Tenth Amendment Challenges to the Surface Mining Control and Reclamation Act of 1977: The Implications of National League of Cities on Indirect Regulation of the States

Lawrence H. Kaplan

Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol49/iss4/14
TENTH AMENDMENT CHALLENGES TO THE
SURFACE MINING CONTROL AND
RECLAMATION ACT OF 1977: THE IMPLICATIONS OF
NATIONAL LEAGUE OF CITIES ON
INDIRECT REGULATION OF THE STATES

INTRODUCTION

The cost of imported oil and gas has increased substantially over the past decade.\(^1\) To decrease the country's reliance on foreign energy supplies,\(^2\) the government has declared a national policy of encouraging the development of the nation's coal reserves.\(^3\) Surface mining is the primary method of extracting coal in the United States, accounting for nearly sixty percent of all coal produced.\(^4\) It is well-

---


2. Statistics from the United States Department of Commerce indicate that crude oil prices during the period 1973-78 were 130.3% higher than during the period 1970-73. U.S. Dep't of Commerce, Statistical Abstract of the United States 604 (1979).


4. House Report, supra note 1, at 72, reprinted in [1977] U.S. Code Cong. & Ad. News at 610. According to statistics from the Bureau of Mines, United States coal production has been somewhat unstable during the past quarter century. In 1953, 457 million tons were produced. It was not until 1965, however, that more than 500 million tons were consistently produced. By 1976, the nation's coal mines produced approximately 670 million tons of coal. Significantly, the percentage of coal production derived from surface mines has increased steadily since 1953. In that year, surface mined coal accounted for less that 25% of the coal produced. By 1971, surface coal production had reached 50% of all coal production. *Id.*, reprinted in [1977] U.S. Code Cong. & Ad. News at 610.
recognized, however, that the process of surface mining may severely impair the quality of the environment. Acid drainage from surface mines, for example, can cause water pollution. Weathering of the earth at a mine site results in land erosion. Surface mining may also cause aesthetic nuisances and disrupt community life.

5. "[S]urface mining consists of removing earth from the coal" as opposed to removing coal from the earth as in underground mining. Id. at 76, reprinted in [1977] U.S. Code Cong. & Ad. News at 614. There are three categories of surface mining: contour, area, and open pit. Contour mining, which is generally done in areas with steep terrain, such as Appalachia, involves excavating that part of a hillside at which the coal seam meets the surface, removing the ground over the coal seam, and then following the contour of the seam as deeply as is profitable. This technique causes a serpentine bench. A variation of contour mining is mountaintop mining. It involves following a coal seam through the mountain, and then dumping the earth removed down the slope. As a result, the mountain is levelled. In area surface mining, which usually is done on flat, rolling countryside, the earth removed is piled to one side of the mine on a ridge adjacent to the area from which the coal was removed. This technique results in a furrowed mine site ending in a ditch. The third category is open pit mining. This method does not actually produce a pit, but, because the thickness of the coal removed is much greater than that of the earth removed, a depression is left in the ground even after the land is refilled. Id. at 77, reprinted in [1977] U.S. Code Cong. & Ad. News at 615.


8. Senate Report, supra note 1, at 51. Erosion is a particularly severe problem in the western coal areas because the annual rainfall does not provide enough moisture to establish vegetative cover on restored lands. Id.; see Rochow, The Far Side of Paradox: State Regulation of the Environmental Effects of Coal Mining, 81 W. Va. L. Rev. 559, 560 (1979).

9. SMCRA, supra note 3, § 101(c), 30 U.S.C. § 1201(c) (Supp. II 1978). Congress found that surface mining adversely affected the public welfare "by impairing
Pursuant to its power under the commerce clause, Congress enacted the Surface Mining Control and Reclamation Act of 1977. This act was designed to protect environmental beauty, by damaging the property of citizens, (and) by creating hazards dangerous to life and property by degrading the quality of life in local communities. Cuts, 30 U.S.C. § 1201(c) (Supp. II 1979).

10. The Constitution gives Congress the authority to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. The commerce clause is the primary source of congressional regulatory power. L. Tribe, American Constitutional Law § 5-4, at 232 (1978). In enacting the SMCRA, Congress apparently based its commerce clause power on the protection of interstate commerce from the adverse effects of pollution from surface mines in other states. See Senate Report, supra note 1, at 49-53; House Report, supra note 1, at 57-61, reprinted in [1977] U.S. Code Cong. & Ad. News at 595-99; cf. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41 (1937) (Congress may regulate private activities that "would have a most serious effect upon interstate commerce."). Commerce clause justification for the SMCRA may also be found in the protection of agricultural production. See Wickard v. Filburn, 317 U.S. 111, 127-29 (1942) (Congress can control the production of wheat by farmers for their own consumption because the cumulative effect of such consumption has an impact on interstate commerce); SMCRA, supra note 3, § 102(f), 30 U.S.C. § 1202(f) (Supp. II 1978); L. Tribe, supra, § 5-5, at 237.

11. Reclamation generally means restoring mined land to its original state. House Report, supra note 1, at 79-80, reprinted in [1977] U.S. Code Cong. & Ad. News at 616-17. There are two phases to reclamation. The first entails backfilling, regrading, and reestablishing drainage patterns. These procedures restore the desired surface contour and proper drainage under it. This second phase requires revegetation. This is accomplished through preparation of the topsoil, fertilization, cultivation, and seeding. In humid eastern states, the risk of slides, siltation, and sedimentation is reduced by keeping the removed earth at the mine site. In the mid-west and west, this technique mitigates the adverse effects of surface mining on underground percolating waters. Id., reprinted in [1977] U.S. Code Cong. & Ad. News at 616-17.

(SMCRA) to improve and regularize the enforcement of surface mining reclamation regulations throughout the nation without unduly discouraging coal production. The SMCRA is a detailed regulatory program that basically requires coal mining companies to restore mined land to its pre-mined condition. For example, all land must be returned to its approximate original contour. When prime farmland is mined, the soil zones must be preserved and reconstituted so that the land is as agriculturally productive as unmined prime farmland in neighboring areas.

Although Congress enacted the SMCRA because it believed that the individual states were unable to remedy the various problems caused by increased surface mining, it contemplated that the states


16. Id. § 701(2), 30 U.S.C. § 1291(2) (Supp. II 1978). The Act defines "approximate original contour" as "that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated." Id., 30 U.S.C. § 1291(2) (Supp. II 1978).

17. Id. § 510(d)(1), 30 U.S.C. § 1260(d)(1) (Supp. II 1978). The SMCRA requires that mine operators "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." Id. § 515(b)(2), 30 U.S.C. § 1265(b)(2) (Supp. II 1978). This provision establishes only minimum requirements. The prime farmland provisions further restrict reclamation by requiring, in effect, that all prime farmlands be capable of producing their former yield after being mined. Id. § 510(d)(1), 30 U.S.C. § 1260(d)(1) (Supp. II 1978).

18. House Report, supra note 1, at 73, reprinted in [1977] U.S. Code Cong. & Ad. News at 611. Congress found that "surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders." SMCRA, supra note 3, § 101(g), 30 U.S.C. § 1201(g) (Supp. II 1978). In its report, the House Committee On Interior and Insular Affairs found, with some exceptions, that there had been a minimal effort by mine operators to restore disturbed lands to their previous levels of productivity. Further, it noted that the laws of 34 states had been ineffective in altering the situation. House Report, supra note 1, at 73, reprinted in [1977] U.S. Code Cong. & Ad. News at 611. In support of its proposed environmental protection standards, the Committee noted that these reclamation methods had been successfully employed by some mine operators in West Virginia and Pennsylvania. The methods practiced by those operators included restoration of disturbed lands to their original contour and revegetation that focused on preventing erosion and landslides on slopes beneath the mining sites. Id. at 97, reprinted in [1977] U.S. Code Cong. & Ad. News at 633.
would eventually assume primary responsibility for formulating and enforcing coal mining regulations.\textsuperscript{19} The SMCRA provides that a federal program for surface mining and reclamation will be implemented in all states only until the Secretary of the Interior accepts comparable programs proposed by the individual states.\textsuperscript{20} If a state fails to submit a plan, or if the Secretary rejects the plan that is submitted, a permanent plan, devised by the Secretary, will govern the coal mining industry in that state.\textsuperscript{21}


\textsuperscript{20} SMCRA, supra note 3, §§ 503, 504, 30 U.S.C. §§ 1253, 1254 (Supp. II 1978). The Secretary of the Interior will only approve a state plan pursuant to a demonstration of its effectiveness. \textit{id.}, 30 U.S.C. §§ 1253, 1254 (Supp. II 1978). The SMCRA provides for both permanent and interim regulatory programs for mining reclamation. \textit{id.} § 502, 30 U.S.C. § 1252 (Supp. II 1978). Originally, the states were to operate under interim regulations for six months prior to submitting their proposals to the Secretary for his approval. \textit{id.} § 502(b), 30 U.S.C. § 1252(b) (Supp. II 1978). The Senate has passed a bill to extend this period. S. 1403, 96th Cong., 1st Sess., 125 Cong. Rec. S12387 (daily ed. Sept. 11, 1979). The House has not yet acted upon the bill. During the interim program, only 8 of the 25 environmental protection performance standards must be met by the states. SMCRA, supra note 3, §§ 502(b), (c), 515, 30 U.S.C. §§ 1252(b), (c), 1265 (Supp. II 1978). The Secretary has issued permanent regulations under which the SMCRA is to be implemented. 30 C.F.R. §§ 700-845 (1980). State reclamation plans must be consistent with the Secretary's regulations. SMCRA, supra note 3, § 503(a)(7), 30 U.S.C. § 1253(a)(7) (Supp. II 1978). The Secretary's regulations are highly specific, providing both stringent guidelines for state-proposed programs and exacting procedures and techniques for use in mining and reclamation operations. 30 C.F.R. § 816.1-.200 (1980). The permanent regulations have been widely attacked as being unnecessarily detailed, inflexible, and arbitrary. See, e.g., 125 Cong. Rec. S12350-59, S12353 (daily ed. Sept. 11, 1979) (remarks of Sen. Hatfield) ("The requirement that State programs be consistent with the regulations inhibits the flexibility of the States in the design of their programs."); \textit{Oversight—The Surface Mining Control and Reclamation Act of 1977: Hearings Before the Senate Comm. On Energy and Natural Resources 25, 96th Cong., 1st Sess. (1979) [hereinafter cited as \textit{Oversight Hearings}] (statement of Gov. Herschler) (SMCRA not intended to require states to enact mirror image regulatory programs); Note, \textit{Surface Mining Control and Reclamation Act of 1977: Regulatory Controversies and Constitutional Challenges}, 8 Ecology L.Q. 762, 764-68 (1980) (OSM has "specified the precise procedures and techniques to be used in mining and reclamation operations.") (footnote omitted)); United States Regulatory Council, Cooperation and Conflict 20-21, 31 (Jan. 1981) (OSM regulations are unnecessarily detailed). Further, it has been asserted that the Secretary's regulations do not comport with Congress' intent that the states retain discretion in administering their reclamation programs. 125 Cong. Rec. S12353 (daily ed. Sept. 11, 1979) (remarks of Sen. Hatfield) ("States will not have the opportunity to design regulatory programs which reflect local conditions."); see \textit{In re Permanent Surface Mining Regulation Litigation}, No. 80-1308 (D.C. Cir. July 10, 1980) (finding that the Secretary's regulations are contrary to the intent of the SMCRA).

Relying on the Supreme Court’s holding in *National League of Cities v. Usery* that the federal government may not use its commerce power to “directly displace the States’ freedom to structure integral operations in areas of traditional government functions,” several states have alleged that the prime farmland and certain original contour provisions of the SMCRA are unconstitutional under the tenth amendment. They argue that these provisions, in conjunction with the provisions empowering the Secretary of the Interior to reject state programs, indirectly coerce the states to accept federal regulation of their land, and thus impermissibly preempt the states’ legislative discretion over an area of traditionally local concern. The

23. *Id.* at 852.
two district courts that have directly addressed this issue have accepted this reasoning and have held that the challenged provisions of the SMCRA are unconstitutional. Two other district courts, however, have indicated in dicta that there is no tenth amendment violation because the SMCRA does not directly require state compliance with federal requirements. This Note analyzes the sufficiency of the states' challenge to the constitutionality of the SMCRA. It contends that, because Congress has effectively deprived the states of their ability to make fundamental decisions concerning the use of their land, the tenth amendment is violated.

I. NATIONAL LEAGUE OF CITIES v. USERY: THE UNDERLYING RATIONALE

The tenth amendment provides that "[t]he 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." Traditionally, the tenth amendment had been construed as imposing no limitation on congressional power to regulate interstate commerce under the commerce clause. In Fry v. United States, however, den than others. Indiana v. Andrus, 14 Envir. Rep. Cases (BNA) 1769, 1781-82 (S.D. Ind.), prob. juris. noted, 101 S. Ct. 67 (1980) (No. 80-231), Star Coal Co. v. Andrus, 14 Envir. Rep. Cases (BNA) 1325, 1333-34 (S.D. Iowa 1980), Virginia Surface Mining and Reclamation Ass'n v. Andrus, 483 F. Supp. 425, 435-36 (W.D. Va.), prob. juris. noted, 101 S. Ct. 67 (1980) (Nos. 79-1538, 79-1596).


31. U.S. Const. amend. X.

32. In United States v. Darby, 312 U.S. 100 (1941), the Court expansively interpreted Congress' power to regulate interstate commerce under the commerce clause. Id. at 118. The Court noted that "the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution." Id. at 116. In sustaining the validity of a federal wage and hour law, the Court found that the tenth amendment was no bar to such congressional exercises of power because there was "nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments . . . 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. In Maryland v. Wirtz, 392 U.S. 183 (1968), overruled, National League of Cities v. Usery, 426 U.S. 833 (1976), the Court strongly relied upon Darby in upholding the constitutionality of amendments to the Fair Labor Standards Act that broadened the Act's application. Id. at 188-93. National League of Cities v. Usery, however, overruled the Wirtz construction of the tenth amendment. 426 U.S. at 855.

the Supreme Court indicated that Congress could not use its commerce power to impair the integrity of the states or to hinder their ability to function independently within the federal system. The Court reinforced this position in National League of Cities v. Usery when it held that the Fair Labor Standards Act (FLSA) was unconstitutional as applied to the states, or their local political subdivisions, to the extent that it displaced state policy decisions concerning employer-employee relations. The Court determined that the states' power to fix the wages paid to and hours worked by their employees engaged in the performance of essential state activities was immune to congressional regulation by virtue of the tenth amendment.

In Fry, the Court held that a federal statute limiting increases in wages and prices was valid as applied to state employees. It found that because the federal action was of an emergency nature, limited in time, it intruded only minimally into state affairs. Fry appears to be a transitional case in the development of the Supreme Court's interpretation of the tenth amendment. Although the Court suggested that federal interference with state functions could outweigh the federal interest in promulgating a regulation, the Court seemed unprepared to completely alter its interpretation of the tenth amendment. Therefore, to achieve the desired result in Fry, the Court characterized the inflation of 1971 as constituting an economic emergency. In his dissenting opinion, Justice Rehnquist suggested that the majority had not gone far enough in recognizing the extent of tenth amendment protection of traditional state functions. Several circuit courts appear to have anticipated the Court's alteration of its approach to tenth amendment questions. Brown v. EPA, 521 F.2d 827, 839 (9th Cir. 1975) (invalidating the use of sanctions by the EPA against state governments for failure to comply with EPA regulations governing pollution), vacated and remanded on other grounds, 431 U.S. 99 (1977); District of Columbia v. Train, 521 F.2d 971, 993 (D.C. Cir. 1975) (holding that the Clean Air Act did not authorize the EPA's administrator to regulate private sources of pollution by requiring states to enact statutes and to administer and enforce EPA programs), vacated and remanded on other grounds, 431 U.S. 99 (1977); Maryland v. EPA, 530 F.2d 215, 288 (4th Cir. 1975) (invalidating EPA regulation requiring states to enact enabling legislation under pain of civil and criminal penalties), vacated and remanded on other grounds, 431 U.S. 99 (1977). But see Pennsylvania v. EPA, 500 F.2d 246, 259-61 (3d Cir. 1974) (holding that the EPA could direct a state's legislature to act; decided prior to Fry, however, and relied primarily on Wirtz). See generally Note, Protection of the Environment and Protection of the States: The Constitutional Issue Raised by EPA Action Under the Clean Air Act, 7 Envt'l L. 383 (1977) [hereinafter cited as Protection of the Environment].

Similarly, the Court has invalidated congressional use of the commerce power when it conflicts with other constitutional provisions protecting the rights of individuals. Leary v. United States, 395 U.S. 6 (1969) (fifth amendment right against self-incrimination); United States v. Jackson, 390 U.S. 570 (1968) (sixth amendment right to trial).

Professor Tribe, noting that "the Court was unclear as to the source of the state sovereignty limitation on congressional power under the commerce clause," has suggested that National League of Cities may not be a tenth
The Court, in *National League of Cities*, articulated two basic rules concerning tenth amendment issues. First, there is a distinction between Congress’ power to regulate areas of private endeavor and its power to regulate the states in their function as states. Congress may always regulate private endeavor "even when its exercise may pre-empt express state-law determinations contrary to the result which has commended itself to the collective wisdom of Congress." The sole limitation on Congress is that the means it selects to effectuate its purposes must be reasonably related to a constitutionally permissible end. Second, Congress may not direct the states to act in areas in which a federal regulatory scheme will alter the delivery of essential state services. The states’ power to engage in discretionary functions related to the delivery of such services may override the power vested in Congress by the commerce clause when these
activities are integral to the operation of states as sovereign entities. Federal regulation in these areas would effectively usurp the tenth amendment reservation of power to the states. This second rule, however, is not absolute. The majority noted, for example, that federally imposed temporary emergency measures might not violate the tenth amendment if they do not unduly interfere with state freedom of action. Justice Blackmun, in his concurring opinion, ably involve interstate commerce are predominantly local in nature. Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602, 612-13 (1951) (highway use tax deemed proper for state to impose despite effect on interstate commerce), overruled on other grounds, Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 288-90 (1977); South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 184-85 (1938) (state regulation of weight and width of vehicles on interstate highways held a permissible burden on interstate commerce due to its local nature); see Willson v. The Black-Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 251 (1829) (Marshall, C.J.). In Maryland v. Wirtz, 392 U.S. 183 (1968), overruled, National League of Cities v. Usery, 426 U.S. 833 (1976), the Court pointed out that immunity attached only to those functions that, if usurped, would lead to the “utter destruction of the State as a sovereign political entity.” Id. at 196 (footnote omitted). In Fry v. United States, 421 U.S. 542 (1975), however, the Court relaxed its stance and indicated that impairment of a state’s independent functioning is sufficient to constitute a violation of the tenth amendment. Id. at 547 n.7.

43. 426 U.S. at 851. The Court mentioned fire prevention, police protection, sanitation, public health, and parks and recreation as activities essential to a state’s sovereignty. It noted that they did not comprise an “exhaustive catalogue” of those activities within the “traditional operations of state and local governments.” Id. at 851 n.16. The Court did not, however, explicitly outline the characteristics of essential activities. Such activities were characterized as “those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services . . . which governments are created to provide . . . [and] which the States have traditionally afforded their citizens.” Id. at 851 (footnote omitted). This ambiguity has led to much criticism of the Court’s analysis. See, e.g., Beaird & Ellington, A Commerce Power Seesaw: Balancing National League of Cities, 11 Ga. L. Rev. 35, 62-66, 72 (1976); Michelman, States’ Rights and States’ Roles: Permutations of “Sovereignty” in National League of Cities v. Usery, 86 Yale L.J. 1165, 1167-80 (1977); Stewart, Pyramids of Sacrifice: Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 Yale L.J. 1196, 1234-37 (1977); Tribe, Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services, 90 Harv. L. Rev. 1065, 1090-96 (1977); Protection of the Environment, supra note 34, at 400-06; Note, National League of Cities v. Usery: A New Approach to State Sovereignty?, 48 U. Colo. L. Rev. 467, 471-76 (1977) [hereinafter cited as A New Approach]. The National League of Cities Court provided one example of an unprotected function through its affirma-
appears to have extended this reasoning by suggesting that a balancing approach always be used when dealing with tenth amendment questions. Under this analysis, the importance of the federal government's interest must be weighed against the extent of federal interference in the essential affairs of the state. Even a substantial displacement of state policy determinations concerning allocation of state resources may be insufficient to establish a violation of the tenth amendment if the federal interest is of overriding significance.

Neither the majority nor concurring opinion addressed those instances in which federal legislation is purportedly directed at private industry, but its pervasive effect is to regulate the states in an area of traditional state concern. The Court also did not consider whether control over land may constitute an essential function of state government. The precise issues presented in the SMCRA cases, therefore,

being of all the component parts of our federal system and . . . only collective action by the National Government [can] forestall extremely serious consequences. Id. In making this exception, the Court harmonized National League of Cities with Fry v. United States, 421 U.S. 542 (1975). See note 34 supra.

46. 426 U.S. at 856 (Blackmun, J., concurring). Justice Blackmun did not believe that the Court's opinion precluded the exertion of federal power in areas such as environmental protection. He felt it was obvious that in this area the federal interest outweighed state concerns. Id.


48. See notes 104-117 infra and accompanying text.
are left unresolved by National League of Cities. Nevertheless, the rationale underlying National League of Cities, that the states must be allowed substantial latitude to govern their local affairs, is broad enough to provide a framework for analyzing any tenth amendment question. 49

II. THE SMCRA: APPLYING THE UNDERLYING RATIONALE OF NATIONAL LEAGUE OF CITIES

A. The Majority Opinion

A close reading of National League of Cities suggests that a three-pronged analysis be applied when congressional legislation purportedly infringes upon the power reserved to the states by the tenth amendment. Initially, the challenged regulation must be directed at the “States as States.” 30 Although this phrase is somewhat ambiguous, 31 the Court appears to have meant that a tenth amendment issue is presented only when the state is acting in a role that it has traditionally assumed. 32 Any restriction of these functions, which


50. 426 U.S. at 845.

51. See note 43 supra and accompanying text.

52. 426 U.S. at 845. Traditionally, only those acts of state governments characterized as governmental were accorded protection from federal interference. Proprietary acts did not enjoy similar immunity and were subject to federal regulation. See Indian Motorcycle Co. v. United States, 283 U.S. 570 (1931) (sale of motorcycles to police force held nontaxable as governmental function); South Carolina v. United States, 199 U.S. 437 (1905) (state sale of liquor held taxable as a proprietary function). This approach was expressly rejected in New York v. United States, 326 U.S. 572 (1946), and National League of Cities has been interpreted as indicating that the Supreme Court did not intend to revive the distinction. Schwartz, National League
are attributes of state sovereignty, must be scrutinized closely. Second, it must be determined whether these attributes are "essential to [the] separate and independent existence" of the states. An essential function is one the states must exercise to operate effectively in the best interests of its citizens and which, if subject to federal interference, would impair the states' ability to govern its own affairs. Finally, it must be determined whether, by enacting the legislation at issue, Congress has preempted essential policy decisions traditionally left to the discretion of the states.

1. Land Use—A Traditional and Essential State Function

Land use planning and control laws have traditionally been considered a local concern of the states and their political subdivisions.


54. 496 U.S. at 845 (quoting Coyle v. Oklahoma, 221 U.S. 559, 550 (1911)).

55. In Amersbach v. City of Cleveland, 595 F.2d 1033 (6th Cir. 1979), the Sixth Circuit suggested a test for determining whether a governmental function is essential under National League of Cities: (1) the government service or activity is beneficial to the community and is provided at little or no cost; (2) the service or activity is provided as a public service and not for financial gain; (3) the service or activity is principally provided by government; and (4) government is in the best position to provide the service or perform the activity because of the community's need for it. Id. at 1037.

56. 496 U.S. at 851.

57. See, e.g., Village of Belle Terre v. Boraas, 416 U.S. 1, 13-14 (1974) (Marshall, J., dissenting) (zoning is an important state function and interference with a local authority's land use power is only justified when a constitutional right is infringed); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 391 (1926) (states should usually provide zoning ordinances); Donohoe Constr. Co. v. Montgomery County Council, 567 F.2d 603, 609 n.17 (4th Cir. 1977) (local planning decisions are "important local functions"), cert. denied, 438 U.S. 905 (1978); Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897, 905 (9th Cir. 1975) (local authorities are generally given responsibility for zoning decisions), cert. denied, 424 U.S. 934 (1976); Valley View Village, Inc. v. Proffett, 221 F.2d 412, 416-17 (6th Cir. 1955) ("[t]hat the regulation by a municipality of the use of property within its borders is within its powers of local self-government... is now too well-established to be questioned"); United States v. City of Parma, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980) (broad discretion should be accorded to local zoning officials); Bossier City Medical Suite, Inc. v. City of Bossier City, 483 F. Supp. 633, 646 (W.D. La. 1980) (zoning established through local ordinances is a proper exercise of state power); Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574, 583 (N.D. Cal. 1974) ("Zoning ordinances have traditionally been entitled to substantial judicial deference."), rec'd on other grounds, 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976); R. Linowes & D. Allensworth, The Politics of Land Use 32 (1975) ("The planning operation is an arm of local government... [and] land-use controls... are almost exclusively among the responsibilities of local governments, not metropolitan or interjurisdictional bodies.").
Clearly, state governments are best suited to provide for economic growth and development through land control legislation. Because state legislatures are closer to their constituents, they are more sensitive to citizens' needs and aware of the costs of achieving social and environmental goals in the state. These needs vary with communities as well as with topography and climate. Indeed, in enacting the SMCRA, Congress acknowledged that, "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions," the states should retain primary governmental responsibility for implementing the requirements of the SMCRA. Federal intervention in state land use planning would depreciate "the opportunity for and value of participation in local decisions," and would, thereby, impair the local self-determination needed for successful planning.

Furthermore, even state interference with local decisionmaking concerning land use is generally deemed improper because the state legislature is too far removed from local concerns to assess them properly. States have, therefore, traditionally exercised their police

58. The Council of State Governments, Land Use Policy and Program Analysis No. 1, at 17 (1974) ("Regulation of development is just one of many areas in which the State is sovereign, and the principle which views local governments as creatures of the States in such situations has long since been established."); R. Linowes & D. Allensworth, supra note 57, at 33 ("[K]ey community development decisions are made locally, so it is natural that planning would be a local matter.").

59. See R. Linowes & D. Allensworth, supra note 57, at 33 (1975) ("The people closest to the problems can best solve them."); Stewart, supra note 43, at 1231-32 (the federal government is not well suited to determine what goods and services state citizens need). Some members of Congress believed that the SMCRA removed "from the jurisdiction of the states governmental functions that can be . . . best exercised on a local level." Senate Report, supra note 1, at 121 (statement of Sen. Hansen).

60. See R. Linowes & D. Allensworth, supra note 57, at 162. In National League of Cities, the cities argued that because "[l]ocal [g]overnment is based on need, . . . it is as varied as the need requirements of each community. Climate, topography, rivers, lakes, seas, all play a part . . . . Our constitutional scheme of Federalism includes the guarantee of ballot box control by citizens over their governmental units; this is the people's power guaranteed by the Tenth Amendment." Brief for Appellants at 111-12, National League of Cities v. Usery, 426 U.S. 833 (1976). This argument, apparently successful in National League of Cities, may be analogously applied to the SMCRA cases. Just as the FLSA amendments had the effect of denying local governments local autonomy, the SMCRA denies states control over local land planning and usage. See notes 73-101 infra and accompanying text. Federal control over concerns necessarily local in nature would violate "[o]ur constitutional scheme of Federalism." Brief for Appellants at 111-12, 426 U.S. 833; see Comment, Farmland Preservation Techniques: Some Food For Thought, 40 U. Pitt. L. Rev. 258 (1979) [hereinafter cited as Farmland Preservation].


62. Stewart, supra note 43, at 1220; see Sierra Club v. EPA, 540 F.2d 1114, 1140 (D.C. Cir. 1976) (The tenth amendment is not violated if "[t]he states retain broad discretion . . . . to control the use of their land and the scope of their economic development."); cert. denied, 430 U.S. 959 (1977).

63. See R. Linowes & D. Allensworth, supra note 57, at 155-65. The authors noted that, although states could legally undertake planning pursuant to their police
power by delegating most control over land use to local municipalities. It has consistently been recognized that state deference to local policy in matters of zoning, for example, is necessary to safeguard the general welfare of communities. Local control over commercial and residential land uses allows government to structure more effectively the delivery of services, such as police protection and fire prevention, that are essential to the safety of its citizens. For example, because commercial areas generally have a higher crime rate than residential areas, consolidating business in one large locale will better allow local governments to allocate police protection resources. Because of their closeness to local conditions, municipal governments can best administer these services. It has been

power, the power "has been largely delegated to local governments." Id. at 155. The states have not been a positive force in assisting local planning because "[t]hey have not been sensitive to the need to direct their own activities so as to accord with local master plans." Id. at 162. The authors observed that this is not surprising in light of the limited success that states have had "in coordinating their own programs and agencies." Id. at 164. States may be poor coordinators "because state legislatures commonly meet so infrequently" and, therefore, cannot respond to local conditions in a timely manner. Id.


68. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 393 (1926) ("Open shops invite loiterers and idlers to congregate; and the places of such congregations need police protection.").

69. Id. at 393. The Euclid Court noted that, because the roads in commercial areas required more frequent repaving than those in residential areas, consolidating each in separate larger districts enabled local government to more efficiently meet repaving needs. After zoning, only those roads in commercial districts needed frequent paving. The result was a saving in the local government's expenditures. Id.

70. Id.; see Young v. American Mini Theatres, Inc., 427 U.S. 50, 73 (1976) (Powell, J., concurring); Amersbach v. City of Cleveland, 598 F.2d 1033, 1037 (6th Cir. 1979); Trustees of Mortgage Trust of Am. v. Holland, 554 F.2d 237, 238 (5th
argued, in fact, that National League of Cities may be construed as suggesting that state citizens have certain legitimate expectations traditionally protected by the state.\textsuperscript{71} Thus, "policy-based legislation by Congress that endangers the provision of certain vital services . . . is constitutionally problematic . . . because it hinders and may even foreclose attempts by states or localities to meet their citizens' legitimate expectations of basic government services."\textsuperscript{72} If state governments generally are incapable of satisfying these expectations, the federal government cannot be expected to take the place of local governments in meeting the local needs of its citizenry.

2. The Loss of State Autonomy

Congress' intent in enacting the SMCRA, unlike its purpose in passing the FLSA, was not to direct the states to forfeit their legislative discretion over traditional state functions.\textsuperscript{73} The prime farmland and original contour provisions do not purport to regulate the states. On its face, the SMCRA compels neither state enforcement of federal requirements nor the expenditure of state funds to effectuate congressional policy.\textsuperscript{74} If states wish to assume the responsibility for regulating mining reclamation procedures within their boundaries, they may formulate their own environmental programs.\textsuperscript{75} Thus, Congress believed the SMCRA allowed the states enough flexibility to implement the basic guidelines it desired in a manner that would not adversely affect state sovereignty.\textsuperscript{76}

\textsuperscript{71} L. Tribe, supra note 10, § 5-22, at 312; see Michelman, supra note 43, at 1165. Arguably, land use planning is an integral governmental function under this rationale. The states and their political subdivisions have generally done all zoning and land use planning. Hence, their citizens have developed an expectancy that state and local governments will continue to provide it in their best interests.

\textsuperscript{72} L. Tribe, supra note 10, § 5-22, at 312 (footnote omitted).

\textsuperscript{73} See SMCRA, supra note 3, §§ 101, 102, 30 U.S.C. §§ 1201, 1202 (Supp. II 1978). Professor Stewart has noted that Congress' decision to draft national environmental protection laws, such as the SMCRA, without reference to differences among states was probably due to the "difficulties of securing legislative consensus on geographically nonuniform measures, legislators' reluctance to delegate to administrators broad discretion over policies profoundly affecting the welfare of their constituents, and the administrative economies of uniform measures." Stewart, supra note 43, at 1219 n.89.


\textsuperscript{75} Id. § 503, 30 U.S.C. § 1253 (Supp. II 1978).

\textsuperscript{76} See Oversight Hearings, supra note 20, at 102 (statement of Sen. Hatfield); id. at 8, 25 (statements of Gov. Herschler); id. at 87 (statement of D. Callaghan).
The effect of the SMCRA, however, is far different from that which its framers contemplated because it does effectively displace state legislative discretion. Regardless of whether a state formulated reclamation program is rejected or accepted by the Secretary of the Interior, that state will have no meaningful choice in controlling and planning for land uses. If the state's plan is not approved by the Secretary, the SMCRA empowers the Secretary to devise a federal program for mining reclamation. In this way, a state's decisions as to the most beneficial uses to which land within its territory may be put is severely limited. Thus, the states are coerced to yield their authority to plan for future use of their land to the federal government. Even when a proposed reclamation program is accepted by the Secretary, "[t]he state would merely stand in the shoes of the federal government and act as its agent in performing the myriad responsibilities required by the Act." Because the states have legislated under the threat of federal intervention, the effect may be that they are forced to consider how best to avoid further federal encroachment rather than what is in the best interests of their constituents. More specifically, however, because the SMCRA contains no variance provisions relating to the reclamation of prime farmland and hills of less that twenty degrees, the design standards enunciated by Congress are extremely

78. Indiana v. Andrus, 14 Envir. Rep. Cases (BNA) 1769, 1778 (S.D. Ind.), prob. juris noted, 101 S. Ct. 67 (1980) (No. 80-231); Virginia Surface Mining and Reclamation Ass'n v. Andrus, 483 F. Supp. 425, 432 (W.D. Va.), prob. juris. noted, 101 S. Ct. 67 (1980) (Nos. 79-1538, 79-1596). In both Indiana v. Andrus, 14 Envir. Rep. Cases (BNA) 1769, 1778 (S.D. Ind.), prob. juris. noted, 101 S. Ct. 67 (1980) (No. 80-231) and Virginia Surface Mining and Reclamation Ass'n v. Andrus, 483 F. Supp. 425, 432 n.6 (W.D. Va.), prob. juris. noted, 101 S. Ct. 67 (1980) (Nos. 79-1538, 79-1596), the courts drew an analogy between the litigation based on the SMCRA and Steward Machine Co. v. Davis, 301 U.S. 548 (1937). In Steward Machine, the Court found that Congressional action under the commerce power was valid under the tenth amendment as long as the states were induced, rather than coerced, to act. Id. at 585-90. The Court rejected the argument that the Social Security Act of 1935, which allowed employers of more than eight employees a tax credit against federal unemployment compensation taxes, was an unconstitutional attempt by Congress to coerce the states to deal with unemployment in the manner Congress desired. Id.; see Vermont v. Brinegar, 379 F. Supp. 606, 617 (D. Vt. 1974) (federal statute mandating a 10% reduction in federal highway funds if federal plan not adopted by a state held not to be coercive because it did not compel the state to embrace the federal plan); A New Approach, supra note 43, at 482-83 (discussing federal programs designed to induce state action).
inflexible. Thus, programs submitted by the states must correspond in almost every detail to the federal program.

Generally, "[v]ariances are escape mechanisms built into most zoning ordinances that allow relief in instances where uniform application of restrictions would serve little public good while causing substantial hardship." Therefore, this absence reflects Congress' implicit decision that the farming of certain areas is their best and highest use possible. Although land might be used in more economically or socially beneficial ways, the states have no choice but to require that prime farmland be returned to its former level of productivity. Admittedly, the land may be used for any purpose the state desires once it is restored. The state, however, is never given the initial opportunity to provide for variances or to enact laws providing for broad land use plans. This scheme is economically inefficient because state plans may have to be reevaluated or, if pursued, may require the needless expenditure of time and money.

82. See notes 120-23 infra and accompanying text.
84. Gladden, supra note 64, at 382 (footnote omitted); see SMCRA, supra note 3, § 515(e), 30 U.S.C. § 1265(e) (Supp. II 1978) (provides for variances from the original contour requirement). Possibly concerned about a tenth amendment challenge, the Secretary of the Interior added § 515(e) to the interim, as well as the permanent, program. See 30 C.F.R. § 716.3 (1980).
86. The SMCRA provides that the Secretary of the Interior may not issue a permit for the mining of prime farmland unless he finds that the operator has the technological capability to restore the area at least to its previous level of productivity. SMCRA, supra note 3, § 510(d)(1), 30 U.S.C. § 1260(d)(1) (Supp. II 1978). If a permit is issued, the land must be restored. Id. § 515(b)(7), 30 U.S.C. § 1265(b)(7) (Supp. II 1978).
89. See National League of Cities v. Usery, 426 U.S. 833, 846-47 (1976) (FLSA amendments held unconstitutional partially because they required state expenditures that would result in a decrease of state services).
Although the challenged original contour provisions are not as obvious a federal regulation of land use as are the prime farmland provisions,\footnote{91} they nevertheless deprive the state and local governments of the discretion to permit site-specific variances.\footnote{92} In certain instances, alternatives to the reclamation requirements of the SMCRA might be desirable and environmentally sound.\footnote{93} Even Congress was aware that not all unrestored land causes environmental harm,\footnote{94} and that local governments may prefer to put such land to other publically beneficial uses.\footnote{95} In fact, because there is a scarcity of flat land in several mountainous states,\footnote{96} states or local governments might wish to provide for the utilization of a levelled hill in its unrestored form.\footnote{97} A state might desire, for example, that a hospital or airport be built or crops be raised in an area subject to the SMCRA’s original contour requirements.\footnote{98} Like the alternatives available to the states with respect to the prime farmland provisions, however, the state then has two limited options. It can either expend funds to flatten the land again before development or it may com-

---

91. See generally SMCRA, supra note 3, §§ 515(b)(1)-(25), 30 U.S.C. §§ 1265(b)(1)-(25) (Supp. II 1978). The original contour provisions are not as obvious a regulation of land use because they do not suggest that the land be returned to a specific use, as do the prime farmlands provisions.

92. The SMCRA does contain a variance for reclamation of steep slopes, which are defined as slopes above twenty degrees. SMCRA, supra note 3, §§ 515(d)(4), 515(e), 30 U.S.C. §§ 1265(d)(4), 1265(e) (Supp. II 1978). In Virginia Surface Mining, however, the court found that the Secretary of the Interior’s regulations had made this variance useless because of conditions attached to its exercise. Virginia Surface Mining and Reclamation Ass’n v. Andrus, 483 F. Supp. 425, 436 n.14 (W.D. Va.), \textit{prob. juris. noted}, 101 S. Ct. 67 (1980) (Nos. 79-1538, 79-1596). In the mountainous Appalachian coal producing states, a return to the original contour may be problematic due to physical and economic difficulties. \textit{Id.} at 433-35.

93. \textit{Id.}

94. 125 Cong. Rec. S12372 (daily ed. Sept. 11, 1979) (remarks of Sen. Huddleston) ("[T]he fact is that when you mine coal you can leave benches and you can leave flat surfaces in the place of steep hillsides without doing any damage to the environment."); 123 Cong. Rec. 15709 (1977) (remarks of Sen. Byrd) ("[P]rotection of environmental values does not in every instance require return to an original contour.").


pletely alter its plans. This has engendered criticism of the SMCRA from states," private parties," and commentators."

The SMCRA further impairs the states' ability to operate independently through its adverse effects on mining companies, although in a less direct manner. Because several coal operators have already been driven out of business as a result of their inability to meet the requirements, a state's decision to exploit certain land for coal mining purposes may never be realized. Moreover, this could cause the states to lose substantial tax revenues used to support essential health and educational services within the states, thereby decreasing the quality or quantity of services its citizens have come to expect. Thus, because the comprehensive effects of the challenged provisions of the SMCRA are to undermine state autonomy over land use regulation and planning for economic growth, they should be held to constitute a violation of the tenth amendment.

B. The Balancing Approach

Under the balancing approach suggested by Justice Blackmun, the same result should be reached. It is evident that the SMCRA has an overly intrusive effect upon the ability of the states to regulate the use of land within their borders. On the other hand, the SMCRA


102. In Virginia Surface Mining and Reclamation Ass'n v. Andrus, 483 F. Supp. 425 (W.D. Va.), prob. juris. noted, 101 S. Ct. 67 (1980) (Nos. 79-1538, 79-1596), the court noted that "[t]he cost of production of coal is increased up to seventy percent. On occasion the economic impracticality of strip mining coal is outweighed by physical realities; equipment may not be available to cover the highwall on a steep slope to restore the original contour." Id. at 434. As a result, mine operators must either suspend operations or initially decline to undertake operations. See id.


104. See notes 73-103 supra and accompanying text.
reflects three important, but divergent, federal interests: to improve environmental protection regulations and encourage agricultural productivity without decreasing the level of coal production. Environmental protection is, of course, a worthy goal. Although Congress did not find that a public health hazard existed, the reports on which it relied indicated that the quality of life in unreclaimed mining areas is declining. In fact, the cumulative effects of unchecked surface mining could conceivably create an emergency situation. The SMCRA is, therefore, generally directed at lessening the risk that current mining practices will ultimately lead to dangerous environmental conditions.

The specific purpose underlying the provision challenged, however, rather than the purpose of the SMCRA generally, should be considered in evaluating each provision. Although the purpose of the challenged original contour provisions is environmental protection, strict adherence to these requirements is not always necessary to protect the environment. In many cases, the effect of meeting the requirements is merely to restore the appearance of the landscape. Therefore, the general implementation of these requirements may displace state decisionmaking or make their realization considerably more expensive for state governments without effectuating a signifi-

106. See Senate Report, supra note 1, at 49-53 (careless mine reclamation may lead to dangers to public health and safety); House Report, supra note 1, at 57-60, reprinted in [1977] U.S. Code Cong. & Ad. News at 595-95 (current practices could cause significant environmental damage).
111. See id. at S12373 (remarks of Sen. Hatfield) ("I have seen lands that have been reclaimed, and in some instances in Pennsylvania where I have seen such lands, they are more attractive than the original terrain."); cf. id. at S12372 (remarks of Sen. Huddleston) (restoration is not always needed to avert environmental damage); 123 Cong. Rec. 15709 (1977) (remarks of Sen. Byrd) (preservation of environment does not always necessitate restoration of land to its original contour).
cant improvement of environmental conditions. The prime farmland provisions, moreover, are not primarily related to health concerns. Rather, they are designed to encourage productivity of the land.\textsuperscript{2} The federal government clearly has a significant interest in ensuring both that land resources are not depleted and that the country's food needs are satisfied.\textsuperscript{113} There is, however, no danger that either of these situations will arise in the near future.\textsuperscript{114}

Admittedly, the consequences of state and local decisions concerning the environment and agricultural production that are beyond the control of state governments may be the proper subject of federal concern.\textsuperscript{115} When there is neither a present nor foreseeable national emergency, however, the justification for federal intervention becomes questionable.\textsuperscript{116} There is, in fact, no national food emergency,

\textsuperscript{112} SMCRA, \textit{supra} note 3, § 102(f), 30 U.S.C. § 1202(f) (Supp. II 1978); see notes 81-90 \textit{supra} and accompanying text.

\textsuperscript{113} Geier, \textit{Agricultural Districts and Zoning: A State-Local Approach to a National Problem}, 8 Ecology L.Q. 655, 655 (1980). Geier notes that certain prime farmland issues are national in scope, such as the wisdom of "increasing reliance on irrigated cropland" and the squandering of land resources, as well as "the fear that continuing land losses threaten the long-term capability of American agricultural production to meet domestic and world food needs." \textit{Id.}

\textsuperscript{114} \textit{Id.} at 655-56, 660 (the adverse consequences of current land practices are of a "long-term" nature). Both the House and Senate failed to even mention this hazard in their respective reports while discussing the adverse impacts of current mining practices. See Senate Report, \textit{supra} note 1, at 49-53; House Report, \textit{supra} note 1, at 58-60, \textit{reprinted in} (1977) U.S. Code Cong. & Ad. News at 596-98.

\textsuperscript{115} Maryland-National Capital Park and Planning Comm'n v. United States Postal Serv., 487 F.2d 1029, 1037 (D.C. Cir. 1973) (federal decisions may control if "potential environmental effects extend geographically beyond the control of one independent local or regional government"); Stewart, \textit{supra} note 43, at 1216 ("If spill-over losses are sufficiently significant and multidirectional then all states may gain . . . from centralized determination of environmental policies."); \textit{see} Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926) (federal control may be proper when "the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."). In Maryland-National Capital Park and Planning Comm'n v. United States Postal Serv., 487 F.2d 1029 (D.C. Cir. 1973), the court noted that "whereas the Federal Government might legitimately defer to New York City zoning in [most] matters . . ., a different issue would be posed by the location within the city of an atomic reactor." \textit{Id.} at 1037. Federal power might override state power if New York were incapable of controlling the hazards caused by such a danger. \textit{Id.}

\textsuperscript{116} In Virginia Surface Mining and Reclamation Ass'n v. Andrus, 483 F. Supp. 425, 432 n.5 (W.D. Va.), \textit{prob. juris. noted}, 101 S. Ct. 67 (1980) (Nos. 79-1538, 79-1596), the court noted that "all constitutional restraints should be strictly construed except in a national emergency." \textit{Id.} at 432 n.5; \textit{see} Beaird & Ellington, \textit{supra} note 43, at 73 n.164. Dissenting in Fry v. United States, 421 U.S. 542 (1975), Justice Rehnquist conceded that an acute emergency could justify temporary congressional action. \textit{Id.} at 559 (Rehnquist, J., dissenting). He indicated, however, that the emergency might have to be tantamount to declared war to justify congressional action under the commerce clause. \textit{Id.} at 558.
and thus, the high degree of interference with the states' roles as allocators and planners of economic development caused by the prime farmland provisions is unwarranted. Moreover, because the federal regulations provide for uniform restoration of certain land to its original contour, even when there is no risk that environmental harm will occur, the SMCRA unduly restricts local and state governmental ability to control land use, and constitutes an impermissible infringement of the powers reserved to the states by the tenth amendment.

III. Recommendations

This conclusion need not herald the demise of the SMCRA. The states have not suggested that there be no improvement in surface mining restoration requirements or in environmental protection standards. Rather, they urge that Congress has failed to select the least restrictive means of dealing with an important national concern.

117. Geier, supra note 113, at 665-66 (because there is no food emergency, the major impact of land use decisions is on the state and local governments), see Farmland Preservation, supra note 60, at 279 ("Zoning and land-use regulation are uniquely of local concern."). See generally Myers, The Legal Aspects of Agricultural Districting, 55 Ind. L.J. 1 (1979).

118. Relatively small changes in the SMCRA’s drafting could well rid the SMCRA of its current constitutional infirmity. In attempting to do this during 1979, the Senate noted “three amendments to the Surface Mining Act . . . [would be] a meager but important beginning to bringing the act back in line with the congressional objective of State primacy.” 125 Cong. Rec. S12352 (daily ed. Sept. 11, 1979) (remarks of Sen. Hatfield). Furthermore, § 707 of the SMCRA provides that “[i]f any provision of this chapter on the applicability thereof to any person or circumstances is held invalid, the remainder of [the SMCRA provisions] and the application of such provision[s] to other persons or circumstances shall not be affected thereby.” SMCRA, supra note 3, § 707, 30 U.S.C. § 1297 (Supp. II 1978).

119. The coal mining states agree that there must be affirmative and sound environmental protection and reclamation regulations. Indiana v. Andrus, 14 Envr. Rep. Cases (BNA) 1769, 1775-81 (S.D. Ind.), prob. juris. noted, 101 S. Ct. 67 (1950) (Nos. 80-231); Virginia Surface Mining and Reclamation Ass’n v. Andrus, 483 F. Supp. 425, 431-35 (W.D. Va.), prob. juris. noted, 101 S. Ct. 67 (1950) (Nos. 79-1538, 79-1596). During Congressional hearings to determine the effectiveness of the SMCRA requirements, testimony indicated that state and local governments did not contest reclamation procedures in general. Senator Domenici observed that the states and local officials did, indeed, care about protecting the environment and supported the surface mining bill. Oversight Hearings, supra note 20, at 237-38 (statement of Sen. Domenici). A director of a state reclamation enforcement division noted that “[w]e are not here . . . to ask that the environmental performance standards . . . be weakened.” Id. at 75 (statement of Hamlet Barry III). Further, a mayor from a mining state testified that his state supported Congress’ intent in enacting the SMCRA, although he did not feel that Congress’ intent had been effectuated. Id. at 110-11 (statement of J. Terry Dolan).

in which to exercise mining reclamation variances to effect other state purposes for the economic and social welfare of their communities.121 During debates in 1979 on a proposed amendment to the SMCRA, one senator suggested, for example, that both federal and state interests would be protected if hills were returned to seventy-five percent, rather than one hundred percent, of their original contour.122 The visual difference would be minor and the land would be sufficiently stable to achieve Congress' environmental protection purposes.123 If the state then elected to use the land in a level condition, the costs of flattening the land would be decreased. The inclusion of variances in the SMCRA would allow compromises of this type to be made.

Furthermore, although one of Congress' stated purposes was to avoid discouraging coal production,124 current federal regulations appear to unnecessarily impede the development of coal resources.125 Several coal companies have been driven out of business by the inflexible and burdensome provisions of the SMCRA.126 In addition,


123. See id. (remarks of Sen. Huddleston).

124. See Senate Report, supra note 1, at 52; note 14 supra and accompanying text.


126. See note 102 supra and accompanying text. During Senate debates on an amendment to the SMCRA in 1979, Senator Hatfield noted that "coal production remains stagnant . . .; surface mine productivity per man per day has decreased steadily . . .; and the regulatory burden continues to increase." 125 Cong. Rec. S12351 (daily ed. Sept. 11, 1979) (remarks of Sen. Hatfield).
the price of coal has increased substantially during the past several years,\textsuperscript{127} and the SMCRA can be expected to contribute to further price escalations in the future.\textsuperscript{128}

Congressional provision for the incorporation of variances into the SMCRA would both dissipate tenth amendment objections to the challenged provisions and would better effectuate Congress’ desire to stabilize coal production.\textsuperscript{129} State retention of the discretion to allow site-specific variances is consistent with Congress’ desire that the states have primary responsibility for implementing the SMCRA. These variances would allow the states to plan for the use of land in an economically efficient manner because, if a variance were employed at sites at which there was no danger of environmental damage, the states could avoid requiring costly procedures to flatten land, or having to alter their plans, to maintain the delivery of essential services to their citizens. If the Secretary of the Interior were in a position to oversee such state decisions, rather than to effectively dictate them to the states, environmental safeguards could still be retained.\textsuperscript{130} Thus, allowing for broader design criteria, as opposed to

\textsuperscript{127} During 1973-78, coal prices increased by over 100%. U.S. Dep’t of Commerce, Statistical Abstract of the United States 604 (1979). A breakdown of the coal price increase showed that coal prices were relatively constant from 1975-77, but increased significantly during 1978, the first year in which the SMCRA was in effect. \textit{Id.} at 747. The cost of mandatory reclamation under the SMCRA may be responsible for as much as one third of the 1978 average price of coal per ton. \textit{See N.Y. Times, Aug. 26, 1979, § A, at 44, col. 1} (“Turning a coalpit into farmland or pasture adds an estimated $2 to $7 a ton to the price of coal. The average price of coal last year was $22.40 a ton.”); \textit{cf. N.Y. Times, Jan. 15, 1981, § B, at 3, col. 4} (“Coal went from $78 per ton . . . to $105 two months later.”).


\textsuperscript{129} \textit{See} Sierra Club v. EPA, 540 F.2d 1114, 1140 (D.C. Cir. 1976) (If “[t]he states retain broad discretion under the regulations to control the use of their land and the scope of their economic development,” the tenth amendment is not violated.), \textit{cert. denied}, 430 U.S. 959 (1977); District of Columbia v. Train, 521 F.2d 971, 994 (D.C. Cir. 1975) (“[T]he Tenth Amendment may prevent Congress from selecting methods of regulating which are ‘drastic’ invasions of state sovereignty where less intrusive approaches are available.”), \textit{vacated and remanded on other grounds}, 431 U.S. 99 (1977); L. Tribe, \textit{supra} note 10, § 5-22, at 317-18 (Courts should be less likely to override congressional decisions if such choices adopt the least restrictive manner of effectuating Congress’ end).

\textsuperscript{130} During Senate debates on the SMCRA in 1979, it appeared that several senators believed that Congress had, in fact, intended the Secretary of the Interior to function in a supervisory capacity. 125 Cong. Rec. S12367 (daily ed. Sept. 11, 1979) (remarks of Sen. Randolph) (“[T]he Office of Surface Mining’s role . . . should be one
strict performance standards, would achieve a preferable accommodation of national and state interests.\textsuperscript{131}

\textbf{Conclusion}

Our federal structure establishes a relationship of mutual respect between the states and the federal government. \textit{National League of Cities v. Usery} reaffirms this principle by indicating that the federal government ought not to interfere unduly with the local affairs of the states. The SMCRA substantially interferes with state affairs because it deprives the states of autonomy over traditional and essential functions. When there is no emergency to warrant federal intervention and congressional policy can be effectuated in a manner that will accommodate state interests, such an approach should be used. Only then will the tenth amendment reservation of powers to the states be meaningful.

\textit{Lawrence H. Kaplan}