a justiciable harm, and be a question not committed to another branch of government.\textsuperscript{26} For example, the framers did not accept a proposal that the President and Congress obtain advisory opinions from the Supreme Court.\textsuperscript{27}

2. Standing of the States

States may sue on behalf of their citizens as \textit{parens patriae} to protect the general comfort, health, or property rights of their citizens threatened by the proposed or continued action of another State. Though it cannot present and enforce claims of their citizens as a
trustee against a sister State under its parens patriae power, a state may sue to protect its citizens from environmental damage “in original actions where the injury affects the general population of a state in a substantial way.” In such an instance, the state is suing for an injury to its sovereign capacity and not for an injury to territory it specifically owns.

III. JUDICIAL INTERPRETATIONS OF STANDING

A. Overview

To understand the analysis in Wyoming of the loss of state tax revenue as a basis for standing, it is useful to examine the three criteria of standing used by the court. First, a state must be “directly affected.” Second, a state must suffer a “real and substantial” injury. Third, and finally, a state must have a “personal interest” at stake to invoke the court’s power.

B. The First Requirement: “Directly Affected”

In order for a state to have standing to sue another state, the state must be “directly affected” by the action of the other state. In Maryland v. Louisiana, relied upon by the court in Wyoming, several states, pipeline companies, and the Federal Energy Regulatory Commission (FERC) sought review of a Louisiana statute imposing a tax on certain uses of natural gas brought into Louisiana from the Outer Continental Shelf (OCS).

Louisiana’s tax fell on the “first use” of the gas, which included the sale, transportation or processing of the gas. The tax, therefore,

28. Id. at 84, n.224 (citing North Dakota v. Minnesota, 263 U.S. 365, 375-76 (1923); New Hampshire v. Louisiana, 108 U.S. 76 (1883); Louisiana v. Texas, 176 U.S. 1, 16-20 (1900), and Maryland v. Louisiana, 451 U.S. 725, 736-39 (1981)).
29. Id. at 84 & n.225 (citing Missouri v. Illinois, 180 U.S. 208 (1901)).
30. Id. at n.226 (quoting Maryland, 451 U.S. at 737).
38. Id. at 730-32. In 1978 the Louisiana Legislature enacted a tax of seven cents per thousand cubic feet natural gas on the “first use” of any gas imported into Louisiana which was not previously subjected to taxation by another state or the United States. The estimated annual revenue was $150 million. Various exemptions from and credits for the tax were also allowed. LA. REV. STAT. ANN. §§ 47:1301-07 (West Supp. 1981). The amount of the tax equalled the
was imposed upon the pipeline companies bringing the gas into Louisiana for processing. However, since nearly 98 percent of the gas brought into Louisiana from the OCS went to out of state consumers, the plaintiff states argued the tax increased costs almost exclusively to consumers in their states. Louisiana argued the case should be dismissed for lack of standing because the tax was imposed on pipeline companies and not directly on the ultimate consumers.

The court determined the standard permitting standing was met if the alleged injury "fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." The court held the plaintiff states qualified for standing because they were considered substantial consumers of natural gas, to whom the pipeline companies passed on the cost of the tax with the approval of the FERC. While collected at the pipeline, the tax burdened the state's consumers in a "substantial and real" way, because their natural gas cost increased as a direct result of the imposition of Louisiana's "First Use Tax."}

C. The Second Requirement: "Real and Substantial" Injury

In order to sue another state, a state must be at risk of suffering a "real and substantial" injury. In Texas v. Florida, upon which the Wyoming court later relied, Texas brought an action in the nature of severance tax the State imposed on Louisiana gas producers, and was owed by the owner at the time of the first taxable "use" within Louisiana. The purpose of the tax was to reimburse the people of Louisiana for damages to the State's waterbottoms, barrier islands, and coastal areas introduced by natural gas from areas not subject to state taxes, and to compensate for costs incurred in protecting those resources. In addition, it was designed to equalize competition between gas produced in Louisiana, subject to the state severance tax of seven cents per thousand cubic feet, and gas produced elsewhere, which was not subject to the severance tax, such as OCS gas. The statute was found to violate the Commerce Clause and the Supremacy Clause.

39. Maryland, 451 U.S. at 728-737. The complaint sought a declaratory judgment that the "First Use Tax" was unconstitutional under: (1) the Commerce Clause, art. I, § 8, cl. 3; (2) the Supremacy Clause, art. VI, cl. 2; (3) the Import-Export Clause, art. I, § 10, cl. 2; (4) the Impairment of Contracts Clause, art. I, § 10, cl. 1; and (5) the Equal Protection Clause of the Fourteenth Amendment. The statute was found to violate the Commerce Clause and the Supremacy Clause.

40. Id. at 735. The Court stated under that view the alleged interests of the plaintiff States would not fall within the type of "sovereignty" concerns justifying exercise of original jurisdiction under art III, § 2, cl. 2 and 28 U.S.C. § 1251(a).

41. Id.

42. Maryland, 451 U.S. at 737 & n.13. FERC consistently took the position that the tax was unconstitutional. FERC's approval of the pass-through was expressly conditioned on the pipeline companies taking legal action to determine the legality of the tax and providing for refund to the customers if it should be declared unconstitutional.

43. Id.


interpleader to determine the domicile of a decedent. Texas brought the action in order to resolve four states’ claims for death taxes upon the decedent’s estate.\footnote{Id. at 401-04.}

In determining whether the threshold for standing was met, the court stated that when a court of equity is asked to prevent a loss which might otherwise result from the independent prosecution of competing and mutually exclusive claims, the court is faced with a justiciable issue.\footnote{Id. at 407.} That justiciable issue constitutes “case” or “controversy” within the meaning of Article III.\footnote{Id.} Furthermore, when the case is between states as rival claimants, with a “real and substantial” risk of loss, the case is within the original jurisdiction of the court.\footnote{Texas v. Florida, 306 U.S. 398, 410 (1939).} As the court’s jurisdiction arose in order to avoid the risk of loss from the possibility of prosecution of multiple claims, the court had to assess that risk.\footnote{Id. at 410.} The court found that each of the four states had made a good faith assertion that the decedent was domiciled within their state at the time of his death.\footnote{Id. at 408.} Each state was preparing to enforce a lien on decedent’s intangibles, which would be taking place if it were not for the original action.\footnote{Id. at 408-09.} Furthermore, the amount of the estate was insufficient to satisfy all claims, and none of the of the four states would consent to become a party to any of the other state’s proceedings to determine the right to collect the tax.\footnote{Id. at 409-10.} Consequently, the right of Texas to assert its tax lien was in jeopardy and without any other forum for remedy.\footnote{Texas, 306 U.S. at 410 (1939).}

D. The Third Requirement: “Personal Stake”

In Simon v. Eastern Kentucky Welfare Rights Organization,\footnote{426 U.S. 26 (1976).} the Court denied standing to indigents and indigent organizations suing the Secretary of the Treasury and the Internal Revenue Service for

\begin{itemize}
  \item 46. Id. at 401-04.
  \item 47. Id. at 407.
  \item 48. Id.
  \item 50. Id. at 410.
  \item 51. Id. at 408.
  \item 52. Id. at 408-09.
  \item 53. Id. at 409-10.
  \item 54. Texas, 306 U.S. at 410 (1939).
  \item 55. 426 U.S. 26 (1976).
\end{itemize}
issuing a revenue ruling allowing favorable tax treatment to a non-profit hospital that offered only emergency-room services to indigents. The indigents and organizations alleged the ruling extended tax exempt status to those hospitals that refused indigents care other than emergency room treatment, which plaintiffs said limited indigent access to medical care. The Court denied standing, however, finding that neither the individuals or the groups could allege a "personal stake" in challenging the agency's actions.

The Court recognized the fundamental principle that the role of the judiciary is limited to actual "cases or controversies." The question "is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.

The Court addressed separately the standing of the organizations and individuals. With respect to the organizations, it determined there was no injury to themselves as organizations. Since injury could only be established as representatives of members injured in fact, their interest constituted only a special interest in the health problems of the poor, which was insufficient to establish standing.

Continuing the analysis, the Court conceded that all the individuals, in one sense, suffered injury in the deprivation of access to hospital services. However, it determined injury "at the hands of a hospital," was insufficient to meet the "case" or "controversy" requirement because no hospitals were named as defendants. Because

56. *Id.* The individual plaintiffs described occasions when they, or a member of their family, had been disadvantaged in seeking needed hospital services because of indigency. Most involved refusal of the hospital to admit the person because of inability to pay a deposit or advance fee, even though enrolled in Medicare. *Id.* at 32-33. The complaint alleged each of the hospitals involved had been determined by the Secretary and Commissioner to be a tax-exempt charitable corporation, receiving substantial private contributions under 26 U.S.C § 501(c)(3). *Id.* at 29. It further alleged by extending tax benefits to the hospitals, despite their refusals to treat indigents, the defendants were "encouraging" hospitals to deny services to the individual plaintiffs and plaintiff organizations. Plaintiffs alleged "injury in their opportunity and ability to receive hospital services in nonprofit hospitals which receive . . . benefits . . . as 'charitable' organizations" and intended beneficiaries of the Code sections granting favorable tax treatment to "charitable organizations." *Id.* at 32-33.


58. *Id.* at 38 (citing Warth v. Seldin, 422 U.S. 490, 498-99 (1975)).

59. *Id.* at 40-46.

60. *Id.* at 40.

61. *Id.* (citing Warth v. Seldin, 422 U.S. 490, 511 (1975)).

62. *Id.*

only the Department of Treasury was named, the Court held the injury was the independent action of a third party not before the Court, and thus was insufficient to establish standing.

Second, the Court found that by only “encouraging” hospitals to deny services to indigents through the revenue ruling, it was “purely speculative” whether the denial of services could be traced to such actions instead of decisions made by the hospital without regard to tax implications. Equally speculative was whether the remedial powers of the Court would result in the availability of hospital services to injured individuals.

IV. Wyoming v. Oklahoma

A. Statement of the Case

The dispute between the two states began when Wyoming petitioned the United States Supreme Court to assume original jurisdiction. The complaint challenged an Oklahoma statute requiring coal-fired electric generating plants producing power for intrastate sale to

64. Id. at 41.
65. Id. at 41-42.
66. Id. at 42-43.
67. Id. at 43.
68. Wyoming v. Oklahoma, 112 S. Ct. 789, 793-94 (1992). The court granted Wyoming permission to file the complaint to invoke original jurisdiction. Wyoming v. Oklahoma, 487 U.S. 1231 (1988). Oklahoma filed a motion to dismiss, asserting Wyoming lacked standing, which the court denied and ordered Oklahoma to answer Wyoming's complaint within 30 days. Wyoming v. Oklahoma, 488 U.S. 921 (1988). The Court then appointed a Special Master. Wyoming v. Oklahoma 489 U.S. 1063 (1989). Each party requested summary judgment. Wyoming argued the Act was a per se violation of the Commerce Clause. Oklahoma argued that the Act was constitutional, Wyoming had no standing, and original jurisdiction was improper. Id. The Special Master recommended conclusions of law. He found that Wyoming had standing and original jurisdiction was appropriate. The second conclusion of law was that the Act facially and effectively discriminated against interstate commerce because Oklahoma failed to demonstrate any legitimate purpose for the statute. The final recommendation of the Report to the Court was made in the alternative. The first alternative was that the court dismiss the action, without prejudice to Wyoming, as it related to an Oklahoma-owned utility, the Grand River Dam Authority (hereinafter GRDA). The second alternative was to find the Act severable to the extent it constitutionally applied to GRDA. Id. The parties requested adoption of the Special Master's Report and contained conclusions of law. Wyoming v. Oklahoma, 111 S.Ct. 2822 (1991). The court denied the requests and set the case for oral argument because constitutionality of the Act was in question. Id. The court adopted, with one exception, the recommended findings of fact and conclusions of law of the Special Master.
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burn a mixture of at least 10 percent Oklahoma-mined coal. Wyoming asked the Court to declare that the statute violated the Commerce Clause and to enjoin permanently enforcement of the Act. The Court granted the injunction.

B. Facts

The facts of the case demonstrate the conflicting economic interests of the two sovereign states. Wyoming is a major coal-producing state which in 1988 shipped coal to 19 other states including Oklahoma. Oklahoma was Wyoming's third largest out-of-state consumer, purchasing eight percent of Wyoming’s total coal production. Because Wyoming imposed a severance tax upon coal extracted within its boundaries, it collected taxes on coal extracted by eight mining companies that sold to four utility companies in Oklahoma.

In June 1985, the Oklahoma Legislature adopted a concurrent resolution with the explicit goal of spurring local economic development and retaining ratepayers' dollars in Oklahoma. The legislature requested Oklahoma utility companies which used coal-fired generating plants to consider plans to blend 10 percent Oklahoma coal with

WHEREAS, the use of Oklahoma coal would save significant freight charges on out-of-state coal from the State of Wyoming, and
WHEREAS, the coal-fired electric plants being used by Oklahoma utilities are exclusively using Wyoming coal; and
WHEREAS, the Oklahoma ratepayers are paying $300 million annually for Wyoming coal; and
WHEREAS, a 1982 Ozark Council Report states that $9 million of the ratepayers dollars was paid as severance tax to the State of Wyoming . . . .
NOW, THEREFORE, BE IT RESOLVED . . . :
THAT Oklahoma utilities using coal-fired generating plants seriously consider using a blend of at least ten percent Oklahoma coal with Wyoming coal and continue to meet air quality standards.
THAT the result of such a blend would assure at least a portion of the ratepayer dollars remaining in Oklahoma and enhancing the economy of the State of Oklahoma.

69. Wyoming, 112 S. Ct. at 793 n.1.
70. Id.
71. Id. at 804.
72. Wyoming, 112 S. Ct. at 794.
73. Id. at 794 n.3.
74. Id.
75. Id. (citing Wyo. STAT. §§ 39-6-301 to 39-6-308 (1990 and Supp. 1991)). The tax is assessed against the extractor and is payable upon extraction at fair market value. Id.
76. Id. The eight mining companies that sell to the four Oklahoma utilities were not parties to the dispute.
the Wyoming coal.\textsuperscript{78} No plant heeded the resolution.\textsuperscript{79} In response, the legislature passed the Act mandating 10 percent minimum purchase of Oklahoma coal.\textsuperscript{80} A year passed without compliance.\textsuperscript{81} Consequently, the Oklahoma Legislature adopted a concurrent resolution which directed GRDA, as a state-owned public utility, to comply with the Act.\textsuperscript{82}

Prior to the Act, the utilities purchased nearly 100 percent of their coal from sources in Wyoming from 1981 to 1984.\textsuperscript{83} These purchases increased in 1985 and 1986 after adoption of Oklahoma Senate Resolution 21.\textsuperscript{84} The utilities reduced purchases of Wyoming coal in favor of Oklahoma coal after the Act became effective on January 1, 1987.\textsuperscript{85} Wyoming estimated that it lost severance taxes in 1987 of $535,866; in 1988 of $542,352; and $87,130 in the first four months of 1989.\textsuperscript{86} Wyoming had an excess mining capacity.\textsuperscript{87} This formed the basis for the argument to the court that the excess could not be sold

\textsuperscript{78} Id.
\textsuperscript{79} Id. The four affected utilities in Oklahoma included three that are privately owned: the Oklahoma Gas and Electric Company, Public Services Company of Oklahoma, and Western Farmers Electric Cooperative. The fourth utility, the GRDA, is an agency of the State of Oklahoma. Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Wyoming, 112 S. Ct. at 795 n. 5. See S. Res. 82, 1988 Okla. Sess. Laws 1915:
WHEREAS, the passage of this law in 1986 has provided over 700 new jobs in Oklahoma’s coal-mining industry and related employment sectors; and
WHEREAS, another benefit of this law is an additional $31 million of taxable income has been generated through the purchases of Oklahoma mined coal; and

\* \* \* \* \*

WHEREAS the Grand River Dam Authority has failed to comply with said law and has refused to recognize the intent of the Oklahoma State Legislature to utilize Oklahoma mined coal,

NOW, THEREFORE, BE IT RESOLVED . . . :

THAT the Oklahoma State Legislature hereby directs the Grand River Dam Authority to immediately begin purchasing Oklahoma mined coal and to comply with the law as stated in [the Act].

\textsuperscript{83} Id. (citing Report of the Special Master 7-8). While the Oklahoma coal has a higher BTU rating than Wyoming coal, because of its higher sulfur content the Oklahoma coal does not burn as cleanly as Wyoming coal and causes more pollution. Id. at n. 7.

\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Wyoming, 112 S. Ct. at 795, n.6. The court observed Oklahoma did not contradict these estimates. Its expert emphasized Wyoming experienced a more severe loss in severance tax revenues due both to its reduction of the severance tax rate and a decline in coal market prices. This testimony was construed by the court to mean the Oklahoma position suggested the estimate of lost severance tax was too high, indicating Wyoming did not provide 100\% of coal purchased. Id. However, the dissent argued that a genuine issue of material fact remained as to Wyoming’s injury-in-fact. Id. at 805-07 (Scalia, J., dissenting).

\textsuperscript{87} Wyoming, 112 S. Ct. at 795, n.6 & n.8. The Director of the Wyoming Department of Environmental Quality stated that as of 1987, the permitted capacity in the Powder River Basin was 318 million tons, whereas total production from all mines was 146.5 million tons. Id.
elsewhere to compensate for the loss of severance taxes derived from purchases by Oklahoma importers. 88

C. **Standing**

The test for invoking original jurisdiction may be met in two ways. 89 The first is whether one state has been wronged by another, furnishing grounds for redressability. The second is by asserting a right susceptible of judicial enforcement according to accepted jurisprudential principles of common law or equity. Both were met by Wyoming. 90 The first test was met because Wyoming alleged harm from the loss of severance taxes directly caused by passage of the Act. 91 The second part was met by Congress granting authority to the Supreme Court to resolve disputes between states. 92

The court adopted the determination of the Special Master that Wyoming's complaint satisfied the requirements for the court to grant standing. Wyoming alleged a real and substantial harm (i.e. loss of tax revenue) caused directly by the Oklahoma statute. 93

In footnote nine of the opinion, the court explained its rationale for deciding the loss of severance tax revenues constituted a direct injury:

We note as well that the recitals in Oklahoma's initial concurrent resolution reflect that coal-fired electric plants within Oklahoma were exclusively using Wyoming coal, with the attendant recognition that "$9 million of the ratepayers dollars was paid as severance tax to the State of Wyoming." Res. 21. The Wyoming coal that would have been sold - but no longer will be sold due to the Act - to Oklahoma utilities by a Wyoming producer is subject to the tax when extracted. Wyoming, which stands to regain these lost revenues should its suit to overturn the Act succeed, is thus "directly affected in a 'substantial and real' way so as to justify exercise of this Court's original jurisdiction." 94

88. Id.
90. Id. (citing Report of Special Master).
91. Id.
92. Id. at 796 (citing 28 U.S.C. § 1251(a)).
93. Id. ("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.").
Furthermore, the court rejected the argument by Oklahoma that Wyoming was not engaged in the commerce or affected as a consumer, and therefore lacked the type of direct injury cognizable in a Commerce Clause action.\textsuperscript{95} Authorities cited by Oklahoma involved claims of \textit{parens patriae} standing rather than allegations of direct injury to the State itself.\textsuperscript{96} A similar argument was rejected by the court in \textit{Hunt v. Washington Apple Advertising Comm'n},\textsuperscript{97} in which a statutory agency had standing to challenge a discriminatory North Carolina apple grading system as violative of the Commerce Clause.\textsuperscript{98} It determined \textit{Hunt} supported Wyoming's 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."\textsuperscript{99}

D. Minority Opinion on Standing

The minority disagreed that a state had standing on the basis of consequential loss of tax revenue.\textsuperscript{100} Three reasons supported the minority's conclusion,\textsuperscript{101} but only two are important to our analysis. First, there was no injury in fact.\textsuperscript{102} Second, the dissenting opinion stated Wyoming was not within the "zone of interest" constitutionally protected under the negative Commerce Clause.\textsuperscript{103}

1. Injury in Fact

The question of whether Wyoming would have sold coal in addition to that diverted from the lost sales to Oklahoma purchasers led

\textsuperscript{95} Id. at 797.
\textsuperscript{96} Id. (citing, Oklahoma v. A., T., & S.F.R. Co., 220 U.S. 277, 287-89 (1911)(refusing to accept jurisdiction because the State of Oklahoma did not ship goods in its governmental capacity, finding the real controversy was between the railway company and certain Oklahoma citizens who shipped by rail); Louisiana v. Texas, 176 U.S. 1, 16-22 (1900)(refusing to accept jurisdiction when a Texas State Health Officer placed a quarantine on all goods imported from New Orleans because of fear of yellow fever outbreaks)).
\textsuperscript{97} 432 U.S. 333 (1977).
\textsuperscript{98} Id. In \textit{Hunt}, the Commission, a statutory agency designed to promote and protect the Washington State apple industry, was composed of 13 growers and dealers from electoral districts by their peers, all of whom paid mandatory assessments to finance its operations. The direct injury requirement was met because the "contraction of the market for Washington apples... could reduce the amount of the assessments due the Commission and used to support its activities." Id. at 341, 345.
\textsuperscript{100} Wyoming, 112 S.Ct. at 804 (Scalia, J., dissenting) (citing the historical roots of the "negative Commerce Clause" from Cooley v. Board of Wardens of Port of Philadelphia, 58 U.S. (12 How.) 299 (1852)).
\textsuperscript{101} Id. at 805-807.
\textsuperscript{102} Id. at 806.
\textsuperscript{103} Id. at 808.
the minority to question if a genuine issue of material fact remained, making the case unsuitable for a summary judgment. The majority reaffirmed the burden of the injured party to show injury on the basis of concrete facts. However, the minority was not satisfied that it was an indisputable fact that Wyoming had lost tax revenues specifically as a result of the Oklahoma statute.

The test for injury in fact, the minority said, was not merely whether the Act "caused Oklahoma sales to be lost," but whether it prevented Wyoming "severances" of coal from occurring. Analytically, the minority saw two possible rationales for connecting sales loss with tax loss. The one adopted by the majority was that "excess mining capacity" was generated by the loss of sales to Oklahoma. The minority posited that an issue existed of whether the loss in sales and concurrent loss in tax revenue was because of Wyoming's coal production outstripping demand. Consequently, there has been no loss of tax revenue, simply a general loss in sales not directly tied to Oklahoma's act. For this reason the minority contended summary judgment stage was not the appropriate place to weigh the evidence to determine whether there was an injury in fact.

2. Zone of Interest

Assuming, arguendo, that Wyoming was injured in fact, the dissenting opinion concluded it still lacked standing because it was not within the "zone of interest" protected by the negative Commerce Clause. Historically, the negative Commerce Clause was intended to protect the national free market. Free trade among the states is

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104. Id.
106. Id.
107. Id. (emphasis in original).
108. Id. at 807.
110. Id.
111. Id.
112. Id. at 807-08 (citing Air Courier Conference of America v. American Postal Workers' Union, 498 U.S. 517, 524 (1991) and Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 320-21 n. 3 (1977) (applying zone of interest test to negative Commerce Clause)).
constitutionally protected to benefit those engaged in interstate commerce.114

The minority argued the interests of the coal companies under this analysis would pass the zone of interest test.115 However, the right of Wyoming to collect taxes was only "marginally related" to standing.116 The minority argued the Court's rationale would open the door to every state taxing interest as potentially falling within the realm of the Commerce Clause.117 More importantly, an outright abandonment of the zone of interest test in favor of a de facto causality test would result in a marked increase in Commerce Clause suits between states.118

V. Analysis119

This analysis will first address the struggle between the economic interests of the states and the Commerce Clause. Second, it will review the goal of efficient energy consumption on the part of the state and federal governments. Third, it will address the environmental repercussions arising from using the loss of state tax revenue as a basis for standing in interstate disputes. Finally, it states that in accordance with the principles of "generational equity," the competing interests must be synthesized in a policy which will meet the needs of future generations. The loss of state tax revenue as a "procedural" basis for

115. Id. at 809.
116. Id.
117. Id. at 809-10. The dissent stated:
   Of course, if the state interest in collecting severance taxes does fall within the zone of interests of the Commerce Clause, so must every other state taxing interest. The zone-of-interest test, as opposed to the injury-in-fact requirement, turns on the type of interest asserted and not on its speculativeness or its degree of attenuation from its alleged source. The injury-in-fact requirement, of course, will still remain "but if and when de facto causality can be established, every diminution of state revenue attributable to the allegedly unconstitutional commercial regulation of a sister State will now be the basis for a lawsuit. Suits based on loss of sales tax revenue ought to become a regular phenomenon, since it is no more difficult to show that an automatic sales tax was lost on a particular sale than it is to show that the severance tax was lost here. Further expansions of standing (or irrational distinctions) lurk just around the corner" if a State has a litigable interest in the taxes that would have been paid upon an unconstitutionally obstructed sale, there is no reasonable basis for saying that a company salesman does not have a litigable interest in the commissions that would have been paid, or a union in the wages that would have been earned.
118. Id. at 810 (citing Associated General Contractors of California, Inc. v. Carpenters, 459 U.S. 519, 536 (1983)("The judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing.").
119. I intentionally departed from more traditional law review practice and left the following analysis in essay form.
standing in interstate disputes must be balanced with the "substantive" policy issues to ensure that courts strike a proper balance in the resolution of the disputes.

A. Economic Interests of the States and the Commerce Clause

The issue of sovereignty remains a strong undercurrent in the balancing of the economic interests of states and in the Commerce Clause's restriction against affecting interstate commerce. The first sovereignty issue is the fundamental struggle between the federal and state governments, resolved in favor of the federal interest by the Supremacy Clause. The second issue is an economic struggle over whether an individual state will prosper at the expense of a sister state.

An analysis of the supremacy aspect of the cases is instructive. The previous decisions in Wisconsin, Texas, and Simon were relied on by the Court in Wyoming to justify its ruling that standing may be based on the loss of state tax revenue. However, in Maryland, the direct conflict between the federal and state sovereign interests is not explicit. It is implied by the invocation of the Commerce Clause against an Louisiana's discriminatory "first use" tax statute. Nor is there a direct conflict between federal and state interests in Texas. In Simon there was no issue of supremacy, since the dispute concerned federal tax law and private hospitals "leaving the state out of the picture entirely. Wyoming paralleled Maryland in its treatment of sovereignty issue.

The next issue is whether one state may profit at the expense of a sister state. Again, the issue is not present in Simon. A distinction may be drawn, however, between Texas and the cases of Maryland and Wyoming. Texas involved the competing interests of states to determine which had the superior nexus that would permit collection of taxes from the decedent's estate. There was no inherently discriminatory aspect. A common aspect of Maryland and Wyoming, however, may be termed a "line of demarcation." In both cases the United States Supreme Court found that the statutes sought to unconstitutionally discriminate between home state and sister state by distinguishing between them simply on the basis of being a different sovereign state.

While the legislation in both cases arguably sought to equalize the economic strength of the sister states, they both did so in a way that focused on the apparent disparate treatment of in-state and out-of-
state interests. This economic disparity is not per se rejected, but rather must yield to the Commerce Clause prohibition when there is no other legitimate state reason other than simple economic protectionism.

B. **Efficient Energy Consumption**

The goal of efficient energy consumption is certainly one which would benefit the nation, states, and citizens of this country. In Maryland and Wyoming, however, the issue of energy efficiency is conspicuously absent from the state's statutes. But if the state statutes of Louisiana and Oklahoma had addressed energy efficiency as a legitimate purpose for the statute, perhaps the outcome of the cases would have been different.

Merely seeking parity with other taxes, as in Maryland, or seeking to retain revenues in-state, as in Wyoming, is insufficient to overcome the presumption of unconstitutionality of disparate treatment. However, if a statute were to use energy conservation as its purpose, and then give tax benefits to those who reach this stated goal, then the court would likely uphold the validity of the legislative enactment. One could envision such a statute giving incentives to individuals who reduce energy consumption in the household setting, which of course would be limited to those who reside within the state. Conferring a benefit on the citizens of the state, however, would not be unconstitutional because the legislative purpose is not by nature discriminatory. But, a producing state which lost tax revenue as a result of another state's incentives could sue, arguing for standing based on Wyoming. In addition, a similar statute granting incentives to corporate entities that encourage energy conservation would survive the test of constitutionality by treating providers of energy from all states with a similar tax benefit or economic incentive. But would a state now hesitate to enact such incentives, for fear of retaliation by a sister state who indirectly lost tax revenue?

Another issue: both statutes in Maryland and Wyoming focused on energy sources, natural gas in Maryland and coal in Wyoming. The focus in Maryland was to seek parity, through the imposition of the "First Use Tax" between Louisiana-produced natural gas and that gas imported from out-of-state. The court treated the plaintiff States as consumers for purposes of standing, but the statute in question and the opinion did not address how to make the consumption of energy more efficient for the ultimate consumer. In Wyoming the legislative
enactments addressed costs to Oklahoma ratepayers, revenue paid to Wyoming, and potential effect on Oklahoma jobs because of the purchase of in-state coal. But again there is no explicit mention of how to consume less energy. The focus is primarily on the loss of revenue that flowed out-of-state to Wyoming.

The question was not raised in either case whether a legitimate state interest would be served in furtherance of a state energy policy. Though Commerce Clause analysis would hinge on the discriminatory treatment between the promulgating state and other states, it would make the analysis more difficult to resolve if the statute did not provide a "line of demarcation," but nonetheless resulted in a loss of state severance taxes as in Wyoming. The effect would be to bring the procedural aspect of standing into play as a critical factor in determining whether the substantive complaint would suffice for invoking original jurisdiction.

The question may be raised whether Oklahoma could have mandated natural gas consumption by utilities, with a stated goal to reduce pollution. Natural gas is an important Oklahoma industry and burns cleaner than coal. If the purpose would be to reduce pollution, then it may be found not to violate the negative Commerce Clause. Any increase to Oklahoma's economy and detriment to Wyoming's economy would be incidental to the main purpose of the statute. The difficulty with maintaining this position, however, is that it eliminates the possibility of permitting other technology-forcing improvements for fuels other than natural gas. The better approach would be to set a specific level of pollution reduction to be targeted as the environmental goal and then let the competing industries seek to attain it. Such an approach would be consistent with the "free market" rationale cited by the minority in its zone of interest analysis.

C. Environmental Repercussions

The specific environmental repercussions arising from loss of state tax revenue as a basis for standing in interstate disputes are demonstrated in Maryland and Wyoming. The environmental repercussions in Maryland were that the state was not able to use the revenues from the "First Use Tax" for protection of the waterbottoms, barrier islands, and coastal islands because of the discriminatory effect of the statute on interstate commerce. In Wyoming, the environmental repercussion was that instead of using Oklahoma coal and potentially increasing air pollution because of sulphur emissions, the cleaner
burning Wyoming coal was not only protected through the extraction tax, but essentially preferred as the fuel of choice. These were the practical effects of the decisions.

Once again, neither case was decided on environmental grounds. But the difficulty for the future is how a state may pass environmental laws intended to reduce pollution which could have a discriminatory effect on interstate commerce in a manner giving rise to standing before the court after Wyoming.

In Maryland, Louisiana passed its statute specifically to compensate the people of that state for damages to waterbottoms, barrier islands, and the coastal areas introduced by drilling for natural gas from federal OCS lands. This interest was not the deciding factor in the case, as the court focused instead on the discriminatory imposition of the “First Use Tax.” Validity of the statute was not discussed. Left unresolved in the case is how a state may seek to fund a policy of protection of the environment, in a way that consequently affects interstate commerce. Clearly, the substantive issue of the environment yielded to the financial interests of sister states under the Commerce Clause analysis as standing was granted to pursue the issue.

In Wyoming, environmental issues were not discussed. Once again, while air quality would be better with Wyoming coal rather than its Oklahoma counterpart, that was not the main focus of the opinion. Again, it hinged on the discrimination resulting from the line of demarcation between Oklahoma coal and Wyoming coal. It is interesting to consider how a different situation would be handled. For example, what if state A produces and burns a cleaner type of coal than state B and passes legislation requiring coal burned within it to meet the air quality standards of state A. This brings into play the discussion raised by McCarty in the conflict between the Clean Air Act and the dormant Commerce Clause, which is at the heart of his analysis and the essence of the problem.120

If the Oklahoma law had been motivated by environmental, rather than economic interests, the outcome of the case may have been different. The legitimate purpose of environmental protection could have resulted in passage of a valid statute that would have survived the test of constitutionality. But even such an enactment would need to be carefully phrased to avoid a similar pitfall. If the air quality for the state were to meet a more stringent level of purity, then it

120. Supra note 14.
would be constitutional. Then all entities would be required to comply with the directive, by whatever means that entity determines most feasible. Again, the pivotal factor is whether there is a selective impact of the statute. Thus, the test would seem to be whether all entities would be required to meet the environmental standard, or whether others would be arbitrarily granted an exception solely on the basis of status.

In contrast, consider a situation where the opposite result may occur. For example, a state may wish to encourage its agencies to seek measures to encourage energy efficiency and determine whether the fuel source meets those criteria. This would lead to an energy source selection process, through which a determination could be made to assess the potential environmental impacts of the particular fuel. Imposition of such a process would likely be upheld, and in the case of Oklahoma and natural gas, may lead to incidental discrimination and increased local state revenues. But more suspect would be the exclusion of specific fuel sources. A better way of mandating such choices would be to allow agencies to assess impacts of the alternatives.

E. Dissent Opinion

Specifically, the minority opinion took issue with the decision that it was permissible to recognize the standing of a state to bring a negative Commerce Clause action on the basis of its consequential loss of tax revenue. The dissent noted there was no clear showing of injury in fact, and Wyoming, as a taxing entity and not a market participant, was not within the zone of interest protected under the negative Commerce Clause.

From a policy perspective, the dissent’s injury in fact argument makes the most sense. The difficulty of tracing the loss of revenue from the discriminatory impact of a particular statute or act can be tenuous and uncertain. Furthermore, the conjecture of interplay between supply and demand would operate to further obscure the factual determination of the injury. Theoretically, this could lend itself to a “forum shopping” analogy whereby statistical comparison, an offended state could track all legislative pronouncements of sister states of any kind which may have an impact within its borders, and then challenge those which have the best chance of success. But this is held in check by the fact that the Oklahoma statute was specifically directed against Wyoming coal. Regardless of whether another state is specifically mentioned in legislation which becomes law, the court will
look beyond the words of the statute to the effect of the law in question. Courts would be well advised to limit such controversies to those which either specifically mention another state, give preferential treatment to intrastate sources, or have an irrefutable and traceable effect on another state.

F. Generational Equity

The economic interests of the states, efficient energy consumption, and the environmental considerations are all significant issues which must be addressed. They do not exist in isolation, but rather are interrelated and should be treated that way in state and federal legislation and before the courts.

With respect to the state and federal legislation, the enactments will continue to deal with the problems of insufficient revenue and energy, and environmental protection, all the while in pursuit of their competing sovereign interests. Perhaps that is the best forum to grapple with these complex problems. Of necessity, however, the courts, as has been demonstrated, are limited to the “case” or “controversy” provisions of Article III of the Constitution. Courts have considerable impact upon the ability of the states, in particular, to attempt to resolve these problems. The role of the courts is simply part of the system of checks and balances inherent in our separation of powers.

Standing plays an integral role in dealing with policy issues facing our society. The relevance of standing to the Supremacy Clause and the subject of generation equity deserves further explanation.

Resolution of societal problems occurs at various levels. Disputes may be dealt with by individuals without access to any of the three branches of federal government, state government, or municipal authorities. But the structural problems which give rise to these problems are usually addressed by the federal government, even if the solutions may not, in every instance, result in a desired change in daily living for its citizens. Because of the supremacy of the federal government, it is at that level most of these policy decisions are made.

The judiciary has evolved to form the cutting edge of policy on a national scale, sometimes eclipsing legislative and executive pronouncements. This is the forum in practice, if not of choice.

Against this background, it is in the courts that one must first maintain the foothold to be heard, or to obtain standing. That crucial stepping stone must first be met in order to address these pressing
issues. Those issues include those of an economic impact, energy efficiency, and environmental protection, among others. As a “check and balance,” standing operates to provide citizens an additional level of accountability and review of policy decisions. The role standing plays, of gatekeeper to the courts, is a significant one which determines which policy issues will be heard and decided.

Whether generational equity is addressed, therefore, may be determined by access to the courts. The concept is not merely an academic topic of responsibility to ensure opportunities for financial success and health of future generations. It is more. From a societal perspective notions of generational equity include decisions concerning the environment and energy consumption which have a direct impact on the world in which we live. The final decision for access to the forum of the courts through standing, in effect, has a direct impact on which issues of the day are addressed and decided.

Regardless of how the problems are resolved, the critical point is that each generation has a responsibility to solve them and live responsibly during the time of their inhabitance of this planet. Economics is important because it is essential to survival of the republic. Energy efficiency is important because the resources that permit the mobility and sophistication of civilization are dependent upon fuels to make it possible. Of course, the importance of the environment as an ecosystem which supports us all is the mainstay of our shared lives.

VI. Conclusion

Review of the loss of state tax revenue as a “procedural” basis for standing in interstate disputes must be balanced with “substantive” policy issues to ensure that the courts strike a proper balance, keeping with the concept of “generational equity.”

The “procedural” basis of the loss of tax revenue as providing standing in interstate disputes will fall into one of two categories. In the first category are those interests which are not discriminatory. This category would give the most uncertainty to the process of judicial review, as suggested in the dissent in Wyoming. The second category would include those statutes, such as were the subject of review in Wyoming and Maryland, that set forth a specific line of demarcation or disparate treatment of the states which gave rise to standing. At some point on the spectrum, the traceability of the loss of tax revenue would reach a point where it could not be attributed to the specific legislative act. While this problem is not wholly resolved in
Wyoming, the proof of traceability could occur, though with great difficulty, in an instance where there was less than 100 percent reliance upon a sister state for a commodity or resource. That near total reliance and specific legislative action to reduce it contributed to the strength of Wyoming’s successful argument that it had standing.

The “substantive” issues at play in Wyoming, Maryland, Texas, and Simon go hand-in-hand with the “procedural” issue of standing. Whether resolving Oklahoma’s attempt to require certain utilities to burn 10 percent indigenous coal, Louisiana’s statute to protect its environmental resources, Texas’ desire to receive death taxes in the dispute of the domicile of a wealthy resident, or indigents and indigent organizations fight for hospital services, the impact of standing on society reaches beyond the boundaries of the individual states and the individual case.

What must be achieved is a balance. Standing in interstate disputes is only a threshold for the consideration of the “case” or “controversy.” The policy issues at stake must also be considered so the society that governed by the law of the judicial pronouncements ultimately improves the lives of its citizens, commensurate with its responsibility as a sovereign.

It is not an easy task. To confront the economic, energy, and environmental responsibilities of our society is not a pleasant duty. To so confront requires looking to a record of activities that have not always been the best or right decision. It is also tempting to merely drift through the more mundane problems that present themselves for immediate resolution. Our duty is to do more. The same foresight and planning which resulted in the strength of this country must be called upon again to re-visit these enormous tasks. With increased technology comes new knowledge which requires new action. By looking into the future, one can reach these horizons.