Hodel v. Virginia Surface Mining and Reclamation Association and Hodel v. Indiana

Tracy Conner
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INTRODUCTION

During the 1980-1981 term, the Supreme Court handed down two decisions concerning the constitutionality of the Surface Mining Control and Reclamation Act of 1977 (SMCRA).¹ In Hodel v. Virginia Surface Mining & Reclamation Association, Inc.² and Hodel v. Indiana³ the Court reversed the decisions of separate federal district courts⁴ that had found several provisions of SMCRA unconstitutional and had permanently enjoined their enforcement.⁵ This Note examines the holdings in Virginia and Indiana in light of prior case law in the areas of federal commerce power, tenth amendment limits on that power, equal protection, procedural due process, and just compensation.

SMCRA is a comprehensive Act by which Congress attempts to set "appropriate standards to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public"⁶ from the depredations of surface mining.⁷ Congress concluded that surface mining had created nationwide problems that were

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4. The district court opinions are Virginia Surface Mining and Reclamation Association, Inc. v. Andrus, 483 F. Supp. 425 (W.D. Va. 1980) and Indiana v. Andrus, 501 F. Supp. 452 (S.D. Ind. 1980). Plaintiffs in the Virginia case were the Commonwealth of Virginia; the Town of Wise, Virginia; the Virginia Surface Mining and Reclamation Association, Inc., an association of surface coal mining operations in Virginia; 63 of its member coal companies; and four individual landowners. The plaintiffs in the Indiana case were the State of Indiana and several of its officials, the Indiana Coal Association, several coal mine operators, and others. Plaintiffs could appeal directly from the district court to the Supreme Court because the district courts invalidated an Act of Congress in a suit to which United States agencies and officers were parties. 28 U.S.C. § 1252 (1976).
5. See notes 21-28 infra & accompanying text.
not being addressed effectively at the state level, and therefore established a federal program, enforced by the Office of Surface Mining Reclamation and Enforcement, to regulate surface mining operations throughout the United States. At the same time, however, the Act encourages the states to take primary responsibility for enforcing its performance standards by developing state regulatory programs to operate in lieu of the federal program. Congress sought to delegate this responsibility to the states because of the diversity in terrain, climate and other physical conditions in areas subject to mining operations. Congress also concluded, however, that nationwide uniformity of surface mining regulation was necessary to ensure that states could not regulate less stringently than their neighbors in order to gain an advantage in attracting industry over states with tougher requirements. Thus Congress provided that state programs would be effective only upon approval by the Secretary of the Interior, and that such approval should be given only if the state program contains standards substantially equivalent to the federal program and the state has demonstrated its ability to enforce those standards.


The Senate report stressed the need for nationwide standards. "Federal legislation to regulate surface coal mining is long overdue. The coal industry can afford the cost of reclaiming surface mined land. What it cannot afford is the continuing uncertainty created by failure to resolve this issue. . . . Uncontrolled surface coal mining in many regions has affected a stark, unjustifiable, and intolerable degradation in the quality of life in local communities." S. REP. No. 128, 95th Cong., 1st Sess. 50 (1977). "While many states already do have laws regulating surface coal mining operations, in many instances these laws are inadequate, or are not fully enforced. . . . They are tailored to suit ongoing mining practices, rather than requiring modification of mining practices to meet established environmental standards." Id. at 51-52.

9. The Office of Surface Mining Reclamation and Enforcement was created within the Department of the Interior by Title II of the Act, SMCRA, § 201, 30 U.S.C. § 1211 (Supp. III 1979).


11. SMCRA, § 102(g), 30 U.S.C. § 1202(g) (Supp. III 1979). Both Virginia and Indiana submitted proposals that were approved in part and disapproved in part. See 45 Fed. Reg. 69,977, 78,482 (1980).


Interim requirements have been established to govern mining activities until a permanent federal or state program is implemented. These include segregation and preservation of topsoil, minimization of disturbance to hydrologic balance, revegetation of mined areas, and spoil disposal, SMCRA § 515(b), 30 U.S.C. 1265(b) (Supp. III 1979). Mining is also
The Virginia district court found that the Act’s reclamation requirements for steep slope mining\(^\text{15}\) interfere with traditional state governmental functions and thus violate the tenth amendment.\(^\text{16}\) The Indiana district court enjoined SMCRA’s prime farmland provisions,\(^\text{17}\) finding that they regulate activities having no substantial impact on interstate commerce and so are beyond Congress’s commerce clause power.\(^\text{18}\) The Indiana court also held that the prime farmland provisions violate the tenth amendment by usurping state functions,\(^\text{19}\) and that both they and the steep slope “approximate original contour” provisions violate the substantive due process and equal protection guarantees of the fifth amendment.\(^\text{20}\) Both district courts held that the provisions for issuing cessation orders and imposing civil penalties for their violation\(^\text{21}\) transgress the procedural due process clause of the

\(15\). The steep slope mining provisions, contained in SMCRA, §§ 515(d)-(e), 30 U.S.C. §§ 1265(d)-(e) (Supp. III 1979), require the operator on a slope of more than twenty degrees to reclaim the area by completely covering the highwall (the face of exposed overburden and coal in an open surface mining cut), returning the site to its “approximate original contour” so that it “closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain . . . .” \(\text{id.}\), § 701(2), 30 U.S.C. § 1291(2) (Supp. III 1979). The steep slope miner must also refrain from placing spoil material on the downslope below the bench or disturbing land above the highwall without obtaining permission from the state or federal regulatory authority as set out in section 515(c). 30 U.S.C. § 1265(c), (d) (Supp. III 1979). Section 515(e) allows for a variance from the approximate original contour requirement only if the operator can show that this would lead to an "equal or better economic or public use." 30 U.S.C. § 1265(e)(3)(A) (Supp. III 1979).

\(16\). \(483\ F.\ Supp.\ at 435.\)

\(17\). The specific provisions to which Indiana objected were section 507(b)(16), 30 U.S.C. § 1257(b)(16) (Supp. III 1979) (requiring a soil survey to determine the exact location of prime farmlands); section 508(a)(2)(C), 30 U.S.C. § 1258(a)(2)(C) (Supp. III 1979) (requiring the permit applicant to provide details of the land’s premining productivity under high levels of management); section 510(d)(1), 30 U.S.C. § 1260(d)(1) (Supp. III 1979) (requiring mine operators to convince the regulatory authority that they have the technological capability to restore the mined land to a level of productivity at least equivalent to “non-mined prime farmland in the surrounding area under equivalent levels of management”); section 515(b)(7), 30 U.S.C. § 1265(b)(7) (Supp. III 1979) (requiring the segregation and replacement of A, B, and C soil horizons); section 515(b)(20), 30 U.S.C. § 1265(b)(20) (Supp. III 1979) (authorizing approval of long-term intensive agricultural post-mining land use); and section 519(c)(2), 30 U.S.C. § 1269(c)(2) (conditioning release of the operator’s performance bond on his restoration of soil productivity”).

\(18\). \(501\ F.\ Supp.\ at 460.\)

\(19\). \(\text{id.}\) at 465-68.

\(20\). \(\text{id.}\) at 469. Specifically, the court held that the absence of variance procedures in the prime farmland provisions, and the limitation of variances from the approximate original contour requirement, SMCRA § 515(b)(3), 30 U.S.C. § 1265(b)(3) (Supp. III 1979), to mining on mountaintops and steep slopes, was not justified by the national interest, and discriminated against miners with substantial coal reserves under prime farmland and few steep slopes or mountaintops. \(\text{id.}\)

\(21\). SMCRA § 521(a)(2), 30 U.S.C. § 127(a)(2) (Supp. III 1979) (instructing the Secretary to shut down mining in whole or in part when he determines that it violates the Act and
fifth amendment.\textsuperscript{22} The lower courts also found that several provisions of SMCRA are impossible to comply with and are economically prohibitive, and thus take from the mine operators all use of their land, in violation of the just compensation clause of the fifth amendment.\textsuperscript{23} In reversing, the Supreme Court held that SMCRA is a legitimate exercise of commerce clause power that does not violate the tenth amendment.\textsuperscript{24} The Court also rejected appellants' equal protection argument.\textsuperscript{25} The Court held, however, that the due process and just compensation questions were not ripe for decision, leaving mine operators free to litigate these issues later if SMCRA's provisions adversely affect specific property interests.\textsuperscript{26}

\section{The Commerce Clause Issue}

The Supreme Court has come to view the commerce clause as a plenary grant of authority to Congress. The Court will defer to congressional findings and uphold federal regulation of an activity, even a purely intrastate one, if it "has a close and substantial relationship to, or effect on, commerce" or if "it is part of a generic type of activities that have a cumulative effect on commerce."\textsuperscript{27} The cases challenging federal law under the commerce clause indicate that the Court will permit regulation of a purely intrastate activity if it has any bearing on interstate commerce.\textsuperscript{28}

\textsuperscript{22} 483 F. Supp. at 447-48; 501 F. Supp. at 471.  
\textsuperscript{23} The Virginia district court enjoined the provisions detailed at note 5 supra. 483 F. Supp. at 441-42. The Indiana district court enjoined the provisions detailed at note 17 supra. 501 F. Supp. at 472.  
\textsuperscript{24} 101 S. Ct. at 2374-75; id. at 2389.  
\textsuperscript{25} Id. at 2387.  
\textsuperscript{26} Id. at 2371, 2374; id. at 2387-88.  
\textsuperscript{27} J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 150 (1978).  
\textsuperscript{28} See, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (Congress can regulate labor relations at any manufacturing plant of a steel company having operations in many states; concept of protecting commerce includes labor disputes and work stoppages at one plant that may have a serious effect on commerce); United States v. Darby, 312 U.S. 100, 125-26 (1941) (upholding federal legislation that (1) prescribed minimum wages and maximum hours for employees engaged in the production of goods for interstate commerce, (2) prohibited shipment of goods made in violation of these regulations, and (3) imposed penalties on noncomplying employers); United States v. Wrightwood Dairy, 315 U.S. 110, 121 (1942) (federal milk regulations found applicable to milk produced and sold in a single state because the presence of unregulated milk on the market could affect the interstate sale of regulated milk); Wickard v. Filburn, 317 U.S. 111, 118-19 (1942) (federal marketing quota imposed on a small farmer who consumed most of the wheat he grew because his
In *Virginia Surface Mining* and *Indiana*, the Court, consistently with traditional commerce clause analysis, deferred to the congressional finding that some instances of surface coal mining have adverse effects on commerce. These cases reaffirm Congress's broad commerce clause authority to prescribe nationally uniform standards for a private activity, despite great regional differences in the activity's impact on the environment and in the impact of the regulations on industry.

The Court used the traditional two-part test set out in *Heart of Atlanta Motel, Inc. v. United States* to determine whether Congress had legitimately exercised its commerce clause power in enacting SMCRA: "The only questions are: (1) whether Congress had a rational basis for finding that [the regulated activity] affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate." The judiciary must under this test give effect to any legislation that Congress could rationally have found necessary to protect interstate commerce.

In holding that Congress overstepped the bounds of its power, the Indiana district court relied on a 1977 study comparing the acreage of prime farmland disturbed by surface mining each year with the total prime acreage in the United States, and concluded from this study that surface mining has only a minimal impact on interstate commerce. The Supreme Court, in reversing, denied that the volume of commerce affected is relevant to the first prong of the *Heart of Atlanta* test. Congress need only make a rational finding that the activity does affect some interstate commerce. The Court noted the depth of the congressional findings on this question and concluded that they provided

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production, when combined with other small sources of production, affects the total supply of the commodity, its market price, and hence commerce); *Maryland v. Wirtz*, 392 U.S. 183, 193-94 (1968) (federal minimum wage requirements applied to employees of certain state and local government institutions, including schools and hospitals).

29. SMCRA, § 101, 30 U.S.C. § 1201(c) (Supp. III 1979), states that Congress finds and declares that

(c) many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.

30. This issue will be examined in greater detail in Part II *infra*.


32. 101 S. Ct. at 2360; *id.* at 2382-85.

33. 379 U.S. at 258-59.

34. 501 F. Supp. at 459-60.

35. 101 S. Ct. at 2383.

36. The congressional findings are set out in section 101(c) of the Act, 30 U.S.C. § 1201(c) (Supp. III 1979).
Congress with a rational basis for finding that surface mining affects interstate commerce.  

The Court also did not question congressional findings in applying the second prong of the Heart of Atlanta test—the requirement that there be a reasonable relationship between Congress’s chosen means and its asserted aim. The Court characterized the congressional purpose as preventing injury to the environment, agriculture, and public health and safety and deferred to Congress’s finding that some regulation was necessary to achieve this purpose; it only briefly examined the relationship between the means chosen by Congress and the goals Congress sought thereby to achieve. The Court emphasized that “commerce power ‘extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end. . . .’” In a footnote, the Court said that there need not be an independent and direct relation between each provision and the goal of preventing adverse effects on commerce.

An expansive and complex regulatory program may contain provisions that, standing alone, are not within the ambit of commerce clause power, but such provisions will nevertheless be given effect if they are integral to a regulatory scheme that, as a whole, is reasonably related to a valid congressional aim.

II

THE TENTH AMENDMENT ISSUE

The Court next discussed tenth amendment limits on federal commerce clause legislation. Unlike well-established commerce clause doctrine, tenth amendment analysis is currently in flux. Before it decided National League of Cities v. Usery, the Supreme Court had acknowledged that the tenth amendment in some way limited federal regulation of state activities, but once said that “[t]he amendment states but a truism that all is retained which has not been surrendered.” While sometimes paying lip service to a tenth amendment check on federal interference with reserved state powers, the Court never invoked the amendment to invalidate an exercise of federal com-

37. 101 S. Ct. at 2360-61.
38. 101 S. Ct. at 2384, 2385.
39. 101 S. Ct. at 2360-62; id. at 2382-85.
40. Id. at 2360-62; id. at 2382-85.
41. 101 S. Ct. at 2362 (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)).
42. 101 S. Ct. at 2385 n.17.
43. Id. at 2385.
44. 426 U.S. 833 (1976).
merce power.\textsuperscript{47}

By holding in \textit{Usery} that the challenged federal legislation violated the tenth amendment,\textsuperscript{48} the Court embarked on a novel course of constitutional analysis.\textsuperscript{49} Unfortunately, \textit{Usery} did not make clear which aspects of state government are immune from federal interference. Today the Court prolongs confusion about the tenth amendment by again failing to explain when federal legislation unlawfully "displace[s] the States' freedom to structure integral operations in areas of traditional governmental functions."\textsuperscript{50}

\textit{Usery} involved a challenge to the 1974 amendments to the Fair Labor Standards Act (FLSA),\textsuperscript{51} which extended the Act's minimum wage and maximum hour provisions to state and local government employees. \textit{Usery} distinguished between "individual businesses [which are] necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside," and the "States as States," which are generally immune from federal interference.\textsuperscript{52} The Court found that the wage regulations exceed tenth amendment limits because they "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."\textsuperscript{53} This holding overturned years of precedent and specifically overruled \textit{Maryland v. Wirtz},\textsuperscript{54} in which the Court had held that the federal minimum wage requirements could be applied to employees of public schools and hospitals.\textsuperscript{55} The \textit{Usery} opinion said that the reasoning in \textit{Wirtz} was no longer authoritative,\textsuperscript{56} and it dismissed as "simply wrong"\textsuperscript{57} language from \textit{United States v. California},\textsuperscript{58} in which the Court had said, "We look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce."\textsuperscript{59}

\textsuperscript{47} J. NOWAK, R. ROTUNDA & J. YOUNG, \textit{supra} note 27, at 159-60.
\textsuperscript{48} National League of Cities v. Usery, 426 U.S. at 852.
\textsuperscript{49} Justice Brennan, dissenting in \textit{Usery}, lamented that the Court repudiated settled principles of constitutional analysis and judicial restraint by means of "an abstraction without substance, founded neither in the words of the Constitution nor on precedent." \textit{426 U.S.} at 860. He viewed the Court's application of the tenth amendment as supported by a "pau-

city of legal reasoning or principle." \textit{Id.} at 872.
\textsuperscript{50} \textit{Id.} at 852.
\textsuperscript{52} 426 U.S. at 845.
\textsuperscript{53} \textit{Id.} at 852.
\textsuperscript{54} 392 U.S. 183 (1968).
\textsuperscript{55} \textit{Id.} at 188.
\textsuperscript{56} 426 U.S. at 854.
\textsuperscript{57} \textit{Id.} at 855.
\textsuperscript{58} 297 U.S. 175 (1936) (upholding federal regulation of state operation of its railroads, which were involved in interstate commerce).
\textsuperscript{59} \textit{Id.} at 185.
There seem to have been two bases for the Court's decision in \textit{Usery}. First, the Court emphasized that the states were forced to implement FLSA and were directed to pay their employees specified minimum wages.\footnote{29 U.S.C. §§ 203(e)(2)(c), 206 (1976).} If \textit{Usery} means that coercion of the states makes a federal act unconstitutional, then it may be consistent with prior cases holding that federal action is valid if it does not coerce the states. For example, in \textit{Steward Machine Co. v. Davis},\footnote{301 U.S. 548 (1936).} the Court upheld Title IX of the Social Security Act, which imposed a federal unemployment insurance tax on private employers but allowed them credit for making payments to their state unemployment systems if the state contributed to a federal unemployment trust fund. Stressing that the states could both choose whether to develop programs that would be eligible for federal grants\footnote{\textit{Id.} at 595-97.} and decide on the particular type of statute to enact,\footnote{\textit{Id.} at 593.} the Court found that the unemployment tax and credit did not coerce, but merely induced, state action.\footnote{\textit{Id.} at 589-90.} \textit{Usery}, on the other hand, involved a federal mandate directed to the states. Instead of being offered an incentive to conform to federal standards as they had been in \textit{Steward Machine}, the states were given no choice but to comply.

The second possible basis for the Court's decision in \textit{Usery} is that FLSA "forced relinquishment of important governmental activities"\footnote{National League of Cities v. Usery, 426 U.S. at 847.} and displaced "traditional [state] governmental functions."\footnote{\textit{Id.} at 852.} In \textit{Usery}, the Court found that structuring the pay scales of state employees was a traditional state function with which the federal government could not interfere.\footnote{\textit{Id.} at 851-52.} This analysis focuses tenth amendment inquiry on the definition of "traditional aspects of state sovereignty." If this is the proper test, it will prove difficult to administer, because the Court has not clearly specified the scope of the states' sovereign functions. It also seems unrelated to the important question of when nationally uniform rules will promote the public welfare more effectively than will state laws.

Both the Virginia and Indiana district courts understood \textit{Usery} as establishing the above criteria for tenth amendment analysis: coercion of the state and impairment of its traditional functions. The district courts reasoned that if SMCRA leaves states with little choice but to enact and enforce a state program, the details of which have been dictated by Congress, then the states had been unconstitutionally co-
The district courts also found that SMCRA interferes with land use planning, which they viewed as a governmental function as traditional as that of structuring pay scales of state employees. The Virginia court found that state land use planning "provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." The Supreme Court reversed the district court holdings that SMCRA exceeds tenth amendment limits on Congress's commerce clause power. The Court identified three rules purportedly established by Usery, and it found that the district courts' holding "rest[ed] on an unwarranted extension" of these rules. According to the Court, Usery means that federal legislation is inconsistent with the tenth amendment only if it (1) "regulate[s] the States as States"; (2) "address[es] matters that are indisputably 'attributes of state sovereignty'"; and (3) "directly impair[s] [the states'] ability 'to structure integral operations in areas of traditional functions.'"

In Virginia Surface Mining, the Court treated as dispositive the first rule above, asking whether SMCRA regulates the states as states. The Court found the Act does not violate this rule, since it leaves states with discretion to undertake enforcement themselves or to allow federal authorities to enforce the Act. The Court rejected the argument that the threat of federal regulation coerces the states into enforcing the Act. The Court also found that the requirements for federal approval of state programs did not coerce the states by leaving them little choice as to the form that these programs would take. The Court compared SMCRA with other federal statutes that had earlier survived tenth amendment challenges because the states were not forced

71. 101 S. Ct. at 2374-75; id. at 2389.
72. 101 S. Ct. at 2366. The Court explained: "Demonstrating that these three requirements are met does not . . . guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed." Id.
73. Id. (quoting National League of Cities v. Usery, 426 U.S. at 854).
74. Id. (quoting 426 U.S. at 845).
75. Id. (quoting 426 U.S. at 852).
76. 101 S. Ct. at 2366.
77. Id.
78. Id. at 2367.
79. See notes 13-14 supra and accompanying text.
80. 101 S. Ct. at 2366.
to expend their own funds to implement them, even though those statutes, like SMCRA, impose federal minimum standards with which the states must comply in enacting their own programs.

If the Court meant that the absence of coercion decides a tenth amendment question, then today’s cases could be reconciled with Steward Machine and National League and could provide a useful rule: Congress may exercise the commerce power without violating tenth amendment guarantees, if it does not command the states to adopt a specific regulatory scheme. SMCRA’s standards are extremely strict, but the Court found that they leave the states sufficient flexibility to avoid tenth amendment infirmity. The Court noted that the Act “establishes a program of cooperative federalism that allows the states . . . to enact and administer their own regulatory programs, structured to meet their own particular needs.” The Court thus took the view that a federal statute, to comply with the tenth amendment, must leave some degree of flexibility to the states. This view ensures that state interests will not be forgotten when Congress decides that national interests necessitate a cooperative federal program imposing uniform nationwide standards.

The Court did not clearly base its holding that SMCRA does not regulate the States as States on the absence of coercion, however. What the Court said was that the Act regulates only private individuals, for whom the tenth amendment does not guarantee freedom from federal interference. This rationale is easy to comprehend and simple to state and to apply, but it is not a principled basis on which to examine the relationship between state and federal government. SMCRA does have a substantial, direct effect on state governments: they are forced to choose either to adopt their own reclamation program conforming with federal standards, or to allow the federal government to enter their territory and to impose federal regulations. The Court’s rationale ig-

83. *Id.* at 1140.
84. 101 S. Ct. at 2366.
86. 101 S. Ct. at 2366-67.
87. As the Indiana district court pointed out, 501 F. Supp. at 465, Congress recognized that factors such as geography, climate, and topography vary from state to state, and that therefore each state should be free to structure its own regulatory program. SMCRA, § 101(f), 30 U.S.C. 1201(f) (Supp. III 1979). Representative Udall, the Act’s chief proponent, wrote that its aim was to “achieve state compliance by continuing state authority while creating a federal presence.” Udall, *supra* note 7, at 555. A provision was created to allow the states to tailor regulations to fit their own needs. 30 C.F.R. §§ 730.5, 731.13(c)(1) (1981). See also 46 Fed. Reg. 34,348 (1981) (proposed amendment to rule to allow states to adopt their own regulations meeting federal requirements instead of merely parroting the federal regulations); Developments, *Energy Law and the Environment*, 8 ECOLOGY L. Q. 762, 764-68 (1980).
88. 101 S. Ct. at 2366.
nores this effect of the Act, and the related consideration that Congress specifically intended to encourage the states to establish their own programs. It is the state, and not the individual mine operator, who is put under considerable pressure to devise a regulatory provision. States that choose to implement their own programs are eligible for federal funding. Both the threat of federal usurpation and the prospect of federal grants can have a direct influence upon the actions of state governments.

Moreover, by announcing the test without explaining two of its three parts, the Court perpetuated the confusion that has surrounded the tenth amendment since the Usery decision. The three-part test discussed above was not explicitly outlined in Usery, and hence the Court was not forced to adopt this formulation of the constitutional inquiry. Although this formulation may clarify matters to some degree, the area is still left in a murky state. The Court's application of the first branch of the inquiry may shed some light on the "states as states" issue, but the Court offers no guidance at all as to how the second and third criteria are to be applied. In addition to being vague, the second and third branches will be very difficult to distinguish from one another. While it might be argued that the Court properly did not address these criteria since it found the first branch dispositive, it can be argued with equal strength that the Court should have taken the opportunity at least to state briefly how the second and third branches are to be applied. Such a discussion would not be unwarranted, for the courts below had found that surface mining constitutes a traditional and integral function of state governments. The Court fails to discuss whether this finding was correct, and the reasons it should be approved or disapproved.

When a case arises challenging federal legislation addressed to the states as states, the Court will be compelled to face the second and third elements. It will be hard pressed to define "traditional governmental functions" in terms of Usery or today's decisions. Were the district courts wrong to view land use regulations as a state function at least as traditional and essential as structuring state employee wage scales, and if so, why?

The Court could have provided lower courts with a more principled test by also examining the challenged legislation's purpose. Rather than playing down SMCRA's intrusion on the States, the Court

91. SMCRA § 705(a), 30 U.S.C. § 1295(a) (Supp. III 1979). The Secretary may make annual grants to the state for up to 80% of the costs incurred by the state in developing, administering, and enforcing its program during the first year, 60% the second year, and 50% of its annual costs thereafter.
92. 101 S. Ct. at 2366.
94. Usery, 426 U.S. at 852.
should have examined whether the interests served by SMCRA and the perceived need for a nationally uniform system of regulation to be accomplished at the state level justify the degree of intrusion that is imposed by SMCRA. A balancing test might have more properly emphasized the policies underlying the tenth amendment than did the three-part test advanced by the Court. In a footnote, the Court indicated that when a statute fails each prong of the tenth amendment test, a court may balance the state and federal interests involved to determine whether it should nonetheless be upheld. Given the vagueness of the majority's test, it would seem more sensible to employ a balancing process as an initial matter, weighing the intrusion on the states against the federal interests served by the regulation at issue. The Court should examine not only the nature of the regulated entity—public or private, integral or peripheral government function—but also the purpose of the federal legislation at issue. Legislation should withstand a tenth amendment challenge when "its operation is not constraint, but the creation of a larger freedom, the states and the nations joining in a cooperative endeavor to avert a common evil." 

III

THE EQUAL PROTECTION ISSUES

The Supreme Court uses a three-tiered test to review legislation challenged on equal protection grounds. If "fundamental rights" are at issue or if the legislation draws on a "suspect classification" (race, national origin, United States citizenship), then the Court will strictly scrutinize the legislation, requiring that it be narrowly drawn to serve a compelling governmental interest. If the legislation involved is an economic or social welfare measure not affecting fundamental rights and not based on a suspect classification, the Court will defer to Congress's judgment and uphold the legislation unless the legislative classifications cannot "arguably relate to a legitimate function of government."

Since SMCRA is a social welfare measure neither affecting a fundamental right nor based on a suspect classification, it should receive the lowest level of equal protection scrutiny. The Indiana district court had held that SMCRA's prime farmland and approximate original contour provisions were arbitrary and irrational, and thus violated the equal protection clause even under the lowest level of scrutiny, because

96. 101 S. Ct. at 2366 n.29.
99. Id. The Court uses an intermediate level of review for classifications based on gender or legitimacy of birth. Id.
the provisions disproportionately burdened surface mining operations in that state. The Supreme Court reversed, holding that the appropriate question is whether "varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational." Since this lenient standard of review is so well-established, it is not surprising that the Court deferred to Congress's judgment and declined to examine more carefully the disproportionate effect of the Act as applied to mine operators in different regions of the country.

IV
THE PROCEDURAL DUE PROCESS ISSUE

The Court has never articulated a single test to determine what process is due before the federal government may deprive a person of life, liberty, or property. Instead, the Court considers each set of facts on a case-by-case basis to determine the procedures necessary to guard against arbitrary action and administrative error. In the SMCRA cases, the Court rejected the appellants' contention that the enforcement and civil penalty provisions of the Act deny individuals procedural due process. The Court held that since SMCRA allows for a hearing and judicial decision after an operation is shut down, the Act's procedure can afford due process and thus is facially constitutional. Moreover, the Court concluded that section 521(a)(2), authorizing the Secretary to order a cessation of mining operations if inspection discloses a health or environmental hazard, provides sufficiently objective criteria to enable the Secretary to determine, in a non-arbitrary manner, whether a sufficient danger exists to justify such a summary shutdown. While acknowledging that due process usually requires an opportunity for "some kind of hearing" before the state

100. 501 F. Supp. at 469. There are no variances available for prime farmland, and Indiana mining operations could not avail themselves of variances from the approximate original contour provisions because the variances apply only to steep slopes. The court held that these provisions thus discriminated against miners in Indiana and other midwestern states, whose coal reserves are likely to lie on the surface of prime farmland, and not on steep slopes or mountaintops.
101. 101 S. Ct. at 2387 (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).
103. Id.
104. See note 21 supra.
105. 101 S. Ct. at 2372-74.
107. 101 S. Ct. at 2374.
108. 101 S. Ct. at 2373; id. at 2388.
may deprive a landholder of a significant property interest,\textsuperscript{109} the Court held that in an emergency summary action is consistent with due process.\textsuperscript{110} The Court looked to congressional findings about the enormous damage mining can cause, and concluded that mines not complying with SMCRA and which in the Secretary’s determination “can reasonably be expected to cause significant, imminent environmental harm,”\textsuperscript{111} create an emergency outweighing the operator’s right to a prior hearing.\textsuperscript{112}

Without announcing its intention of doing so, the Court thus used a balancing test to resolve these procedural due process issues, concluding that the public interests involved outweigh certain property interests of mine owners. The Court could have written a more coherent opinion by making explicit the need to balance public and private interests. The public interest in effective surface mining reclamation should permit the government to act swiftly for the same reasons it permits state cooperation in a nationwide regulatory program.\textsuperscript{113} The Court might also have addressed the relationship of the “emergency situation” that here justifies summary administrative action to the national emergency that justifies federal environmental regulation under the tenth amendment.

\section{V}
THE JUST COMPENSATION ISSUE

Two challenges could be made against SMCRA on the basis of the fifth amendment, which prohibits takings of property without just compensation. First, a facial challenge could be made, in which it would be argued that SMCRA, on its face rather than considered in application to particular property interests, effects an unconstitutional taking. The Virginia district court upheld such a challenge, finding that the approximate original contour provisions of the Act would necessarily diminish the value of affected lands to nearly nothing, and could not “economically and physically” be complied with.\textsuperscript{114} The Supreme Court reversed on this issue.\textsuperscript{115} Stating that the test is whether an act of Congress “denies an owner economically viable use of his land,”\textsuperscript{116} the Court reasoned that, since SMCRA does not categorically prohibit all land use, some economically viable use must remain.\textsuperscript{117}

\textsuperscript{109} Id. at 2372.
\textsuperscript{110} 101 S. Ct. at 2372.
\textsuperscript{112} 101 S. Ct. at 2372-73.
\textsuperscript{113} See notes 95-97 supra and accompanying text.
\textsuperscript{114} 483 F. Supp. at 437.
\textsuperscript{115} 101 S. Ct. at 2369.
\textsuperscript{116} 101 S. Ct. at 2370 (quoting \textit{Agins v. Tiburon}, 447 U.S. 225, 260 (1980)).
\textsuperscript{117} \textit{Virginia Surface Mining}, 101 S. Ct. at 2370, Indiana, 101 S. Ct. at 2388. Only
The Court recognized, however, that a second challenge might be made against SMCRA—that the Act as applied to a particular property owner unconstitutionally takes that owner’s property interest without just compensation. The Court deemed this argument unripe for consideration because neither of the SMCRA cases presented fifth amendment claims with regard to a particular piece of land. This leaves open the possibility that future litigants presenting such challenges may prevail on the taking issue.

It is unclear what test would be applied to determine whether a compensable taking had occurred. The Court now recognizes that non-acquisitive regulation of land use, as well as physical appropriation of property, may constitute a taking. In Pennsylvania Coal Co. v. Mahon, the distinction between regulation and taking was said to be one of degree. There, a state statute prohibited mining of coal if it caused subsidence of certain kinds of property. The Court found that the statute effected a taking because it destroyed some of the mining company’s property rights, even though no property had been physically taken from it. The Court reasoned that a substantially burdensome interference amounts to a constructive taking, and that “[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.”

Both the Virginia and Indiana district courts relied on Pennsylvania Coal in finding an unconstitutional taking, and if that decision were strictly followed, complaining mine operators would stand a good chance of prevailing in a non-facial fifth amendment challenge to SMCRA. The Court’s analysis in Goldblatt v. Town of Hempstead, however, raises some doubt as to the proper application of Pennsylvania Coal. In Goldblatt, the Court apparently balanced the public interest in regulation against the private property interest involved, characterizing even a burdensome interference as noncompensable if based on a

§ 522(e) categorically prohibits mining in certain areas, including National Parks, or within 300 feet of occupied dwellings and public buildings. SMCRA § 522(e), 30 U.S.C. § 1272(e) (Supp. III 1979).

118. Id. at 2371.
119. Id. at 2369-71.
120. See, e.g. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); United States v. Causby, 328 U.S. 256 (1946).
121. 260 U.S. 393 (1922).
122. Id. at 416.
123. Id. at 412-13.
124. Id. at 414.
125. 260 U.S. at 414.
126. 483 F. Supp. at 437, 439, 440, 441, 442.
sufficiently important public interest.\textsuperscript{129}

There are few hints in the SMCRA cases as to which line of reasoning—the Pennsylvania Coal or Goldblatt analysis—the present Court would follow in considering non-facial challenges to SMCRA. The Court referred at one point to \textit{Kaiser Aetna v. United States},\textsuperscript{130} a case that called for consideration not only of the public interest in taking certain property but also of “the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action. . . .”\textsuperscript{131} This approach seems to take greater cognizance of individual property interests than does the balancing approach of Goldblatt. Yet the Court also relied on \textit{Andrus v. Allard},\textsuperscript{132} an opinion that demonstrates less concern for the individual property owner: “[a]t least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking because the aggregate must be viewed in its entirety.”\textsuperscript{133} Indeed, the Court found the ability of mine owners to convert their land to alternative uses controlling in the context of the facial challenge considered in the SMCRA cases.\textsuperscript{134} Under this analysis only one strand—the use of their property for mining—in their bundle of property interests was taken.

A crucial policy issue that courts might examine in attempting to

\textsuperscript{129} In \textit{Goldblatt} the Court upheld a zoning ordinance prohibiting excavation below the water line, even though the ordinance effectively shut down a sand and gravel quarry that had been operating for thirty-one years. \textit{Id.} at 591, 596. The Court said that a regulation is not a taking if it appears that “the interests of the public . . . require such interference; and that the means are reasonably necessary for the accomplishment of the purpose, and are not unduly oppressive upon individuals.” \textit{Id.} at 595. This suggests that whether compensation must be paid turns upon the regulation’s purpose, and that if the court concludes that the public interest in preserving the environment outweighs the property interests of private landowners, then the court will find that SMCRA does not violate the fifth amendment takings clause, even as applied to specific property interests.

Such an analysis, however, could lead to the result that no valid federal legislation would give rise to a compensable taking, for the court would always assume that Congress accounted for private property interests before concluding that they must give way to the general welfare. Since this is a result likely unintended by the drafters of the fifth amendment, the court should itself weigh private property losses against the public gain. This action is particularly appropriate in non-facial challenges to legislation, because Congress cannot determine before the fact what impact legislation will have on specific individuals.

On the other hand, the reasoning underlying the \textit{Goldblatt} Court’s language might have been that some uses of an individual’s property are so offensive to the public interest as not to require compensation to the individual in exchange for ceasing such use. Where such a use is widespread, regulation may be a more efficient way of controlling the use than would be a series of lawsuits directed at individual property owners under a public nuisance theory.

\textsuperscript{130} 444 U.S. 164 (1979).

\textsuperscript{131} \textit{Id.} at 175.

\textsuperscript{132} 444 U.S. 51 (1979).

\textsuperscript{133} \textit{Id.} at 65-66, quoted in Appellants’ Jurisdictional Statement at 22, \textit{Virginia Surface Mining}, 101 S. Ct. at 2352.

\textsuperscript{134} 444 U.S. at 2370.
resolve the conflict in this area is whether a valid governmental regulation, enacted for the benefit of many, causes detriment to a few landowners that is so disproportionate to their share of the gain that the government must compensate them. This issue was explicitly articulated in *Penn Central Transportation Co. v. City of New York*. In that case, the Court held that the owners of the Grand Central Terminal were not entitled to compensation, even though they were prevented by the New York City Landmarks Preservation Law from erecting a multistory office building above the Terminal. The Court based its holding in part upon the fact that appellants were not the only landowners burdened, because the regulations applied to all owners of landmarks and buildings in historic districts. In addition, the owners received the same benefits as did all New York citizens, in that "the quality of life in the city as a whole" had been improved by the law. The Court then examined the regulation's impact on appellants' ability to realize the benefits of property ownership and concluded that reasonable beneficial uses of the landmark site remained.

If this reasoning is followed in future cases arising under SMCRA, then the court will have to determine whether the aggrieved mine operator should have to suffer shutdown in return for the general benefit of land preservation, or whether the operator's individual economic loss is so great as to require compensation. Although there are many mine operators affected by the Act, as there were many owners of historic landmarks affected by the New York law in *Penn Central*, mine operators who are prevented from mining may not be left with any economically viable alternatives. In this way, their plight differs from that of appellants in *Penn Central*, who could continue their existing lucrative operation of the Terminal. Therefore, mine operators may stand a better chance of prevailing on the taking issue in future litigation under SMCRA.

CONCLUSION

In its cursory disposition of the SMCRA cases, the Supreme Court failed to examine the national policy goals and environmental concerns that prompted Congress to pass SMCRA. In lieu of recognizing the

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137. NEW YORK CITY CHARTER & ADMIN. CODE, ch. 8-A, §§ 205-1.0 et seq. (1976). The program was established by New York in order to preserve the city's historic landmarks and historic districts.
138. 438 U.S. at 138.
139. Id. at 134-35.
140. Id. at 134.
141. Id. at 136-38.
policies underlying the Act and addressing the issues presented in this light, the Court discussed each constitutional question in isolation and handed down a decision which does little to clarify the role of federal environmental legislation or the proper scope of judicial review. The Court's summary disposition of the questions presented to it and its creation of the troublesome three-part tenth amendment test will provide little guidance to future legislators or litigants.

*Tracy Conner*