

WEST V. KANSAS NATURAL GAS COMPANY: OKLAHOMA'S EXPERIMENT IN COMMERCIAL PROVINCIALISM

James G. Caster

Department of Political Science, Central State University, Edmond, Oklahoma

Presented are the essential aspects of an important U.S. Supreme Court case which arose out of an attempt by the State of Oklahoma to prohibit the export of natural gas from the state so that the gas could be retained for future use within the state. The state law was held to be in violation of the commerce clause of the U.S. Constitution and the case helped pave the way for the great interstate pipe lines.

Within the vastly complex and ever-changing field of U.S. Constitutional Law, few subjects have commanded more interest and study than the interpretation and application of the federal commerce power. Indeed, few activities are as important to the nation as the regulation of interstate and foreign commerce. It has always been so with our nation.

During the Confederation period, from 1781 to 1789, as each state sought to regulate all trade entering and leaving its domain, an incomprehensible welter of cumulative commercial restrictions and taxation measures adversely influenced national and local trade. James Madison, deploring the sad state of commercial affairs, complained in the case of New Jersey that it was a cask open at both ends. A keen desire among the nation's commercial classes to rectify the trade tangle was one of the strongest motivations for calling the Constitutional Convention in Philadelphia in the fateful summer of 1787.

The delegates were alive to the need for federal regulation of interstate and foreign commerce, but they differed over the best means to accomplish such regulation. The convention was on the verge of adopting a provision which would have authorized Congress to regulate interstate commerce by a two-thirds majority. In one of those quirks of political pragmatism which sometimes attend great events, a compromise between northern and southern representatives was reached. The compromise authorized Congress to regulate interstate and foreign commerce by a simple majority vote and forbade Congress to prohibit the importation of Negro slaves for 20 years. As a result of this agreement, Art. I, Section 8, Clause 3 of the U.S. Constitution states

simply but grandly that Congress shall have the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Considerable legal conflict has marked the interpretation and application of the federal commerce power against state attempts to regulate commerce within the state. As the concept of interstate commerce has been widened through the years to authorize an ever-increasing federal control of trade activities formerly considered strictly within the purview of legitimate state regulation under the terms of the Tenth Amendment, some interesting and novel cases have arisen to challenge the attention and creativity of the U.S. Supreme Court.

The State of Oklahoma, which at one time in the 1920's led the nation in the production of both crude petroleum and natural gas, has pioneered in state regulation of the production of oil and gas to prevent both real and constructive waste of these precious natural resources. One of the most colorful episodes in Oklahoma's earliest attempts to regulate natural gas production was the celebrated case of *West v. Kansas Natural Gas Co.*

The echoes of the festivities which accompanied the inauguration of Charles N. Haskell as the Sooner State's first governor had hardly died away when the First Legislature enacted into law an unusual attempt at economic provincialism. The act, signed into law on December 21, 1907, during the first joyous state Yuletide season, when hearts were light and Oklahoma's political world was new, was entitled "An Act Regulating the Laying, Constructing, and Maintaining and Operation of Gas Pipe

Lines for the Transportation of Natural Gas within the State of Oklahoma . . ." (1).

The act contained 13 sections, perhaps an omen of the statute's ultimate fate, which set out rules and procedures for the chartering and licensing of firms to build gas pipe lines within the state. Such pipe lines were declared to be burdens on the roads, streets, and property of the state and certain safety standards were decreed while the use of eminent domain in the construction of such pipe lines was limited. No gas pipe line could be operated at a pressure greater than 300 pounds per square inch and the use of pumps to increase pressure was prohibited. The measure's most stringent feature was that it absolutely and categorically prohibited the exportation of Oklahoma gas beyond the borders of the state (1).

The prohibition of gas exports from the state was not without precedent and neither was it as arbitrary nor frivolous as it might appear today. The Indiana legislature had passed an act in 1889 which forbade the sale of Indiana gas beyond the state's boundaries. The measure had been designed to conserve for use in Indiana the large natural gas deposits discovered and developed there during the 1880's. A healthy fear of rapid exploitation and dissipation of the valuable substance motivated Indiana to guard her natural gas resources for Hoosier purposes. The Indiana Supreme Court almost immediately decreed this bold attempt at economic provincialism to be violative of the commerce clause of the U.S. Constitution (*State ex rel Corwin v. Indiana and Ohio Oil Co.*, 120 Ind. 575, 22 N.E. 778, 1889). However, in 1891, the Indiana legislature enacted a measure, which successfully withstood legal attack, that forbade the use of all devices to increase the pressure or flow of natural gas for transportation through pipe lines. This measure, sustained as a legitimate exercise of the state's police power, had the practical effect of making technically impossible the export of natural gas from the state (2).

Even before Oklahoma graced our nation's flag with the forty-sixth star, it was an established petroleum producing-area. Oil strikes at Red Fork, Cleveland, and Glenn Pool had been developed to the extent that in 1907 the newest state produced a daily average of 12,138 barrels of

crude oil and a large but undetermined amount of natural gas. The Oklahoma Constitution and the early legislatures were strongly influenced by the Populist political ideals which had swept the prairie farmlands of the nation's heartland in the 1890's (3). Only natural gas and coal were reasonably available within Oklahoma as sources of commercial fuel and many Sooners wanted to conserve the state's natural gas for use within its borders rather than allow it to be exploited by the hated foreign corporations.

Four law suits were promptly filed in the Federal District Court for Eastern Oklahoma to test the constitutionality of the new Oklahoma law and in each case the plaintiff requested a court order restraining the Honorable Charles West, Attorney General of Oklahoma, from enforcing the statute by court action and other means. All of the plaintiffs asserted their respective rights to "buy, sell and transport natural gas in interstate commerce notwithstanding the provisions of the statute." The four complainants in the numerical order in which the cases were filed were: The Kansas Natural Gas Company, the Marnet Mining Company, Mr. A. W. Lewis and Mr. O. A. Bleakley. While their respective circumstances, operations and plans differed considerably from each other, each of the plaintiffs desired to export natural gas from Oklahoma to nearby states.

The Kansas Natural Gas Company, a Delaware corporation, was engaged in the business of purchasing and distributing natural gas in Kansas and Missouri. The company had entered into a contract to purchase the entire production of a large gas well located in Washington County, Oklahoma, and proposed to build a pipe line from the company's southern terminus in Kansas to the gas well and to construct lateral gathering lines to other gas wells which might be drilled in the general area of the contracted well. The company contemplated no local distribution of gas in Oklahoma and was solely interested in the interstate shipment of natural gas.

The other plaintiffs asserted similar claims and enterprises. The Marnet Mining Company, a West Virginia corporation, had purchased a right of way across a portion of Oklahoma and proposed to lay a pipe line for the purpose of purchasing Oklahoma

gas for transportation through its proposed pipe line to customers in Kansas and Missouri. Mr. A. W. Lewis, a citizen of Ohio, had purchased an oil and gas lease on certain lands in Oklahoma where he had drilled a gas well capable of producing several million cubic feet of gas per day. Lewis alleged that the production of his gas well was far in excess of local demand for natural gas and that the state's prohibition of his transporting the gas out of Oklahoma was a deprivation of his property without compensation in violation of the 14th amendment. Mr. A. O. Bleakley, a citizen of Pennsylvania, had purchased a pipe line right of way across certain Indian lands by permission of the Secretary of the Interior and proposed to build a pipe line for the interstate transportation of natural gas from Oklahoma.

These four cases were consolidated by stipulation of all of the parties. They were duly tried and appealed to the U.S. Circuit Court and then appealed to the U.S. Supreme Court by Attorney General West, against whom the decisions in the lower courts had been rendered. Formal argument before the high court was held on April 4, 1911, at which time Mr. West and Mr. Charles B. Ames represented Oklahoma's interests. Messrs. D. T. Watson and John G. Johnson argued the case for the appellees and in conjunction with Messrs. John J. Jones and E. L. Scarritt filed a brief. The case was decided on May 15, 1911, and Associate Justice Joseph McKenna delivered the majority opinion of the Court in which five other justices concurred (1).

Joseph McKenna had been born in Philadelphia in 1843 and as a child journeyed with his Irish parents to California. He was educated at Catholic seminaries in the Golden State but finally chose the law over the priesthood for his life's work. He began the practice of law in 1865 and then for four years was County Attorney of Solano County. He served one term in the California State Legislature as a Republican, and after three defeats (probably because of his Catholicism) he was elected to four terms as Congressman. During his congressional career in Washington, McKenna demonstrated the invaluable faculty of choosing his friends extremely well. He became closely associated with Senator Leland Stanford, the formidable railroad

and empire builder, and William McKinley, the future president. Stanford's influence was credited by contemporaries as the reason for President Benjamin Harrison's appointment of McKenna to a federal judgeship on the 9th circuit court. Later, when McKinley was elevated to the presidency, he summoned McKenna to be his first Attorney General. McKenna occupied that position only a few months before he resigned to accept McKinley's appointment as Associate Justice of the Supreme Court. McKenna resigned from the high court in January, 1925, and died in Washington, D.C., in November, 1926.

The American historian Francis S. Philbrick has described McKenna thusly:

On the Supreme Court, he did not often speak for the Court, but did speak for it in some exceedingly important cases. His mental processes were slow, and, according to his critics confused. At best he had no clear general legal philosophy that made his attitude on new cases readily predictable. His final opinions, however, were characterized by practical sense and clear expression. On the whole, his record was thoroughly respectable, and special students of constitutional law refer to some of his decisions and enunciations of principle as commendable for political vision and sound social judgment with reference to labor, the development of federal power and its relations to the states (4).

Justice McKenna's opinion in *West v. Kansas Natural Gas Company* belongs among his better contributions.

In essence, West argued for Oklahoma that the purpose of the statute was conservation of natural resources, not the regulation of commerce, and that the withholding of the enjoyment of some private property by the state without compensation was not a violation of either the commerce clause or the 14th amendment. The quartet of attorneys for the challengers argued, in the main, that the state's prohibition of the exportation of natural gas from the state was a burden on interstate commerce and was in open violation of the federal commerce clause in the absence of affirmative congressional action.

In his formal opinion, Justice McKenna carefully considered each of the legal contentions made by the parties. He noted that Oklahoma's purpose of conservation was not directed toward the prevention of the waste of natural gas, but merely toward

prohibition of its export from the state. In summation, McKenna opined:

If the states have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that "in matters of foreign and interstate commerce there are no state lines." In such commerce, instead of the states, a new power appears and a new welfare, a welfare which transcends that of any state. But rather let us say it is constituted of the welfare of all of the states, and that of each state is made the greater by a division of its resources, natural and created, with every other state, and those of every other state with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward, it must be done by the authority of another instrumentality than a court (1).

McKenna thus suggested that a constitutional amendment was the only means by which states could be allowed to withhold their natural resources from interstate commerce.

Three distinguished justices, Holmes, Lurton, and Hughes, dissented but the

majority of six would not permit such state interference with interstate commerce. The way was now open for the transmission of Oklahoma's natural gas, first to nearby states and ultimately to the northern and eastern states, for a multiplicity of private and commercial uses. The nation commercially was to sink or swim together and states were not to be allowed to stand aloof of each other. All states would furnish what they could and use their share of what was available.

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