CASE NOTES

LAND USE—THE "PRIME FARMLAND" PROVISIONS OF THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977, ENVIRONMENTALLY PROTECT "PRIME FARMLAND" FROM STRIP MINING, AND HAVE BEEN INTERPRETED NOT TO BE VIOLATIVE OF THE COMMERCE CLAUSE, THE FIFTH OR THE TENTH AMENDMENTS—*Hodel v. Indiana* (U.S. Sup. Ct. 1981).

Prior to any actual enforcement, the State of Indiana together with the Indiana Coal Association[1] brought suit in district court challenging the constitutionality of the Surface Mining Control and Reclamation Act of 1977.[2] Specifically, the suit was against the United States and the Secretary of Interior[3] seeking a judgment declaring the "prime farmland" provisions[4] and other various portions of the Act[5] unconstitutional, as well as seeking injunctive relief from enforcement of the challenged provisions.[6] The com-

1. Plaintiffs were comprised of the Governor of Indiana, the Indiana Department of Natural Resources, local coal companies, and a resident of the state. Indiana v. Andrus, 501 F. Supp. 452, 452 (S.D. Ind. 1980), *aff'd sub nom.* Hodel v. Indiana, 101 S. Ct. 2376 (1981).

2. *Id.* at 454. *See* Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (Supp. I 1977).

3. Cecil D. Andrus was the Secretary of Interior when the suit was originally brought before the Indiana District Court. Later, during the administration changeover from President Carter to President Reagan, Donald P. Hodel was the Acting Secretary of Interior and appellant in the subsequent hearing before the United States Supreme Court. The present Secretary of Interior, under President Reagan's administration, is James Watt.

4. There are six "prime farmland" provisions scattered throughout the Surface Mining Act: (1) 30 U.S.C. § 1257(b)(16) (Supp. I 1977) (a "soil survey" of the land suspected to be prime farmland must be submitted "to confirm the exact location of such prime farmlands. . . ."); (2) 30 U.S.C. § 1258(a)(2)(C) (Supp. I 1977) (must show "the productivity of the land prior to mining, including appropriate classification as prime farmlands. . . ."); (3) 30 U.S.C. § 1260(d)(1) (Supp. I 1977) (operator must show that he "has the technological capability to 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 and can meet the soil reconstruction standards in section 1265(b)(7) . . . ."); (4) 30 U.S.C. § 1265(b)(7) (Supp. I 1977) (minimum requirement that the A, B, and/or C soil horizons of prime farmland be separately removed and replaced.); (5) 30 U.S.C. § 1265(b)(20) (Supp. I 1977) (states the authorization of regulatory authorities to approve "longterm intensive agricultural postmining land use."); and (6) 30 U.S.C. § 1269(c)(2) (Supp. I 1977) (performance bonds released upon a showing that the "soil productivity for prime farmlands has returned to equivalent levels of yield as nonmined lands of the same soil type in the surrounding area under equivalent management practices . . . .").

5. 30 U.S.C. §§ 1258, 1265(b)(3), 1265(b)(5), 1268(c), 1272(a)-(e) (Supp. I 1977) (more general provisions which apply throughout the nation).

6. Indiana v. Andrus, 501 F. Supp. 452, 454 (S.D. Ind. 1980), *aff'd sub nom.* Hodel v.

plainants alleged that the "prime farmland"[7] provisions exceeded the federal government's regulatory authority under the commerce clause of the United States Constitution, and were not reasonably related to controlling commerce since the provisions affected environmental problems.[8] Arguments were also voiced that the provisions were in violation of the fifth[9] and tenth[10] amendments of the Constitution. The district court, finding each of the complainants' constitutional challenges valid, ordered the Secretary of Interior to be permanently enjoined from enforcing the challenged sections of the Act.[11] Within less than a month of that order, Justice Stevens stayed the district court's judgment, because of the severe ramifications of the order, until the appeal could be heard before the United States Supreme Court.[12]

On June 15, 1981 the Supreme Court, concluding that the Surface Mining Act was not susceptible to the complainants' pre-enforcement constitutional challenges, *held,* reversed, remanding the case with orders to have the injunction dissolved.[13] The "prime farmland" provisions of the Surface Mining Act are not violative of the commerce clause, the fifth or the tenth amendments by their use as environmental protection for prime farmland against the effects of strip mining. *Hodel v. Indiana,* 101 S. Ct. 2376 (1981).

The Surface Mining Act has been the subject of several actions prior to the Supreme Court's decision.[14] The cause for such actions lies in the un-

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Indiana, 101 S.Ct. 2376 (1981).

7. The term "prime farmland" is defined as "having the same meaning as that previously prescribed by the Secretary of Agriculture . . . ." 30 U.S.C. § 1291(20) (Supp. I 1977). The Secretary of Agriculture has defined prime farmland as "land that has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber, and oilseed crops, and is also available for these uses . . . ." 7 C.F.R. § 657.5 (1978). The rest of section 657.5 states more specifically the criteria which must be satisfied for land to be declared "prime farmland." *Id.* The Secretary of Agriculture's definition was incorporated into the Secretary of Interior's regulations implementing the Surface Mining Act. 30 C.F.R. § 701.5 (1979). *See also In re* Surface Mining Regulation Litigation, 456 F. Supp. 1301, 1312 (D.C. 1978), *rev'd in part on other grounds,* 627 F.2d 1346 (D.C. Cir. 1980) (the regulation defining "prime farmland" for the interim phase of the Act, was found to be "overbroad in achieving its stated purpose"). Since *In re Surface Mining Regulation Litigation,* the Secretary has published proposed new regulations defining "prime farmland" for purposes of the interim program. *See* 44 Fed. Reg. 33,625 (1979).

8. 501 F. Supp. at 455.

9. The fifth amendment argument was that the "prime farmland" provisions and the "approximate original contour" provisions of the Surface Mining Act, violated the equal protection and due process guarantees of the amendment. *Id.* at 455. Also, the plaintiff's argued a taking of private property without just compensation in violation of the taking clause requirements of the fifth amendment. *Id.*

10. The tenth amendment argument was that the statutory provisions challenged, constituted a displacement of a function traditionally governed by the states—land use control. *Id.*

11. *Id.* at 453.

12. Hodel v. Indiana, 101 S. Ct. 2376, 2381 n.5 (1981).

13. *Id.* at 2388.

14. *See, e.g.,* Concerned Citizens of Appalachia, Inc. v. Andrus, 494 F. Supp. 679 (E.D.

ending struggle between our nation's need for more energy resources, and the desire to preserve and protect our surrounding environment. In *Hodel v. Indiana*, the Supreme Court resolved this struggle in favor of environmental concerns, and based their conclusion upon a similar case—*Hodel v. Virginia Surface Mining*.[15] Both cases involved a broad constitutional challenge to numerous provisions of the Surface Mining Act, yet differed in the particular provisions attacked.[16] Although the provisions attacked were different, the federal government's power to regulate under the Surface Mining Act was still the central theme in contesting the validity of the Act.

Concededly the federal government clearly has the power to regulate in such affairs as energy production and preservation of the environment, especially in regard to federal lands. At issue in the present case—where federally and privately owned "prime farmland" was involved—is the validity of such federal regulations when private parties are involved who wish to put their own lands to their most beneficial use.[17] In determining the rights of private parties in the face of the "prime farmland" provisions of the Surface Mining Act, the Court in *Hodel v. Indiana* first examined the Act itself, to ascertain its purpose and its usefulness.[18]

The Court interpreted the purpose and structure of the Surface Mining Act by reference to its earlier opinion in *Virginia Surface Mining*.[19] The Court had stated that the Act was designed to " 'establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.' "[20] The Act created its own enforcement agency, the Office of Surface Mining Reclamation and Enforcement (OSM), within the Department of the Interior with the Secretary of Interior acting as the administrator of the Act.[21] The objectives of the Act were to be ac-

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Tenn. 1980); Star Coal v. Andrus, 14 ENVIR. REP. (BNA) 1325, 1331 (S.D. Iowa 1980).

15. 101 S. Ct. 2352 (1981).

16. In *Virginia Surface Mining*, the complainants were attacking the "steep slope" provisions. 101 S. Ct. at 2364. *See also* 30 U.S.C. §§ 1265(d)-(e) (Supp. I 1977) (the "steep slope" provisions of the Surface Mining Act). In *Hodel v. Indiana*, the complainants were attacking the "prime farmland" provisions. 101 S. Ct. at 2379.

17. Hodel v. Indiana, 101 S. Ct. at 2379.

18. *Id.*

19. *Id.*

20. 101 S. Ct. at 2356. (citing 30 U.S.C. § 1202(a) (Supp. I 1977)). *See* Dale, *The Surface Mining Control and Reclamation Act of 1977*, 9 ST. MARY'S L.J. 863 (1977) (provides an in-depth analysis of the Act); 30 U.S.C. §§ 1202(b)-(m) (Supp. I 1977) (provide the more specific objectives of the Act).

21. *See* 30 U.S.C. § 1211 (Supp. I 1977). This particular section of the Act may provide the tool by which the present Secretary of Interior, James Watt, can circumvent the actual enforcement of the Act against surface mining operations. *See* NEWSWEEK, June 29, 1981, at 32. In this article, Watt intimated that he would "use the budget system to be the excuse to make major policy decisions." *Id.* In the same article there was a dramatic example of Watt's using such a tactic when he closed down the Denver branch of the OSM, which is one of the major enforcement offices in the West. *Id.*

complished through a two-stage program, consisting of an initial interim regulatory phase, and a subsequent permanent phase.[22] The interim program required immediate implementation, by the Secretary of Interior, of the Act's environmental protection performance standards, along with continued state regulation.[23]

During the interim regulatory program, mine operators are required to comply with some of the Act's performance standards.[24] Those standards require: restoration of land to pre-mining conditions; restoration of land to approximate original contour; minimization of disturbances to hydrologic balance and to water quality; segregation and preservation of topsoil; the construction of coal mine waste piles used as dams and embankments; revegetation of mined areas; and spoil disposal for steep slope mines.[25]

The interim program is to be enforced by the federal government[26] and remain in effect in each state until a permanent regulatory program[27] is implemented in the state.[28] The state may still enforce its own standards, but Congress required the Act's standards to be incorporated as minimum requirements under each state's laws.[29] Any state wishing to assume its own permanent regulatory program over surface coal mining operations within its borders must submit its program to the Secretary for approval.[30] In order to be approved the state program must demonstrate that the environmental protection standards established by the Act and attendant regulations have been included in the state's laws, "and that the State has the administrative and technical ability to enforce these standards."[31] If a state fails to enact such a statute, or submits one which is not approved by the Secretary, then the Secretary is to implement a federal program within the state.[32]

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22. 30 U.S.C. § 1251 (Supp. I 1977). The interim regulations were published on Dec. 13, 1977. 30 C.F.R. § 710 (1980). They are currently in effect in all states with surface mining operations. The regulations were upheld after an attack in *In re Surface Mining Regulation Litigation*. 452 F. Supp. 327, 346-47 (D.C. Cir. 1978).

23. 30 U.S.C. § 1251 (Supp. I 1977).

24. *Id.* § 1252(c).

25. *Id.* § 1265(b).

26. Enforcement assistance by each state was encouraged by Congress by providing for financial reimbursements to states that actively assisted the federal government during the interim phase. *See id.* § 1252(e)(4).

27. The permanent regulations were published on March 13, 1979. 30 C.F.R. § 701 (1980).

28. 30 U.S.C. § 1254 (Supp. I 1977).

29. *Id.* § 1251(b).

30. Hodel v. Virginia Surface Mining, 101 S. Ct. at 2357 (citing 30 U.S.C. § 1253 (Supp. I 1977)). The proposed state program was to be approved or disapproved by the Secretary, "in whole or in part, within six full calendar months after the date such State program was submitted to him." 30 U.S.C. § 1253 (1977).

31. 101 S. Ct. at 2357 (citing 30 U.S.C. § 1253 (1977)).

32. 30 U.S.C. § 1254 (Supp. I 1977). After several extensions granted by the Secretary and one granted by the district court in *In re Surface Mining Regulation Litigation*, the final deadline for proposed state programs was March 3, 1980. *See* 101 S. Ct. at 2357-58 n.7. Excluding Alaska, Georgia, and Washington, all other states in which surface mining is conducted submit-

Whatever the state wishes to do in regard to its own surface-mined lands, it is required at the very least to include the standards established under the Surface Mining Act.

It was this need for strict adherence to the Act's standards which compelled the complainants in *Hodel v. Indiana* to attack the constitutionality of the Act prior to its enforcement. The complainant parties were primarily arguing the constitutional application of the Act in regard to the "prime farmland" provisions.[33] Their foremost contention was that Congress had exceeded its powers under the commerce clause by attempting to regulate surface coal mining operations.[34]

The Supreme Court has stated that there is a presumption of constitutionality as to "legislative [a]cts adjusting the burdens and benefits of economic life . . .,"[35] and that to invalidate such legislative acts under the commerce clause, one of two established tests would have to be satisfied.[36]

The first test is whether Congress had a rational basis for concluding that the regulated activity affects interstate commerce.[37] In the lower court, the complainants successfully argued that the environmental protection standards of the Act were attempts by Congress to regulate the surface coal mining industry when such an industry had "no substantial adverse effect on interstate commerce."[38] This argument was erroneously upheld by the district court, because of its reliance upon statistics found in the *Report of the Interagency Task Force on the Issue of a Moratorium or a Ban on Mining in Prime Agricultural Lands (Interagency Report).*[39] These statistics represented the total amount of prime farmland acreage in the nation compared with how much of the acreage was disturbed annually by surface mining.[40]

The *Interagency Report* disclosed that only 21,800 acres of the total 384,000,000 acres of prime farmland were actually disturbed on an annual basis.[41] Furthermore, the 21,800 acres were found to constitute only six one-thousandths of one percent of all the prime farmland in the nation.[42] This statistic together with others,[43] persuaded the district court that the impact,

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ted their proposed state programs on time. *Id.*

33. 101 S. Ct. at 2381. *See also* note 4 *supra.*

34. 101 S. Ct. at 2381.

35. *Id.* at 2382.

36. *Id. See* text accompanying notes 37, 65 *infra. See also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-62 (1964) (origin of the two tests for the validity of legislative Acts under the commerce clause).

37. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. at 258.

38. Indiana v. Andrus, 501 F. Supp. 452, 457 (S.D. Ind. 1980).

39. 101 S. Ct. at 2381. *See also* 501 F. Supp. at 459 (District Court of Indiana scrutinized the *Interagency Report* in more detail).

40. 101 S. Ct. at 2381.

41. *See* 501 F. Supp. at 459.

42. *Id.*

43. *See* Hodel v. Indiana, 101 S. Ct. at 2382 n.8 (shows only those statistics which were

which surface coal mining had on interstate commerce, was "infinitesimal or trivial. . . ."[44] Consequently, the district court concluded that the "prime farmland" provisions, as well as fifteen other substantive provisions which applied to surface mining generally,[45] were "directed at facets of surface coal mining which have no substantial and adverse effects on interstate commerce."[46]

The *Interagency Report* was the primary factor upon which the district court relied for its conclusion, yet the Supreme Court found an error in such reliance.[47] The Court in *Hodel v. Indiana* discovered that the report was not made for the purpose of examining either the full impact of surface mining on "prime farmland," nor its relation to interstate commerce.[48] The *Interagency Report* was made only for determining whether surface coal mining should be completely banned on prime farmland.[49] Furthermore, the Supreme Court found that the district court's inquiry into the amount of commerce actually affected by surface coal mining was irrelevant.[50] The fact that only six one-thousandths of one percent of the total amount of prime farmland was affected by surface coal mining, was meaningless in determining whether Congress had a rational basis for finding that surface-mined prime farmland affected commerce.[51] The significant inquiry was "whether Congress could rationally conclude that the regulated activity affected interstate commerce."[52]

The district court incorrectly reasoned that air and water pollution were the only possible adverse effects on interstate commerce which would justify congressional action, and that other provisions in the Act had already addressed these effects.[53] What the district court failed to look at was another possibility resulting from prime farmland being destroyed by surface mining operations—the impact a loss in crop production would have on interstate

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important to the district court).

44. 501 F. Supp. at 458.

45. 30 U.S.C. §§ 1258(a)(2)-(4), (8), (10), 1260(b)(1)-(2), 1265(b)(3), (5), (19)-(20), 1272(a), (c)-(d), (e)(4)-(5) (Supp. I 1977).

46. 501 F. Supp. at 460.

47. Hodel v. Indiana, 101 S. Ct. at 2382.

48. *Id.* at 2382-83. The Report held that a complete moratorium was not advisable and that mined prime farmland could be restored to its original productivity through compliance with the "prime farmland" provisions of the Act. *Id.* at 2383.

49. *See* note 44 *supra.*

50. 101 S. Ct. at 2383.

51. *Id.* at 2383 n.11. The Court questioned the insignificance of .04%, an estimation by the district court as to the percentage of the Nation's total corn production which would have been lost during the 1976-77 crop year due to surface mining on prime farmland. *Id.* Such a percentage would have represented an approximate value of $56 million. *Id.*

52. 101 S. Ct. at 2383. *See also* United States v. Darby, 312 U.S. 100, 123 (1941) (sustaining federal power to regulate intrastate activities which have a substantial effect on interstate commerce).

53. 101 S. Ct. at 2382. *See also* Indiana v. Andrus, 501 F. Supp. 452, 460 (S.D. Ind. 1980).

commerce. The converse of this problem was decided by the Supreme Court almost forty years ago in *Wickard v. Filburn.*[54]

In *Wickard,* the focus of the Court's inquiry was the impact on interstate commerce by a gain in crop production rather than a loss.[55] The Court's purpose was to determine whether an act restricting the complainant as to how much wheat he could grow was unconstitutional.[56] The complainant in *Wickard* argued that Congress had exceeded its powers under the commerce clause, since the regulated activity was local in character and only had a trivial or indirect impact on interstate commerce.[57] In response, the Court asserted that even if the complainant's activity was purely local, it could still "be reached by Congress if it exert[ed] a substantial economic effect on interstate commerce. . . ."[58] The Court added that because the complainant's activity may by itself have a trivial impact on interstate commerce was "not enough to remove him from the scope of federal regulation. . . ."[59] Instead, the Court looked to the cumulative effect of others similarly situated.[60]

If, as was held in *Wickard,* one man's overproduction of crops can affect interstate commerce,[61] then surely a loss of crop production—due to surface mining on prime farmland—can be considered affecting interstate commerce, even if only a minute amount of crop production is affected.[62] Such a loss in crop production was evidenced by the *Interagency Report* examined by the Court in *Hodel v. Indiana.*[63] Based upon such evidence, the Supreme Court concluded that Congress did have a "rational basis for finding that surface coal mining on prime farmland affects interstate commerce in agricultural products."[64]

The second test for determining whether to invalidate legislation enacted under the commerce clause is whether the court can find "no reasonable connection between the regulatory means selected and the asserted

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54. 317 U.S. 111 (1942).

55. *Id.* at 113.

56. *Id.* at 118. The controversy in *Wickard* involved a farmer's overproduction of wheat and the federal government's attempt to impose a penalty tax under the Agricultural Adjustment Act of 1938. *Id.* at 114. The Act restricted the amount of acreage which could be devoted to wheat production and also restricted the amount of yield per acre. *Id.*

57. *Id.* at 119.

58. *Id.* at 125.

59. *Id.* at 127-28.

60. *Id.* at 128.

61. *Id.* at 111.

62. *See* note 51 *supra* (facts appear to show more than a minute amount of crop production being affected).

63. 101 S. Ct. at 2383 n.12.

64. *Id.* at 2384. *See also 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. 775-811 (1977) [hereinafter referred to as House Hearings].

ends."[65] In *Hodel v. Indiana,* the lower court erroneously held that the "prime farmland" and fifteen other provisions were not reasonably related to the asserted goal of protecting interstate commerce from adverse effects caused by surface coal mining.[66] This holding was based upon the district court's erroneous assumption that the Act's goals were limited to the prevention of air and water pollution.[67] The Supreme Court found the lower court's rationale to be too narrow and supported this finding on what it had discovered in the *Virginia Surface Mining* case.[68] There the Court stated that Congress, in approving the Surface Mining Act, was also concerned with the productivity of prime farmland after surface coal mining had been performed, and with protecting the public from possible health and safety hazards resulting from surface coal mining operations.[69] These conclusions were derived from various committee reports and hearings which were used by Congress to determine the necessity of the Act.[70]

The same reports and hearings were used by the Supreme Court in *Hodel v. Indiana,* in reaffirming its position that "Congress adopted the Surface Mining Act in order to ensure that production of coal for interstate commerce would not be at the expense of agriculture, the environment, or public health and safety, injury to any of which interests would have deleterious effects on interstate commerce."[71] An additional factor which influenced the Supreme Court to uphold the Surface Mining Act against the complainant's Commerce Clause attack was Congress' desire to protect mine operators in states with stricter standards from those operators in states with more lenient standards.[72] The problem Congress faced was unfair competition among mine operators in different states. Some operators, due to their states' more lenient standards regarding coal mining operations, were able to charge less per ton of coal than those operators who were located in states with more stringent requirements.[73] This was due to the operators' increased cost of production as a result of the stricter standards being imposed.[74] Congress' solution to this problem was to impose uniform regulatory standards across the nation.[75] This was accomplished by passage of the

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65. 101 S. Ct. at 2382.

66. Indiana v. Andrus, 501 F. Supp. 452, 461 (S.D. Ind. 1980).

67. *See* text accompanying note 53 *supra.*

68. Hodel v. Indiana, 101 S. Ct. at 2383.

69. Hodel v. Virginia Surface Mining, 101 S. Ct. at 2360-61. *See also* House Hearings, *supra* note 64, Part II, at 69, 83, 90-95. The U.S. Army Corps of Engineers testified that more than 4,400,000 acres of land in the U.S. has already been disturbed by surface mining and that 1,900,000 of those acres have not been reclaimed. *Id.*

70. Hodel v. Indiana, 101 S. Ct. at 2384.

71. *Id.* at 2385.

72. *Id.* at 2386. *See also* Hodel v. Virginia Surface Mining, 101 S. Ct. at 2363.

73. *See* 101 S. Ct. at 2363.

74. *See id.*

75. *Id.*

Surface Mining Act.

An additional commerce clause argument, which could have been raised in *Hodel v. Indiana* but was not, was employed unsuccessfully by the coal mining operators in *Virginia Surface Mining.*[76] The complainants in *Virginia Surface Mining* argued that Congress could only regulate federal lands as granted under the property clause of the United States Constitution,[77] and could not regulate private lands located within a state's borders. This same argument was advanced in *Star Coal v. Andrus,*[78] an earlier case in which the Surface Mining Act was constitutionally challenged. The Iowa District Court, in *Star Coal,* stated that even if the coal was mined on private land and sold exclusively in that state, Congress could still regulate the activity if the cumulative effect of the activity adversely affected commerce.[79] The district court in *Star Coal* held that surface mining operations, as a whole, do adversely affect interstate commerce.[80] The same result was reached by the Supreme Court in *Virginia Surface Mining.*[81]

The "cumulative effect" criterion had been used prior to *Star Coal*[82] and had become a stepping stone towards broader powers for Congress by allowing regulation of intrastate activities under the commerce clause.[83] The Supreme Court's decision in *National League of Cities v. Usery*[84] suddenly put a halt to Congress' expanding power under the commerce clause. The Court in *Usery* interpreted the tenth amendment as a restriction on the federal government when an attempt was made to regulate a state in its sovereign affairs.[85] The limitation to Congress' commerce clause power was the protection provided to the states in the tenth amendment of the Constitution; yet, the Supreme Court was unclear as to what extent Congress' power has been diminished.

In *Usery,* the Court considered a constitutional challenge to the 1974 amendments to the Fair Labor Standards Act.[86] The Court concluded that

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76. *See* text accompanying note 77 *infra.*

77. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. *See also* City of Euclid v. Amber Realty Co., 272 U.S. 365 (1926) (similar arguments based on the property clause).

78. 14 ENVIR. REP. (BNA) 1325, 1331 (S.D. Iowa 1980).

79. *Id.*

80. *Id.*

81. 101 S. Ct. at 2363.

82. *See* Fry v. United States, 421 U.S. 542, 547 (1975) (earlier cases which established the cumulative effect criterion are *U.S. v. Darby,* 312 U.S. 100 (1941) and *Wickard v. Filburn,* 317 U.S. 111 (1942).

83. 421 U.S. at 547.

84. 426 U.S. 833 (1976).

85. *Id.* at 845.

86. The Act provided state employees with a minimum hourly wage and compensation for hours worked in excess of 40 hours per week, and the Act was imposed upon all state employers. 426 U.S. at 835-36.

when Congress attempts to regulate states as states, the tenth amendment requires recognition of the sovereignty of state government, which could not be impaired by Congress.[87] The *Usery* case appeared to be a guiding light to those arguing against the federal government's intrusion into intrastate affairs, but the light provided proved to be very dim.

The *Usery* tenth amendment argument was proffered by the complainants in *Hodel v. Indiana.*[88] Their basic argument was that the Surface Mining Act was a device that displaced the state's traditional area of concern—land use control and planning—and, therefore, was violative of the tenth amendment.[89] In *Hodel v. Indiana,* the lower court cited *Usery* in upholding the tenth amendment, but, the Supreme Court, by reference to the earlier opinion in *Virginia Surface Mining,* reversed the district court's holding, limiting the application of *Usery* to its facts only.[90]

The Supreme Court's interpretation of *Usery* in *Virginia Surface Mining* was that in order to succeed in having an Act of Congress declared invalid, the claim "must satisfy each of three requirements."[91] It must be shown that "the challenged statute regulates the 'States as States' "; that the subject matter of the regulations are indisputably "attributes of state sovereignty"; and that "the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.' "[92] The Supreme Court utilized this test in analyzing the complainants' attack in *Hodel v. Indiana.* Its finding was that the tenth amendment challenge did not satisfy the first of the three requirements, since the provisions of the Surface Mining Act under attack only regulated private individuals and businesses.[93]

In addition to the *Usery* interpretation, the Supreme Court found that since the states were not compelled to enforce the Surface Mining Act standards, use state funds, or participate in the federal program in any way, there could be no argument that "the Act commandeers the legislative processes of the States. . . ."[94] In *In re Permanent Surface Mining Regulation Litigation,*[95] the D.C. Circuit also refuted such an argument by stating that the Surface Mining Act only established federal minimum standards so

87. *Id.* at 845.

88. 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." U.S. CONST. amend. X.

89. 101 S. Ct. at 2385-86.

90. *Id.* at 2386.

91. 101 S. Ct. at 2366. Satisfaction of the three requirements is shown not to necessarily "guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed." *Id.* at 2366 n.29.

92. *Id.* at 2366.

93. *Id.*

94. *Id.*

95. 617 F.2d 807 (D.C. Cir. 1980).

that the states could still enact and administer their own surface mining program, so as to conform to their own needs.[96] The argument appears valid, but as long as the federal government has the right to protect the free flow of interstate commerce, any acts imposing minimum standards in pursuance of that right will rarely be found usurping a state's legislative processes.

Another argument which was inanely asserted by the complainants in *Hodel v. Indiana,* was based upon the equal protection and substantive due process guarantees of the fifth amendment.[97] They argued that the "prime farmland" provisions imposed a greater burden on states in the Midwest, since there were no variances allowed as there were in the "steep slope" provisions which were primarily enforced in the East and West.[98] The lower court erroneously agreed with this argument, stating that the "prime farmland" and approximate original contour provisions were "irrational, arbitrary and capricious requirements in situations where they are not reasonably necessary to achieve a particular post-mining use. . . ."[99]

Even though the lower court's decision utilized the proper phraseology, "irrational, arbitrary and capricious," the Supreme Court believed the lower court was merely substituting "its own policy judgment for that of Congress."[100] The Supreme Court, in *Hodel v. Indiana,* viewed the Surface Mining Act as social and economic legislation, and as such held that when there are no suspect classifications or infringements upon any fundamental rights, social and economic legislation—like the Surface Mining Act—is valid against equal protection arguments.[101] The rule was restricted, however, in that it would only apply "when the legislative means are rationally related to a legitimate governmental purpose."[102] Certainly any activity which may divide Congress' authority over interstate commerce would be a legitimate governmental purpose, since the power to regulate commerce is a plenary power of Congress.[103]

Social and economic legislation is presumed to be rational, and only a "clear showing of arbitrariness and irrationality" can overcome such a presumption.[104] The complainants, in *Hodel v. Indiana,* were unable to defeat

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96. *Id.* at 808.
97. 101 S. Ct. at 2386.
98. *Id.*
99. Indiana v. Andrus, 501 F. Supp. 452, 469 (S.D. Ind. 1980).
100. 101 S. Ct. at 2386.
101. *Id.*
102. *Id.*
103. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 86 (1824) (commerce power is "complete in itself" and the only limitations upon it are those expressed in the constitution). *See also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (even when an activity is intrastate, if it has a close and substantial relation to interstate commerce then Congress has the necessary power to regulate the activity).
104. 101 S. Ct. at 2386. *See also* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976) (where the presumption of rationality can only be defeated by a clear showing of arbitrariness and irrationality).

this presumption because they did not identify any "arbitrariness" or "irrationality" caused by the application of the "prime farmland" provisions.[105] The Supreme Court went further and stated that even if the appellees were correct in their assertion that the challenged provisions impermissibly discriminated against coal mine operators in the Midwest, there would still be no justification for holding the provisions unconstitutional.[106] The Court's reasoning was supported by *Secretary of Agriculture v. Central Roig Refining Co.*,[107] where the Court concluded that the commerce clause did not "impose requirements of geographic uniformity," therefore Congress could impose regulations which take into account the "varying and fluctuating interests of different regions."[108] Since Congress does have such power to impose varying regulations under the commerce clause, the Supreme Court concluded that a state which has more than one kind of a particular mining operation than another, "does not establish impermissible discrimination under the Fifth Amendment's Due Process Clause."[109]

Finally, the complainants, in *Hodel v. Indiana,* asserted that some of the Act's provisions constituted a taking of private property without just compensation, in violation of the compensation clause of the fifth amendment.[110] As a result, three "prime farmland" provisions were mistakenly held unconstitutional by the lower court.[111] One of the provisions required a mine operator, requesting a permit to mine on "prime farmland," to show that he was capable of restoring the land within a reasonable time after the mining was completed, to the productivity levels of land in the "surrounding area under equivalent levels of management. . . ."[112] The second provision was concerned with the conditions which had to be satisfied before a mine operator's performance bond could be released.[113] The third provision required mine operators to submit information about the productivity of the land they wished to mine before mining operations were begun.[114] The lower court's holding on these three provisions was based upon its finding that it was technologically impossible for coal mining companies to place prime farmland back to its original level of yield or better "under high levels of management practice."[115]

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105. 101 S. Ct. at 2386.

106. *Id.*

107. 338 U.S. 604 (1950).

108. *Id.* at 616.

109. Hodel v. Indiana, 101 S. Ct. at 2387.

110. The compensation clause of the fifth amendment prohibits the taking of private property "for public use, without just compensation." U.S. CONST. amend. V.

111. Indiana v. Andrus, 501 F. Supp. 452, 472 (S.D. Ind. 1980). *See* text accompanying notes 112-14 *infra.*

112. 30 U.S.C. § 1260(d)(1) (Supp. I 1977).

113. *Id.* § 1269(c)(2).

114. *Id.* § 1258(a)(2).

115. 501 F. Supp. at 470.

The Supreme Court in *Hodel v. Indiana* found a deficiency with the district court's ruling in that the complainants' "taking" claims did not identify any property in which the challenged provisions were applied.[116] The Court had previously stated in *Virginia Surface Mining* that a statute's constitutionality, such as that of the Surface Mining Act, should not be decided unless a specific piece of property was actually affected, therefore making a decision necessary.[117]

The purpose for the imposition of such a minimum requirement, as showing actual harm to a specific piece of property, was elaborated on in *Kaiser Aetna v. United States.*[118] In *Kaiser,* the Supreme Court was concerned with the inability to establish any particular formula for determining when a taking had occurred.[119] As a resolution, the Court stated that "taking" assertions would be decided upon "ad hoc, factual inquiries" that identify several factors—"such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action"—which should be considered.[120]

Since the complainants in *Hodel v. Indiana* asserted no claim as to the application of the provisions to any particular piece of land, their claim was held non justiciable.[121] Therefore, the only issue left for the Supreme Court to decide was whether "the Surface Mining Act effected an unconstitutional taking of private property" by its "mere enactment."[122] The Court answered that the Act effected no such taking by its "mere enactment," and deferred to *Virginia Surface Mining* for its reasoning.[123]

The test applied by the Supreme Court in *Virginia Surface Mining* was that used by the Court earlier in *Agins v. Tiburon.*[124] A statute constitutes a taking if it "denies an owner economically viable use of his land. . . ."[125] In *Agins,* a zoning ordinance was passed by the city disallowing the complainants to build as they wanted to on their own land.[126] The complainants argued that the zoning ordinance constituted an unconstitutional taking without just compensation under the fifth amendment.[127] However, the Supreme Court held that since the zoning ordinance did not limit the best use of the

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116. 101 S. Ct. at 2387.

117. 101 S. Ct. at 2369. *See also* Socialist Labor Party v. Gilligan, 406 U.S. 583, 588 (1972) (constitutionality of a statute could not be decided except in a factual situation which merited the analysis).

118. 444 U.S. 164 (1979).

119. *Id.* at 175.

120. *Id.*

121. 101 S. Ct. at 2388.

122. *Id.*

123. *Id.*

124. 447 U.S. 255 (1980).

125. *Id.* at 260.

126. *Id.* at 258.

127. *Id.*

complainants' land, the ordinance did not constitute a taking.[128] In *Agins*, as in *Hodel v. Indiana*, the parties attempting to show an unconstitutional taking failed to show one critical criterion: a particular harm to themselves.[129] Consequently, the Surface Mining Act clearly survives any scrutiny under the economically viable use test.

The Act itself does not prevent any "beneficial use of coal bearing lands."[130] The "prime farmland" provisions essentially regulate how surface coal mining operations may be conducted on certain lands.[131] The provisions, as well as the entire Act, say nothing about regulating any other use to which the owner of coal bearing lands could put his land. Of course, the owner may be deprived of the land's most beneficial use; but as long as the owner has not been deprived of *every* reasonable use of his land, a fifth amendment taking has not occurred.[132] Therefore, since the owner of "prime farmland" could put his land to farming rather than surface coal mining, the owner has not been deprived of an economically viable use of his property, by the enactment of the Surface Mining Act.

The Supreme Court's decision to uphold the constitutionality of the Surface Mining Act in *Hodel v. Indiana*, does not dispense with two very possible future attacks or means of rendering the Act useless.[133] One possibility was alluded to by the Supreme Court in *Hodel v. Indiana*.[134] If a coal mine operator could show that the Surface Mining Act affected a taking, as to a particular piece of land, then the operator could succeed in a fifth amendment argument.[135] Although a possibility, as to prime farmland specifically, the complainant would have a difficult problem getting around the fact that his land could be used for farming rather than surface mining, therefore leaving him with an economically viable use which does not constitute a taking.[136]

There is also the possibility of the effect of the Act being totally circumvented by the present Secretary of Interior. Budgetary cuts in the enforcement mechanism, the OSM, could render the Surface Mining Act ineffective.[137] Such an act could only be overcome by Congress, and therefore it would be a legislative rather than a judicial decision. Despite these two pos-

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128. *Id.* at 262.

129. *Id.*

130. 101 S. Ct. at 2370.

131. *See* note 4 *supra*.

132. *See* Goldblatt v. Township of Hempstead, 369 U.S. 590, 592 (1962). Simply because a regulation deprives a land owner of the most beneficial use of his land, does not render that regulation unconstitutional. *Id.*

133. *See* text accompanying notes 134-37 *infra*.

134. 101 S. Ct. at 2371 n.40.

135. *See id.* A successful fifth amendment argument would also require a showing that just compensation was unavailable. *Id.*

136. *See* Agins v. Tiburon, 447 U.S. 255, 260 (1980).

137. 101 S. Ct. at 2379.

sibilities, the Surface Mining Act presently is a constitutionally valid and useful environmental protection tool, which may be used more in the future.

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CONSTITUTIONAL LAW—A STATE STATUTE, WHICH REQUIRES PHYSICIANS TO NOTIFY THE PARENTS OF IMMATURE AND UNEMANCIPATED MINORS BEFORE PERFORMING AN ABORTION, DOES NOT VIOLATE THE MINORS' FUNDAMENTAL RIGHT TO HAVE AN ABORTION.—*H.L. v. Matheson* (U.S. Sup. Ct. 1981).

H.L.,[1] an unmarried fifteen year old girl who lived with her parents in Utah, discovered she was in the first trimester of a pregnancy.[2] After consultation with both a social worker and a physician, she was advised that an abortion would be in her best interests.[3] The physician also advised her that he was obligated under section 76-7-304 (2) of the Utah Code,[4] to notify her parents before he could perform the abortion.[5] The appellant filed suit[6] in Utah State Court seeking to have section 304(2) of the Code declared unconstitutional and to enjoin the enforcement of the statute.[7] She asserted that the right of privacy found within the fourteenth amendment to the United States Constitution encompassed the right to have an abortion free from state interference or regulation during the first trimester of pregnancy,[8] and that section 304(2) unconstitutionally infringed upon this fundamental right of privacy.[9] The trial judge, in holding section 304(2) consti-

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1. H.L. is a pseudonym to protect the indentity of the Appellant. The trial judge allowed H.L. to proceed without a guardian ad litem to ensure her identity was kept secret. H.L. v. Matheson, 101 S. Ct. 1164, 1167 n.5 (1981).

2. *Id.* at 1167. In *Roe v. Wade*, the Court held that the state may not interfere with a woman's decision on whether to abort during the first trimester of pregnancy. 410 U.S. 113, 164 (1973).

3. 101 S. Ct. at 1166.

4. UTAH CODE ANN. § 76-7-304 (1978). Section 76-7-304 of the Utah Code provides:

> To enable a physician to exercise his best medical judgement [in considering a possible abortion] he shall:
>
> 1) Consider all factors relevant to the well being of the woman upon whom the abortion is to be performed including, but not limited to,
>
> (a) Her physical, emotional and psychological health and safety,
>
> (b) Her age,
>
> (c) Her familial situation.
>
> 2) *Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor* or the husband of the woman, if she is married.

Id. (emphasis added).

5. 101 S. Ct. at 1166.

6. The suit was originally filed as a class action in which appellant sought to represent all unmarried minor women who wanted to obtain abortions, but could not do so because of their physicians' compliance with section 304(2). 101 S. Ct. at 1165.

7. H.L. v. Matheson, 604 P.2d 907 (Utah 1979), *aff'd*, 101 S. Ct. 1164 (1981).

8. *Id.* at 908.

9. *Id.*