Notes

The Constitutionality of the Federal Surface Mining Control and Reclamation Act of 1977

I. INTRODUCTION

The Surface Mining Control and Reclamation Act of 1977[1] represents a legislative conclusion[2] drawn from the struggle between two powerful contemporary interests: protection of the environment and development of natural energy resources. The inevitable clash took place between two interest groups, coal operators and environmentalists. The former group argued that current state laws provided sufficient regulations of surface coal mining.[3] The operators also argued that any further legislation would result in a typical bureaucratic bottleneck in an industry already well versed in regulatory mismanagement.[4] Proponents of the bill pointed to the incredible environmental repercussions of present and future surface mining and claimed that the coal industry should not be allowed to grow in a man-

---

[1]30 U.S.C. §§ 1201-1328 (Supp. II 1978).

[2]The Surface Mining Act went through a six-year evolutionary process, emerging as a "fine-tuned" legislative enactment. H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 57, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 595. The Act's predecessors date back to the 92d Congress. *See id.* During the 93d Congress, the Senate passed S. 425 and later both houses passed the conference report on S. 425. In 1974, however, the bill was vetoed by President Ford. H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 140, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 672. H.R. 25, introduced during the 94th Congress, met a similar fate—another veto by President Ford. H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 141, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 673. President Ford's reasons reflected concern that the bill would cause substantial decreases in the production of coal and would retard the growth of the coal industry because he assumed that coal prices would remain constant, that mining technology would not improve, that there would not be much development of western mining, and that capital investments in mining would not increase. S. REP. NO. 28, 94th Cong., 1st Sess. 175 (1975). Nevertheless, the House almost overrode the presidential veto of H.R. 25. Intense debate reflected congressional frustration with the President's stand:

> My position has always been, when faced with this kind of a Chief Executive: If the President fools me once, it is his fault. If he fools me twice, it is my fault. If he fools me three times, I am a fool, and I refused to accept [that] title heretofore, and I am not to be fooled again.

121 CONG. REC. 17983 (1975) (remarks of Representative Dent). Finally, H.R. 2, introduced during the 95th Congress, successfully passed through the proper legislative channels and was approved in 1977 by President Carter. Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328 (Supp. II 1978)).

[3]H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 191-92, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 720.

[4]*Id.*

ner detrimental to the environment.[5] The bill's supporters also suggested that federal regulations would lend stability to the industry, providing a sound basis upon which long-range decisions could rely.[6]

Both sides had strong arguments. On one hand, coal represents over ninety percent of the United States' total hydrocarbon energy reserves,[7] and surface mining, being less costly and more safe than underground mining, is the most efficient method of extracting coal.[8] On the other hand, the prospective environmental consequences of irresponsible mining demand equal consideration.[9] Both sides have been heard, however, and the legislative response has been formulated. The Surface Mining Act is now law, and its opponents must change their tactics. The battlefield has changed to the courtroom, the weapons to constitutional doctrine.

An important engagement on this new battlefield took place recently in *Virginia Surface Mining and Reclamation Ass'n v. Andrus*,[10] from which the private coal operators emerged victorious. The district court found that the Surface Mining Act violated the fifth amendment,[11] the tenth amendment,[12] and also requirements of procedural due process.[13] Thorough review of the validity of the Act, therefore, necessitates a close inspection of this case.

A constitutional analysis of the Surface Mining Act must begin with the commerce clause[14] because Congress passed the Act as an extension of its authority to regulate commerce.[15] If deemed a proper exercise of authority, the inquiry becomes whether there are any constitutional limitations to the congressional power to regulate commerce or if this power is absolute. Several potential limitations must be examined, including the tenth amendment,[16] substantive due process,[17] and finally procedural due process.[18]

---

[5]H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 186, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 716-17.

[6]*Id.*

[7]H.R. REP. NO. 94-896, 94th Cong., 2d Sess. 8 (1976).

[8]S. REP. NO. 92-1162, 92d Cong., 2d Sess. 16 (1972).

[9]*See* note 68 *infra* and accompanying text.

[10]483 F. Supp. 425 (W.D. Va. 1980).

[11]*Id.* at 447.

[12]*Id.* at 435.

[13]*Id.* at 447-48.

[14]U.S. CONST. art. I, § 8, cl. 3.

[15]*See* 30 U.S.C. § 1201(c) (Supp. II 1978). This section states that "many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare . . . ." *Id.*

[16]U.S. CONST. amend. X.

[17]*Id.* amend. V.

[18]*Id.* amend. XIV, § 1.

II. BACKGROUND

A. The Surface Mining Act: An Overview

The Surface Mining Act has myriad provisions covering a variety of approaches to the surface mining problem.[19] These provisions establish, among other things, an Office of Surface Mining Reclamation and Enforcement,[20] a federal aid program to the states for mineral resource research,[21] a program for the reclamation of abandoned mines which have been unsatisfactorily reclaimed,[22] explicit regulations for all surface mining of coal,[23] regulations for underground mining which affects the surface,[24] the means by which certain lands may be designated as totally unsuitable for surface mining,[25] and the opportunity for individual states to adopt the Surface Mining Act or its equivalent.[26]

Assertions of constitutional infractions concentrate on Title V, the heart of the Act, which deals with the regulation of surface coal mining. To receive a permit to mine coal, an operator must demonstrate an ability to meet the requirements of section 1265[27] in a reclamation plan showing how these requirements are to be met.[28] To comply with section 1265, the reclamation plan must demonstrate how the land can be restored to a condition which is capable of supporting the land's pre-mining uses.[29] Furthermore, the land must be restored to its original contours.[30] If the land is designated as prime

---

[19]For a more exhaustive review of the Surface Mining Act, see Comment, *The Surface Mining Control and Reclamation Act of 1977*, 9 ST. MARY'S L.J. 863 (1978) and Kite, *The Surface Mining Control and Reclamation Act of 1977: An Overview of Reclamation Requirements and Implementation*, 13 LAND & WATER L. REV. 703 (1978).

[20]30 U.S.C. § 1211(a) (Supp. II 1978).

[21]*Id.* § 1221.

[22]*Id.* § 1231(a).

[23]*Id.* § 1265.

[24]*Id.* § 1266.

[25]*Id.* § 1272.

[26]*Id.* § 1253.

[27]*Id.* § 1265(a)-(b). The latter section sets forth 25 general environmental protection standards required of every surface coal miner.

[28]*Id.* §§ 1257(d), 1258.

[29]*Id.* § 1265(b)(2). This section requires the coal operator to

> restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable likelihood, so long as such use or uses do not present any actual or probable hazard to public health or safety or pose any actual or probable threat of water diminution or pollution . . . .

Id.

[30]*Id.* § 1265(b)(3). This paragraph requires the surface coal miner to "compact (where advisable to insure stability or to prevent leaching of toxic materials), and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated . . . ." *Id.*

farm land,[31] more rigid standards must be met.[32] When the surface mining is to occur on mountain-top land, exceptions to the original contour rule are available under certain circumstances.[33] Steep slope mining[34] is also allowed some variance from the original contour rule.[35] Surface mining that is to take place west of the one hundredth meridian west longitude—the western United States[36]—must not affect the "hydrologic functions of alluvial valley floors."[37] The

---

[31]*See id.* § 1257(b)(16).

[32]*Id.* § 1265(b)(7). This paragraph provides that

> for all prime farm lands as identified in section 1257(b)(16) of this title to be mined and reclaimed, specifications for soil removal, storage, replacement, and reconstruction shall be established by the Secretary of Agriculture, and the operator shall, as a *minimum*, be required to—
>
> (A) segregate that A horizon of the natural soil, except where it can be shown that other available soil materials will create a final soil having a greater productive capacity; and if not utilized immediately, stockpile this material separately from other spoil, and provide needed protection from wind and water erosion or contamination by other acid or toxic material;
>
> (B) segregate the B horizon of the natural soil, or underlying C horizons or other strata, or a combination of such horizons or other strata that are shown to be both texturally and chemically suitable for plant growth and that can be shown to be equally or more favorable for plant growth than the B horizon, in sufficient quantities *to create in the regarded final soil a root zone of comparable depth and quality to that which existed in the natural soil*; and if not utilized immediately, stockpile this material separately from other spoil, and provide needed protection from wind and water erosion or contamination by other acid or toxic material;
>
> (C) *replace and regrade the root zone* material described in (B) above with proper compaction and uniform depth over the regarded spoil material; and
>
> (D) *redistribute and grade in a uniform manner the surface soil horizon* described in subparagraph (A).

Id. (emphasis added).

[33]*Id.* § 1265(c)(2). When an operation qualifies for this exception, an operator will be allowed to reclaim the land by "creating a level plateau or a gently rolling contour with no highwalls remaining . . . ." *Id.* This relaxed reclamation standard is also available to operators pursuant to § 1265(c)(3). This provision states:

> In cases where an industrial, commercial, agricultural, residential or public facility (including recreational facilities) use is [the] proposed or the postmining use of the affected land, the regulatory authority may grant a permit for a surface mining operation of the nature described in subsection (c)(2) of this section where—
>
> (A) . . . the proposed postmining land use is deemed to constitute an equal or better economic or public use of the affected land, as compared with premining use . . . .

Id. § 1265(c)(3).

[34]*Id.* § 1265(d)(4). The term "steep slope" refers to any slope greater than 20 degrees or of a lesser angle if so determined by the regulatory authority. *Id.*

[35]*Id.* § 1265(e).

[36]*Id.* § 1260(b)(5).

[37]*Id.* § 1265(b)(10)(F). "Alluvial valley floor" is defined in § 1291 of the Act.

arid or semi-arid nature of these areas requires this specific hydrologic consideration. In all instances, the coal operator, in order to receive a permit, must file a performance bond with the appropriate authority,[38] which can later be recovered upon proper execution of the reclamation plan.[39]

B. A Preview of Virginia Surface Mining and Reclamation Ass'n v. Andrus

The action in *Virginia Surface Mining and Reclamation Ass'n v. Andrus*,[40] was brought by a large group of Virginia coal operators, each of whom claimed to be adversely affected by the stringent requirements of the Surface Mining Act. Cecil D. Andrus, who as Secretary of the Interior was charged with ensuring proper implementation of the Act,[41] was named the defendant in the suit.

Constitutional issues were the means by which the Act was attacked.[42] The court first found that the Surface Mining Act was a proper exercise of legislative power under the commerce clause[43] because of the impact of surface mining on interstate commerce.[44] In addition, the tremendous economic consequences of the Act and the loss of state control over land use supported, in the court's view, a finding that the Surface Mining Act violated the once virtually extinct tenth amendment.[45] Also, relying heavily on *Pennsylvania Coal*

---

[38]*Id.* § 1259.

[39]*Id.* § 1269.

[40]483 F. Supp. 425 (W.D. Va. 1980).

[41]*See* 30 U.S.C. § 1211(c) (Supp. II 1978).

[42]483 F. Supp. at 428. Prior to this constitutional challenge, these same plaintiffs sued for injunctive relief, claiming irreparable harm was caused by enforcement of the Act. Virginia Surface Mining and Reclamation Ass'n v. Andrus No. 78-0244-B (W.D. Va., Feb. 14, 1979) (issuance of a preliminary injunction). The court agreed with their assertions and issued temporary injunctive relief. *Id.* at 6-7. The court then felt compelled to discuss the merits of various constitutional issues raised by the Surface Mining Act. In short, the court commented that the plaintiffs could make a "strong showing" on fifth amendment grounds that a taking of property had occurred, and also that a "flagrant violation" of the right to procedural due process had occurred. *Id.* at 7-10. Undeniably, this gratuitious disclosure of judicial opinion promoted the plaintiffs to again bring suit in the same court, this time, however, relying on the constitutional grounds previously enumerated by the court. *See* 483 F. Supp. at 428.

On appeal, the preliminary injunction was reversed as an improper application of federal injunctive requirements. Virginia Surface Mining and Reclamation Ass'n v. Andrus, 604 F.2d 312, 315-16 (4th Cir. 1979). Instead, an express provision in the Act, 30 U.S.C. § 1276(c) (Supp. II 1978), was found to be the proper test for injunctive relief, and its requirements had not been met by the lower court. 604 F.2d at 315-16.

[43]483 F. Supp. at 430-31. *See* U.S. CONST. art. I, § 8, cl. 3.

[44]483 F. Supp. at 430.

[45]*Id.* at 435. *See* U.S. CONST. amend. X.

Co. v. Mahon,[46] and its primary factor of diminution in value,[47] the court found that application of the Act resulted in a taking of private property without just compensation.[48] Finally, the court found that the plaintiffs' procedural due process rights were infringed.[49] Applying the balancing test espoused in *Mathews v. Eldridge*,[50] the court held unconstitutional provisions of the Act calling for the payment of penalties[51] and the issuance of cessation orders of mining operations[52] before a formal hearing.[53]

III. Congressional Power under the Commerce Clause

Congress enacted the Surface Mining Act pursuant to the power granted it by the commerce clause of the Constitution. Therefore, the threshold question with respect to the validity of the Act is whether it represents a valid exercise of that power.

A. Current Status of the Law

In *Gibbons v. Ogden*,[54] Chief Justice Marshall pronounced the first judicial interpretation of the scope of federal power under the commerce clause: "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations orher [sic] than are prescribed in the constitution."[55] Clearly, Marshall favored a broad reading of the commerce clause, granting extreme deference to congressional demarcations of its own power. In the *Gibbons* opinion, however, the Court stated that "completely internal commerce of a state . . . may be considered as reserved for the state itself."[56] This language, which appeared to reserve certain powers to the states, became a useful crutch for the members of subsequent Supreme Courts which asserted more judicial control over congressional legislation.[57]

---

[46]260 U.S. 393 (1922).
[47]*Id.* at 413.
[48]483 F. Supp. at 441.
[49]*Id.* at 447.
[50]424 U.S. 319 (1976).
[51]30 U.S.C. § 1268 (Supp. II 1978).
[52]*Id.* § 1271.
[53]483 F. Supp. at 447.
[54]22 U.S. (9 Wheat.) 1 (1824).
[55]*Id.* at 195.
[56]*Id.*
[57]*See* J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 136-38 (1978). Judicial restrictions on the federal commerce power continued until the mid-1930s. *See, e.g.*, Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)

The modern Court rejects the once prevalent theories exerting considerable restraints on the federal commerce power and has fully reverted to the principles originally expressed by Marshall. Under the modern view the power of Congress to regulate under the commerce clause is extensive. This power can be broken down into two categories. First, when the object of regulation actually moves in interstate commerce, congressional authority is unchallenged.[58] Second, any activity which substantially affects commerce is a proper subject of congressional regulation. The relatively recent development of this rule has been the primary reason for the current breadth of congressional power under the commerce clause. In *NLRB v. Jones & Laughlin Steel Corp.*,[59] the Court upheld the National Labor Relations Act,[60] which guaranteed the right of employees to organize and prohibited employers from interfering with that right.[61] The *NLRB* opinion established a liberal standard for gauging congressional power under the commerce clause:

(NIRA regulation of prices and working conditions of poultry dealers in the New York metropolitan area was held unconstitutional); Hammer v. Dagenhart, 247 U.S. 251 (1918) (Supreme Court disallowed congressional legislation regulating child labor conditions), *overruled*, United States v. Darby, 312 U.S. 100 (1941); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (Sherman Antitrust Act was held inapplicable to sugar refineries). In the mid-1930s, the threat of President Roosevelt's "Court-packing" scheme presumably induced the Supreme Court to loosen considerably its interpretation of the commerce clause. *See* J. NOWAK, *supra*, at 149-50.

[58]*See* Southern Express Co. v. Byers, 240 U.S. 612 (1916); Railroad Co. v. Husen, 95 U.S. 465 (1877); Erie R.R. v. C. Callahan Co., 204 Ind. 580, 184 N.E. 264 (1933); Huddy v. Railway Express Agency, Inc., 181 S.C. 508, 188 S.E. 247 (1936). The Supreme Court has even held that unconstrained ranging of cattle across state lines constituted movement in interstate commerce. In Thornton v. United States, 217 U.S. 414 (1926), cattle which ranged near the Florida-Georgia border and often crossed state lines were held not to be in compliance with federal inspection and preventive treatment requirements. The Court stated: "We do not think that such passage by ranging can be differentiated from interstate commerce. It is intercourse between states, made possible by the failure of owners to restrict their ranging and is due, therefore, to the will of their owners." *Id.* at 425.

Other objects of commerce have been many and varied. Radio waves, Federal Radio Coms. v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933), cable television, United States v. Southwestern Cable Co., 392 U.S. 157 (1968), teaching by correspondence, International Textbook Co. v. Pigg, 217 U.S. 91 (1910), telegraph wires, Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1 (1877). and contractual agreements, Addyston Pipe and Steel Co. v. United States, 175 U.S. 211 (1899); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898), have been held to be objects moving in interstate commerce for purposes of congressional regulation through the commerce clause.

[59]301 U.S. 1 (1937).

[60]*Id.* at 49. *See* National Labor Relations Act of 1935, ch. 372, §§ 1-16, 49 Stat. 449 (current version at 29 U.S.C. §§ 151-169 (1976)).

[61]*See* National Labor Relations Act of 1935, ch. 372, §§ 1-16, 49 Stat. 449 (current version at 29 U.S.C. §§ 151-169 (1976)).

"Although activities may be intrastate in character when separately considered, if they have such a *close and substantial relation* to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."[62]

B. The Federal Commerce Power As Applied to the Surface Mining Act

1. Surface Mining: Does it Substantially Affect Interstate Commerce?—For the Surface Mining Act to be a justifiable congressional enactment under the commerce clause, surface coal mining, the object of the regulation, must itself move in interstate commerce[63] or must bear a close and substantial relation to interstate commerce.[64] The Surface Mining Act is concerned with coal mining; it regulates a specific industry which does not itself move in interstate commerce.[65] Consequently, it is more appropriate to inquire whether surface coal mining substantially affects interstate commerce. A strong argument that the Act is a valid exercise of the commerce power can be formulated under this latter test, although the core issue of the controversy concerns the property rights of coal operators, rights which appear totally intrastate in character.

Property rights traditionally have been afforded special protection from governmental interference.[66] Thus, it is at first difficult to conceive of the manner in which a person's property substantially affects commerce and is consequently subject to federal regulation. Congress, however, after compiling massive amounts of research, made specific findings concerning the effect on interstate commerce of coal mining and concluded: "[S]urface and underground coal mining operations affect interstate commerce, contribute to the economic well-being, security and general welfare of the Nation and should be conducted in an environmentally sound manner."[67]

---

[62]301 U.S. at 37 (emphasis added) (citation omitted).

[63]*See* note 58 *supra* and accompanying text.

[64]*See* notes 59-62 *supra* and accompanying text.

[65]*Cf.* United States v. Bishop Processing Co., 287 F. Supp. 624 (D. Md. 1968), *aff'd*, 423 F.2d 469 (4th Cir.), *cert. denied*, 398 U.S. 904 (1970) (*Bishop* involves violations of the Clean Air Act of 1955, ch. 360, 69 Stat. 322 (current version at 42 U.S.C. §§ 7401-7626 (Supp. II 1978)), which regulates air pollution and does not concern itself with any one type of industry. An animal reduction plant in Bishop, Maryland, was accused of emitting air pollutants that caused highly offensive and nauseating odors in the surrounding area, including Selbyville, Delaware. The district court held that "the provisions of the [Clean Air Act] relating to the abatement of interstate air pollution may properly be based on the interstate movement of the pollutants themselves . . . ." 287 F. Supp. at 630).

[66]*See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 68 (1972).

[67]30 U.S.C. § 1201(j) (Supp. II 1978).

This position is supported by the evidence. The effects on our nation's environment from the mining, transportation, and use of coal are substantial.[68] Furthermore, strong economic considerations have added to the effect on commerce. Many states had already enacted surface mining regulation before the federal law was passed. Some of these state programs were stringent, while others were more lenient.[69] The product of this discrepancy was an "unfair competitive advantage"[70] to those coal operators working in states with less restrictive standards.[71]

---

[68]For example, rainwater that runs over coal and other minerals in coal seams creates chemical solutions which retard vegetable growth in surrounding areas. When these solutions enter streams they discolor the water and destroy decomposing organisms. As a result, organic waste normally consumed by these organisms does not fully decompose. Cardi, *Strip Mining and the 1971 West Virginia Surface Mining and Reclamation Act*, 75 W. VA. L. REV. 319, 326 (1973). Furthermore, the process of sedimentation, or siltation, takes place to a much greater extent than usual. One result is a reduction in photosynthetic activity which results in a decrease in the amount of plant life. This decrease lowers oxygen production which again has a detrimental effect on the organisms necessary to eliminate organic waste. Other consequences include unsafe water for recreational activity, increased water treatment costs, significant changes in the shapes of streams, erosion of industrial equipment, and increased probability of downstream flooding. *Id.* at 327. In addition, landslides caused by steep spoil banks "block highways, dam streams, crush fences, trespass onto neighboring fields, and damage houses." *Id.* at 328. Similar problems in waterways and streams have been encountered throughout the United States, despite the vast variances in terrain. *See* H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 59, *reprinted* in [1977] U.S. CODE CONG. & AD. NEWS 593, 597-98 (describing the hydrologic effects in the western United States).

Coal, the end product of the surface mining process, is extensively transported on the nation's highways and waterways, thereby affecting interstate commerce. The fact that transportation or use of coal is somewhat removed from the actual process of surface mining should not be problematic. In Katzenbach v. McClung, 379 U.S. 294 (1964), the Supreme Court held that racial discrimination in Olie's Barbecue Restaurant substantially affected interstate commerce. *Id.* at 304. In reaching this conclusion, the Court considered evidence showing that a large portion of the restaurant's food had moved in interstate commerce. *Id.* at 296-97. Thus, the Court appears willing to accept any evidence generally related to the transaction as contributing to the effects of the activity on interstate commerce.

Finally, air pollution from the use of coal also has a notable effect on interstate commerce. *See generally* Comment, *Conversion to Coal Under the National Energy Plan and the Environment: The Delicate Art of Balancing*, 9 TEX. TECH. L. REV. 487 (1978). Briefly, the oxides disbursed into the air return to the earth in the form of an acid rain that affects both terrestrial and aquatic ecosystems. Studies have shown that there is a strong correlation between poor health and high concentrations of sulfur dioxide, although the actual reasons for this occurrence are unknown. *Id.* at 491-92.

[69]*Compare* KY. REV. STAT. §§ 350.010-.990 (Supp. 1978 & Supp. 1979) *and* W. VA. CODE §§ 20-6-1 to -32 (1978 & Supp. 1979), *with* MONT. REV. CODES ANN. §§ 50-1034 to -1057 (Supp. 1977) *and* WYO. STAT. ANN. §§ 30-1-101 to -133 (1977).

[70]H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 186, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 716.

[71]At this point, it should be noted that there are certain coal operators whose mines are so small that it might be argued they create no interstate repercussions and

2. Manner and Scope of Judicial Review.—Once the issue of congressional power under the commerce clause has been explored, it is necessary to determine the manner and scope of judicial review which will be employed when courts are confronted with a challenge to congressional legislation. Essentially, the standard of judicial review afforded commerce clause enactments is classic low level scrutiny.[72] The Supreme Court has given deferential treatment to congressional findings upon which a piece of legislation is based.[73] In *Heart of Atlanta Motel, Inc. v. United States*,[74] the Supreme Court described this standard as: (1) Whether there was a "rational basis"[75] for finding an effect on commerce, and (2) if such a basis was present, whether the means selected were "reasonable and appropriate."[76] With respect to the first factor, Congress has explicitly pronounced the purposes of the Surface Mining Act and surface mining's relationship to commerce in the body of the Act itself. Congress found that

> 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 . . . .[77]

---

therefore should be exempt from congressional surface mining legislation. The decision in Wickard v. Filburn, 317 U.S. 111 (1942), has answered this argument. In *Wickard*, the Supreme Court upheld a marketing quota as applied to a farmer who grew only a small amount of wheat and used almost all of it on his farm. *Id.* at 127-28. The Court found that such wheat still affected the market price; moreover, the cumulative impact of persons similarly situated was "far from trivial." *Id.* Federal regulation under the commerce power was thus warranted. *Id.* at 128-29. With respect to small surface mines, the effect on the market price and the cumulative impact of other such mines arguably serve to justify federal regulation of these mines as well.

[72]*See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (federal civil rights legislation based on the federal commerce power).

[73]*See* Katzenbach v. McClung, 379 U.S. 294, 299-300 (1964). This case, like *Heart of Atlanta*, involved federal civil rights legislation based on the commerce power.

[74]379 U.S. 241 (1964).

[75]*Id.* at 258-59.

[76]*Id.*

[77]30 U.S.C. § 1201(c) (Supp. II 1978) (emphasis added). *See also* H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 58-59, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 596-97. Some dispute exists about the extent of the harmful effects of surface min-

Clearly, Congress had at least a *rational* basis for believing that surface mining affects interstate commerce. The significant environmental ramifications of surface mining, in conjunction with the movement of coal in commerce, requires this result. The court in *Virginia Surface Mining* reached this conclusion with little trouble: "[T]his court finds that Congress had a real and substantial rational basis for enacting the federal surface mining act to protect commerce and the national interest."[78]

Moreover, pursuing the second factor of the *Heart of Atlanta* test, the means employed by Congress to deal with this "evil" appear to pass the minimal requirements of reasonableness and appropriateness. The reclamation standards are designed to help stop water run-off problems and consequent land erosion and water pollution.[79] Also, as the court remarked in *Virginia Surface Mining*: "If the land is not reclaimed in a manner that subjects it to further use, then the productivity of that land is lost to present as well as future generations . . . ."[80] Perhaps these standards are not the most effective means to deal with the problem at hand, but they need not be in order to satisfy the applicable standard of review. Furthermore, it is undisputed that congressional means may be exercised to achieve socially desirable objectives.[81] Congressional concern for past and future harm to the environment, expressed in the form of the Surface Mining Act, certainly qualifies as an acceptable commerce power objective.[82]

In conclusion, surface coal mining appears to substantially affect interstate commerce, and therefore, Congress acted within the parameters of its constitutional authority in passing the Surface Mining Act.

---

ing on the environment. The court in *Virginia Surface Mining* noted this issue. 483 F. Supp. at 430 n.1. Yet, because of the deference due the legislature concerning its findings of fact, the court ignored this contradictory evidence in applying low level scrutiny to the Surface Mining Act and held the Act valid under the commerce power. *Id.* at 430-31.

[78]*Id.* at 431.

[79]H.R. REP. NO. 218, 95th Cong., 1st Sess. 57, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 595.

[80]483 F. Supp. at 431.

[81]Brooks v. United States, 267 U.S. 432, 436-37 (1925) (federal regulations pertaining to transportation of stolen cars from one state to another). *See also* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (racial discrimination); Gooch v. United States, 297 U.S. 124 (1936) (transportation of kidnapped person); Caminetti v. United States, 242 U.S. 470 (1917) (prostitution); Weber v. Freed, 239 U.S. 325 (1915) (importation of "photographic films of a pugilistic encounter," *id.* at 328); Champion v. Ames, 188 U.S. 321 (1903) (transportation of lottery tickets).

[82]*See* 30 U.S.C. § 1202 (Supp. II 1978) which describes the various purposes of the Act.

IV. Constitutional Challenges

Having determined the Surface Mining Act represents, in all probability, a valid congressional exercise of the commerce power, the next step in the analysis is to determine whether any specific constitutionally protected rights are trod upon through the enactment of this law.

A. The Tenth Amendment

One ground of constitutional attack on the Surface Mining Act arises under the tenth amendment.

1. Scope.—Historically, the tenth amendment was a substantial check on the exercise of the commerce power.[83] The rationale was that at some point the proper exercise of federal authority stopped and state authority began. This theory was appropriately called "dual federalism."[84] The more recent expansion of the federal commerce power, however, was accompanied by the concomitant restriction of tenth amendment protections of state power.[85] In 1976, however, the Supreme Court handed down its decision in *National League of Cities v. Usery*,[86] which has to some extent revived the notion of dual federalism. In 1974, Congress amended the Fair Labor Standards Act[87] inserting minimum wage and maximum hour requirements which were to apply to all state employees. The Supreme Court in *National League of Cities* held such applications unconstitutional.[88] Justice Rehnquist spoke for the plurality:

> It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily sub-

---

[83]*See* J. Nowak, *supra* note 57, at 139. The tenth amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." U.S. Const. amend. X.

[84]J. Nowak, *supra* note 57, at 139.

[85]This restriction was best expressed by the Supreme Court in United States v. Darby, 312 U.S. 100 (1941):

> The [tenth] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

Id. at 124. *See generally* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959). The author implies strongly that there are no available neutral principles to guide decisions in this area, thereby accounting for the total abandonment of tenth amendment limitations on the commerce clause. *Id.* at 23-24.

[86]426 U.S. 833 (1976).

[87]29 U.S.C. §§ 201-219 (1976).

[88]426 U.S. at 852.

> ject to the dual sovereignty of the . . . Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States.[89]

Thus, the Court declared that Congress cannot hinder the "traditional aspects of state sovereignty."[90] The Court found that the ability to determine the wages, additional compensation for overtime, and working hours of its employees was an undeniable attribute of a state's sovereignty.[91]

2. National League of Cities v. Usery.—The important question is what long range ramifications did the Supreme Court intend when it ruled in *National League of Cities*? Does the opinion signal a full return to the era of dual federalism or something less drastic? Justice Stevens, in his dissent, feared the former might result.[92]

Review of *National League of Cities*, however, reveals certain boundaries beyond which, arguably the Court's holding should not apply. These boundaries are fourfold. First, although the Supreme Court failed to precisely define a traditional aspect of state sovereignty, Rehnquist's opinion indicates that the Court will become concerned with the protection of state governments only when a "governmental activity" is involved.[93] For instance, activities which would have been impaired in *National League of Cities* were "fire prevention, police protection, sanitation, public health, and parks and recreation."[94] The Court further explained that "it is functions such as these which governments are created to provide, *services such as these which the States have traditionally afforded their citizens*."[95] This emphasis on governmental activities or services was the crux of the *National League of Cities* ruling. The implication is that this element must be satisfied in order to successfully launch a tenth amendment challenge to federal legislation.

Second, the Court in *National League of Cities* recognized that the impingement on state government or its agencies was both direct and substantial.[96] The Court remarked: "The Act, *speaking directly to the States qua States*, requires that they shall pay all but

---

[89]*Id.* at 845.

[90]*Id.* at 849.

[91]*Id.* at 845.

[92]*Id.* at 881 (Stevens, J., dissenting). Justice Stevens commented: "Since I am unable to identify a limitation on that federal power that would not also invalidate federal regulation of state activities that I consider unquestionably permissible, I am persuaded that this statute is valid." *Id.*

[93]*Id.* at 852.

[94]*Id.* at 851.

[95]*Id.* (emphasis added).

[96]*Id.* at 847-48.

an extremely limited minority of their employees the minimum wage rates currently chosen by Congress."[97] In certain instances, if a state did not follow federal standards, a penalty would be assessed against the offending state.[98] In other words, the federal statute was addressed directly to the state; responsibility for compliance with these federal standards was forced upon it, with noncompliance resulting in penalties. The end result of the state's enforcement of the federal guidelines was substantial. State discretionary authority to decide the most appropriate methods of employee compensation was severely limited.[99] Furthermore, a substantial financial burden would have been placed upon several state services, principally, state police and fire departments and their various subordinate agencies.[100]

Third, the Court emphasized that federal power to regulate private activities would remain undisturbed:

> Congressional power over areas of private endeavor, even when its exercise may preempt express state-law determinations contrary to the result which has commended itself to the collective wisdom of Congress, has been held to be limited only by the requirement that "the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution."[101]

Finally, there was only a plurality opinion in *National League of Cities*; a majority of Justices has not yet agreed on this issue. Thus, Justice Blackmun's "swing vote" and his separate opinion on this issue[102] must be considered, perhaps more than the plurality opinion, in order to successfully attack federal legislation on tenth amendment grounds. Essentially, Justice Blackmun favored a balancing approach, which he felt "does not outlaw federal power in areas such

---

[97]*Id.* (emphasis added). The Court repeatedly commented on the "direct" effect of the federal legislation on the states: "[T]hey [the legislative sections in question] are to be applied directly to the States and subdivisions of States as employers." *Id.* at 841. "[T]he vice of the Act as sought to be applied here is that it directly penalizes the States . . . ." *Id.* at 849. "[T]he challenged amendments operate to directly displace the States' freedom . . . ." *Id.* at 852.

[98]*See id.* at 849.

[99]*Id.* at 848. The Court speculated about this loss of discretion. A state, it said, "might wish to employ persons with little or no training, or those who wish to work on a casual basis, or those who for some other reason do not possess minimum employment requirements, and pay them less than the federally prescribed minimum wage." *Id.* Part-time and summer employment of teenagers were also considered situations in which a state could justifiably pay less than a minimum wage law prescribed. *Id.*

[100]*Id.* at 846-47.

[101]*Id.* at 840 (quoting Heart of Atlanta Motel v. United States, 379 U.S. 241, 262 (1964)).

[102]426 U.S. at 856 (Blackmun, J., concurring).

as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."[103]

3. A National League of Cities *Approach to the Surface Mining Act.*—A successful tenth amendment attack on the Surface Mining Act probably cannot be sustained by the plurality holding in *National League of Cities*. The Act clearly does not interfere with governmental activities or services, as was the case in *National League of Cities*. Also, it is equally clear that the Surface Mining Act is not directly addressed to the states, requiring specific and absolute action on their parts.[104] Section 1253[105] provides for the states' establishment of their own surface mining programs if the proposed legislation fulfills minimum requirements. Section 1254[106] provides, in the alternative, for full federal implementation of the Surface Mining Act in those states not in compliance with section 1253. In other words, state utilization of the Act's provisions is optional, while state adoption of the minimum wage provisions in *National League of Cities* was mandatory. A federal request for state participation in a surface mining program does not qualify as direct interference with state authority because section 1253 provides a

---

[103]*Id.* at 856.

[104]Many states have challenged federal clean air standards on tenth amendment grounds. *See, e.g.*, Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975); Brown v. EPA, 521 F.2d 827 (9th Cir. 1975); Pennsylvania v. EPA, 500 F.2d 246 (3d Cir. 1974). These decisions were handed down before *National League of Cities*, yet they are still instructive with respect to the issue of federal regulation that is pointed directly at the states. The Clean Air Act of 1955, ch. 360, 69 Stat. 322 (current version at 42 U.S.C. §§ 7401-7626 (Supp. II 1978)), allowed a federal agency to *compel states* to enforce its provisions and allowed for penalties for noncompliance in certain circumstances. Three of the courts either held or urged that the direct compulsion of state enforcement of federal regulations was a violation of the tenth amendment. Maryland v. EPA, 530 F.2d at 225-26; District of Columbia v. Train, 521 F.2d at 994; Brown v. EPA, 521 F.2d at 838-42. Only the court in Pennsylvania v. EPA found that no constitutional barrier to application of these provisions existed. 500 F.2d at 262.

The Supreme Court granted certiorari on three of these cases, but then the EPA agreed to alter the challenged provisions and the writ of certiorari was dismissed in order for the court of appeals to consider the question of mootness. EPA v. Brown, 431 U.S. 99 (1977) (per curiam). Unfortunately, this action deprived legal analysts of a Supreme Court opinion, subsequent to *National League of Cities*, which might have served to clarify the freshly broken ground of tenth amendment restrictions on the commerce power. *See also* McGinley, Designation of Areas Unsuitable for Coal Mining: An Examination of the Constitutionality of Section 522 of the Federal Surface Mining Act of 1977, at 286-91 (June 7-9, 1979) (presented at ALI-ABA Course of Study on Legal Issues in the Coal Industry at Arlington, Va.) [hereinafter referred to as McGinley].

[105]30 U.S.C. § 1253 (Supp. II 1978).

[106]*Id.* § 1254.

mechanism by which a state may assume control of its own surface mining operations.[107]

The Surface Mining Act also does not have a substantial financial impact on state government. Although there have been substantial economic repercussions from the application of the Act, the state governments have not directly experienced them, rather their constituents have.[108]

In addition, the Court in *National League of Cities* expressly stated that areas of "private endeavor" shall always be proper subjects of congressional measures.[109] Regulation of private surface mines is significantly different from regulation of wages paid by the states.

Finally, a court following Justice Blackmun's balancing approach arguably can sustain the Surface Mining Act against a tenth amendment assertion of unconstitutionality. Justice Blackmun's explicit language, describing "areas such as environmental protection"[110] as ones in which the federal interest should outweigh state interests, supports this result.

The district court in *Virginia Surface Mining*[111] perceived the scope of the tenth amendment as sufficiently extensive to render the Surface Mining Act unconstitutional. The court, relying on *National League of Cities*, found the Act resulted in a significant displacement of state governmental authority "through forced relinquishment of state control of land use planning; through loss of state control of its economy; and through economic harm, from the expenditure of state funds to implement the act and from destruction of the taxing power of certain counties, cities, and towns."[112] The court remarked, with respect to the first assertion, that Virginia was

---

[107]*See also* Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025 (D.D.C. 1978). In *Texas Landowners*, a *National League of Cities* challenge was brought against the National Flood Insurance Act. This Act required that to be a part of the federal program, flood-prone communities had to adopt certain plans in order to reduce possible flood damage. The court found the program in question was one of "inducement" of state participation, rather than one requiring state participation, and consequently upheld the Act. *Id.* at 1030. The Surface Mining Act, in turn, involves even a lesser degree of federal intervention than "inducement"; it provides options leaving the choice to the states.

[108]*See* notes 113-15, 124 *infra* and accompanying text.

[109]426 U.S. at 840.

[110]*Id.* at 856 (Blackmun, J., concurring). *See also* note 114 *supra* and accompanying text.

[111]483 F. Supp. 425 (W.D. Va. 1980).

[112]*Id.* at 435. The court, in finding land use planning is a traditional state government function stated:

> State regulation of land use is in a different category than these activities [*e.g.* fire and police protection, sanitation and park facilities], not being a service per se; however, [this] court feels that it also "provides an integral por-

deprived of the opportunity to decide the best possible use for its own land. In Virginia, ninety-five percent of its strippable coal reserves are in steep slope areas. The Act requires a restoration of mined land to the original contour even though when not restored the level land would provide the necessary basis for commercial development.[113] With respect to the second comment, loss of control of the economy, the court found that enforcement of the Act's provisions cost Virginia its ability to control economic development in those areas where surface mining occurs.[114] In support of the assertion of economic harm, the court found a significant reduction of the coal-based revenue upon which many counties in Virginia rely.[115]

The conclusion reached by the court in *Virginia Surface Mining* stretches the plurality opinion in *National League of Cities*. The court ignored the requirement that governmental activities or services, such as police and fire departments, be affected.[116] The court also refused to recognize that "private endeavors," of which coal mining is one, will be considered proper objects of federal legislation.[117] Rather, the court chose to focus on the substantial effects of the Act on coal operators and construed these as concurrently affecting the state government. The court remarked: "While the act ultimately affects the coal mine operator, its pervasive effect is on the states' legislative authority and on state control of land within its boundaries."[118] This reasoning is inconsistent with the *National*

> tion of those governmental services which the States and their political subdivisons have traditionally afforded their citizens."

Id. at 433 (quoting National League of Cities v. Usery, 426 U.S. at 855).

[113]483 F. Supp. at 433-34. *See* notes 165-68 *infra* and accompanying text for a discussion of a variance permitted by the Act which was intended to respond to this need for level ground in steep slope areas.

[114]*Id.* at 434. *See* Bacon v. Walker, 204 U.S. 311 (1907) ("The laws and policy of a State may be framed and shaped to suit its conditions of climate and soil." *Id.* at 315); E.J. McLean & Co. v. Denver & R.G.R.R., 203 U.S. 38 (1906) ("The exercise of the police power may and should have reference to the peculiar situation and needs of the community." *Id.* at 54-55). *See also* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

[115]483 F. Supp. 434.

[116]For the court's comments on the issue, see note 112 *supra*.

[117]*See* note 101 *supra* and accompanying text.

[118]483 F. Supp. at 432. Several scholarly commentaries have interpreted *National League of Cities* as focusing principally on federal interference with state services. *See* Beaird and Ellington, *A Commerce Power Seesaw: Balancing* National League of Cities, 11 GA. L. REV. 35, 62-63 (1977); Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165, 1172-74 (1977); Schwartz, National League of Cities v. Usery—*The Commerce Power and State Sovereignty Redivivus*, 46 FORDHAM L. REV. 1115 (1978); Tribe, *Unravelling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1076-78 (1977). Thus, it is not unreasonable to extrapolate that these commentators believe that the Surface Mining Act should withstand a tenth amendment challenge under *National League of Cities*.

League of Cities stipulation that the effect on governmental services should be direct. A state governmental service may in fact be impaired by the Surface Mining Act, but the court in making this finding is relying upon an *indirect* result of the Act's application because the Act is not directed at the states but only at private coal operators. Congress cannot be bound, under the scheme of federalism, to accommodate state wishes in all governmental areas indirectly influenced by federal legislation.

4. Discussion.—The plurality standard of *National League of Cities* has troublesome shortcomings as a test for tenth amendment limitations of congressional legislation, which is apparent from the misapplication of the standard in *Virginia Surface Mining*.[119] The standard's foundation is the concept that Congress cannot directly interfere with traditional aspects of state sovereignty.[120] Hence, if a congressional enactment is to be held an unconstitutional intrusion into state authority, the decision must depend upon a characterization of the invaded area as a state service. This results in a lack of flexibility that handicaps courts, like the court in *Virginia Surface Mining*, faced with novel circumstances that seem susceptible to tenth amendment challenge, yet which cannot get past the tests set by the plurality in *National League of Cities*.

An appropriate test should reflect the policy and rationale behind the tenth amendment. The area of federal intrusion into matters of state sovereignty is particularly susceptible to a "tyranny of small decisions [in which Congress] will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell."[121] As a result of this dilemma, courts should be especially sensitive to tenth amendment assertions and should maintain a

> notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.[122]

---

[119]*See* notes 116-18 *supra* and accompanying text. Others have expressed dissatisfaction with the *National League of Cities* test. *See, e.g.*, Matsumoto, National League of Cities—*From Footnote to Holding—State Immunity from Commerce Clause Regulation*, 1977 ARIZ. ST. L.J. 35, 72-76.

[120]426 U.S. at 849. *See* note 90 *supra* and accompanying text.

[121]L. TRIBE, AMERICAN CONSTITUTIONAL LAW 302 (1978).

[122]Younger v. Harris, 401 U.S. 37, 44 (1971) (holding that federal courts, except under extraordinary circumstances, cannot enjoin pending state criminal proceedings).

The plurality's seemingly strict application of the standard to government activity only, however, is not sufficiently sensitive to this notion of protection of state independence. For example, geographical characteristics of the states vary extensively. Each state's land is peculiar and often figures prominently in the traditions, customs, and economic stability of the people occupying that land. The Supreme Court has acknowledged that "[t]he laws and policy of a State may be framed and shaped to suit its conditions of climate and soil,"[123] which seems particularly appropriate when regulation of the land itself is considered. There is a great likelihood, then, that strip mining legislation, applied nationally to diverse geographic regions, will create diverse results. Many states composed only of level land masses do not have to deal with the steep slope provisions of the Surface Mining Act. Consequently, they do not experience the difficulties that a state like Virginia confronts. In Virginia, the impact of the Surface Mining Act has been extreme:

> [C]oal companies have gone out of business, between five hundred and one thousand coal miners have lost their jobs; income from surface mining permits has decreased; the coal-based revenues that the counties rely on to operate have been reduced. Most of the high schools built in recent years in these counties were financed through the coal severance tax. The production of coal is a two-billion dollar business in Virginia, contributing substantially to its economy. While the production is confined to the seven counties in Virginia's most western tip, it also affects many other counties when coal is transported to the port of Norfolk via the Norfolk and Western and Chesapeake and Ohio Railroads. These railroads employ ten thousand people in coal related activities in the Hampton Roads area alone.[124]

Moreover, studies sponsored by the federal government have shown that application of the Act to Virginia's terrain actually "has a higher potential for environmental harm than alternative procedures."[125]

The plurality standard, however, by requiring first that the activity affected by the legislation be a government activity, precludes a true analysis of whether the legislation does in fact impair the state's ability to function effectively.

---

[123]Bacon v. Walker, 204 U.S. 311, 315 (1907).

[124]Virginia Surface Mining and Reclamation Ass'n v. Andrus, 483 F. Supp. at 434.

[125]*Id.* at 435. Of course, *courts* reviewing congressional legislation based on the commerce clause cannot question conclusions made by the legislative body. *See* notes 83-88 *supra* and accompanying text.

An approach more attuned to the policies, purposes, and effects of federal legislation on state sovereignty is needed. Justice Blackmun's balancing test in *National League of Cities* fulfills this requirement[126] by retaining the necessary flexibility to deal with the wide variety of circumstances under which federal legislation might be challenged as usurping a state's sovereign authority. Certain factors should play a dominant role in the balancing. First, a court should determine whether the area in question has traditionally been the subject of state regulation and thus has traditionally been left alone by Congress. Viewed in this manner, land use regulation has normally fallen within the sole domain of state governments.[127]

Second, a court should consider whether states have a particular expertise in the area in question. Usually, this factor will be more significant when specific knowledge of the locality is a prerequisite to effective legislation. Police and fire protection, for example, are provided more efficiently when the regulations are designed with

---

[126]Justice Blackmun specifically noted that federal environmental protection laws were enactments which could survive a balancing test. 426 U.S. at 856 (Blackmun, J., concurring). He was not inscribing a rule of law into stone, however. Any balancing test is inherently fact sensitive. *See, e.g.*, Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). Consequently, Justice Blackmun's generalization concerning environmental legislation, like all generalizations, has a natural limit beyond which it becomes incorrect. This point would occur when there are sufficient factors to outweigh the strong governmental interest in environmental protection. The court in *Virginia Surface Mining* briefly commented on the use of a balancing test for evaluating the Surface Mining Act. The intent of the court, however, was muddled by inexact language: "In considering the relief to be granted in a case like this, the state and federal government's interest must be balanced." 483 F. Supp. at 435. Accepting these words at face value, the court appears to be suggesting that once having found a violation of the tenth amendment under the plurality opinion of *National League of Cities*, the court would decide the *relief* to be afforded from an unconstitutional statute by employing a balancing test. Quite simply, this is an untenable statement of the law. It is more probable that the court realized its holding based on the plurality opinion was shaky at best, and thus decided to further justify its decision under the test forwarded by Justice Blackmun. A footnote to the opinion supports this interpretation: "Justice Blackmun suggests that this [the balancing] is what the majority has actually done in *National League of Cities*." *Id.* at 435 n.12. Assuming the court did intend to bolster its opinion by balancing competing factors, the approach actually applied reflects something less than a full appreciation of the positions of both parties involved. On the state's side, the court recounted the effects of the Act on coal miners, the economy, and the state's physical terrain. *Id.* at 434. For the federal side, the court simply remarked that "[n]o harm will be visited upon the federal government nor to the environment to permanently enjoin this provision of the act." *Id.* at 435. Furthermore, the court refused to grant any validity to the congressional findings compiled after six years of study and debate. 30 U.S.C. § 1201(c) (Supp. II 1978). *See* note 77 *supra* and accompanying text. The court also failed to acknowledge such factors as the advantages of uniform legislation or the unfair competitive advantages which could result without uniform legislation.

[127]*See* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

the characteristics of the area in mind. Again, this factor favors state regulation in the realm of surface mining. A state legislature's specific knowledge of its own geographic features would prove very useful in molding land-use legislation to fit that geography.

Third, a court should consider whether states have adequately dealt with the problem addressed by the challenged federal legislation or have indicated an unwillingness or inability to do so. Many states had already passed strip mining acts before the federal act was enacted,[128] and these acts were specifically directed at each respective state's geographic features. The success or lack of success of these programs should be a factor in the balancing.

Fourth, a court should contemplate the extent to which the federal legislation affects the mechanisms of state government. For instance, in *National League of Cities*, Congress was dictating how a state government should pay its employees.[129] This represented a high degree of interference with government mechanisms. The Surface Mining Act, on the other hand, does not call for interference with state governmental functions. Any effects the Act has on the mechanisms of state government are indirect.

Fifth, a court should investigate the extent to which the federal act could be applied without requiring any state to shoulder a disproportionate burden. Because the Surface Mining Act is directly tied to land, a disparity in its consequences takes place, which in turn leads to varying consequences for the individuals connected with surface coal mining. An extreme inequality of burden may indicate that the federal legislation has intruded in an area which is best left to state governments.

Finally, the advantages of uniform regulation in the area in question and the degree of necessity for comprehensive federal action should be considered. The strength of these factors alone could be sufficient to override the factors which weigh toward states' rights. With respect to the Surface Mining Act, the primary purpose of the legislation is environmental protection, a matter of significant national concern. A goal of consistency in the means chosen for protecting the environment was prompted by the potential for unfair competitive advantages by coal operators in states with lenient reclamation laws and little steep slope terrain. Thus, as part of the balancing, courts should weigh the importance of these goals and should consider whether and to what extent they will be furthered by the legislation.[130]

---

[128]*See* note 69 *supra* and accompanying text.

[129]426 U.S. at 848.

[130]For further discussion of the issue of federally imposed environmental legislation, see Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State*

In summary, predictions in this area of the law are difficult because of the uncertain language in *National League of Cities* and the lack of agreement among the Justices. When the language of the plurality opinion is applied to the Surface Mining Act, the Act appears to be constitutional. However, the court in *Virginia Surface Mining* reached a contrary decision. Arguably, though, the court overstepped the boundaries of the plurality test, resulting in an undue enlargement of the tenth amendment's ability to restrict the federal commerce power. When a balancing test is used, resolving the question of constitutionality becomes difficult because the test is more sensitive to the important federal and state interests involved. Several considerations, however, speak strongly in favor of a successful tenth amendment challenge. The area regulated is one traditionally left to the states, the states have a particular expertise in dealing with their respective land masses, many states have already addressed the environmental problems of strip mining in their own surface mining statutes, and the federal act causes highly diverse results in the various states. Weighed together, these factors are possibly of sufficient magnitude to overcome the federal factors in

---

Implementation of National Environmental Policy, 86 YALE L.J. 1196 (1977). The author also suggested a factor analysis test:

> It is not the case, however, that federal intrusions on local self-determination are justified so long as there is some moral purpose arguably served thereby. Three conditions should be met in order to justify use of the commerce power to coerce state implementation of national moral goals. First, the goals should be among those that could persuasively be regarded as basic in a reflective ideal of the good society. Second, the goals should be of a sort that are unlikely, because of structural defects, to be realized under a regime of non-centralized decisionmaking. Third, federal intervention should promise a substantial contribution to the realization of the goals.

Id. at 1265. Summing up the difficulties in locating a constitutionally acceptable median between states' rights and congressional legislative authority, and therefore reinforcing the need for a balancing test as the most appropriate means of deciding the issue, the author further noted:

> The sobering fact is that environmental quality involves too many intricate, geographically variegated physical and institutional interrelations to be dictated from Washington. Substantial reliance on state and local action and judgment is inevitable. But the need for central stimulus and direction is equally clear. As the Supreme Court has remarked: "Our dual form of government has its perplexities . . . but it must be kept in mind that we are one people; and the powers . . . conferred on the Nation are adapted to be exercised . . . to promote the general welfare, material and moral." These considerations justify a congressional power to mandate state controls on public pollution sources in order to achieve national moral ideals.

Id. at 1266 (quoting Hoke v. United States, 227 U.S. 308, 322 (1913)).

For another article urging adoption of a balancing approach, see Beaird and Ellington, *A Commerce Power Seesaw: Balancing* National League of Cities, 11 GA. L. REV. 35, 72-73.

favor of uniform regulation and comprehensive federal action to solve a nationwide environmental problem most effectively.

B. The Fifth Amendment

A second ground of constitutional attack on the Surface Mining Act arises under the fifth amendment.

1. The Surface Mining Act: A Taking of Property or a Regulation of Property Interest?—Enforcement of the Surface Mining Act has given rise to charges that the government is committing an unlawful taking of private property in derogation of the fifth amendment.

a. General policies and principles.—The fifth amendment guarantees that private property cannot be taken for public use without just compensation.[131] It is often difficult to formulate a workable distinction between the unconstitutional taking of a person's property and the permissible public regulation of that property's private use. As Justice Holmes explained, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[132] The essence of regulation is a compromise of individual freedoms in exchange for the advantages of societal life.[133] The constitutional validity of regulation is a question of degree. At some point regulation becomes onerous, the degree of infringement on an individual's rights so oppressive that a taking of property is the result.

Predictably, the Supreme Court has not defined the critical point at which regulation of property becomes a taking. "[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than disproportionately concentrated on a few persons."[134] In a somewhat more candid appraisal of Supreme Court efforts on this issue, one author has concluded that "the predominant characteristic of this area of law is a welter of confusing and apparently incompatible results."[135]

---

[131]U.S. CONST. amend. V.

[132]Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

[133]Zoning laws are classic examples of this principle. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[134]Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). The issue in this case was the constitutionality of the New York City Landmarks Preservation Commission's veto of Penn Central's detailed proposal for structural alterations to Grand Central Station. The proposed alterations included the addition of a 55-story building on top of the station. The Supreme Court held that the Commission's veto was not an unconstitutional taking. *Id.* at 138.

[135]Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964).

A researcher of the fifth amendment is confronted with myriad rulings decided in an *ad hoc* fashion.[136] Under these conditions, predictive analysis has become hazardous. Certain general principles recur, however, and are relied upon in making decisions on this issue. In *Penn Central Transportation Co. v. New York City*,[137] the Supreme Court presented an historical overview of the case law in the taking area. After careful study of *Penn Central*, at least four factors appear pertinent to a taking analysis: (1) "the character of the governmental action,"[138] (2) whether " 'the health, safety, morals, or general welfare' " are promoted by the legislation in question,[139] (3) whether there is a diminution in value of private property,[140] and (4) whether there is a frustration of "distinct investment-backed expectations" of the property owner.[141]

The character of the governmental action is an important factor. The government may take over private property[142] or require its physical destruction.[143] Governmental activity which is a nuisance under tort principles may amount to a taking of property.[144]

---

[136]*See, e.g.*, Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[137]438 U.S. 104 (1978).

[138]*Id.* at 124.

[139]*Id.* at 125 (quoting Nectow v. Cambridge, 277 U.S. 183, 188 (1928)).

[140]438 U.S. at 131.

[141]*Id.* at 127. For the two most recent Supreme Court decisions dealing with the taking/regulation issue, see Kaiser Aetna v. United States, 444 U.S. 164 (1979) (governmental requirement that a channel dredged by private persons be opened up to the public found to be a taking of private without just compensation); Andrus v. Allard, 444 U.S. 51 (1979) (no taking found with regard to a statute prohibiting the sale of Indiana artifacts containing feathers of certain birds).

[142]*Compare* United States v. Pewee Coal Co., 341 U.S. 114 (1951) (assumption of control of private mines during a national miners' strike constituted a taking), *with* United States v. Central Eureka Mining Co., 357 U.S. 155 (1958) (government order closing gold mines during war time so that skilled miners could be diverted to employment in nonferrous mines held not a taking).

[143]*E.g.*, Miller v. Schoene, 276 U.S. 272 (1928). A Virginia law provided for the destruction of any red cedar trees within two miles of an apple orchard. The cedar trees were the source of a plant disease harmful to apples. Because apple orchards were of much greater value to the area than cedar trees, the Virginia law favored the former. The Supreme Court found that no taking occurred. *Id.* at 279. *See also* National Bd. of YMCA v. United States, 395 U.S. 85 (1969). During riots in the Canal Zone, United States troops retreated into private buildings to fend off rioters. Owners of the buildings claimed the resulting riot damage constituted a taking. The Supreme Court again found no taking occurred. *Id.* at 92-93. It was significant that the troops were also protecting the buildings they occupied. *Id.* at 92.

[144]*E.g.*, Griggs v. Allegheny County, 369 U.S. 84 (1962) (noise and vibration from aircraft held to be a taking of an air easement over residential property); United States v. Causby, 328 U.S. 256 (1946) (excessive noise and vibrations from low flying military aircraft held to be a governmental taking of a nearby chicken rancher's airspace).

Regulation of private property for health, safety, morals, or general welfare is usually held not to be a taking.[145] For example, in *Village of Euclid v. Ambler Realty Co.*,[146] a newly adopted zoning ordinance severely restricting the use of land being held for future industrial development was not a taking.[147] Also illustrative is *Goldblatt v. Town of Hempstead.*[148] The town of Hempstead had enacted an ordinance forbidding sand and gravel mining below the water line. In answering the question whether an unconstitutional taking occurred as a result of this action, the Court adopted the presumption that the exercise of a police power is constitutionally valid so long as it is reasonable.[149] Because the ordinance had presumably been enacted out of concern for the safety of nearby children, and because the parties contesting the ordinance failed to rebut this minimal showing of reasonableness, the Supreme Court found that no taking had occurred.[150]

Diminution in the value of private property, a third factor present in the *Penn Central* analysis, is immaterial when other factors are absent. "[D]ecisions sustaining other land use regulations, which, like the New York law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a taking . . . ."[151] For support, the *Penn Central* decision cited *Village of Euclid*, in which the zoning ordinance had caused a seventy-five percent diminution in land value, and *Hadacheck v. Sebastian*,[152] in which the alleged diminution in value was eighty-seven and one-half percent. The Court in both cases found that no taking had occurred.[153] Diminution in value, even when severe, is relevant but not dispositive.

Finally, the Court in *Penn Central* discussed the frustration of "distinct investment-backed expectations" as a possible ground for finding a taking of private property,[154] citing *Pennsylvania Coal Co. v. Mahon*[155] as the leading case. *Mahon* involved a statute prohibiting

---

[145]Penn Central Transp. Co. v. New York City, 438 U.S. at 125.

[146]272 U.S. 365 (1926).

[147]*Id.* at 397.

[148]369 U.S. 590 (1962).

[149]*Id.* at 594-96. *See* Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959); United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

[150]369 U.S. at 594-96. In another case, Mugler v. Kansas, 123 U.S. 623 (1887), the Court held that the power of a government to protect the health and welfare of the public "cannot be . . . burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain . . . . *Id.* at 669.

[151]438 U.S. at 131.

[152]239 U.S. 394 (1915).

[153]Village of Euclid v. Ambler Realty Co., 272 U.S. at 397; Hadacheck v. Sebastian, 239 U.S. at 409-10.

[154]438 U.S. at 127.

[155]260 U.S. 393 (1922).

the mining of coal in a manner likely to cause surface subsidence. The coal company had specifically reserved by deed the right to mine certain coal deposits regardless of any damage the mining might inflict on surface owners. Because the effect of the statute was to make it "impracticable to mine certain coal," the state for all practical purposes was found to be "appropriating or destroying" the mining company's property interest without just compensation.[156]

b. The taking/regulation issue with respect to steep slope provisions.—The core of the Surface Mining Act lies in section 1265, which outlines the minimum reclamation standards for surface coal miners. General standards for all coal operators are presented in section 1265(b). The operators must, among other things, "restore the land . . . to a condition capable of supporting the uses which it was capable of supporting prior to any mining";[157] "restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated";[158] protect all surface areas in order to control any erosion and air or water pollution;[159] "minimize the disturbances to the prevailing hydrologic balance" by the performance of several preventive measures;[160] dispose of all mine wastes according to prescribed standards;[161] and "insure that all reclamation efforts proceed in an environmentally sound manner and as contemporaneously as practicable with the surface coal mining operations."[162]

Surface miners working in steep slope areas[163] have *additional* requirements which must be met. No debris, spoil, or waste material can be placed downslope below the bench or mining cut; in order to restore the land to its original contour, "[c]omplete backfilling with spoil material [is] required to cover completely the highwall," and land above the highwall cannot be disturbed without approval of the regulatory authority.[164] A variance from the original contour standard may be allowed if "the watershed control of the area is improved" and a "complete backfilling with spoil material [is performed] to cover completely the highwall."[165] The Office of Surface Mining has recently reaffirmed its stance on the requirements for allowing a variance.[166] Covering the highwall with backfill is a key condition to

---

[156]*Id.* at 414.
[157]30 U.S.C. § 1265(b)(2) (Supp. II 1978).
[158]*Id.* § 1265(b)(3).
[159]*Id.* § 1265(b)(4).
[160]*Id.* § 1265(b)(10).
[161]*Id.* § 1265(b)(11).
[162]*Id.* § 1265(b)(16).
[163]*See* note 34 *supra* for the Surface Mining Act's definition of "steep slope."
[164]30 U.S.C. § 1265(d)(1)-(3) (Supp. II 1978).
[165]*Id.* § 1265(e)(1).
[166]44 Fed. Reg. 61312, 61313 (1979).

allowing the variance; yet, this requirement "limit[s] the usefulness of the variance in very steep slopes"[167] or possibly "destroys the usefulness of a variance."[168]

A taking analysis of specific circumstances is inherently difficult. Courts must rely primarily upon the factors found in the *Penn Central* survey of taking/regulation cases. Once delineated and measured for their relative impact, all factors pertinent to the steep slope requirements must be balanced in order to reach a final result. Those factors which, generally speaking, reflect "the economic impact of the regulation on the claimant"[169] work in favor of the coal operators. The major factors are diminution in value and loss of "distinct investment-backed expectations."[170] The significance of these factors is their portrayal of economic consequences to one party in a specific taking/regulation fact situation. These two factors are closely related and certain facts described as falling under one factor might also be characterized as pertaining to the other.[171] However, regardless of whether certain evidence is placed under one factor or the other, a court should reach the same result. In other words, the method of characterization should not make a significant difference.

With respect to the steep slope provisions of the Surface Mining Act, a diminution in value factor can be discerned. Because the provisions require a restoration of surface-mined land to its original contour, coal operators are not able to leave their land in the level condition that is the natural result of surface mining in steep slope areas. There exists a great need for level land in some areas, however. In the past, level land resulting from surface mining in steep slope areas has been used for the "construction of schools, airports, industries, recreation areas, and shopping centers . . . ."[172] The restoration to a steep slope, then, may diminish the usefulness and

---

[167]*Id.*

[168]Virginia Surface Mining and Reclamation Ass'n v. Andrus, 483 F. Supp. at 433 n.9. If the variance requirements were not so stringent, a taking/regulation analysis of the steep slope provisions would not be necessary. The Surface Mining Act itself would then have provided, in appropriate cases, the means to avoid the damaging results to individual interests that have formed the nexus of the fifth amendment challenges to the Act.

[169]Penn Central Transp. Co. v. New York City, 438 U.S. at 124.

[170]*Id.*

[171]For example, *Mahon* was once viewed as the landmark case for the diminution in value factor. *See* 260 U.S. at 413. Yet, in *Penn Central*, the Supreme Court stated: "*Pennsylvania Coal Co. v. Mahon* . . . is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate *distinct investment-backed expectations* as to amount to a 'taking.'" 428 U.S. at 127 (emphasis added).

[172]Virginia Surface Mining and Reclamation Ass'n v. Andrus, 483 F. Supp. at 434.

value of the land. For example, in its original form, steep slope land in Virginia is worth from five to seventy-five dollars an acre; level, this same land is valued at a minimum of five thousand dollars an acre and may be worth as much as three hundred thousand dollars an acre.[173] Hence, the result is a huge diminution in value. Although the weight of this factor in finding a taking is uncertain, as the Court in *Penn Central* observed, a diminution in property value, standing alone, rarely is sufficient to establish a taking.[174]

There may, however, be factors which distinguish steep slope mining from the normal situation in which taking analyses have been applied. The Court in *Penn Central* recognized that in each instance rejecting a taking argument there were other uses of the property permitted by the regulations.[175] There are no such alternate uses in steep slope areas. "Mountainous terrain is unusable for all income producing activities unless it is level, which the act is aimed at preventing."[176] Also, the diminution in value factor is not "standing alone" when applied to steep slope provisions. Another important factor favors private surface miners in the *ad hoc* decision-making process—the frustration of distinct investment-backed expectations. Most coal operators have purchased their land and mining equipment with the distinct expectations of surface coal mining for a profit. Enforcement of the reclamation requirements of the Surface Mining Act has cut deeply into these expectations; the cost of coal production in steep slope areas has increased up to seventy percent.[177] Once again, this represents a substantial harm brought upon challengers of the Act that should weigh in their favor.

On the other hand, the promotion of the "health, safety, morals, or general welfare" of the public is of vital importance in responding to a taking challenge. Congress announced the principal purposes of this legislation in the text of the Act. Most purposes address the protection of the public. More specifically, Congress proposed to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations"[178] and to "promote the reclamation of mined areas . . . which continue . . . to . . . endanger the *health* or *safety* of the public."[179] In addition, Congress intended to "wherever necessary, exercise the full reach of Federal constitutional powers to *insure the protection of the public interest* through effective control of surface coal mining

---

[173]*Id.*

[174]438 U.S. at 131 (citations omitted).

[175]*Id.*

[176]Virginia Surface Mining and Reclamation Ass'n v. Andrus, 483 F. Supp. at 441.

[177]*Id.* at 434.

[178]30 U.S.C. § 1202(a) (Supp. II 1978).

[179]*Id.* § 1202(h) (emphasis added).

operations."[180] Clearly, Congress intended to tackle an ecological matter of long-standing national concern, in other words, a public welfare matter of the type traditionally afforded great weight in a taking analysis.[181]

Reaching a final conclusion on the taking issue is a difficult task. Unlike many past taking cases, the interests of all parties concerned with the steep slope provisions of the Surface Mining Act are strong. Traditionally, the promotion of the public welfare has been considered sufficiently important to sustain legislation subjected to a fifth amendment attack. However, the combination of significant diminution in value, no alternate uses for the property, and a drastic loss of profits represents an unusually damaging effect on private interests.

Because the interests on both sides are strong ones and because taking cases are resolved on an *ad hoc* basis, a court presiding over such a challenge could justifiably rule in favor of either side. In addressing this issue, the court in *Virginia Surface Mining* found the steep slope provisions constituted an uncompensated taking of private property.[182] The court noted the substantial losses in the land values created by adherence to the original contour provisions as opposed to leaving the land level and also noted the increased cost of coal production.[183] Presumably, the court considered these effects as representing a strong diminution in value factor, the only factor which the court adopted.[184] The court indicated a full return to the principles of *Mahon* and suggested that diminution in value had been the decisive factor in all the subsequent taking cases analyzed.[185]

---

[180]*Id.* § 1201(m) (emphasis added).

[181]*See* notes 145-50 *supra* and accompanying text.

[182]483 F. Supp. at 441.

[183]*Id.*

[184]The court did mention that the steep slope provisions made it "physically impossible" to surface mine and that this fact should be taken into account in finding a taking. *Id.* at 434. The sole basis for this conclusion, however, was that "equipment may not be available to cover the highwall on a steep slope to restore the original contour." *Id.* Thus, compliance is not an impossibility in the sense that modern technology cannot provide a means to satisfy the Act. The mere unavailability of equipment does not warrant a conclusion of physical impossibility.

[185]*Id.* at 439. Although the *Mahon* opinion is the leading proponent of the diminution in value factor, the Supreme Court in *Penn Central* cited *Mahon* as an example of the frustration of distinct investment-backed expectations factor. 438 U.S. at 127. Also, although it was commendable for the *Virginia Surface Mining* court to attempt to identify one factor which has played a dominant role in taking cases before and after the *Mahon* decision, the result of this attempt is to lend more organization and coherence to this body of law than actually exists. For instance, the *Virginia Surface Mining* court cited United States v. Cress, 243 U.S. 316 (1917), as exemplifying the diminution in value factor. 483 F. Supp. at 439. In *Cress*, a federal dam blocked a

The *Virginia Surface Mining* decision has some disturbing aspects. Most alarming is its cursory treatment of the public welfare factor. Relegated to discussion in one footnote, this factor received only indirect treatment by the court by reference to the results Congress sought to achieve through enactment of the legislation:

> This conclusion [that the original contour provisions amount to a taking of property] is aided by the nature of the government regulations. It has been shown by the government's own studies . . . that a return to approximate original contour on steep slopes is environmentally unsound and may create dangerous conditions. The fact that property owners are being deprived of the use of their land by a statute that does not accomplish its purpose, nay, may even run contrary to it, tips the balance toward finding a taking.[186]

The law has long been that courts do not strenuously question the motives of congressional legislation or the reasonable means chosen for effectuating the legislation;[187] courts have traditionally paid great deference to the legislative process on the theory that Congress is better equipped to weigh the advantages and disadvantages of legislation than are the federal courts.[188] The court in *Virginia Sur-*

---

stream and caused it to rise above its natural level, injuring private land. The Court found a partial taking, 243 U.S. at 328, but did so because the government's action, in essence, constituted a *physical* invasion of property, not because there was a diminution of value. *See* notes 142-44 *supra* and accompanying text. The *Virginia Surface Mining* court also described United States v. Causby, 328 U.S. 256 (1944), as relying on the diminution in value factor. 483 F. Supp. at 440. In *Causby*, noise from a nearby airport was held to be a taking. 328 U.S. at 266-67. Once again, however, the critical element was the government's physical interference with private property. Finally, the court in *Virginia Surface Mining* forwarded Andrus v. Allard, 444 U.S. 51 (1979), as relying on the diminution in value factor. 483 F. Supp. at 440. In *Allard*, a federal statute prohibited the sale of artifacts containing certain bird feathers. The Court held there was no taking. 444 U.S. at 67-68. The Court discussed "profitability" in reaching this decision, *id.* at 66, implicating consideration of investment-backed expections rather than pure diminution in value. In sum, the *Virginia Surface Mining* court was attempting to dramatize the importance of the diminution in value factor. "[T]he extent of the diminution has always been a decisive factor in [determining] whether a taking has occurred, *if not the most decisive factor*." 483 F. Supp. at 439 (emphasis added). This statement cannot be sustained. Diminution in value is one of many factors which courts can and will consider. A taking analysis involves *ad hoc* decisionmaking, and consequently, different factors may be more important than others in different fact situations. The court in *Virginia Surface Mining* was attempting to find a taking principally by virtue of its characterization of certain facts as a diminution in value, and not by engaging in a balancing process as taking law clearly requires.

[186]483 F. Supp. 441 n.16.

[187]*See* Hadacheck v. Sebastian, 239 U.S. at 413-14 ("[W]e cannot declare invalid the exertion of a power . . . because . . . it does not exactly accomodate the conditions or [because] some other exercise would have been better or less harsh." *Id.*).

[188]*See* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).

face Mining by according weight to the *effectiveness* of a congressional enactment, ignored this fact.

In short, the opinion smacks of judicial legislation. The court was overzealous in its concern for private property rights:

> There are those in every generation who believe that private property should be taken without compensation whenever it is for the public good as conceived by them. This generation is no exception and exponents of this belief fill the halls of Congress and the bureaucracy and infiltrate the courts. The right of a person to own land and the protection of that right were sacred tenets of the common law; and it is no less sacred today as the population booms. We are aware that God only created so much land; that each parcel is considered unique; therefore, as the desire for land increases and the parcels of ownership become smaller and smaller the importance of the Fifth Amendment increases rather than diminishes. . . . [M]ore and more the Fifth Amendment ban on taking any private property without compensation is ignored by men in accordance with their philosophies or whims.[189]

In fact, the decision by the court in *Virginia Surface Mining* appears to have been made in accordance with *its* philosophies or whims. The court ignored the interest in the public welfare and did not engage in an equitable balancing of interests which appears to be required by taking law. Although the court's holding can be justified under a balancing analysis of the situation, the failure to completely examine the competing interests reveals the court's result-oriented approach to the problem.

c. The taking/regulation issue with respect to other provisions of the Surface Mining Act.—Provisions of the Surface Mining Act other than the steep slope provisions also raise taking questions. Mining in mountaintop areas must be conducted in accordance with the general standards of section 1265(b).[190] Thus, again, a return to original contour is mandated.[191] However, unlike the steep slope pro-

---

[189]483 F. Supp. at 440. The court also stated that the following words of Justice Holmes "deserve to be chiseled in stone." *Id.*:

> When this seemingly absolute protection [against a taking of private property without just compensation] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

Id. at 441 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. at 415).

[190]*See* notes 157-62 *supra* and accompanying text.

[191]30 U.S.C. § 1265(b)(3) (Supp. II 1978).

visions, a workable exception to the mountaintop contour provision is available. The exception permits retention of level surface-mined land upon a showing of appropriate post-mining uses and a workable plan designed to promote those uses.[192] In other words, under the present terms of the Surface Mining Act, coal operators in mountaintop areas can totally avoid compliance with the original contour rule in appropriate circumstances, which should serve to sufficiently allay assertions of a governmental taking without just compensation.

Prime farm land provisions also require higher than normal standards of reclamation.[193] In a case being decided in Indiana,[194] these standards were challenged on grounds of physical impossibility of compliance under current technology. If this assertion proves to be true, a strong taking argument would exist. The situation would involve more than a diminution in value or the frustration of distinct investment-backed expectations; it would more closely approximate those cases where the government has physically "invaded" private property.[195]

Finally, the opinion in *Virginia Surface Mining* held unconstitutional certain provisions in the Surface Mining Act which, under specific circumstances, prohibit surface mining altogether.[196] Section 1272 permits land to be designated as unsuitable for surface mining when the reclamation requirements would not be technologically or economically feasible or when surface mining would have severely detrimental effects on the immediate environment.[197] Section 1272 also prevents surface coal mining on land within 100 feet of cemeteries and public roads or within 300 feet of occupied dwellings and public buildings.[198]

Two Supreme Court cases, *Mahon*[199] and *Goldblatt*,[200] are notable here because they deal with situations similar to those addressed in section 1272. Each case involved a statute prohibiting surface mining in certain areas, and each was concerned with protection of public safety. Yet, while the Court in *Mahon* found a taking of property,[201] the Court in *Goldblatt* reached the opposite conclusion.[202]

---

[192]*Id.* § 1265(c)(3). *See* note 33 *supra.*

[193]30 U.S.C. § 1265(b)(7) (Supp. II 1978). *See* notes 31-32 *supra* and accompanying text.

[194]Indiana Coal Ass'n v. Andrus, No. I.P. 78-500-C (S.D. Ind., filed Aug. 16, 1978).

[195]*See* notes 142-44 *supra* and accompanying text.

[196]483 F. Supp. at 441-42.

[197]30 U.S.C. § 1272(a)(2)-(3) (Supp. II 1978).

[198]*Id.* § 1272(e)(4)-(5). *See* McGinley, *supra* note 104. McGinley, in a report presented at an ALI-ABA course, concluded section 1272 should be declared constitutional against a taking challenge.

[199]260 U.S. 393 (1922). *See* notes 155-56 *supra* and accompanying text.

[200]369 U.S. 590 (1962). *See* notes 148-50 *supra* and accompanying text.

[201]260 U.S. at 416.

[202]369 U.S. at 596.

Although *Mahon* has never been expressly overruled, the decision was handed down during the hey day of economic due process, when judicial intervention in economic regulatory legislation was the rule, and statutory repeals were frequent.[203] Indeed the Court in *Mahon* engaged in second-guessing legislative conclusions by considering the public interest at stake.[204] The *Goldblatt* decision, on the other hand, took the deferential approach to legislative purpose that presently typifies judicial review of economic legislation. The decision recognized the importance currently accorded to public safety as a factor in a taking analysis.[205] Hence, it is reasonable to expect that the *Goldblatt* approach will be adopted by the current Supreme Court with respect to taking attacks against section 1272 of the Surface Mining Act.[206]

As a final note, the various mining effects addressed in section 1272 appear to pose a more serious threat to the public health and the environment than the types of effects addressed in other parts of the Act, and accordingly, the courts should adopt a more deferential approach to section 1272 regulation. In other words, as the public health and welfare become increasingly threatened, stricter legislative regulation should be permitted by according relatively greater weight to the public welfare factor.

d. An alternative taking analysis.—Many of the difficulties encountered in any taking analysis are the direct result of the disjunctive body of law in this area. One respected commentator has suggested an alternative approach to taking/regulation issues.[207] He proposes that the current conception of the government's role, which is limited presently to that of a "taker," be changed to recognize two distinct regulatory contexts. In one, the government functions as an impartial mediator weighing the rights of competing societal interest groups with no substantial interest of its own at stake. In

[203]*See* J. NOWAK, *supra* note 57, at 397-404.

[204]260 U.S. at 413-14.

[205]*See* notes 145-50, 178-81 *supra* and accompanying text.

[206]In comparing *Mahon* and *Goldblatt*, an interesting hypothetical presents itself. Suppose *A* and *B* are adjacent land owners, *A* owning a fee simple, as in *Goldblatt*, and *B* owning only a mineral estate, as in *Mahon*. A statute is then enacted forbidding mining in the area where both *A* and *B* own land. In effect, although *A* may have other possible uses for his land, *B* would not. The question then becomes whether a taking analysis will produce different results in the two situations, by virtue of the different property interests involved. Despite the presence of a strong public interest in the statute, some might argue that a taking of *B*'s land exists but not of *A*'s land, because *A* has other uses for his property and *B* does not. Yet, this conclusion seems unfair. The statute in question in essence "takes" the *same* things from *A* that it does from *B*; the only difference is that *A*'s property interest is broader than *B*'s. This disparity in potential result illustrates a need for clearer standards in this area. *See, e.g.*, notes 207-08 *infra* and accompanying text.

[207]Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

such a situation, the fifth amendment proscription of a taking should be applied cautiously, because nothing more than a conciliation of private interests occurs through the use of governmental machinery; no oppressive motive for the governmental act is present. In the other situation, the government acts as a competitor, an active participant in the economic sector of society, so that it stands to gain a direct economic benefit and is motivated by self interest. In this situation, constitutional protection should be applied with more vigor, for there is more incentive for oppressive governmental action.[208]

Because of its simplicity and practical applicability, this theory has a certain attractiveness when compared with the current Supreme Court approach. In any event, when this theory is applied to the provisions of the Surface Mining Act, the result should be clear. The governmental role here is totally impartial; the government has no economic interest at stake. Therefore, a less vigorous inquiry would be warranted, and a taking challenge would probably fail.

C. Procedural Due Process

A final ground of constitutional attack on the Surface Mining Act arises under the procedural due process clause of the fourteenth amendment.[209]

---

[208]*Id.* at 61-67. Several other noted scholars have forwarded various theories on the taking issue. *See generally* Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U.L. REV. 165 (1974); Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970).

[209]U.S. CONST. amend. XIV, § 1.

[210]30 U.S.C. § 1268(c) (Supp. II 1978). Section 1268(c) states:

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

Id.

1. The Penalty and Enforcement Provisions of the Act.—The Surface Mining Act contains, generally speaking, two sets of disciplinary provisions, herein to be referred to as the penalty and enforcement provisions. Procedural due process attacks may be raised with regard to both of these provisions.

a. The penalty provisions.—The Surface Mining Act provides that an operator against whom a penalty is assessed must pay the proposed penalty in full within thirty days of the assessment although no formal hearing has been held.[210] If an operator does not pay the assessed penalty prior to a hearing, he is deemed to have waived all rights to contest the violation or the penalty.[211] A measure of protection is afforded the operator, however, by allowing the penalty money to be placed in an escrow account when the charge is contested.[212] A formal hearing will then be held, and if it is determined at this proceeding that no violation occurred or that the penalty was excessive, the coal operator is entitled to the return of his money plus interest.[213] Additional protection for the operator is also available through section 1275(c), which provides for temporary relief from the assessment *prior* to payment, upon filing a written request to the Secretary of the Office of Surface Mining.[214] The Secretary must respond "expeditiously" and may grant relief if an informal public hearing is held at or near the mine site, the applicant shows a substantial likelihood of eventual findings in his favor, and no damage to the public or the environment will result.[215]

b. The enforcement provisions.—To aid enforcement of the Surface Mining Act, the Secretary of the Interior or his authorized representative has the power to issue cessation orders to any surface mine operator whose mine presents an imminent danger to the

---

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *Id.* § 1275(c).

[215] *Id.* The strict provisions to force compliance with the requirements of the Act perhaps represent the congressional response to difficulties encountered with the federal mine act governing health and safety, Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742, *as amended by* Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 (codified at 30 U.S.C. §§ 801-962 (Supp. II 1978)). The penalties imposed by the Act characteristically have been low, thus minimizing the deterrent effect. It has often proven more economical for operators to pay the fines rather than comply with federal standards. S. REP. No. 1198, 94th Cong., 2d Sess. 24 (1976). In addition, there have been long delays in collecting fines, and arbitrariness and inconsistency have typified the method of assessment. *Surface Mining Control and Reclamation Act of 1977: Hearings on S. 7 Before the Subcomm. on Public Lands and Resources of the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. 1061-63 (1977) (statement of Tom Duncan, President, Kentucky Coal Association).

public or the environment.[216] A hearing is only available after issuance of the order upon an application for review, and the application will not stay the effect of the order.[217] Thus, an operator must cease activities prior to having an opportunity to be heard. Temporary relief from a cessation order, similar to the relief from payment of a penalty, is available, however.[218] Within five days of a request for temporary relief, the Secretary of the Office of Surface Mining must render a decision and may grant relief if, among other things, a hearing at or near the mine site has been held.[219]

2. The Procedural Due Process Challenge.—In general, procedural due process in civil proceedings requires the right to proper notice and a hearing before a property interest can be impaired.[220] The first question is whether there has been interference with a protected property interest.

The Surface Mining Act's provision for a cessation order operates in conjunction with the Act's penalty provisions. In particular, section 1268 provides:

> [A]ny permittee who violates any permit condition or who violates any other provision of this subchapter, may be assessed a civil penalty by the Secretary, *except that if such violation leads to the issuance of a cessation order under section 1271 of this title, the civil penalty shall be assessed.*[221]

Thus, a cessation order, which may be issued without a hearing,[222] leads to the compelled assessment of a penalty that may be as great

---

[216]30 U.S.C. § 1271(a)(2) (Supp. II 1978). This section states:

> When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist . . . which . . . also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation.

Id.

[217]*Id.* § 1275(a)(1).

[218]*Id.* § 1275(c).

[219]*Id.* Once a cessation order has been issued and adhered to, a mine operator has several administrative remedies available, including a formal review, *Id.* 1275(a); a formal hearing conducted in accordance with the Administrative Procedure Act's formal adjudication provision, 5 U.S.C. § 554 (1976 & Supp. II 1978); and judicial review, 30 U.S.C. § 1276(a)(2), (b) (Supp. II 1978). The district court will employ the substantial evidence standard in weighing the findings of the administrative body. *Id.* § 1276(b). Problems of due process arise, however, because the deprivation of an interest occurs *prior* to the pursuit of these remedies.

[220]*See generally* J. NOWAK, *supra* note 57, at 476-77.

[221]30 U.S.C. § 1268(a) (Supp. II 1978) (emphasis added).

[222]*See* notes 216-19 *supra* and accompanying text.

as $5,000 for each violation, and each day the violation continues may be deemed a separate violation.[223] The civil penalty must often be paid before any hearing, and if it is not paid, the operator is held to have waived his right to contest the order and the assessment.[224] Hence, an operator may be required not only to cease part or all of his operations but also to pay a stiff penalty, and is thus deprived of both money and perhaps livelihood before any hearing has been held.

The next question is whether the process provided by the Surface Mining Act is sufficient to protect the interests involved, in other words, whether a sufficient degree of due process is accorded affected parties. In answering this question, courts most often resort to the principles enunciated by the Supreme Court in *Mathews v. Eldridge*.[225] The Court balanced three criteria:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[226]

Because the *Mathews* test depends upon a balancing of interests, it is difficult to predict what conclusion most courts will ultimately reach; nevertheless, an analysis of the various interests involved, will provide some insight. Further insight may be obtained through study of *Virginia Surface Mining* in which the court addressed the due process issue using the *Mathews* approach and concluded that both the cessation order and penalty provisions operated to deprive coal operators of sufficient due process.[227]

a. The nature of the private interests.—At first blush, the harsh effects on coal operators of the Act's penalty and enforcement provisions appear to be tempered by other provisions within the Act. If an operator eventually wins his challenge, he receives a refund of his money plus interest.[228] Also, the availability of temporary relief[229] serves to assuage the problems of procedural due process.

---

[223]30 U.S.C. § 1268(a) (Supp. II 1978).

[224]*Id.* § 1268(c).

[225]424 U.S. 319 (1976).

[226]*Id.* at 335.

[227]483 F. Supp. at 447.

[228]30 U.S.C. § 1268(c) (Supp. II 1978). *See* note 210 *supra.*

[229]30 U.S.C. § 1275(c) (Supp. II 1978). *See* notes 214-15 *supra* and accompanying text.

Furthermore, the private interests involved are essentially pecuniary and as such would not seem to require the degree of protection afforded many other private interests—for example, the interest in continued receipt of a government benefit[230] or the interest of a debtor in protecting against any garnishment of his wages.[231]

The court in *Virginia Surface Mining*, however, found that private interests were *not* adequately protected.[232] With respect to the provisions providing for the payment of civil penalties, the court emphasized the harsh effects of the provisions on private interests.[233] Assessment of these penalties entails more than a mere loss of money for a brief period of time. The Act provides for the potential payment of $5,000 for each violation,[234] and if the violation is not abated within a specified time limit, a penalty may be assessed for each succeeding day of the violation.[235] Penalties of up to $150,000 can result before a formal hearing ever takes place.[236] Because massive credit investments in heavy mining machinery are typical, surface mine operators often have a narrow margin of success.[237] The penalties can thus inflict crippling damage.

The court in *Virginia Surface Mining* discussed a recent situation which demonstrated the harsh consequences of the penalty provisions.[238] Briefly, a coal operator was given notice of a violation for placing overburden on a bench in a lower seam of the operation; a $1,400 fine was assessed. The operator, however, had no other place to dispose of this excess overburden. Hence, he was confronted with the choice of continuing operations and paying $1,400 per day once the abatement period had elapsed, or closing the operation entirely and seeking administrative remedies. The operator chose the latter course of action, and eventually, the violation notice and penalty were rescinded. Unfortunately, the process took five months, and the final result was a shutdown of the mine, the repossession of the operator's expensive equipment, and a business loss of $300,000.[239]

The cessation order provisions also have a significant effect on

---

[230]Goldberg v. Kelly, 397 U.S. 254 (1970) (interest recognized in continued receipt of welfare benefits and notice required prior to termination of benefits).

[231]Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (prejudgment garnishment of wages without notice and prior hearing violates due process).

[232]483 F. Supp. at 447.

[233]*Id.* at 446.

[234]30 U.S.C. § 1268(a) (Supp. II 1978).

[235]*Id.*

[236]The $150,000 represents the possibility of a $5,000 penalty for each of the 30 days within which the Secretary must issue a decision after an application for review, in accordance with 30 U.S.C. § 1275(a), (b) (Supp. II 1978).

[237]483 F. Supp. at 444-47.

[238]*Id.* at 446-47.

[239]*Id.*

the coal operator's private interests. The net result of a cessation order is made more severe because the Act provides for mandatory punitive measures whenever cessation orders are issued.[240] Moreover, a cessation order inherently requires the abandonment of all income-producing activities. The *Virginia Surface Mining* court referred to specific examples of the harshness of cessation orders.[241] For instance, one mining company reported the loss of 5,000 tons of coal after rainfall had filled the unused pits with water. The monetary loss was $160,000. Twelve days later the cessation order was dismissed.[242] Another company was shut down when a federal inspector found an imminent hazard to public health.[243] As a result, 500 men were unemployed until two days later when the inspector revoked his order because there was no valid reason for its issuance.[244]

b. The risk of erroneous deprivation.—The cessation order, which inherently triggers the penalty provisions, may be issued when an inspector finds a certain practice is causing "imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources . . . ."[245] The Act provides that sufficient danger to the public's health and safety exists when

> [a] violation could reasonably be expected to cause substantial physical harm to persons outside the permit area before such . . . violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same conditions or practices giving rise to the peril, would not expose himself or herself to the danger during the time necessary for abatement . . . .[246]

---

[240]30 U.S.C. § 1268 (Supp. II 1978). *See* notes 221-23 *supra* and accompanying text.

[241]483 F. Supp. at 444-45.

[242]*Id.* at 445.

[243]*See* notes 245-46 *infra* and accompanying text for a discussion of the circumstances under which a cessation order may be issued.

[244]483 F. Supp. at 445. One court, in In re Surface Mining Regulation Litigation, 456 F. Supp. 1301 (D.D.C. 1978), found the cessation orders constitutional. In so finding, however, the court in *In re Surface Mining* did not evaluate the effect on the private interests involved. The court instead chose to rely on the balancing test set out in Fuentes v. Shevin, 407 U.S. 67, 91 (1972), which had no private interest factor. This approach, by ignoring an interest that is substantially affected by the Act, seems to be an incomplete method of analysis and would tend to slant the final ruling away from any private interest. Furthermore, the decision in *In re Surface Mining* primarily sustained a facial attack on the Surface Mining Act, and not an attack on the Act as applied. The Act had been in effect for only a short time, and few, if any, instances of enforcement had taken place.

[245]30 U.S.C. § 1271(a)(2) (Supp. II 1978).

[246]*Id.* § 1291(8).

As the court in *Virginia Surface Mining* noted, although at first glance this standard may seem well designed to prevent wrongful deprivation, its breadth and lack of specificity essentially leave the final decision to the subjective judgment of federal inspectors.[247] In turn, this has resulted in the issuance of cessation orders in circumstances causing less than an "imminent danger to the health or safety of the public."[248] In a stern censure of the practice, the court in *Virginia Surface Mining* concluded that "[g]overnment inspectors do not necessarily have the lofty ideals and standards to which persons in positions of great power and responsibility should subscribe."[249]

Also pertinent to the risk of erroneous deprivation in the issuance of cessation orders is the possibility of an alternate or substitute device that is capable of affording more procedural safeguards. The court in *Virginia Surface Mining* suggested the use of temporary restraining orders in place of the cessation order provisions.[250] This course has two major attributes: (1) quick decisions can be rendered, an important consideration when there truly is an imminent danger to the public,[251] and (2) the device provides a more impartial and objective forum for determining whether to issue cessation orders.

Finally, a risk of erroneous deprivation exists with respect to the penalty provisions, whether assessed independently or in conjunction with cessation orders. The amount of any penalty is essentially a subjective determination of an inspector, although again, the Act provides some standards.

> In determining the amount of the penalty, consideration shall be given to the permittee's history of previous violations at the particular surface coal mining operation; the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public; whether the permittee was negligent; and the demonstrated good faith of the permittee charged in attempting to achieve rapid compliance after notification of the violation.[252]

These standards, although well-defined, are also subject to the *Virginia Surface Mining* court's criticism that a government inspec-

---

[247] 483 F. Supp. at 445.

[248] 30 U.S.C. § 1271(a)(2) (Supp. II 1978). *See* note 245 *supra* and accompanying text.

[249] 483 F. Supp. at 445.

[250] *Id.* at 447.

[251] *Id.*

[252] 30 U.S.C. § 1268(a) (Supp. II 1978).

tor does not necessarily have the "ideals" to render a subjective decision which sufficiently protects an individual's interests.

c. The nature of the government interest.—The final criterion concerns the government's interest in the matter at hand. In the present case, the obvious government interest is the prevention of significant and possibly irreparable harm to the public and environment. In situations in which the government interest has been deemed significant, rights to a hearing prior to deprivation have consistently not been required; in fact, several cases have allowed a total deprivation of a private interest when the health and safety of the public have been at stake.[253] Hence, an argument can be made that on the strength of this third factor alone, the required payment of penalties by coal operators before a final hearing should be able to withstand a procedural due process challenge. In addition, the urgent public interest may also justify the severity of a cessation order issued without the procedural protection of a formal hearing.[254] Further examination of the cases allowing a total deprivation of a private interest, however, discloses that the private interests involved were of a more insignificant nature. These interests included, among others, seizure of a rental yacht carrying marijuana,[255] seizure of mislabeled vitamins,[256] and seizure of food unfit for human consumption.[257] In comparison, the cessation of operations at a coal mine, which causes unemployment of workers, possible damage to mine sites, and potential bankruptcy as well, constitutes a much greater deprivation of a private interest. Thus, because of this marked distinction, the *Virginia Surface Mining* court decided not to rely on the previous cases, depsite their precedential value.[258] The court instead declared: "While the governmental interest may be very high in protecting the environment and the public, most situations do not demand the immediate cessation of mining in order to achieve this goal."[259]

3. Summary.—Application of the Surface Mining Act to coal operators in some situations constitutes a grave interference with

---

[253]*See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (seizure of a rental yacht loaded with marijuana); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (seizure of misbranded food allowed even when there was no potential harm to the consumer, only the possibility of misleading him); Phillips v. Commissioner, 283 U.S. 589 (1931) (summary tax proceedings without a prior hearing); North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (seizure of food unfit for human consumption).

[254]In re Surface Mining Regulation Litigation, 456 F. Supp. at 1320.

[255]Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

[256]Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950).

[257]North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908).

[258]483 F. Supp. at 444.

[259]*Id.*

private interests. Miners have lost their businesses due to imposition of both the penalty and the cessation order provisions of the Act. On the other hand, a highly important government interest is also involved—the prevention of present and future harm to the environment and the public. The significance of both these factors makes resolution of the procedural due process issue under the *Mathews* test difficult. However, as the court in *Virginia Surface Mining* found, a substantial argument can be made that the issuance of cessation orders with the resulting mandatory penalties operates to deprive individuals of the due process necessary to protect the private interests involved.[260]

V. Conclusion

Constitutional challenges to the Surface Mining Act present extreme problems for judicial determination. Resolution of this situation, as with most difficult constitutional questions, entails a balancing of competing interests which all merit careful consideration under the Constitution.

Indeed, the significance of the interests at stake for both sides should ensure a bitter fight through the entire judicial system. Although *Virginia Surface Mining* represents a decisive first battle, it was only one of many engagements soon to follow.[261]

R. Russell Petterson

---

[260] *Id.* at 447-48. The court in *Virginia Surface Mining* enjoined the summary issuance of cessation orders, condemning the lack of sufficiently objective guidelines for the federal inspectors. *Id.* at 448. The court also condemned the temporary relief provision, 30 U.S.C. § 1275(c) (Supp. II 1978), because it allows the Secretary five days to respond, a lapse which may lead to total collapse of the mining operation. The court felt a 24-hour period would provide the necessary due process both for instances of relief from cessation orders and from assessed penalties. 483 F. Supp. at 448.

As a final note, if all other constitutional challenges are refuted and a violation of procedural due process is found, the penalty and enforcement provisions would appear severable from the rest of the Surface Mining Act.

[261] In fact, another "engagement" was resolved during the publication of this article. *See* Indiana Coal Ass'n v. Andrus, No. I.P. 78-500-C (S.D. Ind. June 10, 1980). The court in *Indiana Coal Ass'n* found the Surface Mining Act constitutionally deficient on several grounds: The federal commerce power, *id.* at 14-17; the tenth amendment, *id.* at 22-31; equal protection, *id.* at 33-34; the fifth amendment, *id.* at 36-37; and procedural due process, *id.* at 37-38. The opinion focused on Title V, especially on the prime farmland provisions, much of the geography of Indiana being susceptible to their application.

The court first addressed the commerce clause issue. In defining the scope of judicial review, the court employed the two-tier test of *Heart of Atlanta*: (1) Whether there was a rational basis for finding an effect on commerce; and (2) whether the means employed were reasonable and appropriate. Indiana Coal Ass'n v. Andrus at 9-10. *See* notes 75-76 *supra* and accompanying text. With respect to the first factor, the

court relied on a report to congress which stated that only small amounts of prime farmlands are actually used in surface mining, Indiana Coal Ass'n v. Andrus at 10, and thus concluded that "[s]urface coal mining operations on prime farmland, as distinguished *per se* from any other type of land, have an infinitesimal or trivial impact on interstate commerce." *Id.* In addition, the court noted that "active surface mining in Indiana is not causing any surface water quality problems . . . ." *Id.* at 14. As a result, with respect to the second *Heart of Atlanta* factor, the court held that "the prime farmland provisions are not related to the removal of air and water pollution and are, therefore, not a means [of regulation] reasonably and plainly adapted to the legitimate end of removing any substantial adverse effect on interstate commerce." *Id.* at 14-15.

The court's analysis of this issue, however, seems to improperly restrict the federal commerce power. Judicial review of commerce clause legislation involves no more than low level scrutiny. *See* note 72 *supra* and accompanying text. Great deference is given to legislative decisions under this standard of review. *See* note 73 *supra* and accompanying text. Yet, in contravention of these concepts, the Indiana court assumed that air and water pollution were the only effects of surface mining on interstate commerce, Indiana Coal Ass'n v. Andrus at 14-15, ignoring other substantial effects such as the transportation of coal in interstate commerce, *see* note 68 *supra* and accompanying text, and other economic repercussions. *See* notes 69-71 *supra* and accompanying text. In short, the court chose to ignore congressional *conclusions* concerning water pollution casued by surface coal mining and instead recognized a select few of the many reports which Congress *considered* in formulating those conclusions.

The court also ruled on the tenth amendment issue. It found that "[l]and use control and planning is a traditional or integral governmental function . . . ." Indiana Coal Ass'n v. Andrus at 25. Relying on the *National League of Cities* "traditional government function" test, *see* note 90 *supra* and accompanying text, the court concluded that surface mining regulation as a form of land use control, *see* Indiana Coal Ass'n v. Andrus at 27-39, can only be performed by the states. The court then found the provisions of the Act constituted a federal usurpation of local governmental functions with respect to land and, thus, violated the tenth amendment. *Id.* at 30. Yet, as was the case in *Virginia Surface Mining*, the holding seems to be an overbroad application of *National League of Cities*. The premise of the court's holding was that land use control and planning is a traditional state governmental function. Indiana Coal Ass'n v. Andrus at 25. This contradicts the *National League of Cities* stipulation that constitutionally protected state activities must be actual *services*, not merely traditional subjects of state regulation. *See* notes 93-95, 116 *supra* and accompanying text. Moreover, the court's decision disregarded the "private endeavors" qualification in *National League of Cities*. *See* note 101 *supra* and accompanying text. Finally, the court remarked that

> [e]ven if a State program is instituted in Indiana, the Federal Government cannot do indirectly that which is unconstitutional to accomplish directly. In *National League of Cities*, had the Federal Government not legislated that the States pay certain minimum wages to employees which *indirectly* altered the States' choices as to the delivery of certain governmental services to their citizens, but attempted to directly usurp the delivery of these governmental services, it would have been an even clearer violation of the Tenth Amendment.

Indiana Coal Ass'n v. Andrus at 24. *National League of Cities*, however, dealt with a *direct* effect on state governmental services, *see* notes 96-99 *supra* and accompanying text, and not an indirect effect on a state's ability to regulate, the situation presented by the Surface Mining Act.

The attractive aspect of the Indiana court's treatment of the tenth amendment issue is its sensitivity to the harsh circumstances wrought by the Surface Mining Act,

a sensitivity not reflected in the *National League of Cities* plurality test. A balancing test might better serve courts in deciding tenth amendment questions. *See* notes 119-30 *supra* and accompanying text.

The court also found a violation of equal protection, as applied through the fifth amendment. Indiana Coal Ass'n v. Andrus at 33-34. The absence of variance procedures for prime farmland provisions, as are provided in steep slope and mountaintop provisions, was deemed discriminatory to Indiana surface coal miners. *Id.* at 33. The court stated that "there must be an overriding national interest justifying such difference in treatment, and there must be 'a legitimate basis for presuming that the rule was actually intended to serve that interest.'" *Id.* (quoting Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976)). The court concluded that "[t]here is no overriding national interest justifying the lack of variances for the prime farmland and approximate original contour provisions on lands within the Midwest . . . ." Indiana Coal Ass'n v. Andrus at 33.

The court apparently adopted an incorrect equal protection standard in evaluating the Surface Mining Act. *Mow Sun Wong* clearly applies to federal discrimination against aliens—"an *identifiable class of persons* who, entirely apart from the rule itself, are already subject to disadvantages not shared by the remainder of the community." 426 U.S. at 102 (emphasis added). No such identifiable class is discriminated against in the Surface Mining Act. The appropriate standard of review, instead of the higher level of review enunciated in *Mow Sun Wong*, should be low level scrutiny which is applicable to all legislation dealing with economics and the general welfare. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949). Under this lower standard, it seems probable that the Surface Mining Act should survive any equal protection challenges. In fact, the court in *Virginia Surface Mining* reached this conclusion when faced with a similar equal protection issue. 483 F. Supp. at 436.

The Indiana court next dealt with the taking issue. It focused on the requirement that coal operators, in order to obtain permits for surface mining prime farmland, demonstrate that they can "restore such mined area, within a reasonable time, to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management . . . ." 30 U.S.C. § 1260(d)(1) (Supp. II 1978). The court found that even with high level management practice "it is technologically impossible to reclaim prime farmland in a postmining period so that equal or higher levels of yield . . . can be achieved . . . ." Indiana Coal Ass'n v. Andrus at 36. Citing *Mahon*, *see* notes 155-56 *supra* and accompanying text, the court concluded that mineral interests were thereby destroyed and that a taking without just compensation was present. Indiana Coal Ass'n v. Andrus at 36-37.

The Indiana court's analysis is rather brief considering the complexity of this issue. The court fails to analyze previous case law, citing only *Mahon*, and there is a noticeable lack of any reference to the factors important in any taking analysis. *See* notes 137-41 *supra* and accompanying text. Admittedly, taking decisions have to be made in an *ad hoc* fashion. *See* note 136 *supra* and accompanying text. Yet, the Indiana court—as did the court in *Virginia Surface Mining*, *see* notes 186-89 *supra* and accompanying text—refused to properly balance the interests of the federal government against those of the private coal operator. Nonetheless, the court's conclusion can be defended. The physical impossibility of compliance in this case presents even stronger diminution in value and frustration of distinct investment-backed expectations arguments than did the *Virginia Surface Mining* situation. *See* notes 151-56 *supra* and accompanying text.

Finally, the court in *Indiana Coal Ass'n* considered the procedural due process issue and concluded that 30 U.S.C. § 518(c) violated the procedural due process guarantees of the fifth amendment. Indiana Coal Ass'n v. Andrus at 37-38. Once again,

the court's treatment of an issue which requires a delicate balancing of competing interests was summary in nature. The Indiana court considered only the prepayment provisions; provisions of the Surface Mining Act allowing the issuance of cessation orders were entirely ignored. *See* notes 210-19 *supra* and accompanying text. The court relied upon *Fuentes v. Shevin* rather than *Mathews* as the appropriate authority, and failed to analyze any of the factors presented in either case. As in the taking issue, the nature of this question and the law appurtenant to it require more extensive deliberations before a proper response can be formulated. Nevertheless, the Indiana court's decision can be substantiated when this deliberative process is undertaken. *See* note 260 *supra* and accompanying text.