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## A Critique of Hodel v. Virginia Surface Mining and Reclamation Association

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# A CRITIQUE OF *HODEL V. VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION*

## I. INTRODUCTION

On January 3, 1980, the United States District Court for the Western District of Virginia declared substantial portions of the Federal Surface Mining Control and Reclamation Act of 1977<sup>1</sup> (hereinafter "the Surface Mining Act" or "the Act") to be unconstitutional in *Virginia Surface Mining & Reclamation Association v. Andrus*.<sup>2</sup> Specifically, the district court found<sup>3</sup> that section 515(d) and (e) of the Act<sup>4</sup> were in contravention of the tenth amendment,<sup>5</sup> that sections 515(d)-(e) and 522<sup>6</sup> of the Act constituted an unconstitutional taking of private property without just compensation in violation of the fifth amendment<sup>7</sup> and that sections 518<sup>8</sup> and 521<sup>9</sup> of the Act deprived coal operators of their fifth amendment right to procedural due process.<sup>10</sup>

The Secretary of the Interior, the defendant in the district court, perfected an appeal directly to the United States Supreme Court.<sup>11</sup> On appeal, the Supreme Court was faced with four principal issues: (1) whether Congress exceeded its authority under the commerce clause in enacting

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1. Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328 (Supp. III 1979)). On August 3, 1977, President Carter signed the Surface Mining Act into law. The bill had been passed by the House of Representatives on July 21, 1977, and by the Senate on July 20, 1977. H.R. CONF. REP. NO. 493, 95th Cong., 1st Sess. (1977). Congress began to consider actively the regulation of surface mining in 1971. S. REP. NO. 128, 95th Cong., 1st Sess. 49 (1977); H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 57, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 593, 595. Twice previously Congress had attempted to provide a comprehensive surface mining act, but both times President Ford vetoed the bill. H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 140, 141, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 593, 672-73. See generally *Symposium, The National Coal Issue*, 81 W. VA. L. REV. 553 (1979).

2. 483 F. Supp. 425 (W.D. Va. 1980).

3. *Id.* at 431-35.

4. 30 U.S.C. § 1265(d), (e) (Supp. III 1979).

5. The tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend X.

6. 30 U.S.C. § 1272 (Supp. III 1979).

7. 483 F. Supp. at 436-42.

8. 30 U.S.C. § 1268 (Supp. III 1979).

9. 30 U.S.C. § 1271 (Supp. III 1979).

10. 483 F. Supp. at 442-48.

11. 28 U.S.C. § 1252 (1959).

the Surface Mining Act; (2) whether various performance standards under the Act violated the tenth amendment; (3) whether the Act, on its face, amounted to an unconstitutional taking in violation of the just compensation clause of the fifth amendment; and (4) whether the Act's enforcement provisions denied coal operators their procedural due process rights in violation of the fifth amendment.<sup>12</sup> The Supreme Court in an unanimous decision affirmed the constitutionality of the challenged provisions and reversed the district court's decision.<sup>13</sup>

## II. THE STATUTORY FRAMEWORK OF THE SURFACE MINING ACT<sup>14</sup>

The Federal Surface Mining Control and Reclamation Act of 1977 was passed after six years of heated and intense debate between environmentalists and the coal industry.<sup>15</sup> The Act is a comprehensive statute designed to provide national performance standards in the coal mining industry so that society and the environment will be adequately protected from the adverse effects of surface coal mining operations.<sup>16</sup> The Act is divided into two phases: first, the interim regulatory phase; and second, the permanent regulatory program.

The Act also created a new administrative agency, the Office of Surface Mining Reclamation and Enforcement (hereinafter "OSM")<sup>17</sup> whose function<sup>18</sup> is to enforce the statutory provisions applicable to the coal industry

12. Brief for Appellant at ii, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 101 S. Ct. 2352 (1981).

13. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 101 S. Ct. 2352 (1981). Justice Rehnquist's separate opinion concurring in the result is found in the companion case of *Hodel v. Indiana*, 101 S. Ct. 2376 (1981).

14. For an extensive review of the Federal Act, see Dale, *The Surface Mining Control and Reclamation Act of 1977*, 9 ST. MARY'S L.J. 863 (1978); Eichbaum & Buente, *The Land Restoration Provisions of the Surface Mining Control and Reclamation Act: Constitutional Considerations*, 4 HARV. ENV'T'L L. REV. 227 (1980); Friedman & Siedzikowski, *Federal and State Regulatory Authority Under the Surface Mining Control and Reclamation Act of 1977*, 82 W. VA. L. REV. 1053 (1980); Kite, *The Surface Mining Control and Reclamation Act of 1977: An Overview of Reclamation Requirements and Implementation*, 13 LAND & WATER L. REV. 703 (1978). See also Brion, *Federal Regulation of Surface Mining in Virginia*, 67 VA. L. REV. 329 (1981); Note, *The Constitutionality of the Federal Surface Mining Control and Reclamation Act of 1977*, 13 IND. L. REV. 923 (1980).

15. See note 1 *supra*.

16. 101 S. Ct. at 2356; 483 F. Supp. at 428; 30 U.S.C. § 1202 (Supp. III 1979).

17. 30 U.S.C. § 1211(a) (Supp. III 1979).

18. 30 U.S.C. § 1211(c) (Supp. III 1979) provides:

(c) Duties of Secretary.

The Secretary, acting through the Office, shall-

- (1) administer the programs for controlling surface coal mining operations which are required by this chapter; review and approve or disapprove State programs for

during the interim phase.<sup>19</sup> After the interim phase is completed, section

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controlling surface coal mining operations and reclaiming abandoned mined lands; make those investigations and inspections necessary to insure compliance with this chapter; conduct hearings, administer oaths, issue subpoenas, and compel the attendance of witnesses and production of written or printed material as provided for in this chapter; issue cease-and-desist orders; review and vacate or modify or approve orders and decisions; and order the suspension, revocation, or withholding of any permit for failure to comply with any of the provisions of this chapter or any rules and regulations adopted pursuant thereto;

(2) publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this chapter;

(3) administer the State grant-in-aid program for the development of State programs for surface and [sic] mining and reclamation operations provided for in subchapter V of this chapter;

(4) administer the program for the purchase and reclamation of abandoned and unreclaimed mined areas pursuant to subchapter IV of this chapter;

(5) administer the surface mining and reclamation research and demonstration project authority provided for in this chapter;

(6) consult with other agencies of the Federal Government having expertise in the control and reclamation of surface mining operations and assist States, local governments, and other eligible agencies in the coordination of such programs;

(7) maintain a continuing study of surface mining and reclamation operations in the United States;

(8) develop and maintain an Information and Data Center on Surface Coal Mining, Reclamation, and Surface Impacts of Underground Mining, which will make such data available to the public and the Federal, regional, State, and local agencies conducting or concerned with land use planning and agencies concerned with surface and underground mining and reclamation operations;

(9) assist the States in the development of State programs for surface coal mining and reclamation operations which meet the requirements of this chapter, and at the same time reflect local requirements and local environmental and agricultural conditions;

(10) assist the States in developing objective scientific criteria and appropriate procedures and institutions for determining those areas of a State to be designated unsuitable for all or certain types of surface coal mining pursuant to section 1272 of this title;

(11) monitor all Federal and State research programs dealing with coal extraction and use and recommend to Congress the research and demonstration projects and necessary changes in public policy which are designated to (A) improve feasibility of underground coal mining, and (B) improve surface mining and reclamation techniques directed at eliminating adverse environmental and social impacts;

(12) cooperate with other Federal agencies and State regulatory authorities to minimize duplication of inspections, enforcement, and administration of this chapter; and

(13) perform such other duties as may be provided by law and relate to the purposes of this chapter.

19. The interim phase of the regulatory program is dealt with in § 502 of the Act. 30 U.S.C. § 1252 (Supp. III 1979). This section specifies which of the twenty-five performance standards will become immediately operative during the interim phase.

503 of the Act allows the OSM to turn over to the respective states the responsibility for implementing and administering the Act, provided each state submits its own permanent surface mining program to the OSM<sup>20</sup> for approval,<sup>21</sup> and subject to the further qualification that the OSM continue to monitor and oversee the state enforcement.<sup>22</sup> If a state program is not approved by the OSM, then the OSM will be charged with the responsibility of enforcing the entire Act in that state.

The principal regulatory and enforcement provisions of the Act are found in Title V of the Act.<sup>23</sup> Section 501<sup>24</sup> directs the Secretary of the Interior to promulgate rules and regulations that will govern mine operations during the interim phase. Section 502 delineates the exact provisions of the Act which are applicable to the coal operators during the interim phase,<sup>25</sup> most of which are found in section 515.<sup>26</sup> Section 515(b) establishes twenty-five performance standards, although not every one is made applicable during the interim phase. The standards that are made applicable during the interim phase require the coal operator to restore the land to its prior condition,<sup>27</sup> to restore the land to its approximate

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20. 30 U.S.C. § 1253 (Supp. III 1979). The state program must be in substantial accordance with the Federal Act. The state regulatory authority must be sufficiently staffed so as to enable it to enforce effectively the state program. Any rule or regulation promulgated by the state administrative agency must be consistent with the rules and regulations promulgated by the Secretary of the Interior. In addition to these substantive provisions, several procedural requirements must be met before the state program is approved. For instance, the Secretary of the Interior must solicit and publicly disclose any views that another federal agency has on the proposed state program. The Secretary must obtain approval of the Environmental Protection Agency on matters that might relate to air or water quality standards. At least one public hearing must be held within the respective state. Finally, the Secretary must be satisfied that the state has adequate legal authority to enforce the state program. *Id.*

For a discussion of the program submitted by Virginia, see Brion, *Federal Regulation of Surface Mining in Virginia*, 67 VA. L. REV. 329, 332-33 (1981). Virginia's plan was approved in part and disapproved in part. See 45 Fed. Reg. 69,977 (1980).

21. 30 U.S.C. § 1253(b) (Supp. III 1979). The Secretary must approve or disapprove the submitted program within six months. The Secretary may approve all, part, or none of it.

22. 30 U.S.C. § 1253 (Supp. III 1979).

23. §§ 501-529, 30 U.S.C. §§ 1251-1279 (Supp. III 1979).

24. 30 U.S.C. § 1251 (Supp. III 1979).

25. 30 U.S.C. § 1252(b) (Supp. III 1979) provides: "All surface coal mining operations on lands on which such operations are regulated by a State" shall comply with the provisions of subsections 515(b)(2), 515(b)(3), 515(b)(5), 515(b)(10), 515(b)(13), 515(b)(15), 515(b)(19), and 515(d).

26. 30 U.S.C. § 1265 (Supp. III 1979).

27. 30 U.S.C. § 1265(b)(2) (Supp. III 1979). The surface coal mine operation must "restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable

original contour,<sup>28</sup> to segregate and stabilize the topsoil<sup>29</sup> and to eliminate the highwall by complete backfilling.<sup>30</sup> In addition to the section 515(b) performance standards, the Act also has explicit performance standards relating to steep slope mining. Section 515(d)(2) requires that the mine operator reclaim the steep slope by "[c]omplete backfilling with spoil material"<sup>31</sup> so that the highwall will be completely eliminated, and so that the mine site will be returned to its "appropriate original contour."<sup>32</sup> A steep slope is defined as "any slope above twenty degrees."<sup>33</sup> The district court found that Virginia was "particularly affected by this legislation be-

likelihood."

28. 30 U.S.C. § 1265(b)(3) (Supp. III 1979). The surface coal mine operation must "backfill, compact . . . and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated."

29. 30 U.S.C. § 1265(b)(5) (Supp. III 1979) provides:

(5) remove the topsoil from the land in a separate layer, replace it on the backfill area, or if not utilized immediately, segregate it in a separate pile from other spoil and when the topsoil is not replaced on a backfill area within a time short enough to avoid deterioration of the topsoil, maintain a successful cover by quick growing plant or other means thereafter so that the topsoil is preserved from wind and water erosion, remains free of any contamination by other acid or toxic material, and is in a usable condition for sustaining vegetation when restored during reclamation, except if topsoil is of insufficient quantity or of poor quality for sustaining vegetation, or if other strata can be shown to be more suitable for vegetation requirements, then the operator shall remove, segregate, and preserve in a like manner such other strata which is best able to support vegetation.

30. To understand the terms highwall and backfilling, imagine a triangular-shaped cut through a mountain. The altitude of that triangle is the highwall, a vertical cliff of about 100 feet. The base of the triangle is called the bench, a horizontal foundation up to 500 feet. The term backfilling describes the process of returning the material taken out of the cut so that the highwall is eliminated and the original contour of the mountain is restored. Thus, the hypotenuse of the triangle would be the original slope of the mountain. UNITED STATES DEPARTMENT OF THE INTERIOR, SURFACE MINING AND OUR ENVIRONMENT 42 (1967). See also 30 C.F.R. § 701.5 (1979).

31. 30 U.S.C. § 1265(d)(2) (Supp. III 1979) provides:

(d) Steep-slope surface coal mining standards.

The following performance standards shall be applicable to steep-slope surface coal mining and shall be in addition to those general performance standards required by this section: *Provided, however*, That the provisions of this subsection (d) shall not apply to those situations in which an operator is mining on flat or gently rolling terrain, on which an occasional steep slope is encountered through which the mining operation is to proceed, leaving a plain or predominantly flat area or where an operator is in compliance with provisions of subsection (c) hereof:

.....

(2) Complete backfilling with spoil material shall be required to cover completely the highwall and return the site to the appropriate original contour, which material will maintain stability following mining and reclamation.

32. *Id.*

33. 30 U.S.C. § 1265(d)(4) (Supp. III 1979).

cause ninety-five percent of its strippable reserves are located on slopes in excess of twenty degrees."<sup>34</sup>

### III. THE DISTRICT COURT DECISION

On October 23, 1978, the Virginia Surface Mining and Reclamation Association ("VSMRA") filed suit in the United States District Court for the Western District of Virginia challenging the constitutionality of the Act, particularly the statutory provisions that became immediately effective during the interim phase.<sup>35</sup> After a hearing on a motion for a preliminary injunction, the district court enjoined the Secretary of the Interior from enforcing any of the provisions found in Title V. The United States Court of Appeals for the Fourth Circuit, however, dissolved the district court's injunction. During the pendency of the appeal of the district court's ruling on the preliminary injunction, the district court conducted a thirteen-day trial upon the plaintiffs' request for a permanent injunction of the Act's enforcement provisions. Thereafter, the district court issued an order and a memorandum opinion that declared substantial provisions of the Act to be unconstitutional and permanently enjoined their enforcement.

#### A. *The Commerce Clause Issue*

VSMRA attacked the constitutionality of the Act on the theory that Congress lacked authority under the commerce clause<sup>36</sup> of the United States Constitution to regulate surface mining. VSMRA contended that land or land use is incapable of being regulated by the federal government since land cannot be regarded as being "in commerce."<sup>37</sup> The district court was not persuaded by this argument and found that Congress could, pursuant to the commerce clause, validly regulate surface mining regardless of whether such legislation is characterized as regulation of an intrastate activity.<sup>38</sup> The court deferred to the congressional findings, and

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34. 483 F. Supp. at 434.

35. The plaintiffs in the district court advanced several theories as a basis for declaring the Surface Mining Act unconstitutional. Only those issues that were ultimately appealed to the Supreme Court, however, will be discussed in this article. Thus, plaintiffs' claims that the Act violated their fourteenth amendment right to equal protection and their fifth amendment right to substantive due process will not be considered.

36. U.S. CONST. art. I, § 8, cl. 3. The commerce clause permits Congress "[t]o regulate Commerce with foreign nations and among the several states, and with the Indian Tribes."

37. Brief for Appellee at 12, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 101 S. Ct. 2352 (1981).

38. 483 F. Supp. at 430-31. See *Fry v. United States*, 421 U.S. 542, 547 (1975) ("Even activity that is purely intrastate in character may be regulated by Congress, where the activ-

concluded that surface coal mining did in fact have an adverse impact on interstate commerce. Next, the district court applied the rational basis test<sup>39</sup> to determine if the means chosen by Congress to regulate surface mining were rationally related to that end. The district court concluded "that Congress had a real and substantial rational basis for enacting the federal surface mining act to protect commerce and the national interest."<sup>40</sup>

### B. *The Tenth Amendment Issue*

In holding that the Surface Mining Act transcends the limitations placed upon Congress by the tenth amendment, the district court relied extensively upon *National League of Cities v. Usery*.<sup>41</sup> The district court framed the issue as "whether the federal surface mining act is directed to the state as a sovereign entity, displacing its role as a decision-maker in

ity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations."). See also *Perez v. United States*, 402 U.S. 146 (1971) (Congress has the power under the commerce clause to regulate local loan sharking activities); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (Congress has the power under the commerce clause to punish hotel operators for refusing to provide accommodations to persons on account of their race); *Wickard v. Filburn*, 317 U.S. 111 (1942) (Congress has the power under the commerce clause to regulate the production of agricultural goods that are to be consumed only on the farm); *Shreveport Rate Cases*, 234 U.S. 342 (1914) (Congress has the authority under the commerce clause to fix railroad rates even though the rates were of a purely intrastate character).

39. The rational basis test in commerce clause cases emanates from Chief Justice John Marshall's opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."). For a general discussion of Congress' power under the commerce clause, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 227 (1978).

40. 483 F. Supp. at 431. For instance, Congress recognized the enormous impact of unreclaimed or improperly reclaimed surface mining operations on interstate commerce. "If the land is not reclaimed in a manner that subjects it to further use, then the productivity of that land is lost to present as well as future generations . . ." *Id.*

41. 426 U.S. 833 (1976). The Supreme Court's decision in *Usery* has been the subject of much criticism and comment. See Beaird & Ellington, *A Commerce Power Seesaw: Balancing National League of Cities*, 11 GA. L. REV. 35 (1976); Heldt, *The Tenth Amendment Iceberg*, 30 HASTINGS L.J. 1763 (1979); Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977); Stewart, *Pyramids of Sacrifice: Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977); Note, *Practical Federalism After National League of Cities: A Proposal*, 69 GEO. L.J. 773 (1981); Note, *National League of Cities v. Usery: A New Approach to State Sovereignty?*, 48 U. COLO. L. REV. 467 (1977).



areas of traditional governmental services, or whether the act is directed to private activity."<sup>42</sup> After framing the issue, the district court carefully and painstakingly went through the litany of tests announced in *Usery*.<sup>43</sup>

Due to the district court's reliance upon *Usery*, it is helpful at this juncture to discuss what the Supreme Court held in that case. *Usery* involved a tenth amendment challenge to the 1974 amendments to the Fair Labor Standards Act which extended the minimum wage and maximum hour provisions to state and public employees. The Court found that the 1974 amendments constituted an "exercise of congressional authority directed . . . to the States as States."<sup>44</sup> The Court also found that the states' power to decide what amount state employees are to be paid and how many hours they will work are undoubtedly attributes of state sovereignty.<sup>45</sup> Finally, the Court determined that these amendments resulted in the loss of the states' ability to function in areas clothed with the at-

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42. 483 F. Supp. at 432.

43. Justice Rehnquist's opinion in *Usery* poses immense problems in its application by lower courts due to the litany of terms and tests used to delineate the limits of Congress' power under the commerce clause. See, e.g., 426 U.S. at 842 (1976) ("Our federal system of government imposes definite limits upon the authority of Congress to regulate the activities of the States as States by means of the commerce power."); *id.* at 844 ("Neither government [federal or state] may destroy the other nor curtail in any substantial manner the exercise of its powers.") (quoting *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926)); *id.* at 845 ("The question we must resolve . . . is whether these determinations [i.e. what amount of wages are to be paid, who is to receive them and what hours those persons will work] are "functions essential to separate and independent existence."") (quoting *Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911) (quoting *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868))); *id.* at 847 ("forced relinquishment of important governmental activities"); *id.* (the congressional enactment speaks "directly to the States *qua* States"); *id.* at 849 ("interfere with traditional aspects of state sovereignty"); *id.* ("substantially restructure traditional ways in which the local governments have arranged their affairs"); *id.* at 851 ("interfere with the integral governmental functions"); *id.* ("significantly alter or displace the States' abilities to structure employer-employee relationships"); *id.* ("fundamental employment decisions"); *id.* at 852 ("impair the States' 'ability to function effectively in a federal system' ") (quoting *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975)); *id.* ("directly displace the States' freedom to structure integral operations in areas of traditional governmental functions"). For a discussion of the difficulty of applying the standards announced in *Usery*, see 25 EMORY L.J. 937 (1976); Comment, *National League of Cities Crashes On Takeoff: Balancing Under the Commerce Clause*, 68 GEO. L.J. 827 (1980); Comment, *Constitutional Law — Commerce Power Limited to Preserve States' Role in the Federal System*, 30 RUTGERS L. REV. 152 (1976). See generally Beaird & Ellington, *A Commerce Power Seesaw: Balancing National League of Cities*, 11 GA. L. REV. 35 (1977); Michelman, *State's Rights and State's Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977).

44. 426 U.S. at 845.

45. *Id.*

tributes of state sovereignty.<sup>46</sup> The Court concluded that the amendments violated the tenth amendment because Congress acted in a manner that was inconsistent with our federal system of government.<sup>47</sup>

In its consideration of VSMRA's request for a permanent injunction the district court first examined the effect that the Act had upon Virginia's regulatory scheme. Even though the Act permits the states to have their own regulatory programs, the states are nevertheless coerced into a decision because the Act mandates that the state program comply with the federal Act in complete detail.<sup>48</sup> For instance, if the states refuse to submit a program to the OSM for approval, then the Act expressly declares that any state regulation of surface mining that is inconsistent with the Federal Surface Mining Act shall "be preempted and superseded by the Federal program."<sup>49</sup> Thus, the district court found that "[t]he choice that is purportedly given is no choice at all."<sup>50</sup>

The district court then discussed how the Act affects the states' ability to provide essential functions that have been traditionally reserved to the states. There seems to be little or no dispute that land use planning laws and zoning ordinances have traditionally been powers exercised by the states and their localities pursuant to the states' general police powers.<sup>51</sup> In *Warth v. Seldin*,<sup>52</sup> the Court observed that "zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of the State and local legislative authorities."<sup>53</sup> Having laid this foundation, the district court held that the Surface Min-

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46. *Id.* at 851.

47. *Id.* at 852.

48. 483 F. Supp. at 432.

49. § 504(g), 30 U.S.C. § 1254(g) (Supp. III 1979). The subsection further provides that the Secretary of the Interior shall determine which existing state law is preempted. This particular provision may lend itself to a successful constitutional challenge since the judicial branch of government has traditionally determined what state laws are preempted by the supremacy clause of the Constitution.

50. 483 F. Supp. at 432. The district court relied upon *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) and *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), *modified sub nom.*, *District of Columbia v. Costle*, 567 F.2d 1091 (D.C. Cir. 1977) (per curiam), for the notion that states cannot be coerced into making a decision. *See also* *Usery*, 426 U.S. at 852 ("freedom to structure integral operations") (emphasis added).

51. *See* *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13-14 (1974); *Berman v. Parker*, 348 U.S. 26 (1954); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391 (1926); *Donohoe Constr. Co. v. Montgomery County Council*, 567 F.2d 603, 609 n.17 (4th Cir. 1977), *cert. denied*, 438 U.S. 905 (1978); Note, *Tenth Amendment Challenges to the Surface Mining Control and Reclamation Act of 1977: The Implications of National League of Cities on Indirect Regulation of the States*, 49 *FORDHAM L. REV.* 589, 601 n.57 (1981).

52. 422 U.S. 490 (1975).

53. *Id.* at 508 n.18.

ing Act did more than just regulate the manner in which surface mining operations were conducted. The Act, in effect, regulates the way land is used. Accordingly, the district court concluded that the Act interfered with the states' ability to make decisions in areas that have traditionally belonged to the states.<sup>54</sup>

The district court went on to explain the enormous degree of intrusion, particularly in Virginia, that the Act caused. The court held that the Federal Surface Mining Act effectively takes away the control that Virginia has over its own economic development. No longer can a state or its political subdivisions decide what the best possible use of its land should be. The court noted that level land is a precious commodity in the mountainous areas of Virginia. As a result of surface mining in those areas, there has been a substantial increase in the amount of level land available for development. For instance, schools, airports, recreation areas and shopping centers have been constructed on reclaimed surface mines. The Act, however, requires the mine operators to take level land and return it to its approximate original contour. Consequently, the States have relinquished to the federal government the right to decide on how best to develop their own economy.<sup>55</sup>

Second, the district court found that the Act undermined the state's economy by reducing the tax base.<sup>56</sup> Additionally, Virginia was forced to spend one and a half million dollars in an attempt to comply with the Act.<sup>57</sup> Finally, the district court held that Virginia is deprived of the opportunity to decide how best to protect its environment.<sup>58</sup> In short, the district court found, upon the basis of the evidence presented at trial, that the Surface Mining Act operated to " 'displace the States' freedom to structure integral operations in areas of traditional governmental functions' " and " 'substantially restructure[d] traditional ways in which the local governments have arranged their affairs.' "<sup>59</sup>

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54. 483 F. Supp. at 433.

55. *Id.* at 434.

56. *Id.* The basis of this determination was a startling decline in the area's coal production immediately following the effective date of the Act. "[C]oal companies have gone out of business; between five hundred and one thousand coal miners have lost their jobs; income from surface mining permits has decreased; the coal-based revenues that the counties [in southwest Virginia] rely on to operate have been reduced." *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 435 (quoting *National League of Cities v. Usery*, 426 U.S. 833, 849, 852 (1976)). As a result of the district court's findings, it permanently enjoined the enforcement of § 515(d) and (e) of the Act. 30 U.S.C. § 1265(d) and (e) (Supp. III 1979).

### C. *The Taking Issue*

VSMRA argued that sections 515<sup>60</sup> and 522<sup>61</sup> of the Act violated the fifth amendment right to due process in that property was taken without just compensation.<sup>62</sup> It contended that the Act on its face amounts to a taking of private property. In support of this contention, VSMRA relied strongly upon Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*.<sup>63</sup>

The district court analyzed *Pennsylvania Coal Co.* and found that the facts in the present case stand on all fours with the facts in *Pennsylvania Coal Co.*.<sup>64</sup>

In Virginia the evidence shows that surface landowners are possessed of small tracts usually less than one hundred acres. The requirement of return to approximate original contour amounts to a physical restriction on the removal of coal. The landowner cannot remove his coal because it is economically and physically impossible to comply with the steep slope reclamation provisions of the act. Because of the nature of the land, the owner is thereby deprived of any use of his land, not only the most profitable. Mountainous terrain is unusable for all income producing activities unless it is level, which the act is aimed at preventing.<sup>65</sup>

On the basis of these facts, the court declared the approximate original contour provisions to be a constructive taking of private property without

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60. See notes 26-33 *supra* and accompanying text.

61. 30 U.S.C. § 1272(e)(4), (5) (Supp. III 1979) provides that no surface coal mining operations shall be permitted under the following conditions:

(4) within one hundred feet of the outside right-of-way line of any public road, except where mine access roads or haulage roads join such right-of-way line and except that the regulatory authority may permit such roads to be relocated or the area affected to lie within one hundred feet of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected; or

(5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery.

62. U.S. CONST. amend. V provides in part: "[n]or shall private property be taken for public use, without just compensation."

63. 260 U.S. 393' (1922). In addition to *Pennsylvania Coal Co.*, the district court discussed many of the more recent Supreme Court decisions on taking. See *Andrus v. Allard*, 444 U.S. 51 (1979); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

64. 483 F. Supp. at 441.

65. *Id.* The court comments in a footnote that these findings of fact are supported ironically enough by the federal government's own studies. *Id.* at 435 n.11.

just compensation and, therefore, unconstitutional. In addition to this holding, the district court also declared section 522 to be unconstitutional because that section included a wholesale prohibition on surface mining within a specified number of feet from occupied dwellings, schools, churches, public parks and cemeteries, as well as any other land that the appropriate state regulatory authority found to be unsuitable for mining.<sup>66</sup>

#### D. *The Procedural Due Process Issue*

The enforcement provision of the Act,<sup>67</sup> VSMRA contended, violated procedural due process rights<sup>68</sup> because cessation orders could be issued by the OSM without the benefit of a prior hearing. VSMRA also argued that since section 518<sup>69</sup> of the Act requires the surface mine operator who has allegedly violated a provision of the Act to pay the *proposed* penalty before he is allowed to contest the existence of the violation or the amount of the proposed penalty, it deprived him of his due process guarantees. In response to this, the Secretary of the Interior argued that the

66. *Id.* at 441-42.

67. 30 U.S.C. § 1271(a)(2), (3) (Supp. III 1979). Under § 1271(a)(2), the Secretary has the authority to issue cessation orders if an OSM inspector first determines that there is "imminent danger to the health or safety of the public" or "significant, imminent environmental harm to land, air, or water resources." Section 701(8) of the Act, 30 U.S.C. § 1291(8) (Supp. III 1979), defines "imminent danger to the health and safety of the public" as conditions that could "reasonably be expected to cause substantial physical harm to persons outside the permit area before such condition, practice, or violation can be abated." A reasonable expectation of death or serious injury exists "if a rational person, subjected to the same conditions or practices giving rise to the peril, would not expose himself or herself to the danger during the time necessary for abatement."

Under § 1271(a)(3), the Secretary has authority to issue a cessation order if an OSM inspector finds that the surface mine operator has failed to abate a violation.

68. U.S. CONST. amend. V provides in part that no person shall "be deprived of life, liberty, or property, without due process of law."

69. 30 U.S.C. § 1268(c) provides:

(c) Notice; waiver. Upon the issuance of a notice or order charging that a violation of the Act has occurred, the Secretary shall inform the operator within thirty days of the proposed amount of said penalty. The person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account. If through administrative or judicial review of the proposed penalty, it is determined that no violation occurred, or that the amount of the penalty should be reduced, the Secretary shall within thirty days remit the appropriate amount to the person, with interest at the rate of 6 percent, or at the prevailing Department of the Treasury rate, whichever is greater. Failure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

court had no jurisdiction to decide the procedural due process issue since there was no case or controversy.<sup>70</sup> Specifically, the Secretary contended that the issue was not ripe for adjudication because none of the plaintiffs had ever received a summary cessation order under section 521(a), nor had any of the plaintiffs suffered any loss as a result of the issuance of a summary cessation order.<sup>71</sup>

The district court determined that the challenge was not premature and held that the issuance of cessation orders without giving the surface mine operator an opportunity to be heard violated the plaintiffs' due process rights. In the court's view, requiring a surface mine operator to pay the proposed civil penalty before being given the chance to challenge the existence of a violation or the amount of the penalty is violative of the fifth amendment.<sup>72</sup> In holding as it did, the district court applied the *Mathews v. Eldridge*<sup>73</sup> balancing formula:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.<sup>74</sup>

Of particular concern to the court was the fact that a multi-million dollar operation could be completely shut down by a process that deprived the most affected party of an opportunity to be heard. The court also noted that the applicable standard under section 521(a) lacked any meaningful objective criteria.<sup>75</sup> The court ultimately concluded that the additional costs and administrative burden that would result from a pretermination hearing were "relatively insubstantial"<sup>76</sup> when weighed against competing factors.

#### IV. THE SUPREME COURT DECISION

In *Hodel v. Virginia Surface Mining and Reclamation Association*, the Supreme Court, for the first time since *National League of Cities v.*

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70. See U.S. CONST. art. III, § 2, cl. 1.

71. Brief for Appellant at 62, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 101 S. Ct. 2352 (1981).

72. 483 F. Supp. at 447-48.

73. 424 U.S. 319 (1976).

74. *Id.* at 335.

75. 483 F. Supp. at 448.

76. *Id.* at 447.

*Usery*,<sup>77</sup> elaborated upon the proscription to Congress' exercise of its commerce power found in the tenth amendment.<sup>78</sup> As to the fifth amendment taking issue and the fifth amendment procedural due process issue, the Court applied earlier case law and reversed the district court on both issues.<sup>79</sup> Other possible challenges to the constitutionality of the Act remain open because the Court held that several of the issues decided by the district court were not yet ripe for adjudication.

*A. Can Nonfederal Lands Be The Subject of Congressional Regulation Pursuant to the Commerce Clause?*

The Supreme Court gave an emphatic "yes" to the question of whether nonfederal lands can be the subject of congressional regulation through the commerce clause and dispelled any doubts concerning the extent and scope of Congress' power under that clause.<sup>80</sup> The commerce clause is a grant of plenary power.<sup>81</sup> The power to regulate commerce between the states is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution."<sup>82</sup> If Congress finds that a particular activity substantially affects interstate commerce, then, regardless of how indirect that effect is, or how local in character that activity is, Congress may validly regulate that activity subject only to the limitation that it have a rational basis for such legislation. Thus, a reviewing court becomes merely a rubber stamp, deferring to Congress' findings and rationale.

In the face of overwhelming precedent, VSMRA argued that land is an exception to this general rule.<sup>83</sup> To support this position it argued that

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77. 426 U.S. 833 (1976).

78. 101 S. Ct. at 2364-69.

79. 101 S. Ct. at 2369-74.

80. Justice Rehnquist, however, indicates that the commerce clause itself may limit Congress' power. "Thus, it would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited." 101 S. Ct. at 2391. He then concludes that the Surface Mining Act is within those undefined limits and adds that "there can be no doubt that Congress in regulating surface mining has stretched its authority to the 'nth degree." *Id.* To support his assertion that the commerce clause has its own built-in limits, Justice Rehnquist relies upon dicta from past Supreme Court decisions. *See* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); *Carter v. Carter Coal Co.*, 298 U.S. 238, 327 (1936); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554-55 (1935).

81. 101 S. Ct. at 2360. *See also* *National League of Cities v. Usery*, 426 U.S. at 840; *Cleveland v. United States*, 329 U.S. 14, 19 (1946); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

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

83. Brief for Appellee at 11-25, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 101 S. Ct. 2352 (1981).

the property clause<sup>84</sup> of the United States Constitution and cases thereunder impliedly reject any congressional authority to regulate the use of nonfederal lands.<sup>85</sup> The Court, however, dismissed this argument without comment, apparently finding that the property clause is a separate and distinct power that poses no obstacles for Congress in the exercise of its powers pursuant to the commerce clause.

After a discussion of the legislative history of the Act and a recitation of the congressional findings, the Court upheld Congress' authority, finding that surface mining affected interstate commerce and that Congress had a rational basis for enacting the Surface Mining Act. Justice Rehnquist in his separate opinion, however, disagreed with the majority's statement of the test. "In my view, the Court misstates the test. . . . [I]t has long been established that the commerce power does not reach activity which merely 'affects' interstate commerce. There must instead be a showing that regulated activity has a *substantial effect* on that commerce."<sup>86</sup> Congress' findings in this particular case would doubtless satisfy either test, although section 101 of the Act is devoid of the term "substantially affects commerce." However, it may be argued successfully in future cases that Congress has failed to make the necessary findings to support regulation of particular local activity.<sup>87</sup>

84. The property clause of the United States Constitution provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2.

85. See *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976) (The property clause does not authorize "an exercise of a general control over public policy in a State," but only "an exercise of the complete power which Congress has over particular public property entrusted to it."); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958); *Federal Power Comm. v. Oregon*, 349 U.S. 435 (1955) (The Federal Power Commission has authority over navigable waters under the commerce clause, but has authority over nonnavigable waters that are located within federally owned lands only under the property clause.); *United States v. City & County of San Francisco*, 310 U.S. 19 (1940); *United States v. Arizona*, 295 U.S. 174 (1935); *Kansas v. Colorado*, 206 U.S. 46, 87-89 (1906). In addition to the cases construing the property clause, VSMRA points to language in *McCready v. Virginia*, 94 U.S. 391, 396 (1876) ("Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade.").

86. 101 S. Ct. at 2391.

87. This may seem to be a trivial point, but the Court was quite concerned in the *Hodel* case about the lack of any congressional finding to the effect that highwalls substantially affect interstate commerce.

"QUESTION: [J. White]: Mr. Buscemi, what does [Congress'] investigation show the effect on commerce is or may be if there is surface mining of coal without restoring the . . . high wall? . . . I can understand why surface mining might be said to affect commerce, but that wouldn't mean that anything that Congress said, ordered with respect to surface mining would have an effect on commerce.

MR. BUSCEMI: I think that's correct . . . but I think in particular the high wall



### B. *The Tenth Amendment: Still a Truism*

In 1941, the Court characterized the tenth amendment as a "truism,"<sup>88</sup> noting that "[t]here is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments."<sup>89</sup> Prior to that decision, the Court had in-

regulation that you, or the high wall statutory provision that you refer to is very closely connected to preventing adverse environmental effects from surface mining. . . .

QUESTION: . . . [Y]ou mean anything that affects the environment affects commerce? Is that your suggestion?

QUESTION: Well, you still haven't suggested to me what the effect on commerce is . . . of not restoring the [land to the approximate original] contour but flattening it and covering it some other way.

MR. BUSCEMI: . . . I refer you to the findings that Congress made in Section 101 of the statute.

QUESTION: Well, you go ahead and tell me what impact on commerce it has. That's what I'm asking you.

QUESTION: I can understand all of that but I still don't identify in that listing [i.e., recitation from § 101 of the Act] any specific impact on commerce by a failure to restore the original contour when these steep places are mined."

Transcript of Oral Argument at 9-10, 12-13, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 101 S. Ct. 2352 (1981).

88. *United States v. Darby*, 312 U.S. 100, 124 (1941).

89. *Id.* When the States were still debating whether to accept the Constitution and the Bill of Rights, James Madison and Alexander Hamilton were instrumental in persuading the various state legislature to vote for ratification, and in calming the fears of those who clung tightly to principles of state sovereignty. In *FEDERALIST NUMBER 45*, Madison attempts to quiet the widespread apprehension that the States as political entities would be obliterated by the powers of the federal government:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement and prosperity of the State. . . .

If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union, than in the invigoration of its ORIGINAL POWERS [i.e. those possessed by the Articles of Confederation]. *The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained.*

J. KILPATRICK, *THE SOVEREIGN STATES* 32 (1957) (quoting *FEDERALIST NUMBER 45* (J. Madison) (emphasis added)). It seems ironic that the inclusion of a new power that the origi-

validated several federal regulatory schemes on the ground that Congress had exceeded its express powers and had invaded the exclusive province of the states.<sup>90</sup> More recently, the Court has become conscious of federal intervention into a state's sovereignty, and, accordingly, has imposed limits upon Congressional power and judicial interference.<sup>91</sup>

The *Hodel* decision has apparently recast the tenth amendment as merely a "truism," and in so doing has restricted the applicability of *Usery* to its facts. In *Hodel*, Justice Marshall announced a three-part test to be used in deciding whether a federal statute enacted pursuant to the commerce clause violates the limitations found in the tenth amendment:

First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." And, third it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."<sup>92</sup>

He then concluded that the Act does not violate the tenth amendment because it does not regulate the states *qua* states. Consequently, the second and third elements of the test were never considered.

The Court stated that the Act is aimed at "cooperative federalism" and that it was similar to other environmental acts which have successfully survived tenth amendment challenges.<sup>93</sup> For instance, in *United States v. Helsley*,<sup>94</sup> the Ninth Circuit rejected the argument that the Airborne

nal states' rightists did not fear has reduced the tenth amendment to a truism.

90. See *United States v. Butler*, 297 U.S. 1 (1936); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Adkins v. Children's Hospital*, 261 U.S. 525, 560-61 (1923) (overruled in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937)); *Hamner v. Dagenhart*, 247 U.S. 251, 276 (1918) (overruled in *United States v. Darby*, 312 U.S. 100 (1941)).

91. See, e.g., *National League of Cities v. Usery*, 426 U.S. 833 (1976) (The 1974 amendments to the Fair Labor Standards Act operate directly to displace the states' ability to structure integral operations in areas of traditional governmental functions, and therefore transcend the limits placed upon Congress by the tenth amendment.); *Edelman v. Jordan*, 415 U.S. 651 (1974) (The eleventh amendment prevented damage awards against the states.); *Younger v. Harris*, 401 U.S. 37 (1971) (Principles of equity, comity and federalism require a federal court to abstain from interfering in an ongoing state criminal prosecution.). The *Younger* doctrine has since been expanded to noncriminal proceedings. *Moore v. Sims*, 442 U.S. 415 (1979); *Juidice v. Vail*, 430 U.S. 327 (1977); *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

92. 101 S. Ct. at 2366 (quoting *National League of Cities v. Usery*, 426 U.S. 833, 845, 852, 854 (1976)).

93. 101 S. Ct. at 2366.

94. 615 F.2d 784 (9th Cir. 1979).

Hunting Act<sup>95</sup> was violative of the tenth amendment. Likewise, in *Friends of the Earth, Inc. v. Carey*<sup>96</sup> and *Sierra Club v. EPA*,<sup>97</sup> the Clean Air Act<sup>98</sup> was declared to be constitutional.<sup>99</sup> It appears that Congress' aim of "cooperative federalism" has missed its mark when one considers that eight states filed an *amicus curiae* brief in support of VSMRA's position<sup>100</sup> and two other states have challenged the constitutionality of the Act in federal court litigation.<sup>101</sup>

In response to the district court's findings that the Act displaces essential functions traditionally provided by the states, Justice Marshall pointed to the supremacy clause stating that Congress *could*, pursuant to the commerce clause, decide to prohibit all state regulation of surface

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95. 16 U.S.C. § 742j-1 (1972).

96. 552 F.2d 25; 36-39 (2d Cir.), *cert. denied*, 434 U.S. 902 (1977).

97. 540 F.2d 1114, 1140 (D.C. Cir. 1976), *cert. denied*, 430 U.S. 959 (1977).

98. 42 U.S.C. §§ 7401-7626 (Supp. II 1978).

99. 101 S. Ct. at 2366 n.30. The legitimate interest that Congress had in enacting the Clean Air Act is not present in the Surface Mining Act with the same strength. Air, as well as navigable water, is an element common to all states. Contamination of the air or water has serious environmental effects upon states from which the contamination did not originate. The same reasoning does not necessarily apply to the regulation of land. *See Engdahl, Some Observations on State and Federal Control of Natural Resources*, 15 Hous. L. Rev. 1201 (1978); Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977).

100. The states of Arizona, Hawaii, Nevada, North Dakota, Oregon, Utah, Washington and Wyoming filed a brief as *amici curiae* in support of VSMRA's and the Commonwealth of Virginia's position.

101. *Virginia Surface Mining & Reclamation Ass'n v. Andrus*, 483 F. Supp. 425 (W.D. Va. 1980), *aff'd in part, rev'd in part sub nom. Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 101 S. Ct. 2352 (1981); *Concerned Citizens of Appalachia, Inc. v. Andrus*, 494 F. Supp. 679 (E.D. Tenn. 1980); *Star Coal Co. v. Andrus*, 14 ENVIR. REP. (BNA) 1325 (S.D. Iowa 1980); *Indiana v. Andrus*, 501 F. Supp. 452 (S.D. Ind.), *rev'd sub nom. Hodel v. Indiana*, 101 S. Ct. 2376 (1981). In *Concerned Citizens of Appalachia*, the district court held that the Surface Mining Act did not effect a taking of private property without just compensation in violation of the fifth amendment, that it did not deny surface mine operators their procedural due process rights and that the tenth amendment is not violated when a federal statute regulates private enterprises. In *Star Coal Co.*, the plaintiff was seeking a preliminary injunction against the enforcement of various provisions of the Act. The district court held that the Act did not contravene the tenth amendment or amount to a taking under the fifth amendment. The district court, however, did issue a preliminary injunction against the enforcement of § 518(c) of the Act, finding that the plaintiffs showed a substantial likelihood of prevailing on the merits. *Star Coal Co. v. Andrus*, 14 ENVIR. REP. (BNA) at 1330. In *Indiana v. Andrus*, the district court declared substantial portions of the Surface Mining Act to be unconstitutional. For a detailed account of the district court's decision in *Indiana v. Andrus*, see Note, *The Constitutionality of the Federal Surface Mining Control and Reclamation Act of 1977*, 13 IND. L. REV. 923, 964 n.261 (1980).

mining.<sup>102</sup> "Although such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result."<sup>103</sup> Yet, the Court seems to miss the thrust of VSMRA's argument and the district court's decision. VSMRA did not argue that, because the Surface Mining Act preempted state regulatory schemes, the tenth amendment had been violated. Instead, VSMRA contended that the Surface Mining Act does much more than just preempt conflicting state laws. The Act in effect relegates the states to a role subservient to a federal administrative agency. Land use planning decisions and decisions relating to economic development and state environmental protection have been taken away from the states.<sup>104</sup>

In *Sierra Club v. EPA*,<sup>105</sup> the District of Columbia Circuit Court of Appeals held that the tenth amendment is not violated if "[t]he states retain broad discretion under the regulations to control the use of their land in the scope of their economic development."<sup>106</sup> It seems clear under this test that the Surface Mining Act impinges upon the rights reserved to the states by the tenth amendment.<sup>107</sup> But, the Supreme Court impliedly rejected the District of Columbia Circuit test. In order to transcend the tenth amendment, the Act must regulate the state as a state. Apparently, the level of interference and the degree to which the state's ability to structure integral operations is impaired are factors that are totally irrelevant unless the federal law *directly* regulates the states. The Court stated

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102. 101 S. Ct. at 2367.

103. *Id.*

104. See Note, *Tenth Amendment Challenges to the Surface Mining Control and Reclamation Act of 1977: The Implications of National League of Cities on Indirect Regulation of the States*, 49 FORDHAM L. REV. 589, 601-608 (1981).

105. 540 F.2d 1114 (D.C. Cir. 1976). Even before *Usery*, the Court had recognized that federal statutes which afford the states the option to participate in federal programs withstand a tenth amendment challenge. See, e.g., *King v. Smith*, 392 U.S. 309, 316-17 (1968); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295-96 (1958); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) (tenth amendment not violated if congressional legislation induces, rather than coerces, the states into compliance). See also Eichbaum & Buente, *The Land Restoration Provisions of the Surface Mining Control and Reclamation Act: Constitutional Considerations*, 4 HARV. ENV'T'L L. REV. 227, 253 n.147 (1980).

106. 540 F.2d at 1140.

107. See, e.g., *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937). *Steward Mach. Co.* involved a challenge to the Social Security Act of 1935. The Court held that the tenth amendment was not violated if the autonomy of the states was not destroyed or impaired. *Id.* at 586. Cf. *District of Columbia v. Train*, 521 F.2d 971, 994 (D.C. Cir. 1975), *vacated sub nom. EPA v. Brown*, 431 U.S. 99 (1977) ("A federal regulation which compels the states to enforce federal regulatory programs clearly 'impairs the states' integrity' and 'their ability to function in a federal system.'").

that VSMRA's "Tenth Amendment challenge . . . must fail because . . . the statute . . . regulates only 'individuals and businesses necessarily subject to the dual sovereignty of the government of the Nation and the State in which they reside.'"<sup>108</sup>

After *Hodel*, the decision in *Usery* has been reduced to an anomaly in the law. Its applicability to other situations has, for the time being, been greatly diminished. But, the *Hodel* decision cannot be regarded as a departure from existing case law. Neither can it be looked upon as unexpected; Justice Blackmun foreshadowed the result in his concurring opinion in *Usery*: "[I]t seems to me that [the Court] . . . does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."<sup>109</sup>

Justice Blackmun also noted in his concurring opinion in *Usery* that the Court was employing a balancing test to decide whether a valid exercise of Congress' commerce power would violate the tenth amendment.<sup>110</sup> The Court in *Hodel* made clear that a balancing test is applied, but only after the three requirements of the *Hodel* test have been established.<sup>111</sup> Thus, a reviewing court must first determine whether the federal legislation in question directly regulates the states in areas that have traditionally been delegated to state governments. If the court determines that the

108. 101 S. Ct. at 2369.

109. *National League of Cities v. Usery*, 426 U.S. 833, 856 (Blackmun, J., concurring).

110. *Id.* See also Barber, *National League of Cities v. Usery: New Meaning for the Tenth Amendment?*, 1976 SUP. CT. REV. 161, 164 (*Usery* "would thus transport us from a regime which has sacrificed states' sovereignty for congressional supremacy to a regime in which the Court will balance states' rights against interests represented by Congress."); Baird & Ellington, *A Commerce Power Seesaw: Balancing National League of Cities*, 11 GA. L. REV. 35, 73 (1976) (After *Usery* the Court will balance Congress' power to regulate commerce and the economy against the states' tenth amendment guarantee to be free to make decisions in areas that have traditionally been reserved to the states.); Kilberg & Fort, *National League of Cities v. Usery, Its Meaning and Impact*, 45 GEO. WASH. L. REV. 613, 632 (1977) (National interests will be balanced against the legitimate needs of state and local governments.); Note, *Practical Federalism After National League of Cities: A Proposal*, 69 GEO. L.J. 773, 780 (1981) ("the majority's treatment of *Fry* and Justice Blackmun's concurrence point to the conclusion that *Usery* employs a balancing test that evaluates affected federal and state interests and examines the suitability of the chosen means to accomplish the federal end"); Note, *Emerging Concepts of Federalism: Limitations on the Spending Power and National Health Planning*, 34 WASH. & LEE L. REV. 1133, 1151 n.119 (1977) (*Usery* suggests that the Court is balancing state and national interests).

111. 101 S. Ct. at 2366 n.29. "Demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies state submission." *Id.* (authorities omitted).

states *qua* states are not being regulated, or that the matter being regulated is not an attribute of state sovereignty, or that the states' ability to function effectively in those areas has not been impaired, then the court's inquiry is at an end, and the challenged legislation must be held to have not violated the proscriptions of the tenth amendment. But, if the court finds all three requirements to be present, the court must engage in a balancing test to see whether the federal government's interest is demonstrably greater than the states' interest in retaining their sovereignty. The problem that reviewing courts face in the future is the Court's failure to provide any meaningful guidance in balancing the federal government's legitimate interest against the states' legitimate interests. The only redeeming aspect of this problem is that reviewing courts will rarely encounter the unpleasant judicial task of balancing these two interests.

C. *The Surface Mining Act Does Not on its Face Result in a Taking*<sup>112</sup>

The district court ruled that sections 515(d)-(e) and 522 of the Act result in an unconstitutional taking of private property without just compensation.<sup>113</sup> The Supreme Court held that the district court's ruling on the taking issue "suffers from a fatal deficiency."<sup>114</sup> None of the plaintiffs in the district court could identify any specific piece of property "that ha[d] allegedly been taken by operation of the act."<sup>115</sup> Consequently, there was no concrete factual setting upon which the district court could base its decision.

The Court proceeded to explain that surface mine operators may have a remedy against the intrusive nature of the Surface Mining Act. If a surface mine operator desires to mine coal on land above twenty degrees and cannot do so because of the approximate original contour provision, then he may challenge the act *at that time* as being an unconstitutional

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112. See Brion, *Federal Regulation of Surface Mining in Virginia*, 67 VA. L. REV. 329, 343-49 (1981); Eichbaum & Buente, *The Land Restoration Provisions of the Surface Mining Control and Reclamation Act: Constitutional Considerations*, 4 HARV. ENV'T'L L. REV. 227, 244-50 (1980); Note, *Regulation Without Just Compensation: A Political Process-Based Taking Analysis of the Surface Mining Act*, 69 GEO. L.J. 1083 (1981); Note, *The Constitutionality of the Federal Surface Mining Control and Reclamation Act of 1977*, 13 IND. L. REV. 923, 945-56 (1980). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 456-65 (1978); Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U.L. REV. 165 (1974); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Note, *Reexamining the Supreme Court's View of the Taking Clause*, 58 TEX. L. REV. 1447 (1980).

113. See notes 63-66 *supra* and accompanying text.

114. 101 S. Ct. at 2369.

115. *Id.*

taking of private property. Justice Powell in his concurring opinion made this point perfectly clear: "The 'taking' issue remains available to, and may be litigated by, any owner or lessee whose property interest is adversely affected by the enforcement of the Act."<sup>116</sup>

There is no "set formula" to determine when government action will cause the necessary degree of economic injury so that "justice and fairness" will demand the private party be justly compensated for his loss.<sup>117</sup> "Taking" questions by their very nature require an ad hoc factual inquiry into several relevant factors: (1) the impact of the economic injury upon the person being regulated; (2) the degree of governmental regulation of "reasonable investment backed decisions;" and (3) the characterization of the government action.<sup>118</sup>

In response to the lack of an actual factual setting, VSMRA relied upon the 1922 Supreme Court decision of *Pennsylvania Coal Co. v. Mahon*.<sup>119</sup> In that case, Justice Holmes laid down the guiding principle for lower courts in deciding when governmental regulation will amount to a taking: "The general rule . . . is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."<sup>120</sup> This principle has endured and is not inconsistent with the more recent decisions of the Court. Justice Marshall's opinion did not address *Pennsylvania Coal Co.* specifically. *Pennsylvania Coal Co. v. Mahon* was not a facial challenge to governmental legislation. Instead, the plaintiffs in the lower court presented evidence which demonstrated that a particular piece of property was constructively taken by a state law.<sup>121</sup> Therefore,

116. 101 S. Ct. at 2375 (Powell, J., concurring).

117. See *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) where the Court stated that it had "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." See also *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

118. 444 U.S. at 175. The first two factors seem straightforward but the last factor requires elaboration. Generally, if the government action can be characterized as a physical invasion of a person's property, then such action is likely to constitute a taking. See, e.g., *United States v. Causby*, 328 U.S. 256 (1946) (federal government's invasion of airspace destroyed use of farm beneath). Likewise, where the government requires assets that facilitate a uniquely public function, then such action is vulnerable to constitutional attack. Cf. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 128, 135 (1978) (government action does not usually result in a taking when the interference results "from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 124). See also *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-96 (1962).

119. 260 U.S. 393 (1922).

120. *Id.* at 415.

121. *Id.* at 413. In 1921, the Pennsylvania legislature passed a bill that forbade the mining

*Pennsylvania Coal Co. v. Mahon* was inapposite to the Court's decision in *Hodel*.

Since the district court was not presented with a claim that the Surface Mining Act constituted a taking of a specific parcel of land, the only issue for the Court to decide was whether the Act on its face amounted to a taking. Only if the Act denied the surface mine operator the "economically viable use of his land" would the result be a taking.<sup>122</sup> The Court held that the Surface Mining Act easily survived judicial scrutiny under this test. Justice Marshall noted that none of the plaintiffs at the district court proceeding availed themselves of the various administrative remedies, and specifically referred to the variance provision in section 515(d)<sup>123</sup> and the waiver provision in section 522(e).<sup>124</sup> Justice Marshall's reference is somewhat misleading. Section 515(d) does allow the appropriate regulatory authorities to grant the surface mine operator a variance on restoring the land to its approximate original contour. The variance, however, is conditional upon the surface mine operator backfilling completely so as to eliminate the highwall. For all practical purposes, the variance procedure is a futile remedy since the approximate contour provision must still be fulfilled.<sup>125</sup> Section 522(e)(4), one of the waiver

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of anthracite coal in a manner that would cause the subsidence of any dwelling house. The case before the Supreme Court involved only one private dwelling. The Pennsylvania Coal Co. argued that the Pennsylvania statute destroyed their property rights to mine anthracite coal under the house in question, since a deed prior to the enactment of the statute conveyed the right to remove anthracite coal from under the house.

122. *Agin v. Tiburon*, 447 U.S. 255, 260 (1980).

123. See notes 31-34 *supra* and accompanying text.

124. See note 61 *supra*.

125. The Secretary of the Interior acknowledged the futility of the variance remedy in a comment to the proposed regulations. See 44 Fed. Reg. 61313 (1979). Tollage Creek Elkorn Mining Co., IBSMA 80-32 (November 24, 1980), exemplifies the futility of the procedure. In that case, the Interior Board of Surface Mining Appeals reviewed a notice of violation charging that the mining company had not restored the land to its approximate original contour. The owner of the surface rights had planned to use the land for a tree farm after the surface mining was completed. In furtherance of this plan, the landowner had obtained a permit from the appropriate regulatory authority in Kentucky which allowed a variance for the purpose of planting a tree farm. Despite the permit which the landowner had obtained, the Interior Board of Surface Mining Appeals upheld the violation. The Board noted:

Common sense and fairness would appear to require an opposite result. The Federal law seems inescapable, however. Had Congress been presented with the factual situation here, where elimination of the highwall would not benefit the environment but only burden the operator or landowner, it may have provided in the Act for some exception to the rigid backfilling requirements.

Brief for Appellee at 32-33, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 101 S. Ct. 2352 (1981).



provisions, allows the appropriate regulatory authority to permit surface mining operations within 100 feet of a public right-of-way only after there has been an opportunity for a public hearing and a determination that the public will nevertheless be protected.<sup>126</sup> Section 522(e)(5) also contains a provision permitting surface mining within other previously restricted areas if the adjacent landowner agrees. However, section 522(e)(5) still retains a blanket prohibition on surface mining within so many feet of any public building, school, church, community building, institutional building, public park or cemetery.

The most persuasive reason that the Act withstands judicial scrutiny is that the land can be leveled first without ever being surfaced mined. The Court noted that "if flat bench land is truly as valuable as the court below found, there should be no financial impediment to the reestablishment of flat areas on the sites of some old mining operations, once those areas have been restored and stabilized in the manner required by the Act."<sup>127</sup>

The Court concluded that the mere enactment of the Surface Mining Act does not deprive the surface mine operator of the economically beneficial use of his land, and therefore does not on its face take private property without just compensation.

#### D. *Summary Cessation Orders*

Section 521(a)(2) and (3) authorize the Secretary of the Interior to issue cessation orders before the surface mine operator is given an opportunity to be heard.<sup>128</sup> The Secretary, in his discretion, can order total or partial cessation of the surface mining operations upon a showing of an emergency or upon a showing that the surface mine operator has not abated a violation within the appropriate time period. If a cessation order is issued, the affected surface mine operator can immediately seek temporary relief from the Secretary.<sup>129</sup> Upon such a request, the Secretary must respond within five days.<sup>130</sup> Assuming that the Secretary denies the request for temporary relief, the affected party may appeal the Secretary's

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126. See note 61 *supra*.

127. 101 S. Ct. at 2370 n.38.

128. See note 68 *supra*.

129. See § 525(c) of the Act, 30 U.S.C. § 1275(c) (Supp. III 1979). When a surface mine operator seeks relief from a summary cessation order issued pursuant to § 521(a)(2) or (3) of the Act, the Secretary must review the request immediately. The surface mine operator must demonstrate a substantial likelihood of prevailing upon the merits before the Secretary will grant any relief.

130. *Id.*

decision to the appropriate federal district court.<sup>131</sup> The district court found this review procedure unconstitutional for two reasons: (1) the economic injury suffered as a result of a surface mining operation being shut down for only five days is so great that due process mandates a pretermination hearing; and (2) the criteria for issuing a summary cessation order gives too much discretion to an OSM field inspector.<sup>132</sup>

The Supreme Court disagreed with the lower court in both respects. The Court stated that, ordinarily, due process requires a hearing prior to the deprivation of life, liberty or property. A clearly recognized exception to this rule, however, is that "[s]ummary administrative action may be justified in emergency situations."<sup>133</sup>

The Court then undertook a balancing test to determine whether sum-

131. See § 526(c) of the Act, 30 U.S.C. § 1276(c) (Supp. III 1979).

132. See notes 67-76 *supra* and accompanying text.

133. 101 S. Ct. at 2372. See also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 677-680 (1974) (Pre-seizure notice and hearing does not deny property owners due process when the government's interest is the prevention of continued illicit use of the property and the enforcement of criminal statutes.); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (Due process requires that "an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.") (emphasis in original); *Ewing v. Mytinger & Casselberry Inc.*, 339 U.S. 594, 599-600 (1950) (Court upheld § 304(a) of the Federal Food, Drug, and Cosmetic Act which authorized the seizure of misbranded articles without a prior hearing if there was probable cause to believe these articles were dangerous to the health of the public); *Fahey v. Mallonee*, 332 U.S. 245, 253-54 (1947) (Due to the delicate nature of banking institutions and the impossibility of preserving credit during an investigation, it is not unconstitutional to provide a hearing after a conservator has been appointed to a federal savings and loan association.); *Yakus v. United States*, 321 U.S. 414, 442-43 (1944) ("when justified by compelling public interest the legislature may authorize summary action"); *Bowles v. Willingham*, 321 U.S. 503, 519-20 (1944) (the fact that the landlord is not afforded a hearing prior to the time the Office of Price Administration fixes the amount of rent that can be charged does not violate the due process clause "where it is essential that governmental needs be immediately satisfied"); *Anderson Nat'l Bank v. Lueckett*, 321 U.S. 233, 241 (1944) (bank may take possession of inactive accounts without prior hearing to determine abandonment); *Phillips v. Comm'r*, 283 U.S. 589, 595-97 (1931) (immediate collection of taxes prior to hearing does not deny taxpayer due process); *North American Coal Storage Co. v. Chicago*, 211 U.S. 306, 315-21 (1908) (legislature may order summary destruction of property without a prior hearing in order to protect public health).

Of particular concern to the Court in *Hodel* was the Buffalo Creek flood disaster. Congress found this flood to be but one example of the dangerous conditions existing throughout the coal industry. The "Buffalo Creek Flood" resulted in the death of 124 people and in 4,000 people being left homeless. The reported cause of this disaster was the collapse of a mine waste impoundment in West Virginia. H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 129-30 (1977); See H.R. REP. NO. 94-1445, 94th Cong., 2d Sess. 19 (1976). Congress sought to eliminate this type of danger by providing for summary cessation orders.

mary administrative action was warranted. In this case, the Court balanced "the legitimate desire of mining companies"<sup>134</sup> to have a pretermination hearing against "the governmental interest in protecting the public health and safety and the environment from imminent danger."<sup>135</sup> The Court concluded, on balance, that the government interest was paramount and justified summary administrative action.<sup>136</sup>

Justice Marshall next refuted the district court's reasoning that the standards for issuing cease and desist orders lacked sufficient objective criteria. He relied principally upon several provisions found in the Act and regulations that define more fully the standards in section 521.<sup>137</sup> Comparing the Surface Mining Act to other acts, Justice Marshall stated that "these standards are more specific than the criteria in other statutes authorizing summary administrative action that have been upheld against due process challenges."<sup>138</sup>

The Court addressed the point made by the district court that OSM inspectors may be abusing their discretion.<sup>139</sup> The fact that an OSM inspector may have overstepped his authority was held not to be relevant to the issue of whether the statute provided due process. The proper inquiry was "whether the statutory procedure itself is incapable of affording due

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134. 101 S. Ct. at 2372.

135. *Id.*

136. *Id.*

137. Section 701(8) of the Act, 30 U.S.C. § 1291(8) (Supp. III 1979) defines "imminent danger to the health and safety of the public." See note 68 *supra*. The Secretary's regulations also define "imminent danger to the health and safety of the public" and "significant, imminent environmental harm." The regulation defining "imminent danger to the health and safety of the public" recites verbatim the language found in the statute. The term "significant, imminent environmental harm" is defined in the following manner:

(i) An environmental harm is any adverse impact on land, air, or water resources, including but not limited to plant and animal life.

(ii) An environmental harm is imminent, if a condition, practice, or violation exists which-

(a) is causing such harm; or,

(b) may reasonably be expected to cause such harm at any time before the end of the reasonable abatement time that would be set under Section 521(a)(3) of the Act.

(iii) An environmental harm is significant if that harm is appreciable and not immediately repairable.

30 C.F.R. § 701.5 (1979).

138. 101 S. Ct. at 2373.

139. *Cf. Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950) ("Discretion of any official may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised.").

process."<sup>140</sup> The Court did indicate, however, that a pattern of abuse might be enough to declare the summary procedure unconstitutional.<sup>141</sup>

### E. *Imposition of Civil Penalties*

Section 518(c)<sup>142</sup> requires the Secretary to notify the surface mine operator that he has been charged with violating one of the provisions of the Act. In addition, the affected party is notified of the amount of the proposed civil penalty. Only if the party forwards the amount of the proposed penalty will he be given an opportunity to contest the existence of the violation or the amount of the civil penalty.<sup>143</sup> The district court found this waiver provision to be particularly egregious. On appeal, the Supreme Court declined to rule on the merits since none of the plaintiffs in the district court demonstrated that they had suffered any injury as a result of this section. The Court concluded that the challenge to section 518(c) was not justiciable because the claim was premature.<sup>144</sup>

Of all the claims that VSMRA brought, this claim seemed to have the best chance of prevailing on the merits. It has never been a requirement of American jurisprudence that a defendant in a civil setting or a quasi-criminal setting must pay the proposed fine as a condition of defending himself.<sup>145</sup> Section 518(c), in effect, requires the adversely affected party to purchase the opportunity of defending himself.

In *Ex parte Young*,<sup>146</sup> Justice Peckham, writing for the majority, declared:

It may there be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its

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140. 101 S. Ct. at 2373. See also *Yakus v. United States*, 321 U.S. 414, 435 (1944) ("Only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petitioners could we conclude that . . . their constitutional rights have been or will be infringed.").

141. 101 S. Ct. at 2373 n.45. "A different case might be presented if a pattern of abuse and arbitrary action were discernable from review of an agency's administration of a summary procedure." The district court had based its decision upon the issuance of three cessation orders to one coal company, all three of which were ultimately vacated as erroneous. As a result of the shutdown, the coal company lost \$160,000 in recoverable coal and expended \$15,000 in attorneys' fees. 483 F. Supp. at 445.

142. For a discussion on the prepayment of penalties, see Note, *Procedural Due Process and the Prepayment of Civil Penalties: The Surface Mining Act — A Paradigm for Future Legislation*, 28 AM. U. L. REV. 87 (1978).

143. See note 69 *supra*.

144. 101 S. Ct. at 2374.

145. See Note, *supra* note 144, at 96.

146. 209 U.S. 123 (1907).

officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.<sup>147</sup>

The principle enunciated by Justice Peckham is easily made applicable to administrative review. The operation of this statute would tie up needed capital for an indeterminate amount of time.<sup>148</sup> Arguably, this result intimidates the surface mine operator into complying with the OSM's orders to abate an alleged violation that would ordinarily be contested notwithstanding the waiver provision. The inevitable effect of this procedure is to chill the surface mine operator's statutory right to seek administrative review.

## V. CONCLUSION

Clearly the *Hodel* decision does not change the existing law with respect to the commerce clause issue, the "taking" issue, and the procedural due process issue. The Court applied established principles of constitu-

147. *Id.* at 147. See also *Natural Gas Co. v. Slattery*, 302 U.S. 300 (1937); *Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1919); *Wadley Southern Ry. Co. v. Georgia*, 235 U.S. 651 (1915). The decision in *Natural Gas Co.* involved a statute that imposed penalties on a daily basis. Likewise, § 518(a) of the Act states that "[e]ach day of continuing violation may be deemed a separate violation for purposes of penalty assessments." 30 U.S.C. § 1268(a) (Supp. III 1979). The Court in *Natural Gas Co.* struck down the state statute as being violative of the due process clause. "Any application of the statute subjecting appellant to the risk of the cumulative penalties pending an attempt to test the validity of the order in the courts . . . would be a denial of due process." 302 U.S. at 310.

*Wadley Southern Ry. Co.* stands for the principle that a statute imposing civil penalties is unconstitutional if the affected party is deterred from challenging the orders.

A statute . . . which imposes heavy penalties for violation of commands of an unascertained quality, is in its nature, somewhat akin to an *ex post facto* law since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position where he himself must at his own risk pass upon the question. He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative . . . punishment that might be imposed if they should thereafter be declared to be valid.

235 U.S. at 662-63.

Based upon the language of *Ex parte Young*, *Natural Gas Co.* and *Wadley Southern Ry. Co.*, the Act's cumulative penalty provision coupled with the waiver provision in § 518(c) seems especially vulnerable to a fifth amendment due process challenge.

148. See Brief for Appellee at 58, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 101 S. Ct. 2352 (1981).

tional law to the Surface Mining Act and properly concluded that the Act did not violate the fifth amendment or exceed the scope of the commerce clause. Yet the Court indicates that relief for individual surface mine operators may be appropriate if a reviewing court were to make an ad hoc factual inquiry into the relevant factors, and determine that a "taking" had occurred. Furthermore, the Act's civil penalty provisions may yet be declared unconstitutional. Thus, the *Hodel* decision is probably not the death blow that the surface mining industry might envision.

*Hodel* is important for purposes of the interpretation of the tenth amendment. Although the decision certainly cannot be characterized as a departure from earlier precedent, it nevertheless signals a halt to any possible erosion of Congress' power under the commerce clause as a result of the *Usery* decision. *Usery* now appears nothing more than an anomaly. Certainly *Usery* will not be extended into areas that are not closely analogous to its facts. In summary, *Hodel* makes clear that the tenth amendment is not violated unless there is *direct* regulation of the states as states, regardless of the degree of intrusion into the domain that was once occupied by the states.

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