Land & Water Law Review

Volume 17 | Issue 2 Article 7

1982

Constitutional Law - Tenth Amendment - Challenges of Commerce Clause Legislation Affecting Private Individuals and Businesses - Hadel v. Virginia Surface Mining and Reclamation Ass'n

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CONSTITUTIONAL LAW—TENTH AMENDMENT—Challenges of Commerce Clause Legislation Affecting Private Individuals and Businesses. Hodel v. Virginia Surface Mining and Reclamation Ass'n, ... U.S. ....., 101 S. Ct. 2352 (1981).

The Surface Mining Control and Reclamation Act of 1977[1] established a nationwide program for surface mining and reclamation. The Act was written in response to the growing need for energy development in America.[2] The basic purposes of the Act were to minimize the environmental impact of surface coal mining, to preclude surface mining in areas where surface mining could potentially cause irreparable damage, and to balance the need for energy development in America against the need to protect the environment, and other industry, especially agriculture.[3] The Act created the Office of Surface Mining Reclamation and Enforcement (OSM) within the Department of the Interior[4] and gave primary responsibility for administering the Act to the Secretary of the Interior.[5] The Act established minimum standards of mining control and reclamation[6] which are enforced by licensing requirements,[7] bonding of operators,[8] and by various civil and criminal sanctions.[9]

OSM was directed to promulgate interim[10] and permanent[11] regulations. When permanent programs under the SMCRA took effect, the federal standards were to supersede state surface mining regulations.[12] The Act permitted a state to continue to regulate surface mining and reclamation within the state, if it enacted state laws implementing the minimum standards established by the Act, and if the state could show it had the administrative and technical ability to enforce these state laws.[13] The Secretary of the

1. 30 U.S.C. §§ 1201-1308 (Supp. III 1979) [hereinafter cited in text as the SMCRA or the Act].
2. *See* a discussion of the legislative history of the Act in Binder, *Strip Mining, the West and the Nation*, 12 LAND & WATER L. REV. 1 (1977).
3. *See* 30 U.S.C. § 1202(a), (c), (f) (Supp. III 1979); Binder, *supra* note 2, at 1-25.
4. 30 U.S.C. § 1211 (Supp. III 1979).
5. *Id.* § 1211(c).
6. *Id.* §§ 1251-1279.
7. *Id.* §§ 1252(a), 1256, 1260(d)(1).
8. *Id.* §§ 1259, 1269.
9. *Id.* § 1268(a), (e), § 1270.
10. *Id.* § 1251(a). *See* 30 C.F.R. § 710 (1981).
11. 30 U.S.C. § 1251(b) (Supp. III 1979). *See* 30 C.F.R. § 701 (1981).
12. 30 U.S.C. § 1254(g) (Supp. III 1979).
13. *Id.* § 1253.

Interior was given the authority to create and enforce a permanent state program for any state which failed to implement or to enforce a satisfactory state program.[14]

Among the minimum standards defined in Title V of the Act are special provisions relating to "steep slope" mining[15] and provisions relating to "prime farmlands".[16] The "steep slope" provisions require, among other things, that any "steep slope" minesite must be returned to its "approximate original contour" after mining.[17] The "prime farmland" provisions require, among other things, that the land be returned to at least the productive ability of similar farmlands in the surrounding area.[18] In order to obtain a license to conduct mining on these sites, mine operators were required to make a preliminary showing that they possessed the capacity to comply with the Act.[19] In addition, mine operators who failed to meet the standards in reclamation of such sites forfeited their bond.[20]

The Virginia Surface Mining and Reclamation Association was an association of coal producers subject to the provisions of the Act. These coal producers believed the provisions of the Act practically precluded them from mining the coal deposits in southwestern Virginia.[21] Since coal mining was the predominant industry in that region, the Association believed the SMCRA would destroy the "economic life blood of the communities and the people of the region",[22] and would adversely affect the taxing powers of local governments in the area.[23] Therefore, the Association, along with several coal mine operators and coal land owners, filed suit in the Federal District Court of the Western District of Virginia, seeking declaratory and injunctive relief

14. *Id.* §§ 1254, 1256(a).
15. *Id.* § 1265(d).
16. *Id.* § 1260(d).
17. *Id.* § 1265(d)(4). Steep slope means "any slope above twenty degrees." *Id.*
18. *Id.* § 1260(d). Under § 1291(20), "prime farmland" has the same meaning as that "previously prescribed by the Secretary of Agriculture." *See* 7 C.F.R. § 657 (1980).
19. 30 U.S.C. § 1260(b)(2), (d)(1) (Supp. III 1979).
20. *Id.* § 1269.
21. Brief of Petitioners at 6, Hodel v. Virginia Surface Mining and Reclamation Ass'n, ... U.S. ....., 101 S. Ct. 2352 (1981).
22. *Id.* at 2.
23. *Id.* at 30.

from several provisions of the Act.[24] The Commonwealth of Virginia and the Town of Wise, Virginia intervened as plaintiffs challenging the Act under various Constitutional provisions.

The District Court upheld the Act as a legitimate exercise of congressional Commerce Clause powers,[25] but held the challenged provisions to be an unconstitutional violation of the Tenth Amendment.[26] The Supreme Court noted probable jurisdiction of a direct appeal from this decision,[27] and heard the case in June of 1981.

In *Hodel v. Virginia Surface Mining and Reclamation Ass'n*,[28] the plaintiffs, (hereinafter referred to as Virginia), alleged that Congress exceeded the Commerce Clause power in enacting the SMCRA. Virginia argued that the effect of the Act was to regulate land use, which is an area of regulation traditionally left to the states.[29] The Court, in response, noted that Congress had concluded that surface mining and reclamation "affect" commerce.[30] The Court said that since this conclusion was based on detailed investigations and hearings, the Court could not say that the Congress' conclusion was irrational.[31] The Court therefore held the Act was a legitimate exercise of congressional Commerce Clause power.[32]

Virginia also argued that the SMCRA violated the Tenth Amendment.[33] It argued that land use regulation was a traditional state function, and that the SMCRA substantially impaired the states' ability to perform that function.[34]

24. Virginia challenged the Act on Commerce Clause, Fifth, and Tenth amendment grounds. Only Commerce Clause and Tenth amendment challenges are discussed in this case note.
25. Virginia Surface Mining and Reclamation Ass'n, Inc. v. Andrus, 483 F. Supp. 425, 431 (W.D. Va. 1980).
26. *Id.* at 435.
27. The Supreme Court may accept a direct appeal from a federal district court decision which holds an Act of Congress to be unconstitutional pursuant to 28 U.S.C. § 1252 (1976).
28. ____ U.S. ____, 101 S. Ct. 2352 (1981) [hereinafter cited in text as *Hodel*].
29. *Id.* at 2359.
30. *Id.* at 2360-61.
31. *Id.* at 2362.
32. *Id.* at 2364.
33. *Id.*
34. *Id.*

Citing *National League of Cities v. Usery*,[35] the state reasoned the federal interest in enforcing the SMCRA in Virginia was slight as compared to the substantial imposition the Act caused on state sovereignty.[36] Virginia also argued that the SMCRA coerced the state legislatures into enacting specific mining and reclamation regulations in order to avoid losing its power to regulate surface mining and reclamation to a federal agency.[37]

The Supreme Court clarified *Usery*, and held the SMCRA did not violate the Tenth Amendment since it regulated private individuals and businesses, and did not regulate "states as states".[38] The Court held that this was simply a matter of legitimate federal regulations preempting contradictory state regulations under the Supremacy Clause.[39]

COMMERCE CLAUSE ANALYSIS

The power of Congress to regulate interstate commerce under the Commerce Clause is plenary.[40] Though much has been said about the expansion of the Commerce Clause power in recent years, in reality the plenary powers have not been expanded as such. It is the powers under the Necessary and Proper Clause which have been expanded.[41] The Necessary and Proper Clause enables Congress to enact legislation when it is "necessary" and "proper" to do so in effectively fulfilling a specifically enumerated purpose, such as the regulation of commerce.

The powers under the Necessary and Proper Clause are not "plenary" or "full, entire, complete, absolute, perfect

35. 426 U.S. 833 (1976) [hereinafter cited in text as *Usery*]. In *Usery* the Court invalidated federal minimum wage standards as applied to state employees performing traditional governmental functions. *Id.*
36. *See* Brief of Petitioners, *supra* note 21, at 35.
37. Hodel v. Virginia Surface Mining and Reclamation Ass'n, *supra* note 28, at 2366-67.
38. *Id.* at 2366.
39. *Id.* at 2367-68.
40. *See generally* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824).
41. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). *See generally* Engdahl, *The Federal Lands Program Under the Surface Mining Control and Reclamation Act of 1977*, 26 ROCKY MTN. MIN. L. INST. 117, 134 (1980).

[and] unqualified."[42] The standard of analysis used by the Court in reviewing Necessary and Proper Clause questions was established in *McCulloch v. Maryland.*[43] The power is subject to three limitations: 1) The ends sought must be legitimate;[44] 2) the means chosen by Congress must be appropriate;[45] 3) the means chosen by Congress must not violate a clear proscription of another constitutional provision, such as the First Amendment or the Tenth Amendment.[46]

The modern Court, when asked to invalidate an Act of Congress because it exceeds the Necessary and Proper and Commerce Clause powers, exercises a great deal of deference towards congressional determinations. The Court refuses to second guess Congress' determination that the regulated activity "substantially affects" commerce.[47] The Court will refuse to inquire into a statute's "real" purposes, or the drafters' "true" motives, so long as the regulation might rationally promote legitimate ends which Congress might have been pursuing.[48] Thus, the power of Congress to regulate even intrastate activity under the Necessary and Proper and Commerce Clauses has become so broad that some authors have concluded that the only limitations on the powers are express constitutional proscriptions, such as the Bill of Rights.[49] The Court's analysis in *Hodel* exemplifies the great deference given by the Court in modern Commerce Clause litigation.

Virginia alleged that the purpose of the Act was to regulate land use, not commerce, and was therefore beyond the Commerce Clause jurisdiction of Congress.[50] The Court responded that its role, in determining whether a particular

42. Mashunkashey v. Mashunkashey, 191 Okla. 501, 134 P.2d 976, 979 (1942).
43. *Supra* note 41, at 421.
44. The Court will ask here whether the regulation is rationally related to one of the specifically enumerated purposes. With Commerce Clause related questions, the Court asks whether the regulated activity "substantially affects" commerce.
45. Here the Court will determine whether the means chosen bear a rational relationship to accomplishment of the legitimate ends sought.
46. *See generally* Engdahl, *supra* note 41, at 131.
47. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964).
48. *See* United States v. Darby, 312 U.S. 100, 115 (1941); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5.4, at 236 (1978).
49. *See, e.g.*, L. TRIBE, *supra* note 48, § 5.4, at 234, § 5.7, at 240.
50. Brief of Petitioners, *supra* note 21, at 12.

congressional act is valid under the Commerce Clause, is relatively narrow.[51] "The Court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding."[52] The Court then noted the detailed studies and hearings conducted by Congress prior to the enactment of the SMCRA, and concluded that in light of the evidence available to Congress, and the detailed consideration the legislation received "we cannot say that Congress did not have a rational basis for concluding that surface coal mining has substantial effects on interstate commerce."[53] Virginia, in its brief, attempted to refute these congressional findings.[54] The Court chose not to scrutinize the findings and therefore did not address Virginia's statistical allegations.[55]

The thrust of Virginia's argument was that land, as such, could not be "in commerce", and since the SMCRA did not regulate the "commerce aspects" of mining, such as extraction or transportation, it was really a "land use regulation".[56] This argument is substantially similar to efforts made in the past to distinguish different aspects of manufacturing, by arguing that Congress could not regulate the goods until they "entered" commerce. These arguments were rejected long ago.[57]

A companion case to *Virginia Surface Mining and Reclamation Ass'n* was *Hodel v. Indiana.*[58] In that case the state challenged the SMCRA's "prime farmland" provisions with Commerce Clause and Tenth Amendment grounds. The Appellants in that case argued that Congress could not regulate those facets of surface coal mining under the commerce power since coal mining on prime farmlands had only an "infinitesimal effect" or "trivial impact" on interstate com-

51. Hodel v. Virginia Surface Mining and Reclamation Ass'n, *supra* note 28, at 2360.
52. *Id.* (citing Heart of Atlanta Motel v. United States, *supra* note 47, at 258).
53. *Id.* at 2362.
54. Brief of Petitioners, *supra* note 21, at 16-25.
55. *See* Hodel v. Virginia Surface Mining and Reclamation Ass'n, *supra* note 28, at 2362 n.20.
56. Brief of Petitioners, *supra* note 21, at 12.
57. *See* NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937).
58. ..... U.S. ....., 101 S. Ct. 2376 (1981).

merce.[59] The Supreme Court, in denying their challenge, emphasized that the actual volume of commerce affected by the regulated activity is irrelevant.[60] The Court held "the pertinent inquiry . . . is not how much commerce is involved, but whether Congress could rationally conclude that the regulated activity affects commerce".[61] The Court refused to scrutinize Congress' objectives, saying it would not substitute its judgment for congressional determinations.[62] This follows recent decisions, which have held that when Congress determines a particular class of activity substantially affects commerce, it can then regulate all members of that class, regardless of whether an individual member's potential impact on commerce, standing alone, is substantial or not.[63]

Mr. Justice Rehnquist concurred in *Hodel v. Indiana*, and *Hodel v. Virginia Surface Mining and Reclamation Ass'n*.[64] In his concurring opinion he stated that although he agreed with the outcome of the decisions, the Court's opinion seemed to imply that any activity which merely affects commerce may be regulated under the Commerce Clause.[65] He noted that the Court's extreme deference might lead one to believe that there really is no limitation on the Commerce Clause power.[66]

The Commerce Clause holding in *Hodel* is important because the Court affirmed several circuit court cases which have upheld recent federal environmental protection enactments against Commerce Clause challenges.[67] This marks another step in the expansion of the Necessary and Proper and Commerce powers to regulate intrastate activities which have the potential of substantially affecting interstate commerce. This trend has given rise to some concern that the further expansion of this power could potentially destroy the states' sovereignty. As one author put it "no one expects

59. Indiana v. Andrus, 501 F. Supp. 452, 460 (S.D. Ind. 1980).
60. Hodel v. Indiana, *supra* note 58, at 2383.
61. *Id.*
62. *Id.* at 2384.
63. *See* Wickard v. Filburn, 317 U.S. 111, 127-28 (1942); Perez v. United States, 402 U.S. 146, 150 (1971).
64. *Supra* note 28, at 2389 (Rehnquist, J., concurring).
65. *Id.* at 2391-92.
66. *Id.* at 2389-91.
67. *Id.* at 2363.

Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions—in the prospect that Congress will nibble away at state sovereignty . . . until someday essentially nothing is left but a gutted shell."[68]

TENTH AMENDMENT ANALYSIS

A. *Scope of Usery*

Until 1937, the Supreme Court interpreted the Tenth Amendment as imposing substantial restraints on Congress' power under the Commerce Clause. Several times the Court struck down congressional acts as exceeding this power.[69] With the Great Depression and the New Deal, the Court did a turnabout, overruling these prior cases in *NLRB v. Jones and Laughlin Steel Corp.*[70] From 1937 to 1976, the Tenth Amendment seemed to be dormant. The Supreme Court in *United States v. Darby*[71] referred to the Tenth Amendment as "a mere truism" which only meant that those powers not surrendered by the States to the Federal Government have been retained by the States. But then the Supreme Court in *National League of Cities v. Usery*,[72] for the first time in four decades, held that an Act of Congress violated the Tenth Amendment. The scope of the Tenth Amendment immunity, established by *Usery*, was unclear.[73] For example, while two federal district courts read *Usery* broadly, holding the SMCRA violated the Tenth Amendment,[74] two other federal district courts rejected similar Tenth Amendment challenges to the SMCRA.[75] The district court in *Virginia*

68. L. TRIBE, *supra* note 48, § 5.20, at 302.
69. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936).
70. *Supra* note 57.
71. *Supra* note 48, at 124.
72. *Supra* note 35.
73. *E.g., compare* 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 (1980), *with* Note, *Surface Mining Control and Reclamation Act of 1977: Regulatory Controversies and Constitutional Challenges*, 8 ECOLOGY L.Q. 762 (1980) [hereinafter cited as Note, *Surface Mining Control*].
74. Indiana v. Andrus, *supra* note 59; Virginia Surface Mining and Reclamation Ass'n, Inc. v. Andrus, *supra* note 25.
75. Star Coal v. Andrus, 14 Env't Rep. Cases (BNA) 1325 (S.D. Iowa 1980); Concerned Citizens for Appalachia, Inc. v. Andrus, 494 F. Supp. 679 (D.C. Tenn. 1980).

Surface Mining and Reclamation Ass'n v. Andrus interpreted *Usery* as sweeping away nearly forty years of precedent.[76] That court believed that any Federal regulation which interfered with a state's freedom to structure integral operations in areas of traditional governmental functions was invalid under the *Usery* standards.[77] Since the SMCRA displaced state regulation in the traditional governmental function of land use regulation, the Act was held to be invalid.

The Supreme Court in *Hodel* clarified the scope of *Usery*. The Court said a successful Tenth Amendment challenge of a congressional act must satisfy *each* of three requirements.[78] First, there must be a showing that the challenged statute regulates "states as states";[79] second, the federal regulation must address matters which are "indisputably attributes of state sovereignty";[80] and third, it must be apparent that the states' compliance with the federal law would indirectly impair their ability to structure integral operations in areas of traditional functions.[81] Since the first requirement had not been met, the Court in *Hodel* denied the Tenth Amendment challenges.

Virginia argued that the SMCRA coerced the state legislatures into enacting specific regulations in order to avoid the possibility of losing their power to regulate land use within the state to a federal agency.[82] Thus, they argued, the pervasive effect of the SMCRA regulated the "states as states"[83]. The Court did not concern itself with the question of whether the potential impact of the SMCRA fell upon the "states as states". The Court said the incidence of the regulations falls upon private individuals and businesses who are "necessarily subject to the dual sovereignty of the govern-

76. *Supra* note 25, at 425, 432.
77. *Id.*
78. Hodel v. Virginia Surface Mining and Reclamation Ass'n, *supra* note 28, at 2366.
79. *Id.* (citing National League of Cities v. Usery, *supra* note 35, at 854).
80. *Id.* (citing National League of Cities v. Usery, *supra* note 35, at 845).
81. *Id.* (citing National League of Cities v. Usery, *supra* note 35, at 852).
82. Brief of Petitioners, *supra* note 21, at 41.
83. *Id.*

ment of the Nation and of the state in which they reside."[84] The Court went on to say that this was merely an instance of preemption of state law by legitimate federal legislation.[85] "It would be . . . a radical departure from long established precedent for this Court to hold that the Tenth Amendment prohibits Congress from displacing state police power laws regulating private activity."[86]

The result in *Hodel* is not surprising in light of the narrowly drawn language of the *Usery* decision. The Court's opinion in *Usery* relied to some extent upon *New York v. United States*,[87] another Supreme Court case which dealt with the issue of intergovernmental immunities from taxation. Intergovernmental immunities from taxation and from regulation have had similar histories and have been treated as corollaries by the Court.[88] These two areas, taken together, comprise a broader theory of "intergovernmental immunities".[89] Thus the scope of the Tenth Amendment immunities defined in *Usery* and *Hodel* can be clarified by reading the cases in light of the tax immunity defined in *New York v. United States*. There, Justice Stone, speaking for a plurality of the Court, said the immunity only extended to "State activities and State-owned properties that partake of uniqueness from the point of view of intergovernmental relations".[90] The Court said that the federal government could not tax a state house, or income derived by the states through taxation.[91]

But then the Court limited the immunity, saying it only extended to taxation of "states as states".[92] In this context, *Usery* and *Hodel* should not be read broadly, as indicative of a change of direction by the Court. They should

84. Hodel v. Virginia Surface Mining and Reclamation Ass'n, *supra* note 28, at 2365 (quoting National League of Cities v. Usery, *supra* note 35, at 845).
85. *Id.* at 2367-68.
86. *Id.* at 2368.
87. National League of Cities v. Usery, *supra* note 35, at 843 (quoting New York v. United States, 326 U.S. 572, 587-89 (1946) (Stone, J., plurality opinion)).
88. *See* L. TRIBE, *supra* note 48, § 5-20, at 304, § 5-22, at 311.
89. *See* Engdahl, *supra* note 41, at 146-47.
90. 326 U.S. 572, 588 (1946).
91. *Id.* at 582.
92. *Id.*

rather be read in line with applications of the tax immunity to intergovernmental immunities from regulation.[93]

Some authors have been critical of the Court's narrow interpretation of intergovernmental immunities. One noted authority has stated that it is improper to extend the immunity only to the government entity, since the Tenth Amendment reserves non-enumerated powers to the states, *and to the people.*[94] He also argued that it is an anomaly to conclude that a state is more interested in regulating its own service providing employees than it is in regulating the activities of private persons and business conducted within its borders.[95] It can also be argued that the citizens and businesses in the state have an interest in having their day to day activities governed by local government which will be more able to understand their needs, and their peculiar circumstances.

B. *Standard of Analysis*

One flaw in the *Usery* opinion was the Court's failure to enunciate a standard of analysis to be used by litigants and lower tribunals in cases deciding Tenth Amendment questions. Indeed there appeared to be some confusion among the justices themselves concerning what standard of analysis had been used. Mr. Justice Rehnquist, writing for the Court, seemed to use a *per se* standard, by enumerating criteria which would, if met, establish a violation of the Tenth Amendment. Yet the Court failed to overrule *Fry v. United States,*[96] and held that Congress could still enact regulations which violate those criteria in emergency situations.[97] Mr. Justice Stevens assumed the Court established a *per se* standard, and dissented because he could not distinguish the invalidated regulations from other "unquestionably permissible" federal regulations of similar state and

93. *See* Engdahl, *supra* note 41, at 146-47.
94. L. TRIBE, *supra* note 48, § 5-22, at 312.
95. *Id.*
96. 421 U.S. 542 (1975). In *Fry,* the Court upheld the Economic Stabilization Act of 1970. The Court described the Economic Stabilization Act as "an emergency measure to counter severe inflation that threatened the national economy," and said that the Act preempted conflicting State law under the Supremacy Clause. *Id.* at 548.
97. National League of Cities v. Usery, *supra* note 35, at 853.

local activities.[98] In his concurring opinion, Mr. Justice Blackmun assumed the Court used a balancing analysis, weighing the state's interest in being immune from federal regulation against the federal interest in effectively regulating the subject matter.[99] Both Justices Stevens and Blackmun expressed some concern that the *per se* standard of analysis implied in the majority opinion, would invalidate Federal environmental regulations as applied to state and local governments.[100]

Virginia argued in *Hodel* that under the Blackmun balancing test, the state interest in being immune from federal regulation clearly outweighed the federal interest in enforcing the SMCRA in Virginia.[101] They argued that the federal interest in preventing environmental impact was either already met by existing regulations, or was not furthered by the SMCRA provisions as applied to southwestern Virginia.[102] They offered evidence that the steep slope provisions, as applied to this region, actually increased the adverse environmental effects of surface mining.[103] The Supreme Court refused to adopt this analysis.[104]

The Court once again did not specifically address the question of what standard is to be used in Tenth Amendment cases. The three step test seems to establish a *per se* rule, but the Court also stated that meeting the three requirements does not guarantee that the challenge will succeed, and that there are situations in which the federal interest may outweigh the states' interest in being immune from federal regulation.[105] The analysis used by the Court in *Hodel* and *Usery* implies that a standard of analysis similar to the standard used in some equal protection cases should be used. If the challenger in an equal protection case can show that

98. *Id.* at 880-81 (Stevens, J., dissenting).
99. *Id.* at 856 (Blackmun, J., concurring).
100. *Id.* at 880-81 (Stevens, J., dissenting); *id.* at 856 (Blackmun, J., concurring).
101. Brief of Petitioners, *supra* note 21, at 35.
102. *Id.* at 25, 37-38.
103. *Id.* at 37-38.
104. The Court said that determining the adequacy of existing regulations or the wisdom of the Act were questions for Congress to determine and not for the Court. Hodel v. Virginia Surface Mining and Reclamation Ass'n, *supra* note 28, at 2363.
105. *See id.* at 2366 n.29.

the challenged regulation classifies people into "suspect classifications", this triggers strict scrutiny, and only compelling state purposes will overcome the strong presumption of invalidity.[106] Similarly, the Court in *Hodel* and *Usery* seemed to say that if a challenger can make an initial showing that the congressional act offends the three criteria, this will heighten judicial scrutiny, and only compelling federal interests will be able to overcome the presumption of invalidity. This analysis would explain why *Fry* was not overruled, since the regulation there was identified as an "emergency federal wage control"[107] which was of sufficient federal importance to overcome even a strong presumption of invalidity. This standard adequately answers Mr. Justice Stevens' dissent in *Usery*. Since a balancing analysis is used after the three criteria have been met, the Court can then distinguish between invalid and "unquestionably permissible" regulations.[108]

OTHER LIMITATIONS ON COMMERCE CLAUSE POWERS

As was discussed above, the Court in *Hodel* held that the SMCRA was a valid commerce clause regulation which preempted conflicting state regulations and which did not violate the Tenth Amendment. The scheme of the SMCRA is not a new one. Several recent environmental protection enactments have created similar programs which have been described as "cooperative federalism" programs.[109] These programs seek to induce local implementations of national standards for environmental protection by offering funds to states, as well as by threatening private entities with penalties for violations of the standards. The Court in *Hodel*

106. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967).
107. *See* Fry v. United States, *supra* note 96, at 548.
108. To further highlight the consistency between *New York v. United States* and the *Usery* and *Hodel* decisions, two cases which rejected Tenth Amendment challenges of federal regulatory statutes since the *New York* decision in 1946. Both involved what could be classified as emergency federal regulations. *See* Case v. Bowles, 327 U.S. 92 (1946); Hulbert v. Twin Falls Cty., 327 U.S. 103 (1946) (both challenging the Emergency Price Control Act enacted to control the wartime economy). Both would be decided the same way under *Hodel's* Tenth Amendment analysis.
109. *See* Edgman & Menzel, *The Regulation of Coal Surface Mining in a Federal System*, 21 NAT. RESOURCES J. 245 (1981); Battle, *Transportation Controls Under the Clean Air Act-An Experience in (Un)Cooperative Federalism*, 15 LAND & WATER L. REV. 1 (1980).

in upholding the SMCRA, summarily affirmed several circuit court decisions which upheld other "cooperative federalism" programs in the face of Commerce Clause and Tenth Amendment challenges.[110]

Hodel involved a preenforcement challenge to the SMCRA.[111] Though state officials have been unsuccessful in challenging cooperative federalism enactments on Tenth Amendment or strict Commerce Clause grounds,[112] they may still argue that the provisions in these enactments should be narrowly construed so as to minimize their actual imposition upon state sovereignty. One well known author has stated that the Supreme Court will narrowly construe commerce clause enactments which serve to reduce state sovereignty, requiring Congress to clearly announce its intent to preempt state regulation over the subject matter before the language will be given that effect.[113] Thus if the language will bear two constructions, the Court will prefer the construction which interferes the least with state sovereignty. This so called "clear statement doctrine"[114] will supposedly prevent Congress from resorting to ambiguity when faced with difficult state-federal balance questions in the hope that courts will construe the enactment broadly.

State officials have had some success in achieving narrow constructions of cooperative federalism enactments by using the "clear statement doctrine".[115] For example, a dispute has arisen concerning the role the OSM is to play in relation to the role played by the states in implementation of the SMCRA. State officials have argued that the SMCRA scheme gives the states primary authority to promulgate and enforce a state regulatory program which implements the minimum standards set forth within the body of the Act,

110. Hodel v. Virginia Surface Mining and Reclamation Ass'n, *supra* note 28, at 2363.
111. *Id.* at 2354.
112. *See, e.g.*, Bethlehem Steel Corp. v. Train, 544 F.2d 657 (3rd Cir. 1976); United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979); Sierra Club v. EPA, 540 F.2d 1114 (D.C. Cir. 1976), *cert. denied*, 430 U.S. 959 (1977).
113. L. TRIBE, *supra* note 48, § 5-8, at 243-44. *See* United States v. Emmans, 410 U.S. 396 (1973).
114. L. TRIBE, *supra* note 48, § 5-8, at 244.
115. *See, e.g.*, EPA v. Brown, 431 U.S. 99 (1975); Sierra Club v. EPA, 540 F.2d 1114 (D.C. Cir. 1976).

in Title V.[116] This argument carried to its logical end would mean that the Act merely creates minimum mining control and reclamation standards, leaving actual implementation of these standards to state authorities. In support of this position, it has also been argued that Congress realized that a stringent uniform national program was not feasible given the great diversity of conditions under which coal is mined in the different regions of the United States.[117] The variance of "state window" provisions in Title V permit a mining operator to use reclamation procedures other than those prescribed in the Act if he can show that such reclamation will allow the reclaimed mine site to be used in a manner which is at least as productive as would be possible through adherence to the standards prescribed by the Act.[118] State officials have argued that these variance provisions evidence the flexibility in implementation envisioned by Congress.[119]

OSM, on the other hand, has attempted to assume primary responsibility over implementation of the SMCRA. OSM promulgated over one hundred and fifty pages of regulations with four hundred pages of explanatory comment.[120] These regulations prescribe not only general administrative procedures, but also specific and precise procedures and techniques to be used in mining and reclamation.[121] In addition, state officials have accused OSM of effectively closing "state windows" by requiring onerous showings in order to obtain approval of variances.[122] State officials have also alleged that OSM requires almost verbatim copies of the federal regulations before it will approve a state program.[123] The question raised in this dispute is whether the SMCRA gives primary authority for implementation and regulation of the Title V Standards to the states, or to the federal agency.

116. *See* Friedman & Siedzikowski, *Federal and State Regulatory Authority Under the Surface Mining Control and Reclamation Act of 1977*, 82 W. VA. L. REV. 1053 (1980).
117. *Id.*
118. *See* 30 U.S.C. § 1265(d) (Supp. III 1979).
119. *See generally* Friedman & Siedzikowski, *supra* note 116.
120. *See generally* 30 C.F.R. §§ 700-950 (1981).
121. *See* Note, *Surface Mining Control*, *supra* note 73, at 764.
122. *Id.* at 766.
123. *Id.*

Several state officials challenged the OSM regulations in legal proceedings in the Distrcit of Columbia, alleging the agency had exceeded its authority in prescribing standards which exceed those enumerated in Title V of the Act itself. In *In re Permanent Surface Mining Regulation Litigation*,[124] a panel for the D.C. Circuit Court chose to narrowly construe the provisions of the Act so as to minimize the imposition of the Act upon state sovereignty. The panel construed the Act as giving states primary regulatory and decision making authority,[125] while limiting the role of OSM to one of overseeing state enforcement. The panel reasoned that the construction of the SMCRA sought by OSM would take away the discretion Congress sought to vest in the states.[126] The panel held that Congress' intent was to have the states implement the SMCRA, and not to have the states ministerially enforce a federally devised program.[127]

This is not to say that Congress could not limit the role played by states in cooperative federalism programs. The Court in *Hodel* stated that "Congress could constitutionally have enacted a statute prohibiting *any* state regulation of surface coal mining".[128] But until Congress does so by "clearly stating" its intent, states may argue that they still retain important roles in regulating local activities under cooperative federalism enactments.

State officials may also seek to persuade Congress not to preempt state regulations under the Commerce Clause.

124. 10 ENVTL. L. REP. (ENVTL. L. INST.) 20, 526 (D.C. Cir. July 10, 1980).
125. *Id.* at 10.
126. *Id.* at 13.
127. *Id.* at 15. Upon the Secretary of Interior's petition, the D.C. Circuit Court granted rehearing *en banc* and vacated the panel decision. *In re* Permanent Surface Mining Regulation Litigation, 653 F.2d 514 (D.C. 1981). The Circuit Court maintained that the states are given power to administer the SMCRA, and the OSM is given power to oversee state programs. *Id.* at 519. But then the Circuit Court stated that section 201(c)(2) of the Act, 30 U.S.C. 1211(c)(2) (Supp. III 1979), gave OSM general rule making power, and that rules promulgated thereunder which define the broad terms used in the Act would be valid. *Id.* at 524. The court did not necessarily contradict the "clear statement doctrine", but rather, after reviewing the Act, concluded that "[t]he legislative history *makes absolutely clear* the expectation that the Secretary would define the [broad provisions of the SMCRA] in his regulations. . . ." *Id.* at 527 (emphasis added).
128. Hodel v. Virginia Surface Mining and Reclamation Ass'n, *supra* note 28, at 2367 (emphasis added).

Some authors have stated that in modern times the most effective limitations on congressional Commerce Clause powers are political, since the Congress is comprised of representatives from the several sovereign states.[129] In response to OSM's "hard liner" approach to implementation of the Act, West Virginia's Governor, Jay Rockefeller, lobbied in the United States Senate for an amendment to the SMCRA which came to be known as the "Rockefeller Amendment".[130] The amendment would have greatly restricted OSM's authority under the Act. The bill passed the Senate by a lopsided vote in 1979, but then stalled in Congressman Udall's Committee on Interior and Insular Affairs.[131]

IMPLICATIONS OF THE DECISION IN HODEL

If the primary protections of state sovereignty which remain are political, states may have to resort to lobbying efforts to protect their sovereignty. Since such sovereignty would be retained at the sufferance of Congress, it is questionable whether it should really be called sovereignty at all. On the other hand, without uniform national standards, economic disincentives may deter states form enacting more stringent environmental protection laws.[132] If a state enacted reclamation standards which were stricter than those in neighboring states, all other things being equal, its local mine operators would be placed at a disadvantage in the marketplace.[133] Thus uniform national standards are necessary to accomplish reform in environmental protection laws. Therefore the choice may be between preservation of traditional state sovereignty notions, or preservation of the environment.

The most practical approach is to strike a balance between these two extremes. It is possible that Congress

129. *See, e.g.*, L. TRIBE, *supra* note 48, § 5-7, at 241.
130. S. 1403, 96th Cong., 1st Sess. (1979).
131. Edgman & Menzel, *supra* note 109, at 262-63.
132. 30 U.S.C. § 1202(g) (Supp. III 1979).
133. In other words, if a state enacted minimum standards higher than its neighbors, its local enterprises would be at a disadvantage in the marketplace because of higher prices. Businesses would tend to migrate to states where more lenient standards existed. Thus the state would be deterred from any effort to improve existing conditions.

attempted to strike this balance through the SMCRA by creating national standards while leaving actual implementation to local officials who can adjust the standards to varying local conditions. Under this scheme states still play a vital role in implementing the broader national policy set forth by the Congress, while the desired national uniformity is achieved. Indeed, without such flexibility it would be impossible to effectively implement the national standards without unduly inhibiting equally important attempts at energy development.

The plight of coal mine operators in Appalachia which was described in *Hodel* serves to illustrate the inefficiency of strict enforcement of national standards for coal mining. Virginia, in *Hodel*, cited studies conducted in Appalachia which concluded that strict enforcement of "original contour" provisions in that region could cause the very hazards and pollution the SMCRA was created to prevent.[134] They also argued that reclaimed minesites were more productive if left level rather than returned to their original contour since there was a shortage of level land in the area.[135] They offered to show that such leveled lands had been used for farming, and that important facilities had been built on leveled lands, such as airports, hospitals, and schools.[136] These arguments point to the fact that cooperative federalism programs regulating an industry as diversified as surface coal mining will fail unless they are, in fact, cooperative. One of the express purposes of the SMCRA is to strike a balance between conflicting, and perhaps competing, national interests in environmental protection and in energy development.[137] If OSM is to effectively play a role in the effectuation of this compromise, it must start by recognizing the need for flexibility in enforcement of the Act, and must allow "state window" variance provisions to be used where variance from the Title V standards will reach a better result.

134. Brief of Petitioners, *supra* note 21, at 26-30.
135. *Id.* at 5-7.
136. *Id.; see also* findings of fact in Virginia Surface Mining and Reclamation Ass'n, Inc. v. Andrus, *supra* note 25, at 435.
137. 30 U.S.C. § 1202(f) (Supp. III 1979).

CONCLUSION

In *Hodel*, the SMCRA survived Commerce Clause and Tenth Amendment challenges. The Court reasoned that the potential adverse environmental impact of surface mining could substantially affect interstate commerce, and could therefore be regulated by Congress. Since the provisions of the Act only regulate the actions of private individuals and businesses, the Act did not violate the Tenth Amendment. The effect of the *Hodel* decision is to validate "cooperative federalism" programs in the context of federal environmental protection enactments. The opinion in *Hodel* also clarifies the parameters of *Usery* by affirming a narrow scope of intergovernmental immunities from regulation. The opinion implies a three step analysis to be used in Tenth Amendment cases which gives rise to a presumption of invalidity. If the three factors are shown to exist, the presumption of invalidity can only be overcome by compelling federal interests.

Since cooperative federalism enactments are valid, state and federal officials must seek to work out their differences. The conflicting interests of energy development and environmental protection can best be attanied through a spirit of cooperation and through flexibility in enforcement of national standards. Without this sort of flexibility, environmental protection can best be attained through a unduly inhibiting national efforts at energy development. This seems to be the practical approach taken by Congress, and Congress' intent must be implemented through the OSM.

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