DRAKE
LAW REVIEW

Volume 33 1983-1984 Number 2

PRIME FARMLAND AND THE SURFACE MINING CONTROL AND RECLAMATION ACT: GUIDANCE FOR AN ENHANCED FEDERAL ROLE IN FARMLAND PRESERVATION

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Research for this article was supported in part by the Agricultural Experiment Station, College of Agriculture, University of Illinois at Urbana-Champaign.

In recent years, this nation has come to recognize its land as an increasingly critical natural resource. Farmland, in particular, has been the focus of much attention because of its significance in producing food for the peoples of the world.[1] Recent studies have indicated that the United States includes approximately 1.36 billion acres of nonfederally owned agricultural land, of which 413 million acres are cropland.[2] On this land, farmers produce approximately twenty-five percent of the world's wheat and coarse grains.[3] Al-

1. *See, e.g.*, NATIONAL AGRICULTURAL LANDS STUDY, FINAL REPORT (1981) [hereinafter cited as NALS FINAL REPORT]. Not all critics have acclaimed the study. *See, e.g.*, Fischel, *The Urbanization of Agricultural Land: A Review of the National Agricultural Lands Study*, 58 LAND. ECON. 236 (1982); Cook, *The National Agricultural Lands Study: In Which Reasonable Men May Differ*, 35 J. SOIL & WATER CONSERV. 247 (1980).

2. NALS FINAL REPORT, *supra* note 1, at 29. These figures result from 1977 data collected in the United States Department of Agriculture, Soil Conservation Service National Resource Inventory. Slightly different figures resulted from the 1978 Census of Agriculture, which found 1,050 million acres of "land in farms" and 460 million acres of cropland. *Id.* at 27, 29.

3. McClintock, *Global Significance of U.S. Cropland* (National Agricultural Lands Study, Research Paper No. 6), in Senate Committee on Agriculture, Nutrition, and Forestry, 97th Cong., 1st Sess., Agricultural Land Availability 217, 221 (Comm. Print 1981) [hereinafter cited as Agricultural Land Availability].

Coarse grains include corn, sorghum, barley, oats, rye, millet, and mixed grains. The United States is responsible for almost 60% of the international trade in these commodities. *Id.*

though much of the annual grain production is used domestically, a significant part is exported.[4] Thus, the importance of this nation's farmland extends far beyond its borders.[5]

The federal government has long assumed a significant role, both in policy making and in practical implementation of policy, in this nation's agriculture. That role, however, has focused more on the products of agricultural land, than on the farmland itself. Within the past decade, the federal government has shown increased awareness of the importance of agricultural land to the continued productivity of the nation's agricultural sector. With this developing awareness have come efforts to protect valuable agricultural land for future generations. One such effort, directed toward prime farmland subject to strip mining for coal, was the Surface Mining Control and Reclamation Act (SMCRA)[6] enacted in 1977 and subject to much controversy and litigation in the ensuing years.

This article focuses on the federal initiative in protecting agricultural land through SMCRA, and considers the implications of SMCRA for an increased federal role in the protection of other agricultural land. As background for this analysis, the article briefly articulates the importance of the nation's prime farmland and the types of preservation efforts already implemented by states and their subdivisions. In addition, it discusses the effect of surface mining of coal on the continued productivity of agricultural land. The article then focuses on SMCRA itself, particularly the provisions designed to protect prime farmland from the ravages of surface mining. These prime farmland provisions of SMCRA were upheld by the United States Supreme Court in its 1981 decision in *Hodel v. Indiana*,[7] which the article analyzes.

Through SMCRA and its prime farmland provisions, the federal gov-

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4. In 1980, U.S. agricultural exports totaled $39.7 billion, in contrast with agricultural imports of $18 billion. The resulting trade surplus helped offset $90 billion in petroleum imports. McClintock, *supra* note 3, at 221. In terms of land use, in 1978, approximately 133 million acres of cropland were devoted to the production of agricultural exports. *Id.*

5. In the context of an analysis of agricultural land availability, one expert noted that "[i]n terms of competition for the land, we have reached a degree of agricultural export dependency for which parallels can only be found in the ante-bellum cotton South or in our colonial era." Raup, *Competition for Land and the Future of American Agriculture*, in THE CONSERVATION FOUNDATION, THE FUTURE OF AMERICAN AGRICULTURE AS A STRATEGIC RESOURCE 3 (1980), *quoted in* McClintock, *supra* note 3, at 221. This export dependency, however, may affect other nations as much as it does the United States. Nations dependent on purchases or gifts of American agricultural products may become vulnerable to the international economic and political objectives of the United States, reflected in agricultural export policies. McClintock, *supra* note 3, at 233. For example, the January 4, 1980 grain embargo imposed on the Soviet Union reflected an agricultural export policy adapted to perceived national security interests. Soviet Invasion of Afghanistan Address to the Nation, 16 WEEKLY COMP. PRES. DOC. 25-27 (Jan. 4, 1980).

6. Pub. L. No. 95-87, 91 Stat. 447 (codified at 30 U.S.C. §§ 1201-1328 (Supp. III 1979)).

7. 452 U.S. 314 (1981).

ernment has attempted to protect some of the nation's most vulnerable agricultural land. But this protection may not be broad enough. Much of the nation's farmland is threatened by pressures from urban development, rather than from coal mining. Accordingly, the article then considers the implications of SMCRA and *Hodel v. Indiana* for increased federal involvement in farmland preservation on a more comprehensive level. After presenting background information about federal involvement in land use decisionmaking, the article focuses on the large number of federal actions affecting farmland, and on the recently enacted Farmland Protection Policy Act. The article concludes with an analysis of the potential for increased federal involvement in the preservation of agricultural land, in a way consistent with the requirements of the federal Constitution, and with principles and practicalities of effective federal-state cooperation.

I. Surface Mining on the Farm

A. *Prime farmland*

1. *The Significance of Prime Farmland*

Much of the attention directed toward America's farmland in the last decade has focused on what agriculturalists call "prime farmland." While definitions of prime farmland vary, experts generally agree that it is the land best suited to the production of agricultural crops.[8] The Soil Conservation Service (SCS) of the United States Department of Agriculture, for example, has defined prime farmland in terms of its physical characteristics, especially its soil quality, moisture supply, and growing season.[9] Only about half the nation's cropland can be considered prime farmland, according to this definition.[10] Although physical characteristics are most relevant in the

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8. *See, e.g.*, Dideriksen, Hidlebaugh, & Schmude, *Trends in Agricultural Land Use*, in Farmland, Food and the Future (M. Schnepf, ed. 1979); U.S. Comptroller General, Preserving America's Farmland—A Goal The Federal Government Should Support 1-3 (1979) [hereinafter cited as Preserving America's Farmland].

9. 7 C.F.R. § 657.5(a)(1) (1983). The Soil Conservation Service definition reads as follows:

> Prime farmland is 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 (the land could be cropland, pastureland, rangeland, forest land, or other land, but not urban built-up land or water). It has the soil quality, growing season, and moisture supply needed to economically produce sustained high yields of crops when treated and managed, including water management, according to acceptable farming methods. In general, prime farmlands have an adequate and dependable water supply from precipitation or irrigation, a favorable temperature and growing season, acceptable acidity or alkalinity, acceptable salt and sodium content, and few or no rocks. They are permeable to water and air. Prime farmlands are not excessively erodible or saturated with water for a long period of time, and they either do not flood frequently or are protected from flooding.

Id.

10. The SCS divides rural land into eight classes that reflect the soil's capability of grow-

determination of prime farmland, economic criteria may also apply. Location often contributes to the desirability of agricultural land. Moreover, land that is prime for agricultural purposes may be equally desirable for residential and other development. The market created by this desirability often increases the value of the land, and otherwise excellent farmland may not be prime in the economic sense.[11]

The recent emphasis on the importance of prime farmland has been accompanied by the realization that the supply of this important resource is finite.[12] Nonetheless, the finite land base is subjected to continually increasing demands. In the past several decades, these increasing demands have resulted in the conversion of agricultural land from productive farming to urban and other nonagricultural uses. Among these uses are housing developments, shopping centers, industrial parks, mineral development, and water impoundments. This conversion has attracted the attention and constructive criticism of farmers, scholars, and lawmakers at all levels of government.[13]

The extent of this conversion of agricultural land can only be estimated, and the published estimates vary considerably. One widely quoted figure is that farmland is converted to nonagricultural uses at the rate of three to five million acres a year.[14] Of this amount, perhaps half is prime farmland.[15] Another estimate is that each year .09 percent of the nation's privately held

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ing field crops. Land in classes I and II, and part of class III, qualifies as prime farmland. PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 2. In 1975, about 221 million acres (about 55 percent) of cropland were in classes I and II. SOIL CONSERVATION SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE, POTENTIAL CROPLAND STUDY (Statistical Bulletin No. 578) (1977).

One analyst has termed these SCS soil classes "an attractive hazard for land use planners," and suggests that the soil characteristics the classes isolate should not be used exclusively in determining which agricultural lands to protect. Raup, *What is Prime Land?*, 31 J. SOIL & WATER CONSERV. 180, 181 (1976). *See also infra* note 357 and accompanying text.

11. Raup, *supra* note 10, at 180-81.

12. *See, e.g.*, Udall, *Land Use: Why We Need Federal Legislation*, in NO LAND IS AN ISLAND 59, 59 (1975) (reprinted from 1975 B.Y.U.L. REV. 1).

13. *See infra* notes 24, 25, 30.

14. PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 5. Another more disturbing estimate shows a national decline in land in farms of 88 million acres between 1969 and 1978. This suggests a much higher annual rate of 9.8 million acres. Cook, *The National Agricultural Lands Study Goes Out With A Bang*, 36 J. SOIL & WATER CONSERV. 91, 92 (1981).

15. Although prime farmland is often a focus in statistics like these, one commentator noted that "[u]sing the term 'prime agricultural land' is too narrow. The emphasis should be on protecting 'productive agricultural land.' Most eastern states need to save productive land, not just 'prime' land." *A Statement by the NPA Joint Committee on Long-Range Land-Use Planning*, in P. RAUP, THE FEDERAL DYNAMIC IN LAND USE n.3 (1980) (comment by Robert M. Frederick, Legislative Representative, National Grange).

Frederick's comment is particularly pertinent when considered in the context of the changing nature of land. Agricultural economists emphasize that prime land is a dynamic concept. "[L]and once thought of as prime land may over time, through more intensive use, become less prime with respect to the generation of environmental costs." Gibson, *On the Allocation of Prime Agricultural Land*, 32 J. SOIL & WATER CONSERV. 271, 273 n.2 (1977).

land is converted to nonagricultural uses.[16] Despite this decrease in productive cropland, improved agricultural technology has resulted in increased agricultural production.[17] Nonetheless, devices like irrigation, fertilizer, and improved crop varieties cannot continue indefinitely to compensate for these losses of farmland.[18] In addition, it is likely that the next fifty years will bring national and world population pressures for increased United States agricultural production.[19] Thus, even if the nation is not facing an immediately impending land crisis, the conversion of agricultural land poses serious problems over the long term.

The conversion of farmland from agricultural uses is a complex process, one that may take place over a period as long as fifteen to twenty years. A number of factors,[20] acting independently or in concert, may contribute to the conversion. Urban growth pressure is one of the more obvious factors.[21] The speed and relative ease of travel in modern decades have resulted in demand for rural land in places that once were remote and isolated. This demand inflates the value of agricultural land and may lead eventually to nonagricultural uses.[22] In addition to urban pressure and increased land val-

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16. R. HEALY & J. ROSENBERG, LAND USE AND THE STATES 18 (2d ed. 1979). This amounts to 1.2 million acres, which represents .05% of the total U.S. acreage.

The U.S. is composed of 2.3 billion acres of land. Of these acres, the federal government holds one-third; Indian lands comprise another 51 million acres; and states hold 136 million acres. Privately-owned land amounts to 1.3 billion acres. Of this land, 63% is in farms and ranches, and 32% is in forests. Only 5% of privately-owned land is devoted to urban and other uses. *See* Wunderlich, *Landownership: A Status of Facts*, 19 NAT. RESOURCES J. 97, 100-01 (1979).

17. Batie & Looney, *Preserving Agricultural Lands: Issues and Answers*, 1 AGRIC. L. J. 600, 603 (1980).

18. PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 14-16. *See also* Wheeler & Harper, *In Defense of Farmland*, 38 J. SOIL & WATER CONSERV. 4, 4 (1983).

One graphic illustration of the severity of the problem is the loss of prime farmland in the cornbelt states. "We anticipate a total 3.2 million acre prime farmland loss in Iowa, Illinois, Indiana, Ohio, and Missouri combined. If present trends continue to the year 2000, the annual loss will equal 480 million bushels of corn—at $2.50 a bushel, a permanent loss of $1 billion a year, every year, by the century's end." Cutler, *The Peril of Vanishing Farmlands*, N.Y. Times, July 1, 1980, *quoted in* Brown, *World Population Growth, Soil Erosion, and Food Security*, 214 SCIENCE 905, 908 (1981).

19. U.S. DEP'T OF AGRIC., SOIL AND WATER RESOURCES CONSERVATION ACT SUMMARY OF APPRAISAL PARTS I AND II AND PROGRAM REPORT 14 (1980), *cited in* Braden, *Some Emerging Rights in Agricultural Land*, 64 AM. J. AGRIC. ECON. 19, 24 (1982).

20. *See infra* notes 24, 25.

21. Urban growth pressure can be compared to a great flood moving out slowly into the countryside raising land values as it goes. Investors begin buying land for its development potential. New farmers cannot afford to buy farms. Old farmers are less and less able to increase their holdings. At some point, the process becomes irreversible, and farm after farm is subdivided and developed.

NATIONAL AGRICULTURAL LANDS STUDY, EXECUTIVE SUMMARY: THE PROTECTION OF FARMLAND 11-12 (1980).

22. Raup, *supra* note 10, at 180.

ues, other more personal factors may lead to conversion of agricultural land. The farmer's decisions about work and retirement and the interests of the farmer's heirs are sometimes factors, as are declines in farm profitability. In addition, governmental policies such as taxes, government incentives, and regulations may influence a decision to convert.[23]

Those who have written about the conversion of agricultural land to nonagricultural uses generally agree that justifications exist for preventing—or at least minimizing—this conversion.[24] The justifications expressed often focus on food and space. One important justification is the necessity of maintaining supplies of food and fiber for this country and for other areas of the world. A related reason focuses on the importance of agricultural production for local, as well as national and international, economies. In addition, the unrestrained conversion of farmland to urban uses may lead to urban sprawl, with its concomitant waste and expense. A further justification for preserving agricultural lands focuses on the importance of maintaining an optimum amount of open space and preserving a healthy environment.[25] Regardless of which justifications are recited, and which are considered most crucial, the preservation of farmland is a compelling concern to farmers and urban dwellers alike. Indeed, as one writer announced, "the relationship of prime agricultural lands to national and international interests is too self-evident to require . . . elaboration."[26] Although the complexities of private land ownership make it impossible to prevent loss of farmland entirely, a decrease in the rate of loss seems desirable.

2. *State and Local Initiatives Toward Preservation*

Both state and local governments have recognized that the continued loss of agricultural land, especially prime agricultural land, has serious implications. A number of states and local governments, using their authority

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23. NATIONAL AGRICULTURAL LANDS STUDY, EXECUTIVE SUMMARY: THE PROTECTION OF FARMLAND 11 (1980).

The programs of federal agencies that have contributed to farmland conversion. *See* NATIONAL ASSOCIATION OF CONSERVATION DISTRICTS. THE CONVERSION OF AGRICULTURAL LAND, PRELIMINARY REPORT (1979) and *infra* text accompanying notes 321-32. *See also* GENERAL ACCOUNTING OFFICE, EFFECTS OF TAX POLICIES ON LAND USE (CED 78-97, 1978).

24. *See, e.g.*, PRESERVING AMERICA'S FARMLAND, *supra* note 8; Keene, *A Review of Governmental Policies and Techniques for Keeping Farmers Farming*, 19 NAT. RESOURCES J. 119 (1979); Little, *Farmland Conservancies: A Middleground Approach to Agricultural Land Preservation*, 35 J. SOIL & WATER CONSERV. 204 (1980); *but see* J. SIMON, THE ULTIMATE RESOURCE (1981).

25. These four reasons are recited, in similar form, in R. JACKSON, LAND USE IN AMERICA 176 (1981) and Gardner, *The Economics of Agricultural Land Preservation*, 59 AM. J. AGRIC. ECON. 1026, 1028-29 (1977). *See also* Batie & Looney, *supra* note 17, at 604-05.

26. Finnell, *The Federal Regulatory Role in Coastal Land Management*, 1978 AM. B. FOUND. RES. J. 169, 237.

under the police power,[27] have attempted to stem the tide of conversion.[28] Relying on their longstanding "power to adopt and enforce laws affecting the use of private, nonfederal land,"[29] these governmental bodies have used a variety of different techniques in their efforts. Numerous writers have examined these techniques in detail;[30] this article will discuss the methods of agricultural land preservation only briefly. Among the most commonly used methods are zoning, tax preferences, development control devices, and, most recently, right-to-farm laws.

Zoning by states and their political subdivisions is one of the more commonly used methods for protecting agricultural land.[31] Among the types of zoning regulations typically used for agricultural protection are the establishment of minimum lot sizes, zoning for exclusive agricultural use, and open-space zoning. Depending on the form of agricultural zoning, a number of constitutional issues may emerge.[32] In addition, the use of zoning as a tool to preserve prime farmland has elicited a number of cogent criticisms. Among these are the prevalence of permissive, arbitrary, or unenforced ordinances; failure of coordination among contiguous governmental units; and overly simplistic implementation.[33] In addition, zoning may be particularly

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27. Although not named as a state power in the United States Constitution, the "police power" authorizes state regulatory activities that do not exceed the limitations imposed by the fourteenth amendment, and, by incorporation, the Bill of Rights. These activities are part of the right and duty of state and local governments to protect the health, safety, morals, and general welfare of the people. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 389 (1978).

28. A large number of governmental bodies in the United States have the power to regulate land use. These include 3,000 county governments, 18,000 municipalities, and 17,000 townships. At least 14,000 of these do exercise their powers to regulate and control land use. *Resources*, No. 50, October 1975, p. 2, *cited in* R. JACKSON, LAND USE IN AMERICA 215 (1981).

29. Virginia v. Andrus, 483 F. Supp. 425, 433 (W.D. Va. 1980), *citing* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) and Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

30. For recent literature, *see, e.g.*, Batie & Looney, *supra* note 17; Comment, *Farmland Preservation Techniques: Some Food for Thought*, 40 U. PITT. L. REV. 258 (1979); R. COUGHLIN *et al.*, SAVING THE GARDEN: THE PRESERVATION OF FARMLAND AND OTHER ENVIRONMENTALLY VALUABLE LAND, chs. IV-VII (1977); Dunford, *A Survey of Property Tax Relief Programs for the Retention of Agricultural and Open Space Lands*, 15 GONZ. L. REV. 675 (1980); Keene, *supra* note 24.

An extensive bibliography of pre-1979 literature on farmland preservation can be found in Myers, *The Legal Aspects of Agricultural Districting*, 55 IND. L.J. 1, 1 n.5 (1979).

31. Zoning is an exercise of state "police power." Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The right to zone is based on state enabling acts that delegate zoning power to local governmental bodies. Thus, zoning has developed as a local regulatory device. For examples of state enabling statutes, see ILL. REV. STAT. ch. 24, § 11-13-1 (municipal) and ch. 34, § 3151 (county) (1983).

32. *See* Batie & Looney, *supra* note 17, at 612-15. Particularly significant is the "taking" issue. *See generally* F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE (1973).

33. For a more detailed list of criticisms of zoning as a means of preserving prime farmland, *see* R. JACKSON, LAND USE IN AMERICA 180 (1981).

subject to local political pressures and to the tendency of local zoning bodies to make decisions for short-term local benefits.[34]

A related form of farmland preservation, but one not usually relying on state police power for its implementation, is the concept of agricultural districting. Several states have agricultural district laws which often permit voluntary formation of districts by interested farmers and restrict the land within the district to agricultural uses for a specified number of years with renewal possible.[35] Some tax and other benefits then accrue to landowners within the district.[36] Because these benefits are limited, the districts, standing alone, probably cannot prevent agricultural land conversion in areas where encroaching urban development has increased the market value of farmland drastically.[37]

Reducing the farmer's property tax burden is another technique by which states have attempted to keep land in agricultural uses.[38] These pref-

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Another problem with zoning as a means of ensuring farmland preservation is suggested by the following quotation:

> Conventional zoning and subdivision regulation assume that an essentially unlimited supply of land suitable for urbanization exists. The system divides and regulates the use of land in an effort to provide the most desirable living and working conditions for the individual; *the land resource itself is not the focus of attention.* The capacity of the land to support development is considered less important than the compatibility of land uses with one another.

Schoenbaum & Rosenberg, *The Legal Implementation of Coastal Zone Management: The North Carolina Model*, 1976 DUKE L.J. 1, 13 (emphasis added, citations omitted).

34. The pressure for jobs in a time of recession, for example, may encourage zoning officials to rezone prime farmland for industrial use.

35. Among these states are New York, Oregon, Maryland, Illinois, and Virginia. *See* Conklin & Bryant, *Agricultural Districts: A Compromise Approach to Agricultural Preservation*, 56 AM. J. AGRIC. ECON. 607 (1974), for a discussion of the New York law. *See* Myers, *supra* note 30, for a comprehensive discussion of the Virginia and New York agricultural districting laws.

36. Illinois enacted an agricultural district law, the Agricultural Areas Conservation and Protection Act, in 1981. Landowners of an area not less than 500 acres, which is to be as compact and contiguous as feasible, may submit a proposal to the local county board for the creation of an agricultural area. After the implementation of the required statutory procedures, an area may be created; the area is reviewed 10 years after its creation and every 8 years thereafter, and may be terminated at the end of the 10 or 8 year period. Once the area is created, no local government can exercise its powers to restrict or regulate farming unreasonably. Other limitations on governmental actions are provided. ILL. REV. STAT. ch. 5, §§ 1001-20 (1983).

37. Batie & Looney, *supra* note 17, at 621. Myers, *supra* note 30, at 2 calls the districts "a thoughtful, though moderate, alternative" for farmland preservation.

The success of agricultural districts may depend on the degree of urban pressure. One suggestion is that the districts may be effective in semi-rural areas with substantial nonfarm population and existing land speculation, but no chance of selling all land for higher than farm prices within a five-year period. In contrast, they may be less effective in more densely populated semi-suburban areas where landowners have a high expectation of selling farmland at significantly more than farm value within the next five years. Bryant & Conklin, *New Farmland Preservation Programs in New York*, 41 J. AM. INST. PLANNERS 390, 392-94 (1975).

38. *See* Dunford, *supra* note 30; Henke, *Preferential Property Tax Treatment for Farm-*

erential assessment laws provide tax relief by permitting farmland to be assessed at its value, rather than its market value, for real estate tax purposes.[39] The types of programs vary. Some (called deferred taxation laws) provide for the collection of deferred taxes if the land is converted to nonagricultural use; others (restrictive agreement laws) require the landowner to agree to leave the land in agricultural use for a specified number of years, with penalties for failure to do so; still others impose no penalty and require no contract. Nearly all the states have enacted some type of preferential assessment laws.[40] Regardless of type, however, these have not successfully prevented farmland conversion. Some analysts believe that the laws help the speculator, who keeps the land in agricultural production until the time is ripe for development, without really protecting the farmer.[41] At least one authoritative study concluded that tax relief alone does not prevent the conversion of farmland.[42]

Public purchase of farmland, either in fee simple or limited to development rights, is a farmland preservation option that has developed in recent years. Land banking (governmental purchase of land in fee simple) is expensive and has generally not been used for farmland preservation in the United States.[43] The purchase of development rights involves the separation of land value into components for its value as farmland and its value for future development. The latter can be purchased by the government to prevent development of the land. Although less expensive than land banking,

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land, 53 OR. L. REV. 117 (1974); Comment, *Farmland Preservation Techniques: Some Food for Thought*, 40 U. PITT. L. REV. 258, 270-74 (1979).

39. Preferential assessment laws have been challenged on constitutional grounds in Illinois and Minnesota, and both challenges were unsuccessful. *See* Hoffman v. Clark, 69 Ill. 2d 402, 372 N.E.2d 74 (1977); Elwell v. County of Hennepin, 301 Minn. 63, 221 N.W.2d 538 (1974).

40. As of 1977, 42 states had laws to reduce the farmer's property tax burden. *National Agricultural Land Policy Act: Hearings on H.R. 5882 Before the Subcomm. on Family Farms, Rural Development, and Special Studies*, 95th Cong., 1st Sess. 21 (statement of Hon. James Jeffords). By 1981, the National Agricultural Lands Study, Final Report indicated that all states except Kansas and Georgia had some form of preferential assessment. NALS FINAL REPORT 64, 67 (1981). Twenty-eight are deferred taxation; two, restrictive agreement; seventeen, laws without deferral or agreement. A somewhat dated list of preferential assessment provisions is in Keene, *supra* note 24, at 137 n.87.

41. Keene, *supra* note 24, at 137 n.87.

42. COUNCIL ON ENVIRONMENTAL QUALITY, UNTAXING OPEN SPACE 77-79 (1976). Other commentators agree, see Myers, *supra* note 30, at 22 n.111.

New Jersey, which has farmland particularly desirable for urban housing needs, enacted preferential assessment in its Farmland Assessment Act of 1964. At one point, New Jersey had lost farmland at the rate of 60,000 acres per year. In 1977, the loss was reduced to 5,000 acres per year, a decrease attributable in part to the assessment law. Nonetheless, the law did not eliminate farmland conversion. *Hearings on H.R. 5882, supra* note 40, at 39-40 (statement of Phillip Alampi, Secr'y N.J. Dep't of Agric.). *See also* GENERAL ACCOUNTING OFFICE, EFFECTS OF TAX POLICIES ON LAND USE 9-13 (CED 78-97, 1978).

43. *See* R. JACKSON, LAND USE IN AMERICA 183-91 (1981).

only a few programs using this method have been implemented[44] and practical problems have been discovered.[45] Also problematic are transferable development rights. According to this concept, the right to develop land is separated from the remaining components of property ownership; the development rights may then be transferred from agricultural to other landowners, who compensate the agricultural landowners for their loss of the development rights.[46] Although the cost of transferable development rights to taxpayers is low, this concept has not enjoyed wide implementation.

Within the past few years, state legislatures have introduced another method that may in part prevent the loss of farmland: "right to farm" laws.[47] These laws attempt to protect farmers who might otherwise be victims of urban sprawl. Often former urban dwellers who have moved to the country object to elements of rural life like pesticide and herbicide spraying, livestock odors, and machinery noise. The nuisance suits that these new residents sometimes initiate represent considerable interference and expense for farmers and often result in cessation of farming and sale of farmland to developers.[48] Right to farm laws attempt to prevent this result. Several different types of right to farm statutes exist,[49] but in general they prescribe that, under certain conditions, farms that have been operated in a nonnegligent manner for a specific period of time (often one year) shall not become nuisances because of changed conditions in the surrounding area. Because

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44. *E.g.*, the Farmland Preservation Demonstration Project of Burlington County, N.J. and the Farmland Preservation Program of Suffolk County, N.Y. *See* Keene, *supra* note 24, at 140; Peterson & McCarthy, *Farmland Preservation by Purchase of Development Rights: The Long Island Experiment*, 26 DE PAUL L. REV. 447 (1977); Veseth, *Alternative Policies for Preserving Farm and Open Areas: Analyses and Evaluation of Available Options*, 38 AM. J. ECON. & SOC. 97 (1979). For an early account of the Suffolk County experience, *see* Bryant & Conklin, *supra* note 37, at 394-96.

45. *See* Batie & Looney, *supra* note 17, at 607-10. Among these problems are cost of the development rights (which limits the amount of land that can be included), cost of enforcing the easements, and uncertainties about issues like mineral rights and public access. *Id.*

46. *See* Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 2 REAL EST. L.J. 635 (1974); Richman & Kendig, *Transfer Development Rights—A Pragmatic View*, 9 URB. LAW 571 (1977); Costonis, *Development Rights Transfer: An Explanatory Essay*, 83 YALE L.J. 75 (1973).

47. *See, e.g.*, ILL. REV. STAT. ch. 5, §§ 1101-05 (1983); TENN. CODE ANN. § 53-6701-04 (Cum. Supp. 1979); WASH. REV. CODE, §§ 7.48.300, .305, .310 (Supp. 1980). By 1983, at least 37 states had enacted some form of right to farm statute.

48. *See* NATIONAL AGRICULTURAL LANDS STUDY, THE PROTECTION OF FARMLAND: A REFERENCE GUIDEBOOK FOR STATE AND LOCAL GOVERNMENTS 98 (1980); Keene, *supra* note 24; Thompson, *Defining and Protecting the Right to Farm*, 5 ZON. & PLAN. L. REP. 57 (Sept. 1982), 65 (Oct. 1982).

49. For a comprehensive analysis of right to farm statutes, *see* Grossman & Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95 (1983). *See also* Hanna, *Right to Farm Statutes—The Newest Tool in Agricultural Land Preservation*, 10 FLA. ST. U.L. REV. 415 (1982); Note, *Agricultural Law: Suburban Sprawl and The Right to Farm*, 22 WASHBURN L.J. 448 (1983); Comment, *The Arizona Agricultural Nuisance Protection Act*, 1982 ARIZ. ST. L.J. 689 (1982).

these laws are relatively new, their effectiveness has yet to be determined.

Zoning and agricultural districting, preferential tax assessment for farmland, and controls on land development have had some impact on the conversion of agricultural land. Nonetheless, these varied methods pose significant problems. The predominance of zoning, which ensures that fundamental land use decisions will be made at the local level, also ensures that many important land use decisions will be made by the weakest link in American governmental system. These decisions may be based on inadequate information or made without foresight to resolve an immediate crisis.[50] In recent years, interest in statewide land use planning has heightened, and a few states have enacted land use control programs.[51] Most states do not have comprehensive policies for regulating land use, nor do all commentators see such comprehensive plans as desirable.[52] Moreover, the involvement of a number of different levels and agencies of government in land use decisions leads to a fragmented decisionmaking system, with resulting duplication and unnecessary complexity.[53] Despite state, county, and local recognition of the need to protect the remaining farmland, conversion continues. Indeed, the farmland preservation methods outlined "have had limited impact on the loss of farmland and none of the methods proposed or in use seems likely to insure that land will be kept in agricultural production."[54]

B. *Surface Mining and Prime Farmland*

As the above discussion suggests, the continued loss of prime farmland to nonagricultural uses is likely to pose critical productivity problems in the future. Thus, it is important to recognize and, if possible, to reduce significant causes of farmland conversion. One such cause is the surface mining of

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50. R. JACKSON, LAND USE IN AMERICA 212 (1981).

51. *See* F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971); McClaughry, *The New Feudalism—State Land Use Controls*, 5 ENVTL. L. 675 (1975) (analyzing the Vermont experience); Gustafson, Daniels, & Shirack, *The Oregon Land Use Act*, 48 J. AM. PLAN. A. 365 (1982).

See also Illinois Farmland Preservation Act, ILL. REV. STAT. ch. 5, §§ 1301-08 (1983), which articulates a state policy to protect prime agricultural land. The Act requires a number of state agencies to prepare agricultural land preservation policies. In most instances, the Act requires an "agricultural impacts study" if agency action will encroach on agricultural land. *See generally* ILLINOIS DEPARTMENT OF AGRICULTURE, THE ILLINOIS FARMLAND PROTECTION POLICY (1982). The Act does not actually prohibit agency activities that affect farmland, nor does it regulate the activities of private landowners.

52. *See, e.g.*, McClaughry, *supra* note 51, who refers to Vermont's plan as the "New Feudalism".

53. R. JACKSON, LAND USE IN AMERICA 212 (1981). *See* Hawkins, *Local Land Use Planning and Its Critics*, in NO LAND IS AN ISLAND 101 (1975), who comments that "the fragmented structure of local planning is inefficient, chaotic, and uncoordinated."

54. PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 23. *See also* Cook, *The National Agricultural Lands Study Goes Out With a Bang*, 36 J. SOIL & WATER CONSERV. 91, 91-92 (1981).

coal.[55] As background to a discussion of the federal efforts to protect prime farmland through the Surface Mining Control and Reclamation Act, it is useful to comment briefly on the effect of surface mining on the continued productivity of agricultural land.

The fundamental incompatibility of surface mining and environmental preservation is well known.[56] The scarred landscapes of Appalachia, parts of the central Midwest, and the northern Rockies bear silent witness to the damage that unreclaimed surface mines inflict on the environment. Yet, surface mining is an extremely efficient and relatively inexpensive method of removing coal.[57] It allows a mine operator to recover a high percentage of the exposed coal seam, especially compared to the yield from some methods of underground mining.[58] Moreover, for coal seams located within 150 feet of

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55. *See, e.g.*, Esseks, *Nonurban Competition for Farmland*, in FARMLAND FOOD AND THE FUTURE 57 (M. Schnepf ed. 1979); Boxley, *Competition for Agricultural Land to the Year 2000*, in AGRICULTURAL LAND AVAILABILITY, *supra* note 3, at 168; Wooley, *The Protection of Hydrologic and Land Preservation Values Under the Surface Mining Control and Reclamation Act of 1977: A Welcome Reform*, 81 W. VA. L. REV. 627 (1979).

56. *See, e.g.*, Reitze, *Old King Coal and the Merry Rapists of Appalachia*, 22 CASE W. RES. L. REV. 650 (1971); Wooley, *supra* note 55; H.R. REP. No. 218, 95th Cong., 1st Sess. 73-80, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 593, 611-17; 30 U.S.C. § 1201(c) (Supp. III 1979); Randall & Pagoulatos, *Surface Mining and Environmental Quality: An Economic Perspective*, 64 KY. L.J. 549 (1976).

57. Coal represents over 90% of the total hydrocarbon energy reserves in the United States, and currently provides approximately 20% of the nation's energy requirements. *President's Commission on Coal, United States Energy Supply*, in COAL DATA BOOK 15 (1980) [hereinafter cited as COAL DATA BOOK]. Electric utilities accounted for 77% of the nation's coal consumption in 1977, up from 16% in 1947. During the same 30 year period, general industry and retail consumption of coal declined from 65% to 11%. *U.S. Consumption of Coal by End-Use Sector*, in COAL DATA BOOK, *supra*, at 27.

U.S. coal production has fluctuated in the past several decades. In 1918, 579 million tons were produced. By 1947, 631 million tons were produced, only a nominal increase in light of the massive industrialization of the country in the interim. This figure declined to 403 million tons by 1961, to reflect the increasing use of oil and natural gas by homes and industry. Only in the 1970s, in response to the ten-fold increase in the price of imported oil, has coal production increased rapidly. In 1977, 689 million tons were mined, with projections for 1985 and 1990 of 1034 and 1257 million tons. *U.S. Coal Production by Method of Mining*, in COAL DATA BOOK, *supra*, at 83-85; R. LOFTNESS, ENERGY HANDBOOK 57 (1978). At the present rate of operation, the U.S. coal reserves (which account for 31% of the globally known recoverable reserves) will take 700 years to deplete. *Recoverable Coal Reserves*, in COAL DATA BOOK, *supra*, at 63; R. Loftness, *supra*.

Surface mining now accounts for a significant portion of coal production. As recently as 1947, only 22% of the nation's coal was surface mined. Now, 61% of the approximately 700 million tons produced annually comes from surface mines. *U.S. Coal Production by Method of Mining*, in COAL DATA BOOK, *supra*, at 83-85. Ninety percent of Western coal is currently surface mined, as compared with 67% in the Midwest and 47% in Appalachia. *Id.* at 87-89. As the leasing of federally-owned coal reserves in the West continues, the percentage of surface-mined coal will increase. Over the long term, however, deep mine coal recovery operations will be expanded, because large portions of the U.S. coal reserve are located far below the surface.

58. Existing surface mining techniques enable a mine operator to recover 85% to 90% of

the surface, it is the only usable method, because underground mining of these seams is neither feasible nor economically justifiable. Instead, the coal seam is exposed as the layers of soil and overlying rock (the overburden) are scraped away. The "area method" used on flat or gently rolling land, like farmland, involves a progressive series of cuts and continuous backfilling, with the soil layers and overburden of the newest cut used to reconstruct the previous cut.[59] Even on relatively flat lands this reconstruction process has proven difficult. In steep slope areas, like Appalachia and the southern Midwest, piles and ridges of abandoned overburden (spoil) reflect the expense and difficulty of reconstruction.[60]

An ideal setting for surface coal mining operations, in the absence of economic or regulatory disincentives, is prime farmland. The land is generally flat and free of woody vegetation and buildings. Service roads, designed to haul massive quantities of coal, can be constructed relatively easily or existing farm roads can be modified to accommodate the coal. Adjacent space for storing recovered coal, constructing sediment retention ponds, and locating final-cut reservoirs makes prime farmland especially suitable for efficient coal exploitation.[61]

Despite this suitability from the point of view of the mine operator, however, surface mining may be incompatible with continued agricultural production.[62] Even with attempts to make surface-mined land aesthetically acceptable, the underlying disruption of the land and the regional hydrologic system will affect productivity.[63] For cropland in particular, removal of

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the exposed seam. In contrast, the support pillar requirements of most underground mines permit a recovery yield of only 50% to 60%. *Coal Mining Techniques*, in COAL DATA BOOK, *supra* note 55, at 153. Other underground mining techniques result in a higher yield. The room and pillar method, with pillar extraction, may yield 75 to 90% of the coal, and the longwalling method may yield almost 100%. Both methods, however, cause significant and often immediate subsidence.

59. Other surface mining methods are used in regions with less hospitable conditions than the flat or rolling midwest farmlands and western ranges. Contour and mountain top removal are used in steep slope areas, and open pit mining is sometimes used. *Coal Mining Techniques*, in COAL DATA BOOK, *supra* note 57, at 155-64; H.R. REP. No. 218, *supra* note 56, at 76-80; 1977 U.S. CODE CONG. & AD NEWS at 614-17.

60. Bosselman, *The Control of Surface Mining: An Exercise in Creative Federalism*, 9 NAT. RESOURCES J. 137, 138-39 (1969).

61. D. BERNARD, PROJECTED ACREAGE OF PRIME FARMLAND TO BE DISTURBED BY COAL SURFACE MINING IN THE CORN BELT, 1980-2000, at 2 (Prepared at Argonne Nat'l Lab. for U.S. Dept. of Energy, 1979).

62. Traditionally, mine operators who planned to surface mine for coal have purchased the land in private ownership overlaying the coal in fee simple. In contrast, most deep coal mining is pursuant to coal leases, without purchase of the overlying land. Stricter reclamation laws may increase interest in lease arrangements for surface mining.

63. Damage to the hydrologic system caused by surface mining is generally considered a more serious obstacle to reclamation than is the disturbance to the soil itself. The apparently irreversible injury to Appalachian waterways, groundwater sources, and the water-soil balance is discussed in Wooley, *supra* note 55, at 631-42.

the uppermost topsoil horizon creates serious reclamation problems. The reestablishment of the nutrient cycling processes, soil-water relationships, and the groundwater table are critical to restoration of land as agriculturally productive cropland.[64] Indeed, prior to the enactment of state and federal reclamation standards, cropland used for strip mining had usually been restored as pasture, rangeland, or forest, which require less complex soil and water interaction.[65] Even with the stringent reclamation now required by law[66] it remains uncertain whether yields on prime farmland can be restored fully at an economically feasible cost.[67]

By the early 1970s, 1.5 million acres of farmland had been disturbed by surface coal mining, and each year another 100,000 acres are affected.[68] Projections indicate that between the mid-1970s and the year 2000, between 1.8 and 2.5 million acres of agricultural land will be disturbed by surface mining operations.[69] Although much of this land is western rangeland,[70] a significant portion is in the Cornbelt region. Estimates suggest that over the next two

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For a comprehensive account of hydrologic concerns involved in coal mining *see* Israel, *Western Coal Mining in the 1980s: A Study in Federal/State Conflicts*, 13 NAT. RESOURCES LAW. 581 (1981).

64. D. Bernard, *supra* note 61, at 21.

65. SOIL CONSERVATION SERVICE, U.S. DEP'T OF AGRIC., RURAL ABANDONED MINES PROGRAM: ENVIRONMENTAL IMPACT STATEMENT (1978).

66. *See, e.g.*, Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 (Supp. III 1979). The reclamation requirements of this law are discussed *infra* text accompanying notes 87-92.

67. Esseks, *supra* note 55, at 58. Recent research indicates that a yield of 80% of pre-strip mine production may be achieved in the Cornbelt. D. Bernard, *supra* note 61, at 22-26.

Recent research indicates that reclamation to prior levels of agricultural productivity poses difficult problems:

> How to grow crops on reclaimed land remains more theory than practice. After five years, the Reclamation Act's provisions for segregation and replacement of soil materials have not resulted in the mandated levels of corn production. One reason is that what is expected to work well with young soils (such as those in central Illinois) may not even be useful in areas with older soils, such as southern Illinois.

Ashby & Kolar, *Corn After Coal Mining in Southern Illinois*, 5 Mineral Matters 2, 2 (Coal Extraction and Utilization Research Center, Southern Illinois University, Carbondale, IL, July 1983).

68. ECONOMIC RESEARCH SERVICE, U.S. DEP'T OF AGRIC., OUR LAND AND WATER RESOURCES: CURRENT AND PROSPECTIVE SUPPLIES AND USES (Miscellaneous Pub. No. 1290) (1974), *cited in* Esseks, *supra* note 55, at 57.

One study estimated that by the year 2000, an additional million acres (a cumulative 1.8 to 2.5 million) will be disturbed, with another 800,000 acres required for coal and nuclear plants and associated facilities. Barse, *Agriculture and Energy Use in the Year 2000: Discussion from a Natural Resource Perspective*, 59 AM. J. AGRIC. ECON. 1073, 1073 (1977).

69. Esseks, *supra* note 55, at 57. *See also*, Boxley, *supra* note 53, at 168. Of the 4.4 million acres of land already disturbed by surface mining, 1.9 million have not been reclaimed. Hodel v. Indiana, 452 U.S. 314, 327 n.16 (1981) (citing U.S. Army Corps of Engineers' testimony at House Hearings).

70. Western rangeland lies above 62% of the nation's strippable coal reserves. *See* Boxley, *supra* note 55, at 168, and citations therein.

decades, 452,000 acres of land will be disturbed in the Cornbelt. Of that amount, 127,000 acres will be prime farmland.[71] Already in Illinois, for example, some 172,000 acres of farmland have been disturbed and the strippable coal beneath an additional 2.5 million acres of land will no doubt result in further farmland disturbance.[72]

II. Federal Legislation to Regulate Surface Mining on Prime Farmland

Because acres of farmland have been disturbed by surface mining operations and surface mining operators often have approached their mining operations as a "one-time harvest"[73] of the land, surface mining has had a significant impact on agricultural production. In conjunction with numerous other pressures, it has gradually decreased the amount of prime farmland on which high yields of essential crops can be produced. Although a number of states had tried to mitigate the permanent impact of this surface mining on farmland,[74] these attempts have generally been inadequate when viewed in a national context. Therefore, special federal provisions to protect prime farmland were enacted.

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71. Bernard, *supra* note 61, at 21. Another statistic suggests that in the Cornbelt Region, 163,000 acres of cropland (in contrast to farmland) had been affected by surface mining by 1978. Of these acres, only 21,500 were expected to be reclaimed to cropland use, but no estimate of the success (measured by long-term crop yields) of reclamation was given. The remaining acreage was to become range, pasture, and forest. *Id.*

A recent United States Department of Agriculture (USDA) study has minimized the adverse impact of surface mining on agricultural production. Calculating on the premise that all surface-mined land will be reclaimed in conformity with state and federal law, the study projects the average annual value of farm production foregone over the next 25 years in the Cornbelt region to be $17 million, only about one fourth of 1% of the total productive capacity of the region. Natural Resource Economics Division, ESCS, U.S. Dep't of Agric., Resources of the Interior Region and Coal Development, ii (NRED Working Paper 69, 1978), *cited in* Boxley, *supra* note 55, at 167.

Another USDA study estimated that during the average year between now and the end of the century, 568,000 acres of land will be unavailable for other purposes because of mining and reclamation on strip-mined land. *Mining the Nation's Coal: Is Farmland at Risk?*, 3 Farmline 11, 11 (Jan.-Feb. 1982).

Some writers have concluded that the total acreage affected by surface mining activities will probably never be restored to its original use or productive capacity. Bernard, *supra* note 61, at 29; *Mining the Nation's Coal, supra*, at 11.

72. R. Jackson, Land Use in America 172 (1981), *citing* W. Toner, Saving Farms and Farmland: A Community Guide 2 (1978).

Surface mining of coal is particularly significant in Illinois, which is both a major coal producing state and a major agricultural state. *See* 47 Fed. Reg. 12,312 (1982). According to an essay published in 1979, 52% of land on which coal strip mining permits were granted was cropland; forest accounted for 27%, and pasture for 21%. Esseks, *supra* note 55, at 57-60.

73. Esseks, *supra* note 55, at 58, *citing* Smith, Ostendorf, & Schechtman, Who's Mining the Farm? (Illinois South Project, Herrin, IL, 1978). *See also supra* note 62.

74. H.R. Rep. No. 1445, 94th Cong., 2d Sess. 22 (1976).

A. *The Surface Mining Control and Reclamation Act*

The Surface Mining Control and Reclamation Act of 1977 (SMCRA)[75] is a congressional attempt to eliminate the "one-time harvest" characteristic of surface mining, by converting it to a purely temporary land use.[76] Among numerous other provisions, the Act focuses on agricultural land in particular; it regulates mining procedures to ensure that, if surface mining is permitted on farmland, the land will be returned to productive capacity.[77]

The Surface Mining Control and Reclamation Act was the result of nine years of congressional study, review, and debate.[78] Those years of study resulted in three major findings: (1) surface mining seriously impairs the postmining use of the mined land, especially prime farmland; (2) the problem requires a federal solution; and (3) a relatively detailed regulatory scheme governing postmining land reclamation was necessary.[79] The permanent impairment of surface-mined land was a preeminent concern.[80] Con-

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75. Pub. L. No. 95-87, 91 Stat. 447 (codified at 30 U.S.C. §§ 1201-1328 (Supp. III 1979)).

76. *See* Bernard, *supra* note 61, at 4.

77. 30 U.S.C. §§ 1257(b)(16), 1260(d), 1265(b)(7) (Supp. III 1979).

78. For detailed summaries of the legislative history of the Act, *see* Hodel v. Virginia Surface Min. & Reclam. Ass'n, 452 U.S. 264, 278 n.19 (1981); Note, *Tenth Amendment Challenges to the SMCRA of 1977: The Implications of National League of Cities on Indirect Regulation of the States*, 49 FORDHAM L. REV. 589, 591 n.12 (1981); Note, *Summary of the Legislative History of the SMCRA of 1977 and the Relevant Legal Periodical Literature*, 81 W. VA. L. REV. 775 (1979).

Congressional hearings on proposed legislation regulating the surface coal mining industry began in 1968 and continued intermittently over almost a decade. In 1971, the Nixon administration proposed a surface mining bill. [1971] 2 ENV'T REP. (BNA) 610, 918. In the preceding year, a bill (H.R. 4556) that would have banned all surface mining within 18 months of its passage had been introduced in the House by Representative Hechler, but no action was taken on this proposal. *See* discussion at [1971] 1 ENV'T REP. (BNA) 1212-13, and H.R. 1000, 93rd Cong., 1st Sess., 119 CONG. REC. 62 (1973).

In 1974, both houses of Congress agreed on a surface mining and reclamation bill. S. 425, 93rd Cong., 2d Sess., 120 CONG. REC. 25259 (1974). *See also* 120 CONG. REC. 25,273 (1974) (Senate Passage), *id.* at 40,732 (House Passage). President Ford pocket vetoed that bill, however, because he feared that it would aggravate the unemployment and inflation rates and diminish coal production. 120 CONG. REC. 41,996 (1974). Following Congressional review of Ford's objections, a new bill was passed, 121 CONG. REC. 13,663 (1975) (Senate passage); *id.* at 13,503 (House passage), which Ford also vetoed. 121 CONG. REC. 15,421 (1975).

With the change of administration in 1977, and following extensive hearings before the Senate Subcommittee on Public Land and Resources of the Senate Committee on Energy and Natural Resources, and the House Committee on Interior and Insular Affairs, Congress passed the Surface Mining Control and Reclamation Act. *See* S. REP. No. 95-128, 95th Cong., 1st Sess. 59-61 (1977); H.R. REP. No. 95-218, 95th Cong., 1st Sess. 140-41, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 593, 672-73, for the legislative history of the Act. President Carter signed the Act without delay.

79. Eichbaum & Buente, *The Land Restoration Provisions of the Surface Mining Control and Reclamation Act: Constitutional Considerations*, 4 HARV. ENVTL. L. REV. 227, 241-42 (1980).

80. *See, e.g.*, H.R. REP. No. 218, 95th Cong., 1st Sess. 58 (1977). For a comprehensive

gress concluded that the long term protection of postmined lands required a regulatory system based on postmining land use performance standards and supported by active federal and state monitoring and enforcement.[81]

Despite its emphasis on reclamation, however, SMCRA is fundamentally a congressional statement to support the development and exploitation of the nation's coal reserves. Congress recognized that it is "essential to the national interest to insure the existence of an expanding and economically healthy . . . coal mining industry."[82] In the face of coal mining techniques that have shifted dramatically in the past thirty years from underground to surface mining,[83] Congress also recognized the necessity of regulating the surface mining industry to ensure that short-term energy needs do not impose a long-term burden on the environment. To accomplish these dual goals of ensuring an energy supply and protecting the environment, SMCRA created the Office of Surface Mining Reclamation and Enforcement (OSM) within the Department of the Interior.[84] The Secretary of the Interior, acting through OSM, is charged with the primary responsibility for administration and implementation of the Act by promulgating regulations and enforcing the Act's provisions.[85] The provisions of SMCRA distinguish between federally-owned land and land that is privately or state owned.[86] Because

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review of the effects of strip mining on the environment, *see* Udall, *The Enactment of the Surface Mining Control and Reclamation Act of 1977 in Retrospect*, 81 W. VA. L. REV. 553 (1979).

81. S. REP. No. 402, 93rd Cong. 1st Sess. 42 (1973). *See also* Gordon, *The Hobbling of Coal: Policy and Regulatory Uncertainties*, 200 SCIENCE 153-58 (1978), for a critical appraisal of SMCRA and related environmental regulations imposed on the coal industry.

82. 30 U.S.C. § 1201(b) (Supp. III 1979). President Carter's Energy Policy, formulated contemporaneously with the SMCRA, set as a national goal an increase in annual coal use to a level approximately double the 600 million tons used in 1975. Executive Office of the President, Energy Policy and Planning; the National Energy Plan, xiii (1977). In enacting SMCRA, Congress, although concerned with the enforcement of surface mining reclamation regulations, reaffirmed its interest in enforcement without unduly discouraging coal production. 30 U.S.C. §§ 1202(f), (k) (Supp. III 1979).

83. *See* note 57 *supra*.

84. 30 U.S.C. § 1211(c) (Supp. III 1979). The Reagan administration's "Economic Recovery" budget, however, reduced funding radically for OSM. Both the FY 1982 and 1983 budget requests indicated OSM funding reductions, as compared with the Carter budget. *See* Executive Office of the President, Office of Management and Budget, "Fiscal Year 1982 Budget Revisions; Additional Details on Budget Savings," April 1981, pp. 217-218; 12 ENV'T REP. (BNA) 1302 (1982).

85. 30 U.S.C. § 1211(c) (Supp. III 1979).

86. For information about the federal lands regulatory scheme, *see* 30 U.S.C. §§ 1273, 1291(5) (Supp. III 1979). Section 1273(a) deals with the applicability of state programs to federal lands. *See* Barry, *Reclamation of Strip-Mined Federal Land: Preemptive Capability of Federal Standards Over State Controls*, 18 ARIZ. L. REV. 385 (1976); Kite, *The Surface Mining Control and Reclamation Act of 1977: An Overview of Reclamation Requirements and Implementation*, 13 LAND & WATER L. REV. 703 (1978); Comment, *Local Land Use Policies in the Reclamation of Strip Mined Land*, 41 U. PITT. L. REV. 595, 596-98 (1980).

Coal mining on federal land has long been significant. In Western states with large low-

the focus of this article is prime farmland, which is predominantly privately owned, the remaining overview of the regulatory process pertains to provisions for privately-owned land.

At the heart of the Act are provisions for the control of the environmental impacts of surface coal mining.[87] In essence, these provisions require coal operators to reclaim surface-mined land to its premined condition.[88] They establish a two-stage program for the regulation of surface mining: an initial or interim phase,[89] and the subsequent permanent program.[90] This arrangement was designed to ensure a smooth transition from independent state regulations toward a cooperative system of state or federal regulations that comport with congressional objectives. Federal regulations promulgated by OSM governed both the interim[91] and the permanent[92] phases of the regula-

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sulphur coal deposits, the federal government owns 60% and controls the development of more than 80% of the coal reserves, many of which are accessible by surface mining. For a number of years, the federal government did not control reclamation of surface-mined land, and state officials exercised control based on state law or lease provisions. In the mid-1970s, however, the federal government began procedures to issue reclamation regulations pursuant to its authority under the Mineral Lands Leasing Act of 1920. 30 U.S.C. § 189 (1976). This regulatory process raised conflicts between the federal government and states, many of which had stringent reclamation laws that had been applied to federal, as well as state and private, land. In an attempt to resolve this federal-state conflict, the final version of the regulations gave states a choice between federal or state regulation of reclamation. 41 Fed. Reg. 20,252-73 (1976) (adding 43 C.F.R. § 3041, and amending 30 C.F.R. § 211). A comprehensive discussion of this regulatory process, from which the above summary is taken, is Barry, *supra* at 385-96.

The Surface Mining Control and Reclamation Act requires a federal lands program applicable to surface mining and reclamation operations on federal land. When federal land in a state with an approved plan is involved, the program must incorporate, at a minimum, the requirements of the approved state program. States with an approved program may enter into a cooperative agreement providing for state regulation of surface mining and reclamation operations on federal land within that state. 30 U.S.C. § 1273 (Supp. III 1979). *See* Ferguson, *Impact of New Legislation Relating to Federal Coal Resources*, 4 J. CONTEMP. L. 255 (1978).

87. These provisions are in Title V of the Act. 30 U.S.C. §§ 1251-79 (Supp. III 1979). This article provides only a brief overview of these provisions. More detailed analysis can be found in Kite, *supra* note 86; Comment, *The Surface Mining Control and Reclamation Act of 1977*, 9 ST. MARY'S L. J. 863 (1978); Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 268-72 (1981).

88. *See* 30 U.S.C. § 1265(b) (Supp. III 1979), and specific provisions therein. Reclamation involves two separate steps. The first is back-filling, drainage, and regrading to achieve the desired surface configuration and proper drainage. The second is revegetation, which includes topsoil preparation, fertilization, cultivation, and seeding or planting. *See* H. REP. No. 218, 95th Cong., 1st Sess. 79, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 593, 616.

89. 30 U.S.C. § 1252 (Supp. III 1979).

90. *Id.* §§ 1253, 1254, for federal and state program requirements.

91. *Id.* § 1251(a). Interim regulations, applicable to most states, were published on December 13, 1977, 42 Fed. Reg. 62,639 (1977).

92. 30 U.S.C. § 1251(b) (Supp. III 1979). This section required the Secretary of the Interior to publish permanent regulations not later than one year after August 3, 1977. Those regulations, however, were published seven months late, in March 1979. 44 Fed. Reg. 14,902-15,463 (1979).

tory scheme.

The interim regulatory program required compliance with and enforcement of some of SMCRA's performance standards,[93] accompanied by continued state regulation. Federal inspection and enforcement were required, but states could also inspect and regulate. Federal interim standards applied only to surface mining in states that regulated surface mining when SMCRA became law.[94] When the Act was passed in August 1977, however, all states in which surface mining was conducted on private lands had regulatory programs. Accordingly the interim program applied in all relevant strip mining areas throughout the country.[95] The interim period in each state was to extend until a state or federal permanent regulatory program was implemented in that state.

The permanent regulatory phase requires the incorporation of all of SMCRA's performance standards.[96] Federal regulations,[97] including these standards, become effective only after a state program is approved or a federal program for the state is implemented. Any state wishing to assume permanent regulatory authority over surface mining operations on nonfederal lands could submit a proposed permanent program to the Secretary for approval.[98] To receive approval, the proposed state programs are required to meet or exceed the environmental protection standards established by the Act and the accompanying regulations; in addition, the programs have to establish that the state has the administrative and technical ability to enforce those standards. Under this program of "cooperative federalism,"[99] the states, with the aid of federal funds, would be able to enact and administer regulatory programs structured to meet their own particular needs, while still being required to comply with the minimum standards set forth by Congress. In addition, however, the Act makes arrangements for states that do not seize this opportunity for cooperative federalism. If a state fails to submit or enforce a satisfactory state program by the statutory deadline,[100]

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93. The standards for the interim program include restoration of land to its prior condition; restoration to approximate original contour; segregation and preservation of topsoil; minimized disturbance to hydrologic balance; use of waste piles as dams and embankments; revegetation; spoil disposal. 30 U.S.C. §§ 1265(b), 1252(c) (Supp. III 1979).

94. *Id.* § 1252(b), (c).

95. Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 270 n.3 (1981).

96. 30 U.S.C. § 1265 (Supp. III 1979).

97. *See supra* note 92.

98. 30 U.S.C. § 1253(a) (Supp. III 1979).

99. Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 270-71, 287-88 (1981).

100. The original deadline was February 3, 1979, eighteen months after the Act was passed. Pursuant to the Act, 30 U.S.C. § 1254(a) (Supp. III 1979), the Secretary extended the deadline until August 3, 1979. The United States District Court for the District of Columbia further postponed the date to March 3, 1980 because the Secretary's March 1979 publication of the permanent regulations (*see supra* note 92) occurred seven months late. *In re* Permanent Surface Mining Regulation Litigation, Civ. No. 79-114 (D.D.C. July 25 and Aug. 21, 1979), *cited*

the Secretary of the Interior is required to develop and implement a permanent federal program for that state.[101] Such a program will then be enforced by federal officials.[102]

B. *Prime Farmland Under SMCRA*

Among the requirements of SMCRA are numerous provisions that apply specifically to prime farmland and are structured to ensure that mined prime farmland will be restored to its original productivity.[103] For purposes of the Act, prime farmland is land classified as prime by the Secretary of Agriculture, on the basis of factors such as moisture, temperature, chemical balance, and erosion characteristics.[104] In accordance with this statutory requirement, OSM regulations have adopted the comprehensive definition of prime farmland promulgated by the Secretary of Agriculture.[105] In addition, land categorized as prime farmland for purposes of SMCRA must "historically have been used for intensive agricultural purposes."[106]

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in Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 272 n.7 (1981).

101. 30 U.S.C. § 1254 (Supp. III 1979).

102. *Id.* § 1254(a). The statute also provides for federal enforcement of a state program that the state is not enforcing. *Id.* § 1254(b).

In accordance with this statutory arrangement, a number of states have adopted programs that have received either approval or conditional approval from the Secretary. *See* 30 C.F.R. Subch. T, Parts 901-50 (1982). Other states are in the process of having permanent programs approved; are revising previously submitted but rejected programs; or have permanent federal programs proposed for them by OSM.

103. Officials of the USDA Soil Conservation Service have testified that compliance with the prime farmland provisions of SMCRA will result in restoration of productivity. *But see supra* notes 63, 67. In enacting these provisions, Congress followed the recommendation in the report of the Interagency Task Force on the *Issue of a Moratorium or a Ban on Mining in Prime Agricultural Lands*. H.R. REP. No. 218, 95th Cong., 1st Sess. 185, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 593, 715. Congress rejected a Carter administration proposal that urged a five-year moratorium on surface mining on prime farmlands. *Id.*

104. 30 U.S.C. § 1291(20) (Supp. III 1979). The factors are "moisture availability, temperature regime, chemical balance, permeability, surface layer composition, susceptibility to flooding, and erosion characteristics." *Id.*

105. The Secretary of Agriculture's definition of prime farmland is found at 7 C.F.R. § 657 (1983). The essential part of that definition is included in note 9 *supra*. The Secretary of the Interior's regulations implementing SMCRA, 30 C.F.R. § 701.5 (1982), define prime farmland to include lands that meet the Secretary of Agriculture's definition and "which have historically been used for cropland[.]" The regulations define cropland as:

> land used for the production of adapted crops for harvest, alone or in a rotation with grasses and legumes, and includes row crops, small grain crops, hay crops, nursery crops, orchard crops, and other similar specialty crops. Land used for facilities in support of cropland farming operations which is adjacent to or an integral part of these operations is also included for purposes of these land categories.

Id. A more specific OSM definition of prime farmland, focusing on soil types and related characteristics, appears at 30 C.F.R. § 716.7(b) (1982).

106. 30 U.S.C. § 1291(20) (Supp. III 1979). This part of the definition of prime farmland has caused some regulatory complications. The phrase has been interpreted to indicate a period

At several steps of the complicated SMCRA process designed to avoid adverse environmental effects from surface mining, prime farmland receives special protection. An early stage of the process requires a mining operator to apply for a surface coal mining and reclamation permit pursuant to an approved state program or a federal program. The permit application must contain statutorily prescribed material, including information about the type of mining operation, accurate and detailed maps, drainage information, climatological factors, and coal test results.[107] The statute includes a specific requirement for potential prime farmland: if a "reconnaissance inspection" suggests that lands included in the permit application may be prime, the applicant must make or obtain a soil survey to confirm the exact location of the prime farmland.[108] If prime farmland (determined according to the statutory definition discussed above) is confirmed, other requirements in SMCRA apply.

Each application for a surface mining permit must include a reclamation plan,[109] with enough detail to demonstrate that the reclamation required by the state or federal program can be accomplished. Among the items to be included are existing land uses, proposed postmining uses, descriptions of how the postmining uses will be achieved, plans for complying with environmental protection laws, and other relevant information.[110] In indicating the premined condition of the land to be covered by the permit,

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of time in which the land must have been in crop production. Initial OSM regulations required that the land be used in crop production at least 5 of the 20 years preceding the date of the surface mining permit application. 42 Fed. Reg. 62,693 (1977). Surface mining interests criticized this regulation because it brought within its purview land that had been idle for 15 years prior to the permit application, but that had been farmed for the 5 years before the idle period. A court decision enjoined this "historical use" provision of the OSM regulations as overly broad and unsupported in the basis and purpose statement accompanying the regulations. *In re* Surface Mining Litigation, 456 F. Supp. 1301, 1312 (D.D.C. 1978), *rev'd in part on other grounds*, 627 F.2d 1346 (D.C. Cir. 1980).

OSM then modified the historical use provision to require a 5-year nonconsecutive, cropland use during the 10 years prior to the date of acquisition of the land for mining purposes. 46 Fed. Reg. 7,212 (1981), to be codified at 30 C.F.R. § 716.7(b)(2), effective August 14, 1981. *See also* 30 C.F.R. § 701.5 (1982). This new regulation not only cut the time period in half, but also made the period run from the date of acquisition (purchase, lease, or option) rather than the later date of permit application. In addition it includes land that is clearly cropland but falls outside the 5-years-in-10 criterion, and land that, but for some fact of ownership or control unrelated to productivity, would have met the time criterion. As of August 1983, this historical use provision has not been altered. *See* 46 Fed. Reg. 7,210-11 (1981); 46 Fed. Reg. 47,528-29 (1981).

107. 30 U.S.C. § 1257 (Supp. III 1979).

108. *Id.* § 1257(b)(16). *See also* 30 C.F.R. § 779.27 (1982), which prescribes a preapplication investigation of the permit area. Effective June 13, 1983, the requirements for determining the existence of prime farmland have been modified and incorporated into 30 C.F.R. § 785.17, 48 Fed. Reg. 21,462 (1983).

109. 30 U.S.C. § 1257(d) (Supp. III 1979).

110. *Id.* § 1258.

the permit applicant must take special account of land classified as prime farmland. The applicant must indicate the productivity of the land, as well as the average yield of food, fiber, forage, or wood products obtained under a high level of management.[111]

Once prime farmland is identified in the permit application, it receives special consideration during evaluation of the application. Each permit application, including those for mining on prime farmlands, must demonstrate compliance with a number of statutory requirements.[112] In addition, however, for applications involving prime farmland, permits may be granted only if the regulatory authority finds that the operator "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" of the Act.[113] This finding may be made only after consultation with the official of the Soil Conservation Service delegated by the Secretary of Agriculture.[114]

In addition to consideration during the permit evaluation process, prime farmland receives special attention in the Act's general performance provisions. These provisions set minimum standards for all surface coal mining and reclamation operations.[115] Most of these are directed toward successful reclamation of the mined area, and the special provision for prime farmland is no exception. All prime farmlands identified under the Act must be reclaimed under stringent specifications for soil removal, storage, replacement, and reconstruction.[116] At a minimum, the coal operator must remove separately the distinct soil layers, stockpile the layers, and protect them from erosion or contamination. The operator must replace and regrade a

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111. *Id.* § 1258(a)(2)(C).

112. *Id.* § 1260(b). One such requirement is that the area proposed is not included in an area designated unsuitable for surface mining under § 1272, which directs states to establish a planning process designed to designate areas as unsuitable for certain types of mining. An area may be designated if the coal mining operations will "affect renewable resource lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products[.]" *Id.* § 1272(a)(3)(C).

113. *Id.* § 1260(d)(1). Subsection (d)(2) reads "[n]othing in this subsection shall apply to any permit issued prior to August 3, 1977, or to any revisions or renewals thereof, or to any existing surface mining operations for which a permit was issued prior to August 3, 1977."

114. *Id.* § (d)(1). *See also* 30 C.F.R. § 785.17(d) (1981), amended version at 48 Fed. Reg. 21,462 (1983), which refers to the delegation to the Soil Conservation Service, and permits the representative of the Secretary of Agriculture to suggest revisions to the soil reconstruction plan proposed in the permit application.

115. 30 U.S.C. § 1265 (Supp. III 1979). These standards include requirements governing: (a) restoration of land after mining to its prior condition; (b) restoration of land to its approximate original contour; (c) segregation and preservation of topsoil; (d) minimization of disturbance to the hydrologic balance; (e) construction of coal mine waste piles used as dams and embankments; (f) revegetation of mined areas; and (g) spoil disposal.

116. *Id.* § 1265(b)(7). *See also* 30 C.F.R. §§ 823.11-.14, amended version at 48 Fed. Reg. 21,463-64 (1983), for performance standard regulations.

root zone of proper depth and quality, redistribute, and grade the surface soil material.[117] An additional requirement for operators on reclaimed mining lands is revegetation.[118] Prime farmland is treated specially with regard to revegetation, because the Act requires regulatory authority approval of a "long-term intensive agricultural postmining land use."[119]

The Surface Mining Control and Reclamation Act provides one additional special protection for prime farmland. Operators mining on prime farmland, like others to whom permits are issued under the Act, must file a performance bond with the proper regulatory agency.[120] For prime farmland, no part of the bond can be released until soil productivity has returned to yield levels equivalent to yields on nonmined land of the same soil type in the surrounding area under equivalent management practices.[121] This provision ensures that mining operators will comply with the intent of the Act: that surface mining should not interfere permanently with the productive capacity of the nation's prime farmland.

Despite these relatively stringent requirements for permit application, permit approval, and reclamation practices on prime farmland, SMCRA's protection of this valuable land is not absolute. One exception to the protection is inherent in the definition of prime farmland. For purposes of SMCRA, prime farmland is land that fits the Secretary of Agriculture's definition,[122] and that has been used historically for intensive agricultural purposes.[123] Potentially then, prime farmland that does not fit within the regulatory definition of historical use[124] will lose the special protections of the Act. Another, perhaps more significant, exception is the "grandfather

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117. 30 U.S.C. § 1265(b)(7) (Supp. III 1979). Regulations require that permit applicants indicate in some detail how these prime farmland standards will be accomplished. The regulations require, for example, that the reclamation plan indicate a plan for soil reconstruction, replacement and stabilization. 30 C.F.R. § 785.17(c).

118. 30 U.S.C. § 1265(b)(19) (Supp. III 1979). The operator must establish "a diverse, effective, and permanent vegetative cover . . . capable of self-regeneration and plant succession. . . ."

Section 1265(b)(20) required the operator to assume responsibility for revegetation for a period of five full years after the last year of work required to comply with subsection (b)(19); in areas of scanty rainfall, the period of responsibility is 10 years. *See* 30 C.F.R. § 823.15, amended version at 48 Fed. Reg. 21,463-64 (1983), which prescribes performance standards for revegetation.

119. 30 U.S.C. § 1265(b)(20) (Supp. III 1979). The statutory provision referring to approval of long-term agricultural use permits the 5- or 10-year period of responsibility to begin on the date of initial planting for the intensive use. Under certain conditions, the regulatory authority may grant exception to subsection (19), discussed in *supra* note 118. *Id.*

120. 30 U.S.C. § 1269 (Supp. III 1979).

121. *Id.* § 1269(c)(2). The soil type data is derived from the soil survey performed pursuant to section 1257(b)(16) of the Act. *See supra* note 108.

122. 30 U.S.C. § 1291(20) (Supp. III 1979). *See supra* notes 9 and 105.

123. *See supra* note 106 for a discussion of the historical use clause.

124. 30 C.F.R. § 716.7(b)(2) (1982).

clause,"[125] which applies to surface mining operations for which permits were issued prior to August 3, 1977. Operations protected by the grandfather clause, although bound by the general reclamation requirements of SMCRA, are not bound by the requirement that permits can be issued only if the operator can restore the mined land to its former productive capacity[126] and can meet the soil reconstruction standards for prime farmland.[127] The interpretation of this grandfather clause has resulted in a lengthy regulatory process, fraught with legal challenges and characterized by numerous changes of regulatory direction.[128]

The SMCRA prime farmland provisions were perceived as significant intrusions into an area traditionally reserved to state regulation. State sovereignty in the area of land use planning has been considered appropriate because of the "diverse geography, climate, natural resources, population density and economic structures within the various states."[129] Indeed, the Act itself recognized that the unique physical conditions in the various states require local governments to accept responsibility for surface mining and reclamation operations.[130] Nonetheless, these prime farmland provisions impose specific federal prerequisites for mining on prime agricultural lands. In essence, they seem to limit a state's freedom to make basic decisions about the control of land within its borders. The detailed prescriptions in SMCRA and the accompanying regulations go beyond the traditional scope of federal environmental control measures, which have usually required the interdiction of state statutes to implement the desired federal outcome on a local level.[131]

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125. 30 U.S.C. § 1260(d)(2) (Supp. III 1979), quoted *supra* in note 113.

126. *Id.; see supra* text accompanying notes 111, 121.

127. *Id.* § 1265(b)(7); *see supra* text accompanying notes 116-119.

128. An overview of the regulatory process involved in promulgating regulations under the "grandfather clause" provides insight into OSM attempts to find a reasonable balance between mining, agricultural, and environmental interests, and illustrates the effect that fluctuating political goals may have on prime farmland protection. A detailed account is included in *Peabody Coal Co. v. Watt*, 553 F. Supp. 1201 (D.D.C. 1982). *See also* 48 Fed. Reg. 21,454-55, 21,461, 21,462 (1983).

Further exceptions from permanent performance standards apply to support facilities and roads, as well as certain approved waterbodies. 30 C.F.R. § 823.11, amended version at 48 Fed. Reg. 21,463 (1983).

129. Indiana v. Andrus, 501 F. Supp. 452, 465 (S.D. Ind. 1980), *rev'd*, Hodel v. Indiana, 452 U.S. 314 (1981). The district court decision had relied on language in *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975), stating that "zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities." *Id.*

130. 30 U.S.C. § 1201(f) (Supp. III 1979).

131. The array of federal statutes, apart from SMCRA, affecting local land uses and private landowners includes the Solid Waste Disposal Act of 1976, 42 U.S.C. §§ 6901-87 (1976); the Soil and Water Resources Conservation Act of 1977, 16 U.S.C. §§ 2001-09 (Supp. I 1977); the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-64 (1976); the Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601-29 (1976); the Soil Erosion Act of 1935, current version

III. Legitimacy of the Federal Role in Farmland Preservation under SMCRA: *Hodel v. Indiana*

The incursion that SMCRA makes into the traditional state province of land use, coupled with the cost of compliance with SMCRA's prime farmland provisions, have resulted in a series of legal challenges to the Act and its regulations. Cases have been initiated by mining interests, and by several states in which surface mining has had a major impact on the economy and an adverse effect on prime farmland. These actions, contesting the legitimacy of the provisions of the Act and the implementing regulations that restrict the surface mining of prime farmland, have met with mixed results.[132] The most important of the cases challenging the prime farmland provisions is *Hodel v. Indiana*,[133] decided in June 1981 by the United States Supreme Court. Read with its companion decision, *Hodel v. Virginia Surface Mining and Reclamation Association*,[134] the *Hodel v. Indiana* decision answers many of the challenges posed to the prime farmland provisions of

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at 16 U.S.C. § 590(a)-(f) (1976).

132. *See, e.g., In re* Surface Mining Regulation Litigation, 452 F. Supp. 327 (D.D.C. 1978); *In re* Surface Mining Regulation Litigation, 456 F. Supp. 1301 (D.D.C. 1978), *aff'd in part and rev'd in part*, 627 F.2d 1346 (D.C. Cir. 1980). Fifteen mining operators and trade associations, along with the states of Texas, Virginia, and West Virginia, challenged the interim regulations promulgated by the Secretary of the Interior pursuant to SMCRA. Among the challenged regulations was the grandfather exemption for surface mining on prime farmlands. *See supra* text accompanying note 128.

Another case was *In re Permanent Surface Mining Regulation Litigation*, 653 F.2d 514 (D.C. Cir.), *cert. denied*, 454 U.S. 822 (1981), which dealt with the Secretary of the Interior's rulemaking power under SMCRA. The D.C. Circuit held that sections of the Act setting forth information to be submitted by surface mining permit applicants were not intended as exclusive lists of data, and that the Secretary has authority to require applicants to submit items of information beyond those enumerated in the Act.

In *Concerned Citizens of Appalachia, Inc. v. Andrus*, 494 F. Supp. 679 (E.D. Tenn. 1980), *appeal docketed*, No. 80-1448 (6th Cir.), the court refused injunctive and declaratory relief against enforcement of SMCRA in an action that alleged fifth amendment taking of property and procedural due process violations, as well as tenth amendment infringement on reserved state powers.

Similarly in *Andrus v. P-Burg Coal Co., Inc.*, 495 F. Supp. 82 (S.D. Ind. 1980), *aff'd*, 644 F.2d 1231 (7th Cir. 1981), the court rejected a commerce clause challenge to the Act. In *Star Coal Co. v. Andrus*, No. 79-171-2 (S.D. Iowa, Feb. 13, 1980), 14 E.R.C. 1325, *appeal dismissed*, No. 80-1284 (8th Cir. 198_), the court rejected challenges based on the fifth and tenth amendments, but enjoined some of the Act's enforcement provisions. *See* Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 275 n.16 (1981).

In two related actions in Illinois, *Midland Coal Co. v. Andrus*, C.D. Ill., Civ. No. 79-1172 *appeal pending* and *In re Southwestern Illinois Coal Corp.* (The Captain Mine, Docket No. REA 78-1) (both cited at 45 Fed. Reg. 25,993-94 (1980)), disputes between the Department of the Interior and a coal company, and the Illinois Department of Mines and Minerals arose as to the definition of which prime farmlands are to be "grandfathered" in under the Act, and for how long.

133. 452 U.S. 314 (1981).

134. 452 U.S. 264 (1981).

SMCRA.

A. *District Court Litigation*

Both the *Hodel v. Indiana* and the *Virginia Surface Mining* cases were initiated by plaintiffs with direct economic interests in surface coal mining. The *Indiana v. Andrus* plaintiffs,[135] concerned with the adverse economic impact of the prime farmland and related provisions of SMCRA on their businesses and on the state generally, initiated their action in August 1978. They contended that the prime farmland provisions of SMCRA had imposed excessive expenses on Indiana surface coal mine operators[136] and threatened to destroy Indiana's competitive position as a coal producer.[137] They alleged that the challenged provisions of the Act violated a number of protections guaranteed by the United States Constitution. Provisions of SMCRA, they argued, exceeded congressional powers under the commerce clause, encroached on Indiana's sovereign powers under the tenth amendment, and violated the due process and taking clause requirements of the fifth amendment.[138] Accordingly, they sought a judgment declaring portions of the Act unconstitutional and a permanent injunction to prevent the Secretary of the Interior from enforcing the challenged provisions.

In June 1980, the district court issued an injunction and a declaratory judgment granting the relief requested by plaintiffs. In deciding the case, the court adopted as its own the "thorough yet concise statement of proposed findings of fact and conclusions of law"[139] submitted by plaintiffs. It incorporated those findings and conclusions into its opinion. Thus, the court concluded that the prime farmland and other challenged provisions regulated aspects of surface mining that have no substantial adverse effects on interstate commerce.[140] Certain other provisions dealing with postmining land use, the court found, were not means "reasonably and plainly adapted

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135. *Indiana v. Andrus*, 501 F. Supp. 452 (S.D. Ind. 1980), represents a consolidation of two original actions, one brought by the state of Indiana and its representative officials and agencies charged with natural resource development and the other initiated by the Indiana Coal Association, several mining companies, a corporation that leases farmland to mining companies, and an individual citizen of Indiana.

136. The district court noted that one plaintiff, AMAX Coal Company, incurred increased equipment and operating costs exceeding $49 million for the years 1978 and 1979 through the prime farmland, topsoiling, and approximate original contour requirements of the Act. These increased costs caused AMAX to close one mine just prior to the effective date of the Act's interim program. As a result, Indiana lost 152 jobs and over 600,000 tons of coal production annually. Indiana v. Andrus, 501 F. Supp. at 456.

137. *Id.* Most of Indiana's coal is produced through surface mining. *Id.* at 455. Thus Indiana suffered a disproportionate burden through SMCRA.

138. *Id.* at 455. These constitutional challenges will be examined in more detail in the discussion of the Supreme Court decision, *infra*.

139. *Id.* at 457.

140. *Id.* at 460.

to [the legitimate end of] removing substantial adverse effect[s] on interstate commerce."[141] The court found that other provisions requiring explicit governmental procedures and structures for land use planning involved federal usurpation of powers reserved to the states by the tenth amendment.[142] In the district court's view, the absence of variance provisions for the prime farmland and approximate original contour requirements constituted a deprivation of substantive due process. No national interest justified this lack of variances and the court saw the provisions as irrational, arbitrary, and capricious.[143] The court also concluded that the stringent reclamation standards (which, plaintiffs argued, could not realistically be achieved) prevented coal companies from mining their coal; thus the effect of the Act was to destroy a mineral interest (a property right), without just compensation.[144]

Plaintiffs in *Virginia Surface Mining* had also challenged provisions of SMCRA.[145] Because of differences in terrain, these plaintiffs[146] focused specifically on the "steep slope," rather than on the prime farmland provisions of the Act. The steep slope provisions require in part that coal operators mining in steep slope locations restore the surface-mined land to its premined "approximate original contour."[147] In challenging the Act, the *Virginia Surface Mining* plaintiffs alleged that the law deprived Virginia of control over its own economic development, land use, and environment.[148] In

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141. *Id.* at 461.

142. *Id.* at 464-68.

143. *Id.* at 469.

144. *Id.* at 470-71. The court also concluded that procedural due process was violated by certain of the Act's provisions. *Id.* at 471. In its opinion, the court relied on plaintiff's findings and conclusions; it did not acknowledge the contrary arguments raised by defendants.

145. Virginia Surface Mining & Reclamation Ass'n v. Andrus, 483 F. Supp. 425, 429 (W.D. Va. 1980). Plaintiff's attack focused on Title V of SMCRA, which gives the Department of Interior the authority to regulate surface mining and specifies the environmental standards to be met by mine operators. 30 U.S.C. §§ 1251-79 (Supp. III 1979). The challenge focused on the sections of SMCRA that established the interim regulatory program, because the permanent program became effective only on June 3, 1980. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 273 (1981).

146. Virginia Surface Mining & Reclamation Ass'n v. Andrus, 483 F. Supp. 425 (W.D. Va. 1980). The suit was initiated by an association of coal producers engaged in surface coal mining operations in Virginia, 63 of its member coal companies, and four individual Virginia landowners. The Commonwealth of Virginia and the Town of Wise, Virginia, located in the major surface mining region of the state, intervened as plaintiffs.

147. A steep slope is a slope above twenty degrees, or a lesser slope defined as steep after consideration of soil and other factors. 30 U.S.C. § 1265(d)(4) (Supp. III 1979). Coal mine operators mining on steep slopes must comply with special rules, in addition to the other reclamation provisions contained in § 1265, and the implementing regulation. The approximate original contour requirement is at § 1265(b)(3). Plaintiffs complained about all the reclamation provisions, with special attention to the steep slope provisions. Virginia Surface Mining & Reclamation Ass'n v. Andrus, 483 F. Supp. at 436 n.14.

Ninety-five percent of strippable coal lands in Virginia are located on slopes above twenty degrees. *Id.* at 437.

148. More specifically, plaintiffs alleged that, as a consequence of the contested

addition, the law imposed economically infeasible and physically impossible reclamation standards on mine operators. They argued that these standards ultimately would deprive Virginia landowners of a profitable land use, and eventually would destroy the surface mining industry in that state.[149]

The district court recognized the irreparable injury that enforcement of the Act could inflict on the Virginia surface mining industry. Moreover, the court was particularly concerned with SMCRA's burden on Virginia's right to regulate its own affairs, the confiscatory nature of the restoration regulations, and the outright prohibition of mining in certain areas of the state.[150] Accordingly, it enjoined the enforcement of several of the Act's provisions.[151] Unlike the Indiana court, the *Virginia Surface Mining* court did not hold that the contested provisions of SMCRA violated the commerce clause.[152] The court did, however, hold that the challenged provisions of the Act violated the taking clause[153] and the procedural due process clause of the fifth

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provisions:

(1) The Commonwealth of Virginia was deprived of control over the economic development and land use of southwestern Virginia;

(2) Land values in the surface mine region were adversely affected because unreclaimed level land is significantly more valuable than restored steeply sloped land;

(3) Because it is economically infeasible and physically impossible to return a steep slope area to its original contours after surface mining, the state would be burdened by the resulting decline in its $2 billion coal production industry.

(4) Enforcement of SMCRA's reclamation provisions would prevent Virginia from enacting the optimum environmental standards for its particular needs, thereby leading to the loss of a traditional state governmental function; and

(5) Restrictions imposed by the Act would amount to a taking without just compensation, because in effect they destroy the landowner's right to have his or her property mined. *Id.* at 434-35.

149. Coal mining in Virginia is concentrated in seven counties, in which a need for level land exists. Prior to SMCRA, leveled strip-mined land has been used for schools, airports, industry, recreation, shopping centers, and agricultural activities. By requiring reclamation to approximate original contour, SMCRA would prevent many of these uses. In addition, it would substantially diminish the value of postmined land. Land in southwest Virginia, before strip mining, had been worth $5 to $75 per acre. After being leveled, the land was worth at least $5000, and as much as $300,000 per acre. Land restored to its original contours reverts to the original, much lower values. *Id.* at 434.

150. Regarding outright prohibition, *see* 30 U.S.C. § 1272(e) (Supp. III 1979), discussed at *id.* at 441-42.

151. *Id.* at 448.

152. *Id.* at 430-31. The court recognized the Act as environmental protection legislation, affecting the nation as a whole, whereas the *Hodel v. Indiana* decision viewed the impact of the Act on a state-by-state basis, and concluded that Indiana would be placed at a competitive disadvantage were the Act to be enforced. Nor did the *Virginia Surface Mining* court hold that the contested SMCRA provisions violated the equal protection and substantive due process clause of the Fifth Amendment, as plaintiffs had alleged. *Id.* at 435-36.

For an article evaluating the constitutionality of SMCRA, in the context of the *Virginia Surface Mining* district court decision, see Note, *The Constitutionality of the Federal Surface Mining Control and Reclamation Act of 1977*, 13 IND. L. REV. 923 (1980).

153. Virginia Surface Mining & Reclamation Ass'n v. Andrus, 483 F. Supp. 425, 436-42

amendment,[154] and interfered with state powers under the tenth amendment.[155]

B. *The Supreme Court Decisions*

In June 1981, the Supreme Court issued its opinions in *Hodel v. Indiana*[156] and *Hodel v. Virginia Surface Mining and Reclamation Association*.[157] Justice Marshall wrote the separate, but interrelated, opinions for the Court in these companion cases.[158] The Court held that, in the context of a facial attack, the challenged provisions of the Surface Mining Control and Reclamation Act are constitutional. Neither the rights of states as states, nor the rights of private landowners and mining operators are violated by the implementation or enforcement of the challenged provisions of

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(W.D. Va. 1980). In effect, the court agreed that applying the original contour requirement to steep slopes prohibits landowners from mining their coal, thus depriving them of property without just compensation. *Id.*

154. *Id.* at 442-48. The procedural due process challenge focused on cessation orders issued without a prior hearing 30 U.SC. § 1271 (Supp. III 1979) and on violation notices and civil penalties. *Id.* § 1268.

155. Virginia Surface Mining & Reclamation Ass'n v. Andrus, 483 F. Supp. at 431-36. The court recognized the "approximate or general contour" provision, 30 U.S.C. § 1265(d)(2) (Supp. III 1979), as the most intrusive practical aspect of SMCRA. *Id.* at 433-34.

156. 452 U.S. 314 (1981).

157. 452 U.S. 264 (1981).

158. Justices Powell, Burger, and Rehnquist filed separate, but generally concurring opinions.

Justice Powell believed the Act to be "an extraordinarily intrusive program of federal regulation and control of land use and land reclamation." Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. at 305. Nonetheless, the Court's commerce clause precedents clearly supported the Congress's power to enact SMCRA constitutionally. Powell noted that a fifth amendment "taking without compensation" issue, while premature, would likely arise due to the Act's serious effect on Virginia landowners. The taking issue, he noted, must be resolved in specific cases. *Id.* at 306.

Chief Justice Burger, who concurred generally in Justice Rehnquist's opinion, joined the Court's opinions in the two cases because the Court had found the requisite "substantial effect on interstate commerce" required for commerce clause legislation. *Id.* at 305.

Justice Rehnquist concluded that Congress not only must act in a manner consistent with all provisions of the Constitution, but also, when its authority is challenged, must establish that its regulatory activity has a substantial effect on interstate commerce. Activity that merely "affects" interstate commerce is inadequate to justify Congressional intervention. Because he was uncertain how broadly the Court meant to interpret the commerce clause, Rehnquist elected merely to concur in the Court's judgment. *Id.* at 307-13.

Commentators have not received Justice Rehnquist's opinion kindly. *See, e.g.*, the following evaluation:

> In an opinion that can only be described as a judicial aberration, Justice Rehnquist has stated that the states delegated their commerce power to the federal government. His attempt to justify a judicial role in restricting the federal commerce power on this premise not only cuts against the court's decisions since 1937, it also runs counter to the theory of the nature of federal power employed [in earlier decisions].

J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 20, 27 (Supp. 1982).

the Act.

Acknowledging the congressional determination that coal production should not prosper at the expense of agriculture, the Court rejected the commerce clause challenge in *Hodel v. Indiana* to the prime farmland provisions.[159] Focusing on the tenth amendment issues, the Court found that the contested provisions do not regulate the states as states, but directly regulate only the activities of private individuals and businesses.[160] Nor do the provisions violate the fifth amendment;[161] they neither take private property without just compensation nor discriminate impermissibly. Thus, the prime farmland provisions of the Act withstood constitutional challenge.

Although the focus of this article is the prime farmland provisions of the Act, the following discussion treats both the *Virginia Surface Mining* and the more directly relevant *Hodel v. Indiana* decisions. Because the two cases posed similar constitutional challenges to different provisions of SMCRA, the Supreme Court used its *Virginia Surface Mining* decision as the vehicle to resolve issues that are also crucial in *Hodel v. Indiana.*[162]

1. *The Commerce Clause*

In deciding to hold the challenged provisions of SMCRA unconstitutional under the commerce clause, the district court in *Hodel v. Indiana* had articulated two rationales. The court had held that the six prime farmland provisions[163] were "directed at facets of surface coal mining which have no substantial and adverse effect on interstate commerce."[164] It had reached this conclusion by relying on statistics that evaluated what the district court characterized as a relatively small amount of prime farmland acreage disturbed annually by surface mining.[165] With respect to other challenged pro-

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159. *See infra* notes 163-82 and accompanying text.

160. *See infra* notes 183-212 and accompanying text.

161. *See infra* notes 213-38 and accompanying text.

162. *See Hodel v. Indiana*, 452 U.S. 314, 330 (1981), in which the Court relies on its *Virginia Surface Mining* opinion, 452 U.S. at 286-93, to resolve the tenth amendment issue.

163. The prime farmland provisions of SMCRA are discussed in detail at *supra* notes 103-28 and text accompanying. *See also* Hodel v. Indiana, 452 U.S. at 321 n.6. The provisions at issue are:

(1) 30 U.S.C. § 1257(b)(16) (Supp. III 1979) (soil survey of suspected prime farmland);
(2) *Id.* § 1258(a)(2)(c) (productivity information in reclamation plan);
(3) *Id.* § 1260(d)(1) (restoration to nonmined yield levels);
(4) *Id.* § 1265(b)(7) (removal and replacement of soil horizons);
(5) *Id.* § (b)(20) (approval of agricultural postmining use); and
(6) *Id.* § 1269(c)(2) (release of performance bonds).

164. Indiana v. Andrus, 501 F. Supp. 452, 460 (S.D. Ind. 1980).

165. *Id.* at 459. The district court had noted that about 21,800 acres, amounting to 0.006% of the nation's prime farmland, were disturbed annually. *Id.* at 459. The court had relied on the *Report of the Interagency Task Force on the Issue of a Moratorium or a Ban on Mining in Prime Agricultural Lands*, presented to the House Committee on Interior and Insular Affairs, April 5, 1977. *Id.* at 458. At this rate "[i]t would take 166 years for surface mining to

visions of the Act,[166] the court had decided that the only possible adverse effects on interstate commerce—air and water pollution—were addressed adequately by other provisions of SMCRA; therefore, the district court concluded that the provisions were not reasonably calculated to protect interstate commerce.[167]

The Supreme Court rejected the district court's reasoning. Noting that economic legislation enjoys a presumption of constitutionality,[168] the Court restated the two-pronged standard used to evaluate commerce clause regulations: "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends."[169]

The Court had no difficulty in finding that the Act satisfies the first prong of this standard. The legislative history of the Act amply demonstrated that Congress had a rational basis for deciding that surface mining on prime farmland affected interstate commerce in agricultural products.[170]

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disturb [1%] of the total prime farmland in the United States." *Id.* at 459. *But see infra* note 171.

166. *See* Hodel v. Indiana, 452 U.S. 314, 322 n.9 (1981).

The provisions at issue were:

(1) 30 U.S.C. § 1256(b)(3) (Supp. III 1979) (approximate original contour requirement);

(2) *Id.* § 1265(b)(5) (removal, segregation, and replacement of topsoil);

(3) *Id.* §§ 1272(a), (c), (d), (e)(4), (e)(5) (permanent regulatory procedures to designate land unsuitable for surface mining and restrict location of mining near certain facilities);

(4) *Id.* §§ 1258(a)(2), (3), (4), (8), (10) (reclamation plan requirements);

(5) *Id.* §§ 1260(b) (1), (2) (approval or disapproval of permit applications); and

(6) *Id.* §§ 1265(b)(19), (20) (revegetation on mined lands for a five or ten year period).

167. Indiana v. Andrus, 501 F. Supp. at 461.

168. *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976); *see also* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 83-84 (1978).

169. Hodel v. Indiana, 452 U.S. 314, 323-24 (1981). The Court has construed the commerce clause broadly since the 1937 shift toward granting greater economic regulatory powers to the federal government. *See generally* J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 150-56 (1978).

170. Hodel v. Indiana, 452 U.S. at 324-26. For example, the topsoil replacement requirement of SMCRA, 30 U.S.C. § 1265(b)(5) (Supp. III 1979), was adopted pursuant to U.S. Army Corps of Engineers testimony, before a 1977 House Committee on Interior and Insular Affairs, that, "[s]egregation of and preservation of topsoils during, or preceding mining operations . . . [was required] to provide soil conditions conducive to rapid revegetation after mining. . . ." *Surface Mining Control and Reclamation Act of 1977, Hearings on H.R. 2 before the Subcommittee on Energy and the Environment of the House Committee on Interior and Insular Affairs, Pt. II*, 95th Cong., 1st Sess. 86 (1977).

The Court also analyzed legislative history in the commerce clause context in the *Virginia Surface Mining* decision. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 277-81 (1981).

Congressional findings as to the adverse impact of surface coal mining on commerce and the public welfare are discussed in S. REP. No. 128, 95th Cong., 1st Sess. 49-53 (1977); and H.R.

Moreover, even if the effect of surface mining on interstate agricultural commerce is relatively small,[171] Congress is not prohibited from regulating that activity under the commerce clause.[172]

Turning to the second prong of the commerce clause standard, the Court held that the prime farmland and other challenged provisions were reasonably related to the goal of protecting interstate commerce.[173] The goals of SMCRA are not, as the district court had asserted, merely to prevent air and water pollution.[174] As the Court demonstrated in its analysis in *Virginia Surface Mining*,[175] Congress had instead intended to protect the productive capacity of surface mined lands and to protect the public from the health and safety hazards of surface mining.[176] The provisions that the district court had invalidated were reasonably designed to meet these legitimate goals.[177]

As part of its resolution of the commerce clause issue in *Virginia Surface Mining*, the Court acknowledged the characterization of the ultimate issue in that case: "[W]hether land *as such* is subject to regulation under the Commerce Clause, i.e., whether land can be regarded as 'in commerce.' "[178] The Court noted the argument that land use regulation is within the province of the state police power and that congressional power to regulate in that area is stringently limited.[179] In rejecting this manner of framing the ultimate issues, the Court stated that calling an activity local or intrastate does not determine whether Congress may regulate that activity under the commerce clause.[180] Instead, congressional power extends to activities, even intrastate activities, that affect interstate commerce significantly

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REP. NO. 218, 95th Cong., 1st Sess. 58-60 (1977), *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 593, 596-98.

See also Note, *The Constitutionality of the Federal Surface Mining Control and Reclamation Act of 1977*, 13 IND. L. REV. 923, 931 n.68 (1980); Note, *Tenth Amendment Challenges*, *supra* note 78, at 590 nn.5-10.

171. But the Court was not convinced that the effect is so small. The 21,800 acres of prime farmland annually disturbed by surface mining would have produced 0.04% of the 1976-77 corn crop, with a value of $5.16 million. Hodel v. Indiana, 452 U.S. at 325 n.11.

172. *Id.* at 324.

173. *Id.* at 327.

174. Even if the goals were to prevent air and water pollution, however, the Court suggested that it might not accept the district court's conclusion of unconstitutionality. The challenged provisions of the Act contribute to environmental goals. *Id.* at 327 n.15.

175. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 277-80.

176. Hodel v. Indiana, 452 U.S. at 327.

177. *Id.* at 329. The Court noted that each individual provision in a complex regulatory scheme need not be directly related to a legitimate goal. The provisions must, however, be part of a regulatory scheme that satisfies the test as a whole. *Id.* at 329 n.17.

178. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 275.

179. *Id.* at 275-76. Appellees had argued "that Congress may regulate land use only insofar as the Property Clause grants it control over federal lands." *Id.* at 276 (footnote omitted). The property clause in U.S. CONST. art. IV, § 3, cl. 2.

180. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 281.

enough to make regulation of the activities an appropriate means to the legitimate end of regulating interstate commerce.[181] Coal is a commodity that moves in interstate commerce. Therefore, Congress can rationally decide that regulating the local activities that lead to the interstate commerce is necessary to protect interstate commerce.[182]

2. *The Tenth Amendment*

Another major constitutional issue resolved by the Supreme Court's decisions in *Virginia Surface Mining* and *Hodel v. Indiana* focused on the tenth amendment.[183] In the district court proceeding in *Indiana v. Andrus*, the plaintiffs had argued that the prime farmland and other substantive provisions of the Surface Mining Control and Reclamation Act intruded on functions ordinarily reserved to state and local governments and thus violated the tenth amendment.[184] In accepting this argument, the district court had ruled that the real purpose and effect of the law was land use regulation, which the court viewed as a traditional function of state government.[185] The court had found, both in the Act and in its legislative history, clear indicia that Congress intended to impose *per se* land use controls and planning policies on states in which surface coal mining was conducted on prime farmland.[186] Thus, the district court held that the challenged provisions violated the tenth amendment because they caused "displacement or regulation of the management structure and operation of the traditional governmental function of the States in the area of land use control and planning. . . ."[187] Likewise, the district court deciding *Virginia Surface Mining* concluded that the Act contravened the tenth amendment because it interfered with

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181. *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942), in which a farmer growing a small quantity of wheat primarily for on-farm consumption was held subject to federal marketing programs. His crop, like that of similarly situated farmers, affected the overall supply and price of the wheat market.

182. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 281. The Court also recognized the congressional finding that nationwide surface mining and reclamation standards are necessary to prevent destructive interstate competition, a traditional role for commerce clause legislation. *Id.* at 281-82.

183. U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Historically, the tenth amendment had served as a substantial check on federal exercise of the commerce and other powers. *See generally* J. NOWAK, *supra* note 169, at 139-40.

For an evaluation of tenth amendment issues written before the Supreme Court decisions in *Virginia Surface Mining* and *Hodel v. Indiana*, see Note, *Tenth Amendment Challenges*, *supra* note 78.

184. Indiana v. Andrus, 501 F. Supp. at 461-68.

185. *Id.*

186. *Id.*

187. *Id.* at 468. The Indiana plaintiffs contended that the highest and best postmining land use might be forestry, industrial, residential, or recreational uses, instead of the agricultural use they found dictated in the Act's reclamation requirements. *Id.* at 462, 466.

"traditional [state] governmental functions" of regulating land use.[188] The Act caused the states to lose control of land use planning and of their economy, and to suffer economic harm from the cost of implementing the law and from the loss of tax revenue.[189] Both district courts cited the 1976 Supreme Court decision in *National League of Cities v. Usery*[190] as support for their conclusions.

The Supreme Court refused to accept the district courts' analyses of *National League of Cities* to resolve the tenth amendment issues raised by the Surface Mining Control and Reclamation Act. In an exhaustive analysis in *Virginia Surface Mining*,[191] adopted by reference in *Hodel v. Indiana*,[192] the Court rearticulated the meaning of *National League of Cities* for state sovereignty and held that the challenged provisions of SMCRA did not violate the tenth amendment protections of state sovereignty. In *National*

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188. Virginia Surface Mining and Reclamation Ass'n v. Andrus, 483 F. Supp. 425, 435 (W.D. Va. 1980) (quoting National League of Cities v. Usery, 426 U.S. 833, 852 (1976)). The district court inquired whether the Act regulates the activities of private individuals or the governmental decisions of states. The court recognized that the law "ultimately affects the coal mine operator," but nonetheless concluded that it hampered the states' ability to make essential decisions. *Id.* at 432.

For a discussion of land use as a traditional state function, see Note, *Tenth Amendment Challenges*, *supra* note 78, at 601-04; *see also* Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977), for a tenth amendment analysis of federal environmental programs.

189. Virginia Surface Mining and Reclamation Ass'n v. Andrus, 483 F. Supp. at 435. The plaintiffs contended that the requirement of returning steep slope land to its approximate original contours was "economically infeasible and physically impossible," and would harm the state's economy. *Id.* at 434. Coal production would be reduced by compliance with the Act's provisions; moreover, the reclamation requirements prevented the implementation of improved (level land) uses.

190. 426 U.S. 833 (1976). *National League of Cities* had involved a constitutional challenge to the 1974 amendments to the Fair Labor Standards Act that extended federal minimum wage and maximum hour requirements to state and local government employees. In its decision, the Supreme Court held that the challenged provisions could not be applied constitutionally to state and local government employees. Although wage and hour regulations generally fall within the commerce power of the federal government, the tenth amendment prevents their application to state and local government employees. In so deciding, the Court found that the determination of employee's wages and hours is an "undoubted attribute of state sovereignty." *Id.* at 845. That alone, however, does not result in a tenth amendment violation. In addition, the Court inquired whether the wage and hour regulations impaired essential activities of the state, and concluded that significant impairment of state financial resources would result. *Id.* at 848. *See* J. NOWAK, *supra* note 169 at 160-63.

In its discussion of *National League of Cities* the Court, in *Virginia Surface Mining*, 452 U.S. at 292 n.33, noted that a measurable impact on a state's economy, standing alone, will not "establish a violation of the tenth amendment." "[T]he determinative factor [in *National League of Cities*] was the nature of the federal action, not the ultimate economic impact on the states." *Id.* (citing *National League of Cities*, 426 U.S. at 874); *but see infra* notes 401-38 and accompanying text.

191. 452 U.S. 264, 283-93 (1981).

192. 452 U.S. 314, 330 (1981).

League of Cities, the Court noted it had distinguished sharply between congressional regulation of private persons and businesses "necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside,"[193] and regulation "directed, not to private citizens, but to the States as States."[194] The tenth amendment does not impede regulation of private businesses or persons, but such regulation is limited by the requirement that "the means chosen . . . must be reasonably adapted to the end permitted by the Constitution."[195] Where states as states are concerned, however, Congress has less power and must recognize that its regulation cannot impair state attributes of sovereignty. States must remain free "to structure integral operations in areas of traditional governmental functions."[196]

In applying its reasoning in *National League of Cities* to the controversy over provisions of SMCRA in *Virginia Surface Mining*, the Court articulated three requirements that must be satisfied to support a claim that congressional commerce power legislation is invalid under the tenth amendment. First, the challenged legislation must regulate the "States as States."[197] Second, the federal law must "address matters that are indisputably 'attribute[s] of state sovereignty.' "[198] Third, it must be clear that state compliance with the federal legislation will directly impair the state's ability "to structure integral operations in areas of traditional governmental functions."[199] Applying these requirements to SMCRA, the Court found that the Act did not meet the first requirement: the challenged provisions of SMCRA did not regulate the states as states.[200]

Focusing on the steep slope provisions of the Act, the Court stated that those requirements govern only the activities of mining operators who are private individuals and businesses. States themselves are not compelled to enforce the standards, spend state funds, or participate in the federal regulatory program.[201] Therefore, the Act does not commandeer state legislative

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193. National League of Cities v. Usery, 426 U.S. 833, 845 (1976), *quoted in* Hodel v. Virginia Surface Mining and Recl. Ass'n, 452 U.S. 264, 286 (1981).

194. National League of Cities, 426 U.S. at 845, *quoted in* Virginia Surface Mining, 452 U.S. at 286.

195. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 262 (1964), *quoted in* National League of Cities, 426 U.S. at 840 and Virginia Surface Mining, 452 U.S. at 286.

196. National League of Cities, 426 U.S. at 852, *quoted in* Virginia Surface Mining, 452 U.S. 287.

197. National League of Cities, 426 U.S. at 854; Virginia Surface Mining, 452 U.S. at 287.

198. National League of Cities, 426 U.S. at 845; Virginia Surface Mining, 452 U.S. at 288.

199. National League of Cities, 426 U.S. at 852; Virginia Surface Mining, 452 U.S. at 288.

200. Meeting each of these three requirements, however, does not mean that a tenth amendment challenge to federal commerce power action must succeed. In some situations, the federal interest advanced by the legislation may be compelling enough to justify state submission. Virginia Surface Mining, 452 U.S. at 288, n.29, (citing Fry v. United States, 421 U.S. 542 (1975), which was reaffirmed in *National League of Cities*, 426 U.S. at 852-53.)

201. A state that does not submit a permanent program complying with SMCRA and its

processes.[202] Instead, like other federal laws that have survived tenth amendment challenges,[203] the Act "establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs."[204] The applicability of those federal minimum standards, the Court emphasized, does not mean that the Act regulates states as states.

The Court emphasized that the tenth amendment does not prohibit a scheme, like SMCRA, from prescribing federal minimum standards which a state may choose to implement or instead yield to the federally administered regulatory program. Invoking the preemption doctrine,[205] the Court noted that the tenth amendment does not limit the power of Congress to preempt state regulation of private activities affecting interstate commerce.[206] Citing decisions that affirm Congress's authority to preempt state laws that regulate private activity affecting interstate commerce,[207] the Court noted that the commerce clause grants Congress the power to prohibit any (rather than just inconsistent) state regulation of these activities.[208] Under its commerce power, Congress could have prohibited *all* "state regulation of surface coal mining"; thus its decision to allow states to assume a regulatory role does not make its legislation constitutionally infirm.[209] More-

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regulations may leave the full regulatory burden to the federal government. *See* the discussion of the interim and permanent regulatory programs at *supra* text accompanying notes 87-100.

202. Virginia Surface Mining, 452 U.S. at 288.

203. *E.g.*, the Airborne Hunting Act, 16 U.S.C. § 742j-1 (1976), upheld in United States v. Helsey, 615 F.2d 784 (9th Cir. 1979); the Clean Air Act, 42 U.S.C. §§ 7401-7626 (Supp. III 1979), upheld in Friends of the Earth, Inc. v. Carey, 552 F.2d 25, 36-39 (2d Cir.), *cert. denied*, 434 U.S. 902 (1977); the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. II 1978), upheld in Sierra Club v. EPA, 540 F.2d 1114, 1140 (D.C. Cir. 1976), *cert. denied*, 430 U.S. 959 (1977). These decisions are listed in *Virginia Surface Mining*, 452 U.S. at 289 n.30.

204. *Virginia Surface Mining*, 452 U.S. at 289. *See In re* Permanent Surface Mining Regulation Litigation, 617 F.2d 807, 808 (D.C. Cir. 1980).

205. The preemption doctrine arises from the supremacy clause. U.S. CONST. art. IV, cl. 2. For a recent review and affirmation of the preemption doctrine, *see* Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317-19 (1981); *see also*, Note, *Railroad Noise Regulation Under the Noise Control Act of 1972: One Step Toward Noise Pollution Abatement*, 1978 U. ILL. L.F. 887, 902 n.103 (1978), for a succinct review of the preemption doctrine in a situation where the federal government is entering an area previously left to state and local regulation.

206. Virginia Surface Mining, 452 U.S. at 289-90.

207. *E.g.*, Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977); Perez v. Campbell, 402 U.S. 637, 649-50 (1971); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141-43 (1963).

208. *E.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); Campbell v. Hussey, 368 U.S. 297 (1961); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

The *Virginia Surface Mining* decision recognizes that preemptive congressional laws do curtail or prohibit the states' rights to make choices in important subject areas, but noted that the supremacy clause dictates this result. Virginia Surface Mining, 452 U.S. at 290.

209. Virginia Surface Mining, 452 U.S. at 290-91. The Court found nothing in *National*

over, this conclusion is valid even if the federal legislation at issue preempts laws enacted under the police power of the states. Citing long-established precedent, the Court refused to hold that the tenth amendment prohibits Congress from preempting state police power laws that regulate private activity.[210]

The Supreme Court's resolution of the tenth amendment issue focused on the first of the three factors articulated by *National League of Cities*: whether the federal legislation at issue regulates "states as states." Because the decision did not require it, the Court did not resolve one issue potentially raised by the *Virginia Surface Mining* litigation: whether land use regulation is an "integral governmental function." The Court assumed that the district court had held correctly that land use regulation was an integral governmental function, but noted that it was not deciding whether this is actually correct.[211] In its *Hodel v. Indiana* decision, which incorporates by reference the analysis in *Virginia Surface Mining*, the Court again referred to the land use issue. The Court did not agree with the district court that the Act is a land-use measure similar to zoning ordinances enacted by state and local governments. Instead the Court noted that "the prime farmland and other provisions at issue in this case are concerned with regulating the conditions and effects of surface coal mining. Any restrictions on land use that may be imposed by the Act are temporary and incidental to these primary purposes. The Act imposes no restrictions on postreclamation use of mined lands."[212] Thus, in both *Virginia Surface Mining* and *Hodel v. Indiana*, the Court makes it clear that it has not ruled on the status of land use regulation as an integral function of local government entities.

3. *The Fifth Amendment*

a. *The Taking Issue*

In both *Virginia Surface Mining* and *Hodel v. Indiana*, the plaintiffs had contended and the district courts had agreed that the effect of challenged provisions of SMCRA was a governmental taking of property without just compensation. In *Virginia Surface Mining*, the district court had found the steep slope provisions[213] and the prohibitions on mining in certain ar-

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League of Cities that suggested any tenth amendment protection from preemptive federal regulation of private activities that affect interstate commerce. *Id.*

210. *Id.* at 292. The Court cited decisions upholding commerce power statutes that preempt exercises of state police power. *See* United States v. Walsh, 331 U.S. 432 (1947) (upholding Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-392); United States v. Darby, 312 U.S. 100 (1941) (upholding Fair Labor Standards Act, 29 U.S.C. §§ 201-219); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding National Labor Relations Act, 29 U.S.C. §§ 151-68).

211. Virginia Surface Mining, 452 U.S. at 293 n.34.

212. Hodel v. Indiana, 452 U.S. at 330 n.18.

213. The steep slope provisions (*see supra* note 147) required operators to perform the

eas[214] to be unconstitutional because they "deprived [the owner] of any use of his land, not only the most profitable use."[215] In *Indiana v. Andrus*, the district court had found that three of the prime farmland provisions[216] took private property without just compensation because "it is technologically impossible to reclaim prime farmland in a postmining period so that equal or higher levels of yield under high levels of management practice can be achieved."[217]

The Supreme Court disagreed with the district courts on the taking issue. Articulating its rationale in the *Virginia Surface Mining* decision, the Court concluded that the "taking claim arose in the context of facial challenge," which posed "no concrete controversy concerning either [the application of SMCRA] to particular surface mining operations" or the effect of the Act on particular parcels of land.[218] No plaintiff had identified property actually taken by the operation of the surface mining provisions at issue. The Court noted that decisions ruling on the constitutionality of statutes ordinarily require a factual setting that demands the resolution of the con-

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"economically and physically impossible" task of restoring steep slope surface mines to their approximate original contour. Virginia Surface Mining and Reclamation Ass'n v. Andrus, 483 F. Supp. 425, 437 (W.D. Va. 1980). Moreover, the value of the mined land, even after restoration to approximate original contour, would be greatly diminished. *Id.* The district court recognized the existence of a variance procedure, but suggested that the difficulty in complying with its requirements made it "meaningless." *Id. See* Virginia Surface Mining, 452 U.S. 293 n.35. *See also id.* at 297 n.39, in which the Supreme Court notes that the district court's conclusion that the variance procedure was meaningless is premature.

214. 30 U.S.C. § 1272 (Supp. III 1979), discussed at *supra* note 150. *See also* Virginia Surface Mining, 452 U.S. at 294 n.36. Some of the provisions (30 U.S.C. §§ 1272(a), (c), (d) (Supp. III 1979)) became applicable only during the permanent phase of the regulatory program, and had not been applied at the time of the litigation. Thus, no justiciable case or controversy existed with regard to those sections, according to the Supreme Court. *Id.*

215. Virginia Surface Mining and Reclamation Ass'n v. Andrus, 483 F. Supp. at 441. The district court had relied on the Supreme Court decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). That decision had found unconstitutional a Pennsylvania law making it unlawful to mine anthracite coal so as to cause the subsidence of certain lands and structures. The court concluded that the law had appropriated the mining company's property interest without just compensation. Virginia Surface Mining, 483 F. Supp. at 441-42.

Pennsylvania Coal has been criticized by some writers. *See, e.g.*, F. Bosselman, D. Callies & J. Banta, The Taking Issue 238 (1973).

216. Indiana v. Andrus, 501 F. Supp. at 469-70. The three requirements were:

(1) 30 U.S.C. § 1260(d)(1) (Supp. III 1979), which required the mining operator seeking a permit to indicate the capacity to restore the land to the productivity level of nonmined prime farmland in the locality under equivalent levels of management;

(2) *Id.* § 1269(c)(2), conditioning the release of the operator's performance bond on complete restoration; and

(3) *Id.* § 1258(a)(2), requiring information about pre-mining productivity of the land in reclamation plans filed in the permit applications.

217. Indiana v. Andrus, 501 F. Supp. at 470.

218. Virginia Surface Mining, 452 U.S. at 295.

stitutional issue,[219] a principle that assumes particular importance in taking cases. Lacking specific property alleged to be taken by the Act, the Court could not perform the "ad hoc, factual inquiries" required in the taking determination.[220]

Having concluded that it could not find that the Act had effected an unconstitutional taking without an allegation that particular parcels of property had been affected, the Court turned to the question of whether the "mere enactment" of the Act constitutes a taking. This question can be answered in the affirmative only if a statute regulating uses of property "denies an owner economically viable use of his land. . . ."[221] The Court found no difficulty in deciding that the challenged provisions of SMCRA did not satisfy this requirement. The law merely regulates, but does not prohibit, surface coal mining operations. Nor does it deprive owners of alternative uses of their coal-bearing lands. Thus, the enactment of SMCRA did not deprive the plaintiffs of economically viable use of their lands.[222]

In the *Hodel v. Indiana* litigation, as in *Virginia Surface Mining*, the Court noted that the taking claims did not focus on any particular properties to which the prime farmland provisions at issue had been applied, nor to any parcels of land for which permits had been denied. Thus, mere enactment of the statute was the only issue properly before the district court. On that issue, the Supreme Court, citing its discussion in *Virginia Surface Min-*

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219. *Id.* at 294-95. *See* Socialist Labor Party v. Gilligan, 406 U.S. 583, 588 (1972); Rescue Army v. Municipal Court, 331 U.S. 549, 568-75, 584 (1947); Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 461 (1945). All were cited by the Supreme Court. Virginia Surface Mining, 452 U.S. at 295.

220. Virginia Surface Mining, 452 U.S. at 295. The Court quoted from its recent decision in *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), to indicate that the "ad hoc, factual inquiries" must be conducted with respect to specific property, and are generally focused on the economic impact of a regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action. *Id.* at 295.

221. *Id.* at 296 (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980), and citing Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)). In *Agins v. Tiburon*, the Court had held that a California landowner, restricted by a local zoning ordinance in the density of single-family residences permitted on his property had not suffered an unlawful taking, because his property had retained its marketability, albeit at a significantly reduced price. Similarly, in *Penn Central*, the Court upheld a New York City Landmarks Preservation Commission veto of a Penn Central proposal to modify their Grand Central Terminal Building. The historic and architectural status of the building, coupled with the "transferable development rights" option awarded by the city to the corporate landowner, prevented the Preservation Commission's action from constituting a taking.

222. Virginia Surface Mining, 452 U.S. at 297. The Court added that the plaintiffs cannot legitimately complain about the way in which provisions of the Act have been applied in specific circumstances, or the way they will affect particular coal operations. Because the plaintiffs have not sought administrative relief under the procedures provided by the Act, the taking issue was not ripe for judicial determination. *Id.* The Court's decision does not preclude others from alleging that the Act and its regulations effect a taking, when applied to a particular parcel of land. *Id.* at 297 n.40. *See supra* note 158.

ing, concluded that no taking had occurred. The prime farmland provisions, like the steep slope provisions, merely regulate rather than prohibit surface mining; they do not prohibit alternative economic uses of prime farmland. Therefore they do not deprive the property owner of economically viable uses of farmland.[223]

b. *Other Fifth Amendment Issues*

The district courts in both *Virginia Surface Mining* and *Hodel v. Indiana* had concluded that several of the enforcement provisions of SMCRA violated the fifth amendment's due process clause. In both cases the civil penalty provisions were at issue;[224] in *Virginia Surface Mining*, the Court had also addressed provisions that permit the summary issuance of total or partial cessation orders when mining operations are perceived to violate the Act.[225] The Supreme Court, again articulating its reasoning in *Virginia Surface Mining*, found no due process infirmities in the contested provisions of the Act.[226] With regard to the cessation orders, the Court noted that "some kind of hearing" is required prior to the deprivation of a significant property interest.[227] If an emergency situation is involved, however, summary administrative action may be justified.[228] The Court found that the issuance of immediate cessation orders fell under the emergency situation exception to the normal due process requirements. The orders represent a congressional attempt to accommodate "the legitimate desire of mining companies to be heard before submitting to administrative regulation and the governmental

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223. Hodel v. Indiana, 452 U.S. at 334-35. Even though plaintiff coal companies owned and presently intended to mine lands affected by the challenged provisions of the Act, the Court refused to find an unconstitutional taking had occurred. *Id.* at 335 n.20. *See also* Virginia Surface Mining, 452 U.S.s at 294 n.36. Note, *Regulation Without Just Compensation: A Political Process-Based Taking Analysis of the Surface Mining Act*, 69 GEO. L.J. 1083 (1981).

224. *See* Virginia Surface Mining, 452 U.S. at 303-04; *Hodel v. Indiana*, 452 U.S. at 335-36. These provisions require the recipient of a notice of violation or a cessation order to be informed of the proposed civil penalty to be assessed against it. An operator who wishes to contest the violation or the amount must prepay the proposed penalty into an escrow account, after which the operator receives an adjudicatory hearing. 30 U.S.C. §§ 1268(c), 1276(a)(2) (Supp. III 1979).

225. Virginia Surface Mining, 452 U.S. at 298-303. A total or partial cessation order may be issued when a federal inspection indicates that the operation violates the Act or a permit condition, and the operation poses an immediate danger to public health or safety, or causes or can be expected to cause environmental harm. Cessation orders are subject to informal or formal administrative review, and eventually to judicial review. 30 U.S.C. §§ 1271, 1275, 1276 (Supp. III 1979).

226. Virginia Surface Mining, 452 U.S. at 298-304.

227. *Id.* at 299. *See, e.g.*, Parratt v. Taylor, 451 U.S. 527, 540 (1981); Boddie v. Connecticut, 401 U.S. 371, 379 (1971).

228. Virginia Surface Mining, 452 U.S. at 299-300. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 677-80 (1974); Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971).

interest in protecting the public health and safety and the environment from imminent danger."[229] The Court found that the criteria established by the Act and the implementing regulations were sufficiently specific to reduce the risk of government error.[230] Moreover, prompt and adequate post-deprivation administrative hearings, coupled with the availability of judicial review, protect mine operators.[231] Thus, the Court concluded, the cessation orders permitted by the Act did not violate due process.

Similarly, the Court held that the civil penalty provisions of the Act did not constitute violations of due process. No plaintiffs in *Virginia Surface Mining* or *Hodel v. Indiana* had made a showing that civil penalties had been assessed against them under that Act, or that the prepayment requirement of the Act had been applied to them. Thus, no case or controversy concerning the operation of the civil penalty provisions had been before the district court. The Supreme Court therefore concluded that the challenge to the provisions was premature.[232]

In *Hodel v. Indiana*, the Supreme Court also considered allegations that the prime farmland and approximate original contour provisions of SMCRA violated the equal protection and substantive due process protections of the fifth amendment. The district court, noting that variances from the prime farmland provisions are not permitted and that variances from the original contour requirement are available for steep slope and mountaintop mining but not for mining on prime farmland, had ruled that such discrimination could not withstand equal protection scrutiny.[233] Moreover, the district court had concluded, the prime farmland and original contour provisions are "irrational, arbitrary and capricious requirements" that deprive mining operators of substantive due process.[234]

The Supreme Court disagreed and chided the district court for substituting its policy judgment for that of Congress.[235] Briefly reviewing equal

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229. Virginia Surface Mining, 452 U.S. at 300.

230. *Id.* at 301. That standard, articulated at 30 U.S.C. § 1291(8) (Supp. III 1979), defines the threat of imminent danger to the health and safety of the public, *see supra* note 225, as do the OSM regulations, 30 C.F.R. §§ 700.5, 701.5 (1980) (current version (1982)), *quoted in* 452 U.S. at 301 n.45.

231. Virginia Surface Mining, 452 U.S. at 303.

232. Virginia Surface Mining, 452 U.S. at 304; Hodel v. Indiana, 452 U.S. 314, 335-36.

A number of lower court cases challenging the application of SMCRA's provision for prepayment of civil penalties have been decided or are pending. These are collected in Esterman, *Due Process in Surface Mining Regulation: SMCRA's Penalty Prepayment Provisions Withstand Legal Challenges*, 12 ENVTL. L. REP. (ENVTL. L. INST.) 10071 (1982).

233. Indiana v. Andrus, 501 F. Supp. 452, 469 (S.D. Ind. 1980). The district court decided that, absent "an overriding national interest," the discrimination was impermissible. *Id.*

234. *Id.*

235. Hodel v. Indiana, 452 U.S. at 331. The Court noted that the district court's invalidation of provisions of SMCRA on grounds of substantive due process exceeded its proper role. The court had acted as a "superlegislature, passing on the wisdom of congressional policy determinations." *Id.* at 333. *See generally* J. NOWAK, *supra* note 169, at 404-10.

protection doctrine, the Court noted that economic legislation like SMCRA will withstand equal protection attack "when the legislative means are rationally related to a legitimate governmental purpose. Moreover, such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality."[236] The plaintiffs in *Hodel v. Indiana* had not showed that the challenged provisions of the Act had been applied in an irrational or arbitrary manner. Even if the Act particularly burdened mining operators in the Midwest, a statute's lack of uniform geographic impact does not make it arbitrary.[237] Congress has the power to determine what levels of protection are required for the different types of lands on which surface mining take place, and it has made its distinctions rationally.[238]

IV. Implications of *Hodel v. Indiana* for an Enhanced Federal Role in Farmland Preservation

In upholding the challenged provisions of the Surface Mining Control and Reclamation Act in *Hodel v. Indiana* and its companion case, *Virginia Surface Mining*, the Supreme Court recognized explicitly the importance of prime farmland to this nation's continued agricultural productivity. In its commerce clause analysis, the Court concluded that Congress could rationally decide that surface coal mining on prime farmland affects interstate commerce in agricultural products, and that the substantive provisions of the Act were reasonably related to the legitimate goals of protecting interstate commerce in agriculture from the adverse effects of surface mining. Moreover, the tenth amendment does not impede Congress's ability to regulate the conduct of private businesses and individuals, even if the regulated conduct involves the use of land. In addition, other litigation[239] suggests a judicial willingness to accept some federal regulation of private uses of land, when the regulation is in the national interest and is drafted to avoid interference with constitutionally protected rights of individuals and of the states

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Although the Supreme Court has not been faced recently with a serious substantive due process challenge to a federal or state land use or environmental protection regulation, the Court's opinion in *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), strongly suggests "that the Court would not only presume that a legislature had a reasonable basis for enacting a particular economic measure," but would go so far as to hypothesize reasons if the legislature failed to state them explicitly. *See* J. Nowak, *supra* at 411-12. Due process does not significantly restrain government actions in the area of economics or social welfare. "While due process still protects a person's liberty in society, only those liberties or rights of 'fundamental' constitutional magnitude will be actively protected by the Supreme Court." *Id.* at 410.

236. Hodel v. Indiana, 452 U.S. at 331-32 (citations omitted). Of course, legislation that employs suspect classifications or impinges on fundamental rights will receive closer scrutiny. *Id.*

237. *Id.*

238. *Id.* at 333.

239. *See* discussion at *infra* notes 271, 441.

and their subdivisions.

The Court's recognition of the preservation of prime agricultural land as a legitimate focus of legislation in the context of surface mining raises a question about the exercise of the commerce power or other federal constitutional powers to protect agricultural land in other situations. Numerous other uses of agricultural land will, like surface mining, cause long-term or irreversible damage to agricultural productivity.[240] Among these are urban and village expansion, industrial and energy development, and highway construction. Supreme Court approval of a significant federal role in preventing destruction of agricultural land through surface mining suggests the possibility of an enhanced federal role in the protection of agricultural land from other types of encroachment.

Accordingly, the concluding section of this article will ruminate about the possibility of such an enhanced federal role in agricultural land protection. It will survey some of the existing federal programs and policies that affect land use with particular focus on agricultural land. In so doing, it will examine briefly some unsuccessful proposed federal legislation intended to affect land use planning and to protect agricultural land. It will discuss the recently enacted Farmland Protection Policy Act. Finally, the article will consider the possibility of further federal legislation intended to protect farmland and evaluate some possible parameters—both constitutional and practical—for that legislation.

A. *Federal Involvement in Land Use Regulation—General and Agricultural*

The federal government has been involved in land use to some degree since the late 1700s.[241] In recent years, particularly with the development of comprehensive environmental legislation, federal involvement in land use decisionmaking has become more pervasive. Because the federal government will not always admit that federal land use laws exist, however, it is sometimes difficult to identify federal statutes and programs that influence land use.[242] Nonetheless, well over one hundred federal programs, under the aus-

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240. *See supra* notes 62-72 and accompanying text.

241. One example of late eighteenth century federal land use legislation was the Ordinance of 1785, which established the rectangular survey system, a form of land description that led to orderly development, but was not always keyed optimally to the location of natural resources, navigation systems, and other physical characteristics. A. REITZE, ENVIRONMENTAL PLANNING: LAW OF LAND AND RESOURCES 1-10 (1974). Another example is the federal disposition of public lands beginning in 1780. *A Statement by the NPA Joint Committee on Long-Range Land-Use Planning*, in P. RAUP, THE FEDERAL DYNAMIC IN LAND USE at v (1980).

242. F. BOSSELMAN, D. FEURER & T. RICHTER, FEDERAL LAND USE REGULATION 5 (1977). These authors note that:

> [i]n addition, federal agencies are often inclined to minimize the land use impact of various statutes they administer. This may result from a hesitancy to intrude into a primarily state and local matter or a prudent decision that too pronounced an asser-

pices of at least twenty-three federal departments and independent agencies, affect land use decisionmaking.[243] Federal programs affect both public lands and privately-owned property; they have an impact on both rural and urban land. Some indicate a clear intention to influence, or even control, land use; others have an indirect, but nevertheless real, effect on land use decisions.[244] Even these indirect measures have, over the long term, probably been as influential as state and local actions designed to direct land use.[245]

A wide range of federal activities affects land use. In general, these activities fit into several, sometimes overlapping, categories. One type of federal action is direct land ownership by the federal government, and the control over that federally-owned land. Another encompasses indirect control of land use by means of programs that either encourage or require land use planning as a condition for the receipt of federal funds. A third type of federal action includes public spending programs, particularly those related to transportation and other public facilities. Finally, some national legislation provides for direct regulatory control of land use.[246] The influence of these federal activities is often enhanced by the doctrine of preemption, which

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tion of land use authority might result in congressional action to restrict the asserted power.

Id.

243. Boxley, *Ownership and Land Use Policy*, in ECONOMICS, STATISTICS, AND COOPERATIVES SERVICE, USDA, AGRICULTURAL ECONOMIC REPORT 438, STRUCTURE ISSUES OF AMERICAN AGRICULTURE 165 (1979).

Although the precise number of federal programs affecting land use is not clear, there are many. A federal government publication refers to 122 such federal programs identified by the Congressional Research Service. PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 48. One writer notes that more than 130 of the 850 federal assistance or regulatory programs for state and local governments affect land use directly. R. JACKSON, LAND USE IN AMERICA 59 (1981).

244. The importance of these indirect federal controls has increased over the past 50 years. The "balance of power . . . has shifted strongly in favor of the federal government . . . primarily through the unplanned and uncoordinated pursuit of goals that were not at first perceived to affect land use." P. RAUP, THE FEDERAL DYNAMIC IN LAND USE 2 (1980).

245. NPA Statement, *infra* note 261, at v. As one writer noted, "[T]he Federal Government of the United States virtually from its inception has strongly affected the uses of land, so much so that it might be fairly said that the Federal Government has made nearly all of the important governmental decisions, leaving the irrelevant incidentals to lesser governments." A. REITZE, ENVIRONMENTAL PLANNING, *supra* note 238, at 1-10.

246. These four categories are outlined by R. JACKSON, LAND USE IN AMERICA 47-62 (1981). The following ways in which federal programs affect land use are articulated by F. BOSSELMAN, D. FEURER, & T. RICHTER, *supra* note 239, at 1-2:

1. They directly regulate the use that may be made of land;
2. They fund state or local programs of land use regulations;
3. They require the preparation of plans to guide future land uses;
4. They construct, or pay for the construction of, facilities that use land and that may strongly influence surrounding land uses; and
5. They provide a variety of stimulants and depressants to various segments of the economy that influence the way private users of land behave.

determines the extent to which federal power will exclude state or local governments from an area of legislation.[247] Although not all federal activities with land use implications have an impact on agricultural land, an overview of some of these activities is a useful background to a consideration of the federal role in agricultural land preservation.

1. *General Land Use Measures*

Federally-owned land provides the most obvious example of federal land use activities. Almost one-third of the land in the United States, more than 700 million acres, is public land.[248] Most of this federal land is concentrated in Alaska and eleven Western states; little federal land exists in the East.[249] Although much of this land is under the control of the Bureau of Land Management and the Department of Interior, some seventy separate civilian and military agencies and other government organizations also are instrumental in controlling the public lands.[250] The management policies developed for these lands represent conscious actions designed to develop resources and resolve land use conflicts.[251] For example, a recent federal law established a public land policy that focuses on the management of public lands both to preserve their scientific, scenic, ecological, and environmental values and to satisfy the nation's need for minerals, food, timber, and fiber from those lands.[252] The law requires both the Secretary of the Interior and the Secretary of Agriculture to play major roles in developing and maintaining land use plans for certain public lands. In addition, the law provides guidelines for these administrators in following the statutory mandate.[253]

Federal activities that govern or influence land use are by no means limited to federally-owned lands.[254] Many federal programs apply nationally,

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247. *See supra* notes 205-08 and accompanying text. For recent preemption cases see J. NOWAK, *supra* note 158, at 41 (Supp. 1982).

248. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 10 (1977). *See supra* note 16; Wunderlich, *Landownership: A Status of Facts*, 19 NAT. RESOURCES J. 97, 100-01 (1979).

249. The extent of federal ownership varies from state to state. For example 96% of Alaska is federal land, but in Connecticut, the figure is only .3%. R. JACKSON, LAND USE IN AMERICA 49 (1981). For more information on public lands, see Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C.D.L.REV. 269, 269-72 (1980).

250. R. JACKSON, LAND USE IN AMERICA 48-49 (1981).

251. P. RAUP, *supra* note 241, at 20. *See generally*, Culhane and Friesema, *Land Use Planning for the Public Lands*, 19 NAT. RESOURCES J. 43 (1979).

252. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (1976). The policies are set out in § 102 of the Act, codified at 43 U.S.C. § 1701-82 (1976 & Supp. II 1978). *See* H.R. REP. No. 1163, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6175.

253. Section 202 of the Act, 43 U.S.C. § 1712 (1976). The Act also includes comprehensive provisions for range management (§§ 401-04) and rights of way (§§ 501-11), and designates several specific management areas (§§ 601-03).

254. Other federal programs also affect land use directly, through the acquisition of land

and carry implications for both private and public lands. These programs often constitute indirect controls on land use, controls that are exercised through incentives to state and local governments. As such, they are actually intergovernmental programs, which provide a variety of ways for state and local governments to participate. Among the state and local roles are developing implementation plans, reviewing plans, issuing permits, and enforcing federal standards.[255] A number of these program encourage land use regulation, but mandate compliance only when federal funding is accepted. The availability of federal dollars to state and local programs, however, increases the effectiveness of these federal incentive programs.[256]

Some of the environmental protection laws enacted in the recent past help to illustrate this "quiet federalization of land use controls."[257] The Federal Water Pollution Control Act Amendments of 1972,[258] for example, include a number of provisions that affect land use.[259] The most important of these, section 208,[260] which requires control of nonpoint source water pollution, directs agencies charged with preparing area-wide section 208 plans to specify methods designed to control nonpoint source pollution. In some instances, these methods must include land use requirements.[261] Similarly, the Clear Air Act[262] represents some federal control, albeit indirect, over land use. For example, state plans for attaining and maintaining compliance with federal ambient air quality standards may be required to include methods that control land use.[263] The law contains other provisions that may affect

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for specific purposes. For example both the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-87 (1976 & Supp. II 1978) and the law authorizing the Land and Water Conservation Fund, 16 U.S.C. §§ 460l-5 to 460l-22 (1976 & Supp. V 19891), permit federal acquisition of land for scenic, recreational, and other purposes.

255. LAND USE CONTROLS IN THE UNITED STATES 3 (E. Moss., ed. 1977) [hereinafter cited as LAND USE CONTROLS].

256. R. JACKSON, LAND USE IN AMERICA 60-61 (1981).

257. Hagman, *A New Deal: Trading Windfalls for Wipeouts*, in NO LAND IS AN ISLAND 173 (1975).

258. Pub. L. 92-500, 86 Stat. 816 (1972) (codified in selected sections of 33 U.S.C.); amended by the Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1566.

259. 33 U.S.C. §§ 1252, 1256, 1281, 1288, 1289, 1313 (1976 & Supp. II 1978).

260. *Id.* § 1288. *See generally* March, Kramer, & Geyer, *Nonpoint Source Water Pollution and Section 208 Planning: Legal and Institutional Issues*, 3 AGRIC. L.J. 324 (1981).

261. *E.g.*, 33 U.S.C. § 1288(b)(2)(H) (1976).

262. 42 U.S.C. §§ 7401-7642 (1976 & Supp. I 1977).

263. 42 U.S.C. § 7410(a)(2)(B) (Supp. I 1977). At one time this subsection of the Clean Air Act referred to measures including, but not limited to, "land use and transportation controls." The First Circuit held that the term "land-use" within this subsection included "the types of regulations normally subsumed under zoning and planning devices." South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646, 668 (1st Cir. 1974). Subsequently, Congress amended the subsection to refer to "transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution. . . ." Pub. L. No. 95-95, § 108, 91 Stat. 685, 693 (1977).

The legislative history of the 1977 Amendments suggests that this change was made for

land use.[264]

Another area in which the federal government has accepted a significant role is coastal land management.[265] Indeed, of the numerous federal conservation programs that incorporate procedures combining federal funds and oversight with state implementation,[266] only the federal coastal zone management program actually appears to dictate long-term land use to private landowners.[267] The Coastal Zone Management Act, enacted in 1972 and amended significantly thereafter,[268] authorizes federal financial aid to states

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clarity, rather than to avoid federal involvement in land use. "The House bill deletes the term 'land use' from § 110(a)(2)(B) of the Act, because of its vagueness, and more specifically directs State plans to include air quality maintenance measures, and preconstruction permit requirements to assure compliance with all requirements of the Act." The conference agreement accepted this House provision. H.R. CONF. REP. No. 564, 95th Cong., 1st Sess. 125, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 1502, 1506. The House Report adds that "[e]ven these measures [maintenance plans and preconstruction review] could not be required if a State adopts a plan which is adequate to assure timely attainment and maintenance of the national ambient air quality standards without such measures." H.R. REP. No. 294, 95th Cong., 1st Sess. 16, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 1077, 1094.

264. Four areas affecting land use are outlined in LAND USE CONTROLS, *supra* note 255, at 42: preconstruction review of major new stationary sources of pollution: preconstruction review of direct sources; development of attainment and maintenance plans for ambient air quality: prevention of deterioration of ambient air quality in 'clean air' regions.

265. The primary source of federal authority in the coastal zone management area, as in other areas of federal regulation providing financial incentives, is the spending power of Article I, § 8. Finnell, *supra* note 26, at 247. This article, part of a series on coastal zone management, provides a comprehensive discussion of the federal role in the use of coastal areas.

266. *E.g.*, Air Pollution Prevention and Control Act [Clean Air Act], 42 U.S.C. §§ 7401-7642 (Supp. I 1977); Federal Water Pollution Control Act [Clean Water Act], 33 U.S. §§ 1251-1376 (1976 & Supp. II 1978); Forest and Rangeland Renewable Resources Planning Act, 16 U.S.C. §§ 1600-87 (1976 & Supp. II 1978); and Solid Waste Disposal Act, 42 U.S.C. 6901-87 (1976 & Supp. II 1978).

267. Note that SMCRA, which places no restrictions on postreclamation use of surface-mined land, does not dictate long-term land use. Hodel v. Indiana, 452 U.S. at 330 n.18.

268. 16 U.S.C. §§ 1451-64 (1982). Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280 (1972) (as amended by Coastal Zone Management Act Amendments of 1976, Pub. L. No. 94-370, 90 Stat. 1013 (1976)), and Coastal Zone Management Improvement Act of 1980, Pub. L. No. 96-464, 94 Stat. 2060 (1980).

The Coastal Zone Management Act reflects the congressional finding that the effective management, beneficial use, protection, and development of the "coastal zone" is in the national interest. The "coastal zone" as defined in 16 U.S.C. § 1453(1), means the coastal waters and the adjacent shorelands, strongly influenced by each other and in proximity to the shore lines of the several coastal states; it includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. The "coastal states" are those that border on the Great Lakes, as well as on saltwater bodies. *Id.* § 1453(4).

Although at least one commentator believes it is likely, pursuant to the commerce and supremacy clauses, that Congress would be constitutionally empowered to enact comprehensive land use planning and regulatory programs for a state's coastal zone, Finnell, *supra* note 26, at 236-39, Congress has elected to subsidize direct state coastal zone management programs, so long as they comport with the broad federal guidelines imposed by the CZMA. Finnell, *supra* note 26, at 236-39. This law appears to impose less stringent federal requirements on landown-

for development and implementation of comprehensive land and water use controls, and management plans for coastal zones.[269] Although state participation in the program is optional, the availability of federal funds and the opportunity for the state to influence federal decisions involving its coastal zone encourage states to participate.[270] Despite the participating state's influence, however, the law reserves to the federal government authority over important coastal management decisions.[271]

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ers than does SMCRA, and to leave more regulatory decisions to the states. *See generally*, Finnell, *supra* at 244-45, 280-82.

269. Federal grants are available under the law for the development and implementation of management programs, which must be reviewed and approved by the Secretary of Commerce. 16 U.S.C. § 1454 (1982) The management programs must include (1) a definition of what constitutes permissible land and water uses within the coastal zone that have a direct and significant impact on coastal waters, *id.* § 1454(b)(2); and (2) an identification of the means by which the state proposes to control the permissible land and water uses, including relevant constitutional provisions, laws, regulations, and judicial decisions, *id.* § (b)(4). Although the federal government does not directly regulate land use in CZMA, it seeks to ensure that a state's proposal for coastal zone management is legally enforceable. Particularly because individual property owners may be deprived of certain land uses under CZMA programs, Congress realistically has conditioned funding on some assurance that future litigation will not result in the dismantling of a funded state program.

For a brief explanation of the law see LAND USE CONTROLS, *supra* note 255, ch. 6.

270. After approval of a state plan, federal activities in the coastal area must comport with that state plan. As Finnell indicates, *supra* note 26, at 249 & n.422, five "consistency clauses" provide state influence over federal decisions in the coastal zone. For example, 16 U.S.C. § 1456(c)(1) provides that "[e]ach Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs."

271. *See* Finnell, *supra* note 26, at 249 n.423.

A recent U.S. Supreme Court decision, Sec'y of the Interior v. California, 104 S. Ct. 656 (1984), construed the "consistency requirement" of the CZMA. That provision requires federal agencies that conduct or support activities "directly affecting" the coastal zone to conduct or support those activities in a manner "consistent with" state management programs. 16 U.S.C. § 1456(c)(1) (1982).

The case arose from the Department of the Interior's sale of oil and gas leases on the outer continental shelf (OCS) off California's coast. The district court had believed that a federally-approved state coastal zone management program could not be undermined by the Department of the Interior's interest in leasing oil drilling sites on the OCS without prior state approval. California v. Watt, 520 F. Supp. 1359 (C.D. Cal. 1981), *modified on other grounds*, 668 F.2d 1290 (9th Cir. 1981), 683 F.2d 1253 (9th Cir. 1982), *reversed*, 104 S. Ct. 656 (1984). The Ninth Circuit, affirming the district court in part, agreed that leases could not be sold without a determination of consistency with the state plan, but would not agree that the federal lease sale had to be consistent. 683 F.2d at 1267. The Ninth Circuit had affirmed the intent on Congress, in 16 U.S.C. § 1451(i), that states are to exercise their full authority over the lands and waters of their coastal zones under the CZMA, regardless of the contrary interests of federal agencies. The Supreme Court agreed to review the narrow issue of whether the lease sale is subject to the consistency provision. *See* Comment, *CZMA Consistency and OSC Leasing*, 13 ENVTL L. REP. 10,266 (Sept. 1983).

The Supreme Court held that the sale of OCS leases is not an activity that directly affects the coastal zone; thus, no pre-sale consistency review is required. 104 S. Ct. at 672. Although

A related federal program, which affects coastal as well as other areas, focuses on the control of flood plains.[272] The National Flood Insurance Act of 1968 had, as a prerequisite to participation, the requirement that communities adopt satisfactory land use controls to regulate development within flood hazard areas.[273] The 1973 amendments to this law conditioned federal financial assistance for property acquisition or construction in areas of flood hazard for which insurance is available on participation in the flood insurance program.[274] Through this legislation, the federal government intended to encourage state and local governments to make land use adjustments to constrict development in flood plains and minimize flood damage.[275] Criteria for state and local measures have been prescribed, and these impose specific land use requirements.[276]

Other federal programs are more direct.[277] By their very existence, they

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the CZMA does not explain what activities directly affect the coastal zone, the Court looked to the legislative history, *id.* at 661-66, and the purposes, *id.* at 666-68, of the CZMA to determine that Congress did not intend the consistency clause to reach lease sales on the OCS (that is, beyond the coastal zone). Also, because mere sale of the lease did not include permission to explore or produce (activities for which the consistency review requirements clearly do apply, 16 U.S.C. § 1456(c)(3)(B)), the sale could not be characterized as directly affecting California's coastal zone. 104 S. Ct. at 671-72. Four justices dissented, *id.* at 672-89 (Stevens, J. dissenting)

Although other Congressional legislation has the objective of preserving and protecting the nation's resources, only the CZMA was explicitly intended to encourage the active participation of state and local governments. California v. Watt, 520 F. Supp. at 1374. *Cf.*, Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1801-66 (Supp. II 1978); National Environmental Policy Act, 42 U.S.C. §§ 4321-69a (1976 & Supp. IV 1980); Endangered Species Act, 16 U.S.C. §§ 1531-43 (1982); and the Marine Mammoral Protection Act, 16 U.S.C. §§ 1361-1407 (1982); with the CZMA, 16 U.S.C. §§ 1451-64 (1982).

272. The National Flood Insurance Act, as amended by the Flood Disaster Protection Act of 1973, 42 U.S.C. §§ 4001-4128 (1976). *See generally*, Holmes, *Federal Participation in Land Use Decisionmaking at the Water's Edge—Floodplains and Wetlands*, 13 NAT. RESOURCES LAW. 351 (1980); Baram & Miyanes, *Managing Flood Risk: Technical Uncertainty in the National Flood Insurance Program*, 7 COLUM. J. ENVTL. L. 129 (1982).

273. 42 U.S.C. §§ 4022, 4102 (1976).

274. *Id.* §§ 4012a, 4022 (1976).

275. *Id.* §§ 4001(e)(1), 4102(c)(1)(3) (1976).

276. 44 C.F.R. §§ 59.1, 60.1 (1982).

See also the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-87 (1982). This law, in particular, authorizes federal guidelines for local zoning ordinances for lands contiguous to a river subject to protection under the law. *Id.* § 1277(c).

277. One example of direct federal regulation of private land involves the Sawtooth National Recreation Area in Idaho. The law establishing the area, 16 U.S.C. §§ 460aa-460aa-14 (1982), gives the Secretary of Agriculture power to promulgate regulations "setting standards for the use, subdivision, and development of privately owned property within the boundaries of the recreation area." *Id.* § 460aa-3. This law permits a federal agency to impose zoning-like restrictions on private land. Among the guidelines proposed for private property are the use of post and pole fences instead of barbwire; subdued colors like brown, gray, and tan; replacement of sheet metal roofs. *Id.* The law met resistance from municipal and county governments as well as private landowners. R. JACKSON, LAND USE IN AMERICA 52 (1981). *See also Sawtooth National Recreation Area: Hearings on S. 1407 and H.R. 6957 Before the Subcommittee on*

affect land use dramatically. An obvious example is the federal involvement in transportation facilities. The extensive system of federal-aid highways[278] has consumed vast areas of land. Approximately twenty-six million acres of land are devoted to transportation systems.[279] Although not all of these systems are federally supported, those that are account for a large number of these acres. One mile of interstate highway, for example, can require up to forty-eight acres of land.[280] These highways lead indirectly to other federally-influenced land use changes, because of their tendency to encourage more intensive land development in areas remote from urban centers.[281]

The Surface Mining Control and Reclamation Act[282] must be included with federal laws that affect land use. In contrast to federal highway development, characterized as a direct federal land use involvement that consumes land, SMCRA has the goal of preserving land. It attempts to strike a careful balance between ensuring the development of coal resources and preventing environmental degradation and between federal and state participation. The scope of the law is broad for it applies to coal in any ownership. Its prescriptions are detailed, almost like regulations, and leave little discretion for the Secretary of the Interior.[283] The Act represents Congress's determination to exercise, wherever necessary, "the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations."[284] Like the federal laws discussed below, SMCRA affects agricultural land.

2. *National Land Use Policy Legislation: A Failed Attempt*

Although a number of federal programs affect, and sometimes protect, the nation's land resources, little coordination of these programs seems to exist. Each program appears directed toward one specific land resource, and

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Parks and Recreation, 92d Cong., 2d Sess. (1972); S. REP. No. 797, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3013.

278. 23 U.S.C. §§ 101-151 (1976 & Supp. II 1978). *See* LAND USE CONTROLS, *supra* note 255 ch. 10.

279. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: THE FIFTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 39 (1974).

280. *Id.* Generally, a freeway right of way consumes between 30 and 45 acres per mile, and interchanges (which are located every 2 to 7 miles in rural areas) require approximately 40 acres. For detailed information *see* Schmidt, *Freeway Impact on Agricultural Areas*, 20 NAT. RESOURCES J. 587, 588 (1980).

281. *See* P. RAUP, *supra* note 241 at 16-17, who observes:

> The obvious land-use dimension of federal grants-in-aid of highways has been use of the taxing power to create new wealth in land. The hidden dimensions has been the creation of an asymmetrical transfer mechanism that shifts income from highway users to landowners and generates a derived demand for federal aid to deteriorating central cities.

282. 30 U.S.C. §§ 1201-1328 (Supp. III 1979).

283. Ferguson, *Impact of New Legislation*, *supra* note 86 at 257, 264.

284. 30 U.S.C. § 1202(m) (Supp. III 1979).

no comprehensive plan unifies these disparate federal land programs. During the environmentally-sensitive early 1970s, when many of the federal laws just mentioned were passed, Congress also considered the enactment of a rather comprehensive land use policy law.[285] Between 1970 and 1975, approximately forty national land use policy bills were introduced into Congress.[286] These bills, which varied in detail but were quite similar in substance, were intended in part to coordinate federal programs affecting land use. The various laws would have established planning and regulation procedures, and provided federal financial aid to the states as an incentive to wise planning. Although no national land use law ever passed both houses of Congress, the bills aroused substantial debate and enhanced awareness of the nation's land resources.[287]

Proponents of a federal land use law argued that, amidst the multitude of governmental activities that influence land use, no federal framework existed to ensure that the work of local, state, and national governments and agencies would be coordinated.[288] Moreover, they believed that local government control of planning often led to lack of understanding or concern with environmental effects of land use decisionmaking.[289] Thus, the proponents believed a more centralized system of decisionmaking was necessary. The bills introduced and debated in Congress, however, did not fully address these perceived problems. The bills were largely devoid of true policy; instead they focused on planning and regulatory procedures. In addition, they espoused planning activity that was not truly national; rather, they proposed federal funds for state planning. Their provisions did not pretend to solve pressing land use problems like urban sprawl and conversion of agricultural land.[290]

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285. *See* R. HYMAN, NATIONAL LAND USE POLICY LEGISLATION: A BIBLIOGRAPHY (1979), for an extensive listing of the bills introduced, their legislative history, and relevant literature. *See also* Johnson, *Land Use Planning and Control by the Federal Government*, in NO LAND IS AN ISLAND 75 (1975); Udall, *Land Use*, *supra* note 12; N. LYDAY, THE LAW OF THE LAND: DEBATING NATIONAL LAND USE LEGISLATION 1970-75 (1976); C. LAMB, LAND USE POLITICS AND LAW IN THE 1970's at 36-54 (1975).

286. *See* R. HYMAN, *supra* note 285, at 2-3.

287. Senator Jackson introduced a bill in 1970, S. 3354, 91st Cong., 2d Sess. (1970), reintroduced in 1971, S. 632, 92d Cong., 1st Sess. (1971). Jackson's bill emphasized planning, and would have provided federal funds to states for planning and classifying land use. Later the Nixon administration introduced a bill with a more regulatory orientation, which required states to develop a planning process, and then a regulatory program. S. 992, 92d Cong., 1st Sess. (1971). A compromise bill passed the Senate S. 632, 92d Cong. 1st Sess. at 118 CONG. REC. 31,186-92 (1972). The bill did not reach a vote on the House floor. The Senate also passed S. 268, 93d Cong., 1st Sess. (1973). In 1974, the House narrowly defeated a weakened version of the bill. H.R. 10,292, 93d Cong., 2d Sess. (1974).

See Reilly, *New Directions in Federal Land Use Legislation*, 331, 350-57 in LAND USE CONTROLS: PRESENT PROBLEMS AND FUTURE REFORM (D. Listokin, ed. 1974).

288. Udall, *supra* note 12, at 60.

289. *Id.* at 59.

290. R. HYMAN, *supra* note 285, at 4.

The proposed laws faced insurmountable problems. Among the more significant were the longstanding tradition of local regulation of land use decisionmaking[291] and the related fear that a federal land use law would lead to "federal zoning."[292] Another difficulty was the language of the bills themselves; they did not provide criteria or standards to establish whether a parcel of land should be developed.[293] Another problem was the belief held by some that central land use planning, relatively untried in the United States, would be effectual.[294] Others feared that national land use planning would compromise private property rights.[295] In addition, the bills faced substantial opposition from effective lobbying groups.[296] Eventually this opposition, together with the ideological and practical problems inherent in the bills themselves, led to their defeat.

3. *Federal Actions Affecting Farmland*

As this brief overview has indicated, the federal government sponsors a number of programs that affect land use directly or indirectly. In addition to its involvement in general issues affecting land use, the federal government has played a role in the area of farmland, in particular. This role has been enhanced recently by enactment of the Farmland Protection Policy Act, which will be discussed below.[297] A number of federal programs and policies, however, carry implications for both the conversion and the preservation of agricultural land. Moreover, these implications are evident in laws directed, in the main, toward purposes other than farmland protection. Examples of programs that protect and tend to convert farmland illustrate this federal involvement. Following these examples is a brief discussion of the Farmland Protection Policy Act.[298]

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291. R. JACKSON, LAND USE IN AMERICA 214 (1981).

292. *See* N. LYDAY, *supra* note 282, at 50.

293. Johnson, *supra* note 285, at 79-80; R. LINOWES & D. ALLENSWORTH, THE POLITICS OF LAND-USE LAW: DEVELOPERS VS. CITIZENS GROUPS IN THE COURTS 2 (1976). These authors noted that the proposed laws referred to controls to be exercised in critical areas, but provided no way to determine what a critical area was, and no way to limit the controls exercised. *Id.*

294. R. LINOWES & D. ALLENSWORTH, THE POLITICS OF LAND-USE LAW, *supra* note 293, at 1:

> [C]entral planning . . . does not work and . . . there is no experience to date that would justify the proponents' claims to the contrary. Central planning in the United States has been weak at best, having been tried in only a few places, and there is no reason to assume the situation would change because of a new law approved by Congress.

295. *See, e.g.*, N. LYDAY, *supra* note 285, at 51; Johnson, *supra* note 285, at 76. Johnson also argued that the proposed laws neglected to consider the issue of externalities. *Id.* at 77-86.

296. R. JACKSON, LAND USE IN AMERICA 214 (1981).

297. 7 U.S.C. §§ 4201-09 (Supp. V. 1981). *See infra* text accompanying notes 342-58.

298. At this juncture, it is important to note that most farmland is privately owned. Boxley, *supra* note 240, at 161. About 99% of the cropland, and three-fifths of pasture and rangeland is privately owned, according to statistics that Boxley cites. The 1974 Census of Agri-

a. Federal Protection

A few federal statutes approach the issue of farmland protection more or less directly, with provisions that require federal agencies to gear their actions in some way toward agricultural land, particularly, "prime farmland." The Surface Mining Control and Reclamation Act is a recent example of this approach.[299] The Rural Development Act of 1972[300] recognizes the "increasing need for . . . identification of prime agricultural producing areas that should be protected."[301] Accordingly, it directs the Secretary of Agriculture to inventory and monitor land use changes and trends, degradation of the environment resulting from improper soil use, and related environmental agricultural problems. Soil, water, and related resource conditions are to be reflected in reports issued regularly.[302] A related law, enacted more recently, is the Soil and Water Resources Conservation Act of 1977.[303] Its provisions direct the Secretary of Agriculture to carry out a continuing appraisal of the nation's soil, water and resources.[304] It encourages the fullest use of the cooperative arrangements between the federal government and state soil and water conservation agencies, including cooperative data collection and appraisal, and authorizes a program directed toward soil and water conservation.[305] In addition, the National Environmental Policy Act of 1969 (NEPA)[306] requires that environmental reviews and impact statements prepared for federal projects consider prime farmland.[307]

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culture indicated that 2.3 million farm operators, slightly more than 2 million owned some land.

Thus, federal actions that affect farmland may have direct significance for concepts of ownership that have long been part of this nation's history. *See generally*, Braden, *supra* note 19; Bock, *The Expanding Public Interest in Private Property*, 29 J. SOIL & WATER CONSERV. 109 (1974).

299. See *supra* text accompanying notes 103-28 for a discussion of the Act's approach to prime farmland preservation.

300. Pub. L. No. 92-419, 86 Stat. 670 (1972).

301. 7 U.S.C. § 1010a (1982).

302. *Id.*

303. Pub. L. No. 95-192, 91 Stat. 1407 (1977) (codified at 16 U.S.C. §§ 2001-09 (1982)).

304. 16 U.S.C. § 2004 (1982). The legislative history of the Soil and Water Resources Conservation Act of 1977 indicates that the law "is not, nor is it intended to be, a land use control bill." H.R. REP. 95-344, 95th Cong., 1st Sess. 7, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 3670, 3673.

305. 16 U.S.C. §§ 2003(b), 2005 (1982). Despite the significance of this law for agricultural resources, however, its policies are directed more to soil conservation than to preservation of farmland.

306. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321, 4331-35, 4341-47, 4361 (1976)).

307. 42 U.S.C. § 4332 (1976). *See* PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 48.

NEPA requires an environmental impact statement for "legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1976). One of the factors to be included is the presence of "any irreversible and irretrievable commitments of resources." *Id.* § 4332(2)(C)(v). The National Planning Association notes that a consideration of land use is implied, but would prefer a more explicit require-

With the exception of SMCRA, however, these statutes do not directly affect the uses and the ultimate preservation of prime farmland. Instead, they prescribe only that the nation's agricultural resources be studied and inventoried, and that the effects of federal projects on prime farmland be considered. And as a recent federal government study indicates, mere consideration of the effects on farmland does not guarantee preservation. A review of environmental impact statements and other environmental review documents for twenty-five projects of five agencies illustrated that the agencies actually gave little consideration to preserving farmland. That goal, often given low priority, generally was outweighed by other considerations,[308] such as the perceived need for housing or for additional highway construction.

In the face of the relative paucity of federal programs with provisions that require preservation of prime farmland, some federal councils and agencies began to emphasize the importance of those lands and to encourage serious consideration of the effects of proposed programs on them.[309] The President's Council on Environmental Quality, for example, issued an administration-wide policy that directed heads of administrative agencies to consider the loss of prime and unique farmland as part of the preparation of environmental impact statements under NEPA. It required efforts to assure that farmlands not be converted unless other national interests override the importance of preservation or outweigh the environmental benefits of farmland protection.[310] This policy directive was issued in 1976 and later updated.[311]

Individual administrative agencies also have implemented farmland preservation policies. The United States Department of Agriculture, predictably, is one of the most active in this area. As late as 1974, however, researchers within USDA compiled reports that acknowledged continuing farmland losses, but minimized the problems that these losses created.[312] Shortly thereafter, the agency began to take more seriously the importance of retaining agricultural lands.[313] In 1976, the Secretary of Agriculture re-

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ment to take land use into account. *NPA Statement*, *supra* note 241, at iv.

308. PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 35-40.

309. For an overview of administrative agency action, *see* Dunford, *The Evolution of Federal Farmland Protection Policy*, 37 J. SOIL & WATER CONSERV. 133 (1982).

310. PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 35, 40.

311. NALS FINAL REPORT, *supra* note 1, at 75. The final report, at 75-76, notes that two other policies indirectly protect agricultural lands by focusing federal assistance for urban growth in urban centers where no agricultural land conversion would occur. These are the President's Small Community and Rural Development Policy, and the Presidential Memorandum on Community Conservation Guidance.

312. *See, e.g.*, ECONOMIC RESEARCH SERVICE, U.S. DEP'T OF AGRIC., FARMING IN THE CITY'S SHADOW (AGRICULTURAL ECONOMICS REPORT No. 250) (1974); ECONOMIC RESEARCH SERVICE, U.S. DEP'T OF AGRIC., OUR LAND AND WATER RESOURCES (Miscellaneous Pub. No. 1290) (1974). Both are cited in PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 6.

313. A 1975 seminar on the retention of prime farmland recommended that the USDA

vealed a land use policy that urged major consideration of prime lands and the need to retain maximum agricultural productivity. To that end, the policy statement provided that "USDA will urge all agencies to adopt the policy that Federal activities that take prime agricultural land should be initiated only when there are no suitable alternative sites and when the action is in response to an overriding public need."[314] The policy requested USDA agencies to ensure that environmental impact statements considered prime farmland, and to make their own programs consistent with the goal of preserving prime farmland.[315] In 1978, the policy statement was strengthened and USDA agencies were directed to increase assistance for local efforts to preserve farmland. In addition, the agencies were directed to change their programs to minimize irreversible land conversion and to intercede in land-converting programs of other federal agencies.[316] In 1982, a new memorandum, issued in response to the Farmland Protection Policy Act, set forth a new policy statement on land use.[317]

Likewise, the Environmental Protection Agency has an explicit policy designed to protect environmentally significant agricultural land. This policy, adopted in 1978, dictates a large-scale effort to protect farmland. It includes requirements of support and technical assistance for state and local farmland preservation projects; consideration of farmland in a number of programs including air and water pollution, water quality management, and solid waste disposal; additional research; and increased public awareness.[318] Other agencies, including the Department of Housing and Urban Development and the Department of Transportation, have farmland conservation policies under formulation. Despite these policies, many subunits and field programs of the agencies have not yet incorporated the policies into their

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take a major role in enhancing and retaining agricultural lands. *See* USDA, RECOMMENDATIONS ON PRIME LANDS 17-20 (1975); PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 6.

314. PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 7.

315. *Id.* at 7. In testimony delivered in 1977, an official of USDA stated that "The retention of America's prime farmlands in production may well be the most important land resource issue to face this Nation now and in the future. . . . For many reasons—economic, social, environmental—we must place our concern for the future of the Nation's Prime farmlands at the top of our priority list." *National Agricultural Land Policy Act: Hearings on H.R. 4569 before the Subcommittee on Family Farms, Rural Development, and Special Studies, House Committee on Agriculture*, 95th Cong., 1st Sess. Series No. 95-L at 49-62 (June 15 & 16, 1977) (Testimony of USDA Assistant Secretary for Conservation, Research and Education.), *quoted in* PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 8-9.

316. PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 9; Secretary's Memo No. 1827, Revised, October 30, 1978.

This memorandum and No. 1807, Revised (Dec. 14, 1977) have been superseded by Memorandum No. 9500-2 (Mar. 10, 1982).

317. Memorandum No. 9500-2 (Mar. 10, 1982), issued by John R. Block, Sec., U.S. Dep't of Agric. *See infra* note 357.

318. PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 41-42; U.S. ENVIRONMENTAL PROTECTION AGENCY, POLICY ON AGRICULTURAL LANDS, September 8, 1978.

guidelines.[319]

Another indication of federal interest, albeit not control, of agricultural land is the National Agricultural Lands Study completed in 1981. Sponsored by the Department of Agriculture and the Council on Environmental Quality, this study represents a major effort to determine the availability of agricultural land, the extent and causes of its conversion, and the ways in which conversion might be avoided. The study resulted in a number of interim reports, technical papers, guidebooks, and a final report. It also developed recommendations for the preservation of agricultural land, including some directed at national policymakers and federal agencies. These recommendations include a presidential or Congressional statement of policy; positive incentives within federal programs to avoid nonfarm use of good agricultural land; the required adoption of an agricultural land policy within each federal agency whose programs result in farmland conversion; interagency monitoring of agricultural land policies; coordination of single-purpose federal assistance program with state or local planning efforts; and tax provisions that do not favor conversion of agricultural land.[320]

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319. NALS FINAL REPORT, *supra* note 1, at 49, 76.

Another area in which agricultural land preservation had to be considered was the A-95 review process designed to ensure regional coordination of projects involving federal funds or programs. The A-95 review process was in part a product of the Intergovernmental Cooperation Act of 1968. Pub. L. 90-577, 82 Stat. 1098 (codified at 42 U.S.C. §§ 4201-44 (1976)). In part, that Act provides that "[t]o the maximum extent possible, consistent with national objectives, all Federal aid for development purposes shall be consistent with and further the objectives of State, regional, and local comprehensive planning." *Id.* § 4231(c). *See* Memorandum of November 8, 1968, 33 Fed. Reg. 16,487 (1968).

Under the A-95 process, state and local government agencies requesting aid in over two hundred programs submitted applications to state and local clearing houses. These clearing houses circulated the applications for review and comment to interested agencies. Technically these reviews, which considered the applications for consistency with already-existing comprehensive plans, were to consider farm preservation goals. *See* Keene, *supra* note 24, at 123 & n.6; *see also* OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-95 REVISED (1971).

Evidently, most agencies relied on this A-95 process to assess the impacts of projects on agricultural land. Because "agricultural land review and protection are not specifically included in the A-95 reviews," even when such inclusion might be appropriate, "the A-95 process appears to be of limited value in identifying adverse agricultural land impacts." Mierzwa and Hiemstra, *Federal Programs Affecting Agricultural Land Availability* in AGRICULTURAL LAND AVAILABILITY, *supra* note 3 at 347, 374. For a discussion of the scope and efficacy of A-95 review, *see* Reilly, *New Directions in Federal Land Use Legislation*, *supra* note 287, at 339-47.

Effective April 30, 1983, the A-95 process has been rescinded. Exec. Order No. 12,372 (1982), 3 C.F.R. 197 (1982). The Order attempts to foster strengthened federalism by relying on state and local processes for coordination and review of federal financial assistance and development. It suggests that states consult with local governments in establishing review processes and instructs federal agencies to comply with these state processes insofar as possible.

320. NALS FINAL REPORT, *supra* note 1, at 88-91. The Final Report includes a list of NALS Publications.

b. Federal Encouragement of Conversion

In distinct contrast to federal programs to protect farmland and federal policies urging its conservation, a number of federal programs take farmland directly to fulfill their purposes or encourage its conversion through their projects.[321] Among these are programs involving housing, economic development, capital improvements, natural resource development, or environmental protection.[322] Highway construction provides an example of federally-financed developments that consume large amounts of farmland,[323] as do housing projects administered primarily in the Department of Housing and Urban Development.[324] The Corps of Engineers also proposes and completes projects such as lakes that often consume large tracts of agricultural land. Other federal projects take only a small amount of agricultural land themselves, but encourage other development (for example, housing) that requires farmland. Waste water disposal facilities sponsored by the EPA and rural water or sewer systems financed by the Farmers Home Administration (FmHA) are examples.[325] Still other federal programs may not involve the land physically at all, but nevertheless encourage conversion of farmland to other uses. One such example is the income tax incentive for home ownership, an incentive that encourages housing investment and often results in housing development in previously rural areas.[326] A recent government study

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321. *See generally* Mierzwa and Hiemstra, *Federal Programs Affecting Agricultural Land Availability*, *supra* note 319.

A survey carried out by the National Association of Conservation Districts indicates that officials of conservation districts recognize significant federal contributions to farmland conversion. Of the 775 districts that characterized their farmland conversion problems as serious or very serious, 54% said federal actions were a significant or a major cause of the conversion. The federal agencies most often named were FmHA, Federal Highway Administration, Corps of Engineers, and Environmental Protection Agency. NATIONAL ASSOCIATION OF CONSERVATION DISTRICTS, THE CONVERSION OF AGRICULTURAL LAND: A LOOK AT THE ISSUES BY CONSERVATION DISTRICT OFFICIALS, PRELIMINARY REPORT 4, 6 (1979).

322. For a brief discussion of these programs *see* NALS FINAL REPORT, *supra* note 1, at 48-50; PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 36-40.

323. *See supra* note 280 and accompanying text.

324. PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 36-38.

325. Recently, two FmHA water development projects in South Dakota were challenged, in part because of their role in encouraging urban sprawl and destroying the productivity of prime farmland. Sierra Club v. Cavanaugh, 447 F. Supp. 427 (D.S.D. 1978).

See also Lundeen, *Rural Water Systems and Land Use*, in NORTH CENTRAL REGIONAL CENTER FOR RURAL DEVELOPMENT, LOCAL AGRICULTURAL LAND POLICIES: CASES FROM THE MIDWEST 170, 180-82 (1981); Anthan, *How U.S. policies help gobble up the farmland, Vanishing Acres*, The Des Moines Register, July 12, 1979.

Congress recently enacted a law designed to discourage the use of prime farmland for FmHA projects. Pub. L. No. 97-35, § 160(a)(4), 95 Stat. 357, 376 (1981). This section provides that interest rates on loans made after Sept. 30, 1981 for FmHA projects are to be increased by 2% if projects involve the use of prime farmland, when other site options exist. *Id.* Prime farmland is defined in accordance with 7 C.F.R. § 657.5(a)(b) (1983).

326. For a discussion of income tax incentives to homeownership, see GENERAL ACCOUNT-

has indicated that federal projects usually do not fail because their implementation involves conversion of prime farmland. Instead, the achievement of other objectives takes precedence, and the agricultural land is converted to nonagricultural use.[327]

As these examples illustrate, federally-sponsored programs have demonstrated ambivalence about the importance of preserving agricultural land in agricultural uses. In some instances this ambivalence results from the very nature of the federal projects, especially those that do require vast areas of land. In others, the programs of an agency subunit may conflict with the agency's formal policy on preserving farmland. This has occurred, for example, with FmHA, which is responsible for supporting projects like rural water supply facilities that often lead to increased development in rural areas.[328] Occasionally different agencies may be working at cross purposes within a single area. HUD, for instance, may foster housing development contiguous to existing municipalities to avoid farmland conversion, while FmHA finances rural housing developments that take more farmland.[329]

What these federal programs have lacked is a sense of coherence. The "proliferation of federal programs and lack of meaningful coordination in federal decisionmaking are difficult obstacles to solving local land use problems."[330] In addition, no effective intergovernmental mechanism for settling conflicts has existed.[331] Moreover, no effective national policy or set of objectives has ensured the optimal use of land, especially prime agricultural land.[332]

ING OFFICE, EFFECTS OF TAX POLICIES ON LAND USE (CED-78-97) 29-34 (1978). One writer commented that federal tax policy "has powerfully augmented the conversion of farmland to residential uses." P. RAUP, *supra* note 241, at 6. *See also* RAUP, *Urban Threats to Rural Lands: Background and Beginnings*, 41 J. AM. INST. PLANNERS 371, 373 (1975).

See EFFECTS OF TAX POLICIES ON LAND USE, *supra* for a brief discussion of the effect of estate tax on farmland and the aid to retention of farmland provided by I.R.C. §§ 2032A, 6166 (1982).

327. PRESERVING AMERICA'S FARMLAND, *supra* note 8. This study reviewed 25 projects from 5 Federal agencies to reach its conclusions.

328. In March 1977, FmHA published proposed regulations that protected prime agricultural lands. The proposed regulations specified that FmHA could approve programs irrevocably using these lands only when no suitable alternative sites were available and when the project responded to an overriding public need. 42 Fed. Reg. 11,841 (1 March 1977). These proposed regulations never became effective. Evidently, however, FmHA has taken steps to ensure that its programs comply with the USDA's statement on land use policy. Letter from David G. Unger, USDA, in PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 67. And in Illinois, FmHA has helped the state department of agriculture develop criteria for determining the impact of certain federal programs on agricultural lands, as an element of the state's A-95 review process. *But see supra* note 319; NALS, FINAL REPORT *supra* note 1, at 76; *see also supra* note 325.

329. PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 52.

330. Udall, *supra* note 12, at 63.

331. *See also* P. RAUP, *supra* note 241, at 26-27.

332. Moreover, the attitude of federal agencies does not seem optimistic. The GAO stated that "[f]ederal agencies lack the authority to insure the retention of privately owned farmland,

4. *The Farmland Protection Policy Act*

The lack of a coherent national policy to protect farmland did not remain unnoticed. Less than a year after both CEQ and USDA issued policy memoranda focusing on farmland preservation,[333] several bills directed specifically toward farmland protection were introduced in Congress. The 95th Congress considered nine bills that would have established a national agricultural land policy and articulated a federal role in advancing that policy.[334] Although none of the bills passed, the concept was not defeated. The 96th Congress also saw the introduction of farmland protection bills. Most important among these was H.R. 2551,[335] the Agricultural Land Protection

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but they can review or revise their own activities which take or encourage the taking of prime and other farmland." As the Secretary of Agriculture testified in 1977, "[t]he best we [USDA] can do is to identify our prime agricultural land and encourage those in decisionmaking positions to maintain that land in agricultural uses." PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 35.

333. *See supra* text accompanying notes 310-15.

334. PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 49-51; Dunford, *supra* note 309, at 134-35.

These bills, similar in language and intent, recognized the importance of agricultural productivity to the economy, environmental quality, human health and welfare, and national leadership in food production; they declared it the policy of the federal government, in cooperation with the states and their subdivisions, to "use all practicable methods to retain, protect, and improve agricultural land. H.R. 5882, 95th Cong., 1st Sess. § 101(a) (1977). To advance this policy, the bills would have given the federal government responsibility to reduce the conversion of agricultural land to nonagricultural uses; limit the encroachment of industrial activities that deprive croplands of water or reduce yield by air pollution; encourage the optimum use of agricultural land for maximum yields; include an assessment of the effects of major federal actions on agricultural land in environmental impact statements required under NEPA; inventory and evaluate farmland on a continuing basis; cooperate with states in protecting agricultural land; and require all activities carried out by the United States to be coordinated to protect agricultural land. *Id.* § 101(b). The proposed laws included programs to implement these policy goals. Among the programs included were the establishment of an agricultural land review commission, and a program providing technical and financial assistance to states for carrying out pilot farmland preservation projects.

Hearings on the bills were held. *See, e.g., National Agricultural Land Policy Act: Hearings on H.R. 5882 Before the Subcomm. on Family Farms, Rural Development, and Special Studies of the House Comm. on Agriculture*, 95th Cong., 1st Sess. (1977). Hearings were also held on S. 1616. PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 51.

One commentator stated:

> Perhaps the most apt way to sum up is that agricultural land retention legislation is the wrong thing at the wrong time and for the wrong reasons. The number of people clamoring for enactment and the power of the governmental agencies supporting the idea do not alter this basic conclusion.

Gardner, *The Economics of Agricultural Land Preservation*, 59 AM. J. AGRIC. ECON. 1026, 1035 (1977).

335. H.R. 2251, 96th Cong., 1st Sess. (1979). This bill included three major provisions: a long-term study of the causes and impact of the loss of agricultural land; a program providing financial and technical assistance to state and local governments for the development of innovative approaches to farmland conservation; and a directive that federal agencies were to ad-

Act, which, as one commentator noted, caused the House to treat seriously for the first time the idea that America's agricultural land base is limited.[336] This bill, like others introduced in the 96th Congress, was defeated.[337] Perhaps the time was not right for agricultural land protection legislation. Only six months before the defeat of H.R. 2551, the Administration had authorized the expensive National Agricultural Lands Study, scheduled for completion in 1981.[338] The results of that study, it may have been thought, would verify the need for federal farmland legislation and help define the most useful parameters for any law to be enacted. Other factors also made this Congress reluctant to pass legislation to protect farmland.[339]

By the time the 97th Congress was in session, the National Agricultural Lands Study (NALS) had been completed. Its findings indicated that the nation's farmland is being converted to nonagricultural uses at a significant rate and that the cumulative loss of cropland could seriously increase the economic and environmental costs of producing food and fiber during the next twenty years.[340] The publication of the NALS documents, as well as public interest in the issue of farmland protection, in part prompted the Senate and House Agriculture Committees and the Administration to include agricultural land protection provisions in their versions of the 1981 Agriculture and Food Act.[341] Provisions in the Senate bill included mandatory requirements (perceived to create disruption of federal pro-

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minister programs and actions to be consistent with state and local farmland preservation policies. *See* Dunford, *supra* note 309, at 135; Little, *Demise of the Agricultural Land Protection Act: Some Optimism in Defeat*, 35 J. SOIL & WATER CONSERV. 99, 99 (1980).

336. Little, *supra* note 335, at 99.

337. The House Agriculture Committee approved the bill in November 1979; the full House defeated the bill in February 1980. The Senate Bill, S. 795, did not clear the Senate Agriculture Committee, in part due to a hesitation to enact legislation prior to the completion of the National Agricultural Lands Study and a concern that the law would result in federal land use legislation. Dunford, *supra* note 309, at 135.

338. Little, *supra* note 335, at 99.

339. For example, amendments of the original bill during the legislative process may have lost support for the legislation. Dunford, *supra* note 309, at 135. Funds for demonstration projects developed by state and local governments were removed from the bill, as was the "consistency requirement," which mandated that federal programs be consistent with state and local policies.

Political reasons also may have been influential, with Congress reluctant to enact nonemergency legislation, especially legislation slated to cost 60 million dollars. Little, *supra* note 335, at 99. The bill also lacked support from potentially influential agencies and lobbying groups. *Id.* The American Farm Bureau Federation, for example, withdrew its support, and the Office of Management and Budget prevented USDA from supporting the bill. Yet another problem was fear that the financial assistance provided by the proposed legislation would result in federal interference with land use decisions.

340. NALS FINAL REPORT, *supra* note 1, at 8-10.

341. Pub. L. No. 97-98, 95 Stat. 1213 (1981); *see* 127 CONG. REC. E5668 (daily ed. Dec. 8, 1981) (memorandum of John McClaughry to the Cabinet Council on Food and Agriculture of Aug. 14, 1981, included by Rep. Brown).

grams), while the other two bills required administrative agencies to be increasingly sensitive to the issue of farmland preservation.[342] In the summer of 1981, both the Senate and the House Agriculture Committees approved the farmland protection provisions of their versions of the farm bill; these bills were passed by the full House and Senate in the fall.[343] The Conference Committee essentially adopted the House version of the provisions.[344] The Farmland Protection Policy Act, included in Title XV of the Agriculture and Food Act of 1981, was signed into law on December 22, 1981.[345] It became effective in June 1982.[346]

In enacting the farmland protection subtitle of the farm bill, Congress recognized both that the nation's farmland is a unique natural resource, gradually being converted irrevocably to nonagricultural use, and that the continued decrease in the nation's farmland base may threaten the ability to meet domestic and export food and fiber needs, as well as undermine the economic base of many rural areas.[347] Congress also recognized that federal actions result in the conversion of farmland[348] and that federal agencies (led by USDA) should prevent federal government actions from converting farmland to nonagricultural uses in situations in which other national interests do not outweigh the policy of protecting farmland.[349] Based on these findings, Congress articulated the dual purposes of the Act:

> [t]o minimize the extent to which Federal programs contribute to the unnecessary and irreversible conversion of farmland to nonagricultural uses, and to assure that Federal programs are administered in a manner that, to the extent practicable, will be compatible with State, unit of local government, and private programs and policies to protect

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342. 127 CONG. REC. E5668 (daily ed. Dec. 8, 1981).

343. *See* Dunford, *supra* note 309, at 135-36.

344. H.R. REP. No. 377, 97th Cong., 1st Sess. 264-65, *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 2250, 2361-62.

345. Pub. L. No. 97-98, §§ 1539-49, 95 Stat. 1213, 1341-44 (1981) (codified at 7 U.S.C. §§ 4201-09).

346. *Id.* § 1549.

347. 7 U.S.C. § 4201(a)(1)-(4) (1982).

348. *See supra* text accompanying notes 321-29. The legislative history of the Act demonstrates a recognition of federal effects on agricultural land:

> [T]he Federal Government, which may be the largest single force in agricultural land conversion, lacks a clear policy for addressing this vital issue. Accordingly, the agricultural protection provisions are needed to initiate a process to bring about changes in Federal programs and policies that will assure the protection of agricultural land and to assist State and local interests in farmland retention efforts. At the same time, however, the program will leave unhampered the rights of State and local governments to establish agricultural land protection policies of their own, and of private and local landowners to use their own lands as they see fit.

S. REP. No. 126, 97th Cong., 1st Sess. 151, *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 1965, 2115.

349. 7 U.S.C. § 4201(a)(5)-(7) (1982).

farmland.[350]

To implement these purposes, the Act articulates a farmland protection policy with three primary elements.[351] First, USDA, in cooperation with other units of the federal government, is to develop criteria for identifying the effects of federal programs[352] on the conversion of farmland to nonagricultural uses.[353] Second, using the USDA criteria, the departments, agencies, independent commissions, and other units of the federal government are to identify and take into account the adverse effects of federal programs on the preservation of farmland; consider alternative actions to lessen those adverse effects; and assure that federal programs are compatible with state,

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350. *Id.* § 4201(b). The Act defines farmland to include all land described as follows:

(A) prime farmland is land that has the best combination of physical and chemical characteristics for producing food, feed, fiber, forage, oilseed, and other agricultural crops with minimum inputs of fuel, fertilizer, pesticides, and labor, and without intolerable soil erosion, as determined by the Secretary. Prime farmland includes land that possesses the above characteristics but is being used currently to produce livestock and timber. It does not include land already in or committed to urban development or water storage;

(B) unique farmland is land other than prime farmland that is used for production of specific high-value food and fiber crops, as determined by the Secretary. It has the special combination of soil quality, location, growing season, and moisture supply needed to economically produce sustained high quality or high yields of specific crops when treated and managed according to acceptable farming methods. Examples of such crops include citrus, tree nuts, olives, cranberries, fruits, and vegetables; and

(C) farmland, other than prime or unique farmland, that is of statewide or local importance for the production of food, feed, fiber, forage, or oilseed crops, as determined by the appropriate State or unit of local government agency or agencies, and that the Secretary determines should be considered as farmland for the purposes of this subtitle.

Id. § 4201(c)(1). The remainder of the Act makes no distinction between prime, unique, and ordinary farmland.

351. On July 12, 1983, the Department of Agriculture published proposed rules for implementation of the Act. 48 Fed. Reg. 31,863-66 (1983). These would add Part 658 to 7 C.F.R. The rules include land and site assessment criteria, guidelines for the use of the criteria, information about the technical assistance available to help protect farmland and the USDA assistance with federal agency review of policies and procedures. *Id.*

352. The Act defines federal programs to include activities or responsibilities of federal departments, agencies, independent commissions, or other units that involve "(A) undertaking, financing, or assisting construction or improvement project; or (B) acquiring, managing, or disposing of Federal lands and facilities." 7 U.S.C. § 4201(c)(4) (Supp. V. 1981). Construction or improvements that are beyond the planning stage on the effective date of the Act are not included. *See also* 48 Fed. Reg. 31,864 (1983) (to be codified at 7 C.F.R. § 658.3) (proposed July 12, 1983).

353. 7 U.S.C. § 4202(a) (1982). The proposed USDA regulations set out the criteria to be used by federal agencies. 48 Fed. Reg. 31,864-65 (1983) (to be codified at 7 C.F.R. § 658.4) (proposed July 12, 1983). These include both land evaluation criteria, which focus on the value of the property as farmland, and site assessment criteria, which ascertain the suitability of the property for protection as farmland. The system bears some similarity to the LESA system described *infra* in note 357.

local, and private programs to protect farmland.[354] To fulfill this second policy objective, each federal government unit is to review its current laws, rules, and policies to determine whether any provision will prevent full compliance with the Act. Each unit is also to develop proposals designed to bring its programs and activities into conformity with the Act.[355] Third, USDA is to make available information useful in restoring, maintaining, and improving the quantity and quality of farmland.[356] In addition, the Secretary of Agriculture is encouraged to provide technical assistance to state or local governments or nonprofit organizations that desire to develop programs or policies to limit farmland conversion.[357] Unfortunately, however, the Act does not authorize financial assistance for these state and local programs. The Secretary is authorized to carry out the purposes of the Act with "existing facilities and funds otherwise available. . . ."[358]

The Act includes two significant limitations. It "does not authorize the

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354. 7 U.S.C. § 4202(b) (1982). For guidelines on the use of the criteria, see 8 Fed. Reg. 31,865-66 (1983) (to be codified at 7 C.F.R. 658.5) (proposed July 12, 1983).

355. 7 U.S.C. § 4203 (1982). *See also* 48 Fed. Reg. 31,866 (1983) (to be codified at 7 C.F.R. § 658.7 (proposed July 12, 1983). The Secretary of Agriculture must report to Congress on progress made in implementing the Act, including in particular information about the effects of federal programs on farmland, and the results of the policy and procedure reviews required under 7 U.S.C. § 4203(a) (1982). *Id.* § 4207.

356. *Id.* § 4202(c). *See also id.* § 4205, which directs the Secretary of Agriculture to design, implement, and distribute educational programs and materials and to establish farmland information centers as depositories for information on farmland issues.

357. *Id.* § 4204. *See also* 48 Fed. Reg. 31,866 (1983) (to be codified at 7 C.F.R. § 658.6) (proposed July 12, 1983).

In response to the Act, USDA has revised its land use policies. The agency will discourage the unnecessary conversion of prime and unique farmlands; manage its land use programs and the land it administers to protect resources; conduct research; aid in surface-mine reclamation, and in planning for restoration of land used for mineral extraction. In addition, USDA will advocate retention and protection of farmlands in programs conducted by other federal agencies. Secretary, U.S. Dep't of Agric., Memorandum No. 9500-2 (Mar. 10, 1982).

One federal program intended to protect agricultural land is LESA, the Land Evaluation and Site Assessment system. Designed to facilitate decisionmaking by landowners, developers, local and state planners, and governing officials, the system is used to determine the quality of land for agricultural uses and to assess areas for agricultural viability. The assessment system has two components: land evaluation and site evaluation. The first looks to soil quality, and assigns a relative value for agricultural use. The second considers other important factors that help to qualify a site for agricultural use. The system is flexible and is designed to be adapted to local conditions. *See generally*, SOIL CONSERVATION SERVICE, U.S. DEP'T OF AGRICULTURE, NATIONAL AGRICULTURAL LAND EVALUATION AND SITE ASSESSMENT (LESA) HANDBOOK 310-VI (1983).

358. *Id.* § 4206. Perhaps the explanation for the lack of financial assistance lies in the controversy regarding this provision in legislation proposed in the 95th and 96th Congresses, as well as in financial exigency. *See* Dunford, *supra* note 309, at 136; *but see* Agriculture and Food Act of 1981 §§ 1514-19. These sections provide matching grants for conservation activities (for soil, water, and related resources). Activities eligible under the grant program include "agricultural land retention or preservation." *Id.* § 1516(a)(4). Thus, funds may be available for eligible farmland conservation efforts by states and local government units.

Federal Government in any way to regulate the use of private or non-Federal land, or in any way affect the property rights of owners of such land."[359] No doubt this provision can in part be explained by the fear of federal zoning and federal interference with private land use decisionmaking that was so clearly demonstrated during debate on farmland protection legislation proposed in prior Congresses and in proposed federal land use policy legislation. Indeed, similar provisions, limiting federal interference in private land use decisions, appeared in earlier proposed legislation.[360] Another significant limitation is the provision that the Act does not provide a basis for any legal or equitable action challenging a federal program that affects farmland.[361] Congress did not intend the Act to be used to stop federal programs that resulted in the conversion of agricultural land. Instead, the Act is designed to ensure that federal agencies consider fully the impact of their activities on valuable agricultural land.

Even a strong national policy, like the Farmland Protection Policy Act, will not necessarily prevent the conversion of agricultural land or solve the problems caused by the conversion. Other forces, including local and state governments, landowners, and developers, play central roles in land use decisionmaking. Their decisions are often made without consideration of the long-range implications of present day choices. Without federal action stronger than "policy,"[362] these decisionmakers will continue to determine, for the most part, whether agricultural land will remain in agricultural uses. Accordingly, the remainder of this article will consider the advisability of a more forceful federal role in farmland preservation.

B. *Potential for Increased Federal Involvement*

1. *Need for Federal Guidance*

As the above discussion has indicated, recent years have seen increasing

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359. 7 U.S.C. § 4208(a) (1982). Section 4208(b) states that the requirements of the Act do not apply to "the acquisition or use of farmland for national defense purposes."

360. PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 51. *See, e.g.*, H.R. 5882, § 307, 95th Cong., 1st Sess. (1977):

> "This Act does not authorize the Federal Government to regulate the use of private land or to deprive owners of land of their rights to property or to income from the sale of property and does not diminish in any way the rights and responsibilities of the States and political subdivisions of States.

361. 7 U.S.C. § 4209 (1982).

362. Some indications exists that Congress is considering legislation stronger than policy, to protect especially vulnerable agricultural lands, albeit from erosion rather than development. The so-called "Sodbuster" bills are designed to prevent permanent and irreversible erosion that often results when marginal farmland is plowed for cultivation. The Sodbuster bills would discourage the cultivation of highly erodible land that has not been farmed recently, by making the farmer ineligible for government income support or financial incentive assistance for crops grown on that land. *See* S. 663, 98th Cong., 1st Sess., 129 CONG. REC. S2087 (daily ed. Mar. 3, 1983), and H.R. 3457, 98th Cong., 1st Sess., 129 CONG. REC. E3286 (daily ed. June 30, 1983).

evidence that the federal government is aware of the extent of conversion of prime agricultural land and is committed, at least to some extent, to preventing further conversion. The National Agricultural Lands Study, for example, represented a massive commitment of federal resources to evaluate the problem. The Farmland Protection Policy Act is an effort to make agencies of the federal government aware that their actions have potential for conversion, as well as to encourage those agencies to avoid using important agricultural land for their programs and projects. Federal policymakers have thus begun to recognize the economic and environmental implications of this nation's agricultural land.

The problems inherent in the degradation of the environment and the gradual consumption of natural resources are truly national in scope. Congress has attempted to find national solutions, usually with state cooperation, to these problems. Efforts to protect resources like air, water, floodplains, and wetlands, for example, have resulted in broadly applicable federal legislation, which involved substantial state cooperation and often resulted in some regulation of privately-owned resources or individual activities. The incremental enactment of national environmental legislation has gradually encompassed more and more resources and affected decisionmaking by individuals, as well as by state and local governments. Indeed, "[t]he history of environmental protection legislation in the 1970's suggests that federal action will increasingly impose regulatory restraints on the use of privately-owned natural resources."[363]

Like the nation's other natural resources, farmland—and especially prime and valuable farmland—is essential to the continued economic and physical well-being of our citizens. Perhaps unlike other resources, the significance of these agricultural resources is worldwide; the productivity of our farmland is essential in meeting the food and fiber needs of peoples in other parts of the world. As the discussion above has suggested,[364] in many instances, national rather than local policies have led to the conversion of agricultural lands.[365]

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363. Eichbaum & Buente, *supra* note 79, at 259. The authors continue: "This trend is meeting strong resistance, including varied demands for reduction of the impact and scope of federal regulation." *Id.*

364. *See supra* text accompanying notes 321-32.

365. *See generally*, P. RAUP, *Urban Threats to Rural Lands*, *supra* note 323:

> . . . [W]e can now pinpoint one of the areas of basic conflict in American land policies. Land law is state law. The implementation of land use decisions has been jealously guarded as a primary responsibility of local government. But the criteria by which choices among land uses should be guided must of necessity be national in scope. If we refer to the inventory . . . of ways in which we have promoted urban sprawl, it is clear that it is national policies and not local policies that have generated urban threats to rural lands. It is wishful thinking to believe that corrective action can be taken at local government levels, in the absence of clear-cut national guidelines. An unwillingness to accept the need for these guidelines at a national level lies at the heart of the current debate in Congress over national land use policy.

Moreover, the fragmented state and local efforts to curb farmland conversion have not been entirely successful.[366] Some evidence exists that comprehensive state land use plans may be effective in slowing the rate of conversion.[367] States continue to implement new, often vital, programs intended to protect their agricultural land.[368] Yet, too often local decisions involve a narrow base of interests, and the result may be land use decisions that fail to reflect long-term objectives.[369] It seems clear that the short-term marketplace factors that often predominate in land use decisions should, in the case of agricultural land, be offset by more farsighted national objectives.

Federal efforts have stood in the vanguard in legislation to protect the environment; an area in which the federal government has "unique responsibility, if not authority."[370] The essential nature of these efforts, and their continued vitality despite numerous judicial challenges, emphasizes the fact that despite traditional state regulation, state police power in the areas of the environment and natural resources is not, and should not, be sacrosanct.[371] This reflection on the allocation of governmental authority is likewise pertinent to the preservation of farmland. In areas fraught with controversy and weighted with national implications, the federal government often can be expected to assume leadership, both in setting policy and in providing monetary aid. Both types of federal leadership may now be required to assure the continued protection of productive farmland.[372] The federal government seems to be in the best position to evaluate needs, articulate poli-

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Id. at 376. *See also* P. RAUP, *supra* note 241.

366. *See supra* text accompanying notes 27-54.

367. *See, e.g.*, Furuseth, *Update on Oregon's Agricultural Protection Program: A Land Use Perspective* 21 NAT. RESOURCES J. 57 (1981); Furuseth, *The Oregon Agricultural Protection Program: A Review and Assessment*, 20 NAT. RESOURCES J. 603 (1980).

368. *See, e.g.*, ILLINOIS DEPARTMENT OF AGRICULTURE, THE ILLINOIS FARMLAND PROTECTION POLICY (1982) and ILL. REV. STAT. ch. 5, §§ 1301-08 (Supp. 1983) (Illinois Farmland Preservation Act).

369. *See, e.g.*, R. LINOWES & D. ALLENSWORTH, *supra* note 293, at 119: "we will have to build . . . a much wider base for making zoning, subdivision, floodplain, public facility location, and other key land-use decisions."

370. Eichbaum, *State/Federal Relations in Environmental Protection: How Will They Evolve in the 1980s?* 12 ENVTL. L. REP. (ENVTL. L. INST.) 15091, 15093 (Dec. 1982).

371. Fischer, *Allocating Decisionmaking in the Field of Energy Resource Development: Some Questions and Suggestions*, 22 ARIZ. L. REV. 785, 852-53 (1980):

> The state police power, as it affects the environment, energy development, or natural resource management, is not in any way sacrosanct. Federal interference with these functions is not manifestly different from federal interference with weights and measures. The fact that both have traditionally been subject to state regulation does not mean that federal regulation is precluded. Indeed, commerce clause regulation has historically proceeded upon the assumption that the environment, energy production and natural resources are subject to intensive and, where necessary, exclusive federal regulation.

Id. See SIDOR, *Review*, in U.S. DEP'T OF AGRIC., PERSPECTIVES ON PRIME LANDS 248, 249 (1975?).

372. *See supra* notes 14-26 and accompanying text.

cies, and develop programs, even if those programs are eventually implemented—in the model of much environmental legislation—at the state or local level.[373]

As one commentator noted, "[n]atural resources are essential, finite, and irrevocably threatened by human activity. In the absence of effective state action, federal protective action to provide national management of those resources is necessary."[374] Now may be the time for a closer look toward the need for more national guidance in the management of our irreplaceable farmland resources.[375] Accordingly, the concluding pages of this article evaluate the constitutional parameters of a federal farmland protection program and speculate as to the type of program that might be enacted successfully.[376]

2. *Constitutional Parameters of Federal Guidance*

The plethora of litigation that has followed new federal enactments designed to protect the nation's natural resources, for example, the Surface Mining Control and Reclamation Act, has made it clear that any attempt by the federal government to protect prime farmland by regulating its use is likely to be challenged on constitutional grounds. Therefore, using the SMCRA decisions as major guideposts, it is useful to predict the outcome of such constitutional challenges and to consider what attributes of potential

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373. *See* CORTY, *Review*, in U.S. DEP'T OF AGRIC., PERSPECTIVES ON PRIME LANDS 250, 251 (1975?).

374. Eichbaum & Buente, *supra* note 79, at 259. The quoted statement ends "and consistent with constitutional principles." *Id.*

375. Since the variety of society's problems are generally seen to be unresolvable by smaller units of government with their limited scope of action and inability to mount cooperative responses, looking to higher government levels for direction and assistance seems only rational. . . . The day of unrestrained local decisions over land-use policy has now passed, however strong the continuing rhetoric in the United States to the contrary. It is time to look clearly at who is making land-use decisions and on what basis. We can make somewhat more rational and considered decisions only when we fully acknowledge the essential roles of higher levels of government in these decisions.

Roberts & Hetzel, *The Inevitable Accretion: Federal and State Takeover of Land-Use Controls*, URB. L. & POL'Y 105, 111 (1980).

376. Over thirty years ago, an agricultural law scholars predicted, in what may prove to be a prophetic voice, an enhanced federal role in farmland preservation:

In time, assuming that population does not become static and that science does not find soil to be a relatively unimportant factor in feeding humanity, it can be expected that the federal government will move into a land-use control program containing substantial penalties and sanctions; that the states will adopt more legislation regulating those phases of farming which affect the public welfare; and that common law principles will slowly accommodate themselves, like the rule of natural drainage, to situations in which one man's farming practices can be demonstrated to have a material effect on the lands of surrounding owners.

Hannah, *Legal Devices for Controlling the Use of Farmland*, 38 VA. L. REV. 451, 468 (1952).

farmland protection legislation might insulate it from successful attack.

When federal legislation, like SMCRA or a farmland protection law, is challenged on constitutional grounds, two areas of inquiry predominate. The first is the constitutional source of authority for the federal enactment. Although the federal government enjoys a broad spectrum of powers, its powers are limited to those specifically enumerated in the Constitution. Powers not delegated to the federal government are reserved to the states.[377] The second inquiry is whether the legislation comports with restrictions on federal power, for example, those limitations imposed in constitutional amendments.[378] Thus, federal farmland protection legislation must be based on proper constitutional authority, most likely the commerce clause. In addition, it must not violate provisions of the relevant limitations on federal power, specifically the tenth amendment and the fifth amendment taking prohibition. Another issue that may be raised focuses on preemption authorized by the supremacy clause, if the legislation does not address that question directly.

a. Commerce Clause

Although the federal government's authority is restricted to powers enumerated in the Constitution, which grants no general federal police power,[379] numerous federal activities intended to advance the general welfare are authorized by the commerce clause. The commerce clause grants plenary authority to Congress, and may be exercised to its utmost extent, in the regulation of both interstate commerce itself and activities affecting commerce.[380] Because the commerce clause is read broadly to allocate extensive power to Congress, its exercise is likely to be limited chiefly by political restraints perceived by Congress.[381]

In both *Virginia Surface Mining* and *Hodel v. Indiana*, the Supreme

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377. Rosenthal, *The Federal Power to Protect the Environment: Available Devices to Compel or Induce Desired Conduct*, 45 S. CAL. L. REV. 397, 398 (1972): "[v]irtually any conceivable measure reasonably intended to protect the environment can readily be sustained under one or more of the grants of authority to Congress." Rosenthal suggests the commerce power, the power to tax and spend, and the treaty power as sources of federal authority for environmental protection. *Id.*

Another author has enumerated several federal doctrines that form the basis for federal regulation of land use. These include: commerce-navigation power, proprietary power, war power, admiralty, treaty power, general welfare power, and control of interstate relations. A. REITZE, *supra* note 241, at 1-15. Despite this rather extensive list, the commerce power seems most relevant to the analysis of potential federal farmland protection legislation.

378. J. NOWAK, *supra* note 169, at 112. *See also* Holmes, *supra* note 272, at 351.

379. J. NOWAK, *supra* note 169, at 119.

380. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824).

381. *See* Finnell, *supra* note 26, at 236. Finnell gives a brief history of the evolution of the commerce clause at *id.* 229-36.

Court reaffirmed the broad scope of commerce clause power in a context pregnant with possibilities for federal farmland protection legislation. Because legislative acts affecting the nation's economic life come before the Court with a presumption of constitutionality, the scope of judicial review is relatively narrow.[382] The test is simple: "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends."[383]

It is clear, both from the Supreme Court's language in *Hodel v. Indiana* and from the abundance of studies of agricultural land conversion, that Congress would have a rational basis for finding that the conversion of agricultural land affects interstate commerce. The Court referred in *Hodel v. Indiana* to legislative history that demonstrated congressional consideration of published reports and public testimony concerning the loss in agricultural productivity due to surface mining.[384] The consideration of this evidence led to a rational conclusion that "surface mining on prime farmland affects interstate commerce in agricultural products."[385] A conclusion that the conversion of agricultural land, especially prime land;[386] to nonagricultural uses affects interstate commerce would be equally rational. Research in recent years has demonstrated the pervasive nature of the farmland conversion problem and its effects on continued agricultural productivity.[387] Thus, there already exists a body of documented research to support the congressional conclusion. Moreover, the fact that these findings are contested does not prevent Congress from drawing its conclusions. The constitutional test requires only that Congress have a rational basis.

In addition, the Court makes it clear that even an activity usually considered 'local' or 'intrastate' may be regulated under the commerce clause.[388]

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382. Hodel v. Indiana, 452 U.S. 314, 323 (1981).

383. *Id.* at 323-24; *see also* Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. at 264, 276. This test was articulated in similar language in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-59 (1964): "The only questions are: (1) whether Congress had a rational basis for finding that [the regulated activity] affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate."

384. Hodel v. Indiana, 452 U.S. at 325-2.

385. *Id.* at 326.

386. SMCRA regulated prime farmland. But much farmland not generally categorized as prime is productive and its harvests add significantly to the nation's agricultural productivity. Moreover, in areas without vast areas of prime land, the preservation of productive agricultural land is necessary. *See supra* note 15. Numerous agricultural activities take place on nonprime land—*e.g.*, dairying, livestock farming, forestry.

387. *See* authorities cited *supra* in notes 1, 3, and 8.

388. *See* P. BENSON, THE SUPREME COURT AND THE COMMERCE CLAUSE, 1937-1970, 345 (1970):

Congress under the authority of the Commerce Clause, is able to reach into every

Commerce power extends to intrastate activities that affect interstate commerce and are therefore regulated as a means to protect or regulate interstate commerce.[389] Under this reasoning, the use of productive agricultural land, often considered primarily a local issue, may be regulated as a means of protecting interstate commerce from the adverse effects of conversion of that land. Indeed, little direct impact on interstate commerce from individual parcels of land[390] may be required:

> The argument that conversion of a specific, small parcel might have only a trivial effect, if any, on interstate commerce would not necessarily preclude regulation of the parcel. It would be necessary to show only that the specific, small parcel "taken together with that of many others similarly situated" had the requisite extrastate effect.[391]

Even under a more stringent version of this first test, a congressional finding about agricultural land should pass constitutional muster. The Court in both *Virginia Surface Mining* and *Hodel v. Indiana* focused on the effect of the regulated activity on interstate commerce. Justice Rehnquist, however, concurring in the judgment, asserted that some nexus between the activity regulated and interstate commerce is not sufficient. Rather, he believed that Supreme Court "cases have consistently held that the regulated activity must have a *substantial* effect on interstate commerce."[392] The application of this substantial effect standard to federal farmland preservation regulation would pose no problems. As the Court noted in *Hodel v. Indiana*, even the relatively small number of acres of prime farmland affected by surface mining results in the disturbance of "not an insignificant amount of commerce."[393] *A fortiori*, the millions of acres of farmland converted from agricultural production annually would substantially affect interstate commerce in agricultural products. In light of Justice Rehnquist's insistence on this more stringent standard, however, a specific congressional finding that

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nook and cranny of the highly interdependent American economic system. It has unquestioned control over any business activity which in any way "affects" commerce, regardless of how "local" that activity may be, how remote or "indirect" its effect may be, and how small or insignificant the contribution of a single instance may be if it is representative of "many others similarly situated."

389. Virginia Surface Mining, 452 U.S. at 281.

390. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942).

391. Finnell, *supra* note 26, at 238. *See* Perez v. United States, 402 U.S. 146, 154 (1971): "Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *See also* Virginia Surface Mining, 452 U.S. 264, 308-09 (Rehnquist, J., concurring).

392. Virginia Surface Mining, 452 U.S. at 310-11 (Rehnquist, J., concurring). *See* Note, *Constitutional Challenges to the Surface Mining Control and Reclamation Act*, 43 MONT. L. REV. 235, 239-40 (1982). This author criticizes Justice Marshall's opinion for the Court because of its failure to deal adequately with the question of substantial effect: the treatment "reflects again the Court's traditional indifference to considerations of degree in commerce clause interpretations." *Id.* at 240.

393. Hodel v. Indiana, 452 U.S. at 325 n.11.

agricultural land conversion has a substantial effect on interstate commerce might be provident.[394]

The second part of the commerce clause analysis focuses on the legislative scheme's reasonable relationship to the goal of protecting interstate commerce from the harmful effects of the conversion of farmland.[395] The result under this arm of the analysis, of course, will depend in large part on the specific legislative and regulatory scheme enacted to protect agricultural lands. Nonetheless, the standard is not particularly stringent. As the Court stated in *Virginia Surface Mining*, the effectiveness of existing laws in dealing with a problem like farmland conversion is ordinarily a matter committed to legislative judgment.[396] Congress enjoys considerable latitude in enacting a regulatory program, should it find existing laws inadequate. As long as the regulatory scheme is reasonably related to congressional goals, it will be upheld. The scheme will normally be overturned only if perceived as irrational.[397] Although congressional prudence in designing the scheme of regulation is required, a program, even if controversial, based on careful, documented study and reasonably designed to protect farmland should be upheld. Moreover, Congress will enjoy some freedom in designing a farmland protection program. A complex regulatory program can be upheld without showing that every provision of the program is independently directed to the congressional goal. The provisions must be an integral part of a regulatory program that, considered as a whole, satisfies the commerce clause test.[398]

Federal regulation in the area of farmland protection, involving land use issues that are normally regulated by state or local government, might involve aspects of regulation similar to those usually imposed in the exercise of state police power.[399] Yet, when congressional regulation fulfills a legitimate federal purpose, such as the protection of interstate commerce in agricultural products, the legislation should not be deemed invalid merely be-

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394. *See* Note, *A Critique of Hodel v. Virginia Surface Mining and Reclamation Association*, 16 U. RICH. L. REV. 179, 193 n.8 (1981). The author noted that in oral argument the Court seemed concerned at one juncture about the lack of a specific finding of substantial effect on interstate commerce. *Id.*

395. *See* Hodel v. Indiana, 452 U.S. at 327.

396. Virginia Surface Mining, 452 U.S. at 283.

397. *See* Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 258 (1976): "[e]ven when a congressional decision seems strained or doubtful, or a particular application seems unwisely included within the congressional scheme of regulation, the role of the courts in assessing the judgment of Congress is extraordinarily limited; the judiciary will intervene only where the legislative decision is regarded as irrational." *Id.*

398. Hodel v. Indiana, 452 U.S. at 329 n.17.

399. *See* Finnell, *supra* note 26, at 238; United States v. Carolene Prods. Co., 304 U.S. 144, 147 (1938): "[I]t is no objection to the exertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states."

cause it invades an area traditionally left to state regulation.[400] Nonetheless, the legislation may not improperly infringe on state powers guaranteed by the tenth amendment.

b. Tenth Amendment

In essence, analysis of a congressional enactment in terms of the tenth amendment focuses on the scope of power that the commerce clause (or other source of federal authority) grants to Congress.[401] In a number of decisions issued in recent years, including *Virginia Surface Mining* and *Hodel v. Indiana*, the Court has formulated, rearticulated, and applied[402] the standards for determining when a federal law infringes on state sovereignty in contravention of the tenth amendment:

> First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."[403]

If a statute meets each prong of this test, a further inquiry, in the nature of judicial balancing, is made to decide if "the federal interest advanced . . . justifies state submission."[404] Obviously, if the statute at issue fails to meet at least one of the three prongs of the test, the balancing is not required, at least formally, and the statute will not be found to intrude on state sovereignty.

A determination of whether a federal farmland protection statute will intrude on state sovereignty depends, more than in a commerce clause analysis, on the structure of the legislative scheme. Nonetheless, it is possible to make some general observations about federal farmland protection and the tenth amendment.

The first prong of the test, set out so succinctly in *Virginia Surface Mining*, is the easiest to analyze. As the Court noted in both *Virginia Surface Mining*[405] and *Hodel v. Indiana*,[406] the legislative scheme enacted in SMCRA did not regulate states as states, but only the activities of coal mine

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400. Sax, *supra* note 397, at 258.

401. *See* E.E.O.C. v. Wyoming, 103 S. Ct. 1054, 1065 (1983) (Stevens, J., concurring).

402. The most recent cases include E.E.O.C. v. Wyoming, 103 S. Ct. 1054 (1983); F.E.R.C. v. Mississippi, 456 U.S. 742 (1982); United Transp. Union v. Long Island R.R. Co., 455 U.S. 678 (1982).

403. Virginia Surface Mining, 452 U.S. at 287-88 (quoting National League of Cities v. Usery, 426 U.S. 833, 854, 852 (1976)).

404. Virginia Surface Mining, 452 U.S. at 288 n.29. *See also* E.E.O.C. v. Wyoming, 103 S. Ct. 1054, 1069 (1983) (Burger, J., dissenting).

405. Virginia Surface Mining, 452 U.S. at 288-89.

406. Hodel v. Indiana, 452 U.S. at 330.

operators who were private individuals and businesses. States themselves were not forced to spend state funds or to regulate under SMCRA; the federal government would bear the entire regulatory burden, should states choose not to regulate.[407] It would follow that a farmland preservation scheme that imposed no mandatory regulatory burdens on state government, assumed no control of state lands,[408] and focused its directives on private individuals would not regulate the states as states. Such a law could, as SMCRA did, impose minimum standards for regulation, which states may choose to enact or to reject, leaving the burden of regulation to the federal government.

Just because a law regulates states as states, however, does not mean that the law is constitutionally defective. As the Court noted in *Virginia Surface Mining*, Congress could have prohibited any state regulation of surface mining, an action that would have regulated the states as states.[409] Only in areas in which Congress has no preemptive power under the commerce clause would such prohibition raise constitutional problems. In essence, congressional regulation of states as states poses no problems unless attributes of state sovereignty and integral governmental functions are involved. Even then, judicial balancing may determine that no tenth amendment violation exists.

The federal regulation of farmland preservation requires closer analysis in light of the second and third prongs of the tenth amendment test, which focus on attributes of state sovereignty and integral operations connected with traditional government functions. As recent Court opinions have indicated, these inquiries are intended to ascertain whether a federal enactment

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407. One writer raises a question about the importance, for tenth amendment purposes, of the absence of coercion. If absence of coercion was the basis for upholding SMCRA, a useful rule is that "Congress may exercise the commerce power without violating tenth amendment guarantees, if it does not command the states to adopt a specific regulatory scheme." Note, 10 ECOLOGY L.Q. 69, 78 (1982). This author, however, did not believe that the decision was based clearly on the absence of coercion.

Justice O'Connor, in her partial dissent in *F.E.R.C. v. Mississippi*, 456 U.S. 742, 775 (1982), noted the absence of coercion in SMCRA. She stated that SMCRA "allows the States to choose either to work with Congress in pursuit of federal surface mining goals or to devote their legislative resources to other mining and land use problems." *Id.* at 783.

408. [T]he question of governmental control over a specific area of concern is less important than is the measurement of the impact of that control upon the respective position of the states relative to the federal government. For example, sovereignty is often popularly conceived of as power over space, generally phrased in terms of land. Hence federal intrusion into state control over state land could be expected to raise much greater difficulty than federal intrusion into state control over privately owned land or federal lands. . . . Allowing nonconsensual involvement of the federal government in the traditionally protected area of state land holdings would suggest that the state government existed at the sufferance and will of the central government.

Fischer, *supra* note 371, at 845-46 (citations omitted). *See also id.* at 852-53.

409. Virginia Surface Mining, 452 U.S. at 290.

threatens the "separate and independent existence"[410] of states or impairs their ability to "function effectively in a federal system."[411] A determination of whether a federal law impairs the states' ability to structure integral operations may focus on considerations of degree.[412] In preserving the integrity of each level of government as a decisionmaking unit, "neither governmental entity may go so far as to unduly impair the essence of the other as a functioning entity."[413] Although the goal of these tests is clear, the ambiguity and vagueness of their formulation, which has received relatively little elucidation from the Court, make more difficult a determination of which matters must be left to the states.[414] Moreover, the importance of cooperation between state and federal decisionmakers makes line-drawing difficult.

In applying the second and third parts of the Court's tenth amendment test, it is useful to consider just what areas must be left to the regulation of the states. The Court gave some guidance in *National League of Cities* when it stated that "fire prevention, police protection, sanitation, public health, and parks and recreation" were activities essential to a state's sovereignty.[415] The Court noted, however, that these did not comprise an exhaustive catalogue of activities that were traditional state functions.[416] And its holding in *National League of Cities* both indicated that the wages and hours of police and firemen were in this category and implied that wages and hours of state employees in schools and hospitals also fit within the description.[417] Although the SMCRA cases, decided five years later, did not require the Court to go beyond the first prong of the tenth amendment analysis, other cases have provided some additional elucidation. The Court has held, for example, that the operation of railroads engaged in interstate commerce is not an integral part of traditional state activities and that federal regulation of state-owned railroads does not impair the state's sovereign functions.[418] State sovereignty is not impaired by application of federal age discrimination laws to employment of state fish and game wardens, even though the employment involved a state park whose management is clearly

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410. *See* E.E.O.C. v. Wyoming, 103 S. Ct. 1054, 1062 (1983); F.E.R.C. v. Mississippi, 456 U.S. 742, 765 (1982); United Transp. Union v. Long Island R.R. Co., 455 U.S. 678, 687 (1982).

411. F.E.R.C. v. Mississippi, 456 U.S. 742, 765-66 (1982). A law should withstand the tenth amendment challenge when, as supporters of a controverted statute noted, "its operation is not constraint, but the creation of a larger freedom, the states and the nation joining in a cooperative endeavor to avert a common evil." Steward Machine Co. v. Davis, 301 U.S. 548, 587 (1937).

412. *See* E.E.O.C. v. Wyoming, 103 S. Ct. 1054, 1062 (1983).

413. *Fischer, supra* note 371, at 844.

414. *See* Note, *Separating Myth from Reality in Federalism Decisions: A Perspective of American Federalism—Past and Present*, 35 Vand. L. Rev. 161, 193-95 (1982).

415. National League of Cities v. Usery, 426 U.S. 833, 851 (1976).

416. *Id.* at 851 n.16.

417. *National League of Cities* overruled *Wirtz v. Maryland*, 392 U.S. 183 (1968). 426 U.S. at 854.

418. United Transp. Union v. Long Island R.R. Co., 455 U.S. 678, 683-84 (1982).

a traditional state function."[419]

None of these decisions, however, answers the issue raised in the context of federal farmland protection legislation. An effective federal farmland protection statute would likely involve some restrictions on the conversion and the use of farmland. Thus, the issue is whether the regulation of land use is an area that the federal government must leave to state regulation under the tenth amendment. The issue was acknowledged but not decided in the SMCRA cases. In *Virginia Surface Mining*, the Court assumed, but did not hold that land use regulation is an "integral governmental function."[420] The Court's resolution of the "states as states" issue made it unnecessary to decide the question. In *Hodel v. Indiana*, the Court stated that SMCRA is not a "land-use measure after the fashion of the zoning ordinances typically enacted by state and local governments."[421] The prime farmland provisions imposed only "temporary and incidental" restrictions on land use; there are no restrictions on post-reclamation use of the lands. Thus, a farmland protection law, presumably structured to restrict the conversion of farmland on a more permanent basis, involves a situation different from the prime farmland provisions of SMCRA.

Clearly, questions involving the use of nonfederal land have long been considered matters of primarily local concern.[422] Indeed, the Court itself ac-

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419. E.E.O.C. v. Wyoming, 103 S. Ct. 1054, 1062-64 (1983). *See also* F.E.R.C. v. Mississippi, 456 U.S. 742 (1982), which also reached the tenth amendment issue in a situation involving regulation of public utilities.

A commentator has suggested that two aspects of state and local government autonomy merit protection. Stewart, *supra* note 188, at 1231-32. The first is the freedom to formulate the structure of governmental decisionmaking machinery and the operation of that machinery. *But see* F.E.R.C. v. Mississippi, 456 U.S. 742, 762 (1982). The second is the determination of the goods and services state and local governments are to provide and the means of financing them. The first, of course, is more important, and neither is absolute. The commentator notes, however, that "other traditional local functions, including the provision of a higher quality environment through zoning or other regulation of private conduct, equally serve federalist values of noncentralized decisionmaking and therefore should enjoy comparable privileged status." Stewart, *supra* note 188, at 1232.

Where environmental issues are involved, Stewart reflects further:

> The conditions should be met in order to justify use of the commerce power to coerce state implementation of national moral goals. First, the goals should be among those that could persuasively be regarded as basic in a reflective ideal of the good society. Second, the goals should be of a sort that are unlikely, because of structural defects, to be realized under a regime of noncentralized decisionmaking. Third, federal intervention should promise a substantial contribution to the realization of the goals.

Id. at 1265. He believes that three types of environmental goals meet these criteria: "The prevention of serious harm to human health; maintenance of diverse environments to stimulate individual and collective cultural development; and preservation of irreplaceable environmental assets for future generations." *Id.* Certainly the preservation of valuable agricultural land fulfills this final environmental goal.

420. Virginia Surface Mining, 452 U.S. at 293 n.34.

421. Hodel v. Indiana, 452 U.S. at 330 n.18.

422. *See supra* text accompanying notes 129-31.

knowledged recently that "regulation of land use is perhaps the quintessential state activity."[423] Even so, it is far from clear that a farmland protection scheme would unconstitutionally impair a state's ability to "structure integral operations in areas of traditional governmental functions." Such a law would not totally usurp the state's traditional land use functions, but would instead add protection only to a limited class of land that has proved to be an important national resource.[424] The state, or its authorized subdivision, would retain full authority over other land use decisions. Any restriction on the conversion of farmland to nonagricultural uses would be a rather limited intrusion on the panoply of land use decisions open to the states.[425]

Moreover, the Court's recognition of land use regulation as a quintessential state activity contains a hint that land use regulation may not be entirely prohibited to the federal government. A footnote in a recent decision by the Court upholding a public utilities regulatory scheme that established a mandatory agenda to be considered by state legislative or administrative decisionmakers acknowledges that both the public utility law and SMCRA affected traditional functions of state government.[426] The former interfered with the legislative process and the latter with land use decisions. Yet neither scheme violated the tenth amendment.[427] The footnote, however, seems to suggest that Congress has more power to coerce states to enact specific legislation in pursuit of national goals when the area at issue is preemptible. Because it seems unlikely that an area so closely connected with land use as farmland protection would be preemptible (or at least, would be preempted)[428] Congress might prefer to tread rather carefully in structuring farmland protection legislation.[429]

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423. F.E.R.C. v. Mississippi, 456 U.S. 742, 768 n.30 (1982).

424. Indeed, the protection of this resource—prime or productive farmland—is the very purpose that led to the prime farmland provisions upheld in *Hodel v. Indiana*. *But see* Eichbaum, *supra* note 370, at 15,093. He suggests that the federal government lacks the authority to regulate land use, and therefore may be less effective in environmental protection than are states. *Id.*

425. In *E.E.O.C. v. Wyoming*, the Court focuses on the degree of intrusiveness in a consideration of whether the law at issue impairs the states' ability to structure integral operations. 103 S. Ct. 1054, 1062 (1983). *But see F.E.R.C. v. Mississippi*, 456 U.S. 742, 767-68 n.30 (1982), which suggests that an evaluation of intrusiveness is irrelevant to a constitutional inquiry.

426. F.E.R.C. v. Mississippi, 456 U.S. 742, 767-68 n.30 (1982).

427. The Court noted that the partial dissent had articulated "no constitutionally significant theoretical distinction between the two statutory schemes." *Id.*

428. *See infra* text accompanying notes 462-70.

429. For example, Congress may prefer not to require specific state enactments but instead encourage them through economic or other incentives.

The congressional approach in another area involving land use may be instructive here. Statutes designed to protect the national seashore include the so-called "sword-of-Damocles" provisions, in which Congress sought to achieve land use controls indirectly. These provisions suspend federal authority to acquire private inholdings of land by eminent domain, but only if local zoning consistent with federal standards is imposed and enforced. 16 U.S.C. §§ 459b-3(b)(2) (1982) (Cape Code National Seashore); 16 U.S.C. § 459e-1(e) (1982) (Fire Island Na-

The emphasis in recent tenth amendment decisions on federal threats to "separate and independent [state] existence" may prove helpful.[430] Natural resources—like air, water, and farmland—carry implications that extend far beyond the boundaries of a state. The federal government has regulated to protect natural resources in numerous environmental statutes, which have survived constitutional challenge. Some of the statutes have affected land use to some extent. In a sense, farmland is a special type of natural resource unlike air and water, it is not ambient, but is firmly located within the boundaries of a single state. This situation, however, makes it no less valuable as a natural resource, nor does it diminish its national importance. Federal regulation directed at preserving this important resource should not be viewed as a threat to the states' separate, independent existence. Thus, a carefully structured law should not be found to meet the second and third prongs of the tenth amendment test.

As the Court noted in *Virginia Surface Mining*, however, even if the Court concludes that challenged federal legislation meets all three parts of the test announced in *National League of Cities* and rearticulated in the SMCRA cases and later decisions, a law may be held not to violate the tenth amendment.[431] Instead, the Court noted, situations exist in which the federal interest may be important enough to justify state submission.[432] This comment suggests that some decisions may require judicial balancing of state and federal interest. Thus, even if a federal farmland protection statute did not meet the three-part tenth amendment test it may still be subjected to the judicial balance of interests.

The Court's recognition in *Virginia Surface Mining* of this possibility and the difficulty of applying the last two parts of the tenth amendment test make an analysis based on balancing useful.[433] A commentator on the SM-

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tional Seashore); 16 U.S.C. § 410j (1982) (Everglades National Park). "Sword-of-Damocles" provisions were upheld in *Halpert v. Udall*, 231 F. Supp. 574 (S.D. Fla. 1964), *aff'd*, 379 U.S. 645 (1965). *See* Sax, *supra* note 397, at 242, 253-54.

430. *See supra* note 410.

The Court stated in United States Transp. Union v. Long Island R.R. Co., 455 U.S. 678, 686-87 (1982):

> This Court's emphasis [in *National League of Cities*] on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation. Rather it was meant to require an inquiry into whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its "separate and independent existence."

431. Virginia Surface Mining, 452 U.S. at 288 n.29.

432. *Id.*, 452 U.S. at 288 n.29; *see also* E.E.O.C. v. Wyoming, 103 S. Ct. 1054, 1064 n.17 (1983).

433. *See* Finnell, *supra* note 26, at 270. *See also* Justice Blackmun's concurring opinion in *National League of Cities*, 426 U.S. 833, 856, 876 (1976) (Blackmun, J., concurring); Bogen, *Usery Limits on National Interest*, 22 ARIZ. L. REV. 753, 766-68 (1980); Note, *A Critique*,

CRA decisions has suggested a two-pronged analytical formula that may serve well in the context of prime farmland regulation.[434] The first question under this analysis is whether the legislation meets the commerce clause test. The discussion above indicates that a federal scheme for the protection of prime farmland is likely to fall within congressional power under the commerce clause.[435] The second question is whether the legislation is a necessary and proper exercise of congressional power. This analysis requires a balancing of federal and state interests.

The federal interest in farmland protection is strong. Like environmental protection, it "safeguards an interest that has widespread ramifications which the individual states cannot [or do not] adequately serve . . . and provides a public good that the private sector cannot supply."[436] Federal studies of the extent of farmland conservation demonstrate the existence of a significant problem with widespread national implications,[437] both from economic and food standpoints. But the state interest in this area is also weighty. The conversion of farmland carries implications for local, as well as national, economies. More important, however, are the state interests in regulating the land within its borders and the tradition of encouraging local participation in land use decisions.[438] The fact that land use is *traditionally* an area of state regulation, however, is probably not enough to tip the balance against federal legislation. After all, the commerce clause may extend to areas that have a history of state or local regulation.[439] Instead, the proper inquiry may be whether the federal legislation is structured to accommodate, rather than to supersede, the state interest. Such accommodation, which can be accomplished through a federal farmland protection program that requires or encourages adaptation to local conditions, could permit the conclusion that both the federal and the state interests can be satisfied through the federal legislation.[440] Thus, under the judicial balance suggested here, carefully structured federal legislation to protect farmland could be upheld.[441]

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supra note 394, at 198, 199; Note, 10 ECOLOGY L. Q. 69, 79-80 (1982).

434. Note, *Separating Myth from Reality, supra* note 414, at 195-99.

435. *See supra* notes 379-400 and accompanying text.

436. Note, *Separating Myth from Reality, supra* note 414, at 197.

437. *See supra* notes 1, 3, 8 for federal literature on the importance of conserving farmland.

438. Note, *Separating Myth from Reality, supra* note 414, at 197. *See also* Note, *Tenth Amendment Challenges, supra* note 78, at 601-03.

439. *See supra* text accompanying notes 388-89.

440. The LESA system discussed *supra* note 357 illustrates a flexible, yet principled, system of land evaluation that leaves room for local conditions and values.

441. Two recent court decisions involving federal legislation affecting land use are relevant to a consideration of an enhanced federal role in the traditionally state and local legislative domain of land use regulation

In *United States v. 0.16 of an Acre of Land*, 517 F. Supp. 1115 (E.D.N.Y. 1981), a federal district court upheld the Secretary of the Interior's power, pursuant to a provision in the Fire

c. *The Taking Issue*

Another challenge to federal farmland protection legislation that must be anticipated is the taking issue. Although the details of any particular legislative scheme will ultimately help to decide the taking issue, some general principles must be stated. The fifth amendment provides that private property may not be taken for public use without just compensation.[442] Compensation need not be paid for regulation, but only for "taking." Because farmland protection legislation, if enacted, would no doubt restrict the use of privately-owned land, some landowners will assert that the regulation has the effect of taking their private property rights. The Supreme Court's analysis in *Virginia Surface Mining* and *Hodel v. Indiana*, as well as in other decisions, suggests that such a constitutional challenge is likely to be unsuccessful.

Island National Seashore Act, 16 U.S.C. § 459e-1(a) (1982), to condemn a privately-owned parcel of land and divert it to a federally-desired use. United States v. 0.16 of an Acre of Land, 517 F. Supp. at 119. Pursuant to the Act, the Secretary had sought to acquire the parcel to add it to the National Seashore Area currently under development. *Id.* at 118. The local township's zoning board had granted a variance to the property owner, which enabled him to build on National Seashore designated land. *Id.* at 117.

In rejecting the local zoning board's tenth amendment objection to the federal preemption of local control, the district court stated that nothing in *National League of Cities* " 'suggests that the Tenth Amendment shields the states from preemptive federal regulation of private activities.' " *Id.* at 1122 (quoting Virginia Surface Mining, 452 U.S. at 291). Because the parcel was privately owned, the eminent domain proceedings had provided due process, and the Act authorized the taking of the property, the federal action was determined to be legitimate. *Id.*

The Court cited Justice Blackmun's concurring opinion in *National League of Cities*, which stated that the Supreme Court's decision, expanding the scope of state's rights, "does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential. *Id.* at 1122 (citing *National League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring).

In *Minnesota v. Block*. 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 1645 (1982), the Eighth Circuit upheld the restrictions imposed by the Secretary of Agriculture on the use of waterways included within the Boundary Waters Canoe Area Wilderness Act of 1978, 16 U.S.C. § 1133 (Supp. II 1978). Minnesota v. Block, 660 F.2d at 1259. The Secretary had imposed restrictions limiting the use of motor boats and snowmobiles on nonfederal, state "owned" land and water. The court minimized the impact of the restrictions on the state, holding that the use, rather than the ownership, of the land was in question, and the state does not "own" the affected waterways to the same degree that it owns the adjacent land.

The court noted that the ban on motorized vehicles restricted private individuals, rather than the State of Minnesota. Thus, the court rejected Minnesota's tenth amendment challenge. In addition, the court stated that the Act encouraged Minnesota to draft its own regulations (which had to be at least as strict as the federal regulations) for the protection of Boundary Waters Canoe Areas. This provision enabled the State to exert sovereign control over the area. Moreover, insofar as the complex question of waterways, navigable waters, and the degree of state sovereignty thereof was concerned, the court concluded after a review of the applicable treaties and statutes, that there existed a legitimate federal interest in compelling the State of Minnesota to regulate the use of the Wilderness Area. *Id.* at 1253.

442. U.S. CONST. amend. V.

Although a number of theories have been suggested to explain the Court's decisions in taking cases,[443] it seems clear that no single theory can accurately summarize the Court's taking doctrine. Instead, as the Court itself acknowledged in recent decisions,[444] no set formula determines when injuries caused by public action must be compensated and not borne by a relatively few persons. Rather, the Court engages in "essentially ad hoc, factual inquiries. . . ."[445] These inquiries have focused on several factors, including "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action."[446]

In essence, the ad hoc factual inquiries turn on two primary issues[447] and their consideration involves a judicial balance of public and private interests. The first is the character of the governmental action, in other words, the breadth of its regulatory scope and the number of people affected. When the character of the governmental action is evaluated, it seems evident that regulatory action is considered a taking less often than is actual invasion of private property.[448] Indeed, regulation for the public good is generally upheld, as long as there is no unreasonable interference with private property rights.[449] This generalization is significant in the present context because a federal farmland protection scheme is likely to involve regulation, rather than direct invasion of private property.

The second issue is the degree of interference of the regulation with

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443. Among these theories are those called diminution of value, invasion, harm-benefit, and enterprise-arbitration. *See* D. MANDELKER, LAND USE LAW, ch. 2 (1982); Eichbaum & Buente, *supra* note 79, at 244-48; Note, *Regulation Without Just Compensation*, *supra* note 223, at 1086-96.

444. *E.g.*, Virginia Surface Mining, 452 U.S. at 264; Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). *See also* Andrus v. Allard, 444 U.S. 51, 65 (1979): "Formulas and factors have been developed in a variety of settings. Resolution of each case, however, ultimately calls as much for the exercise of judgment as for the application of logic." *Id.* (citation omitted).

445. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

446. *Id.*

447. *See* Loretto v. Teleprompter Manhattan CATV Corp., 102 S. Ct. 3164 (1982); Agins v. Tiburon, 447 U.S. 255 (1980) (weighing of public and private interests); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 82-84 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978).

For a detailed exposition of these factors, *see* Note, *Regulation Without Just Compensation*, *supra* note 223.

448. *See* Note, *Regulation Without Just Compensation*, *supra* note 223, 1098. *See also* Loretto v. Teleprompter Manhattan CATV Corp., 102 S. Ct. 3164, 3175-76 (1982): "[W]hen the 'character of the governmental action' . . . is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." (citation omitted.)

449. PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). *See also* J. NOWAK, *supra* note 158 at 74 (Supp. 1982).

private property interests. An important factor to be considered in the context of this inquiry, which involves regulation rather than invasion, is diminution in value of the property. It is clear that mere diminution in value does not constitute a taking. Moreover, although severe diminution in value may violate the fifth amendment, the amount or proportion of diminution needed to constitute a taking is not consistent from case to case;[450] each is evidently decided on its own facts. It is also clear, however, that more interference will be tolerated if the governmental action is regulation, rather than intrusion.[451] But regulation that goes too far will constitute a taking.[452]

A federal law directed toward the preservation of privately-owned farmland is likely to include some regulation of land use, possibly similar to zoning regulations. As one commentator has noted, a zoning regulation is no more a taking when it is enacted by the federal government, than when it is imposed by states or their subdivisions.[453] In either instance, the regulation must be directed toward the public welfare. Such legislation could face a taking challenge in two instances. The challenge could be to the law as enacted, a so-called facial challenge, or to the law as applied to specific parcels of property.[454] The latter cannot be addressed adequately without indications of the effect of the law on specific land. Although the analysis in either instance would be similar, case law indicates that facial challenges to legislation rarely succeed.[455]

Regulation to protect farmland represents governmental action that is relatively broad in scope. The millions of acres of prime farmland (and even greater amounts of productive farmland) are held by numerous landowners. Thus, effects of protective legislation are likely to be experienced by a relatively broad spectrum of individuals, rather than by only a few.[456] Moreover, such legislation would be intended to achieve legitimate goals in the public interest—the protection of an irreplaceable natural resource—much like the goals of environmental protection statutes.

Another consideration is the degree of interference with the property rights of landowners. The actual interference, of course, depends on the type of restriction imposed on farmland use. Yet, the very purpose of such legislation suggests that the interference is not likely to constitute a taking. The loss to some landowners is likely to be a diminution in property value, if the

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450. *See* F. Bosselman, D. Callies, & J. Banta, The Taking Issue 208-11 (1973).

451. *See supra* note 448.

452. *E.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

453. Sax, *supra* note 397, at 254.

454. *See* Virginia Surface Mining, 452 U.S. at 295-97.

455. D. Mandelker, *supra* note 443, at 30. *See, e.g.*, Virginia Surface Mining, 452 U.S. at 295-97.

456. The Court recognized in *Hodel v. Indiana*, 452 U.S. 314 (1981), that the prime farmland provisions that applied to coal-bearing lands involved a substantial amount of land. *Id.* When all prime farmland is considered, the scope of regulation is indeed broad.

land cannot be converted to urban or industrial use. But, even if these more profitable uses are prohibited, the owner is not deprived of all "reasonable investment backed expectations" from the property. A profitable use remains: farming, the use for which the land is regulated. Even if a profitable use remains, however, the interference may be too great if the agricultural use is unreasonable on specific parcels of land because of a predominance of nonagricultural uses in the area.[457] Accordingly, a legislative scheme must be structured so that farmland restricted to farming uses is located in an agricultural area where the land will be used in a way similar to surrounding and nearby land. This structure is also desirable from a practical point of view.

A recent Supreme Court decision, *Agins v. Tiburon*,[458] supports the conclusion that a carefully drafted farmland preservation scheme will not violate the fifth amendment taking prohibition. *Agins v. Tiburon* involved a taking challenge to a local ordinance that restricted the development of a five-acre tract overlooking San Francisco Bay. The value of the land was reduced dramatically by the ordinance, which had been adopted to protect open-space land. In holding that the mere enactment of the ordinance did not take property without just compensation, the Court noted that it substantially advanced legitimate governmental goals: the discouragement of "premature and unnecessary conversion of open-space land to urban uses," and the protection of residents from the "ill effects of urbanization."[459] The ordinance did not prevent the best use of land, nor did it extinguish any "fundamental attribute of ownership."[460] In recognizing the legitimacy of regulation to retard urbanization, the decision in *Agins* suggests that the Court would be sympathetic to a farmland preservation law, designed to prevent the conversion of agricultural land to urban uses and to protect this natural resource for future generations.[461]

d. Preemption

Another issue that must be considered in connection with a federal farmland protection law is federal preemption. Preemption sometimes becomes an issue when Congress enacts a law pursuant to one of its granted powers (for example, the commerce clause), particularly when the legislation involves an area that has traditionally been subject to state, rather than federal, regulation. Mandated by the supremacy clause,[462] the doctrine of pre-

457. *See* D. MANDELKER, *supra* note 450, at 333; F. BOSSELMAN, *supra* note 445, at 204.

458. 447 U.S. 255 (1980).

459. *Id.* at 261.

460. *Id.* at 262.

461. D. MANDELKER, *supra* note 443, at 332-33.

462. U.S. CONST. art. VI, cl. 2. Although this discussion of preemption is necessarily brief, much literature exists. *See* Finnell, *supra* note 26, at 239-47, which focuses on preemption in

emption focuses on federal power to exclude states from fields of legislation and the constitutional inability of states to enter some areas of legislation.[463] Its purpose is to avoid conflicting regulation of conduct in areas where several regulatory authorities might ordinarily exercise their power. Preemption can be imposed either by Congress or by judicial decision. Because Congress does not always make clear its intent, however, the Court has had numerous opportunities to make preemption decisions.

As in other areas of the law that involve controversies couched in extremely divergent factual situations, the Court has articulated no precise formula by which all preemption issues are decided. Nonetheless, two significant criteria have emerged from decided cases. The Court commonly invokes the preemption doctrine when state laws conflict or interfere with federal laws and when evidence shows that Congress intended to "occupy the field" of legislation. The first test generally evaluates the state and federal statutes, and determines whether the state law conflicts with the federal.[464] The second test focuses on federal law: the Court determines whether Congress intended to occupy the field of legislation and, if so, where the boundaries of that field lie. Then the Court construes state law to determine whether it fits within those boundaries and is therefore preempted.[465] In determining whether Congress intended to occupy the field, three inquiries may be relevant: whether the federal regulatory scheme is so pervasive that no room remains for state regulation; whether the federal interest is so dominant that enforcement of state laws in the area is precluded; and whether state law will frustrate the purpose of the federal law.[466] In making these inquiries, the Court is looking for a clear congressional purpose of preempting state legislation, for "[t]he exercise of federal supremacy is not lightly to be presumed."[467] Moreover, in areas traditionally characterized by state decisionmaking, the Court tends to give greater deference to state enactments.[468]

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the context of coastal land management and cites many of the relevant cases and literature. *See generally* J. NOWAK, *supra* note 169, at 267-70.

463. Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 DE PAUL L. REV. 630 (1972).

464. *E.g.*, Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 626 (1975). *See* Perez v. Campbell, 402 U.S. 637, 644 (1971).

465. *See* Hirsch, *Toward A New View of Federal Preemption*, 1972 U. ILL. L.F. 515, 529; Hines v. Davidowitz, 312 U.S. 52 (1941).

466. *See* Note, *Railroad Noise Regulation*, *supra* note 205, at 902 n.103 for decisions that illustrate these three inquiries. The first two inquiries comprise the "Rice" test. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see also* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

467. New York State Dept. of Social Service v. Dublino, 413 U.S. 405, 413 (1973) (quoting Schwartz v. Texas, 344 U.S. 199, 203 (1952)).

468. Finnell, *supra* note 26, at 240, refers to "a tendency to accord a presumption of validity to state and local legislative judgments in matters having complex environmental, so-

By enacting a farmland preservation scheme pursuant to its commerce clause power, Congress would have the opportunity to decide whether to preempt state law;[469] failing a congressional decision, the Court may have an opportunity to decide, should a controversy arise. It seems unlikely, however, that a federal farmland protection scheme would preempt state or local regulation in the area. In the first place, such a scheme should be designed with enough flexibility to adapt to the geographic and political realities of the individual states. No doubt, it would involve a significant amount of state cooperation and implementation, if that flexibility is to be retained. It should be designed to complement, rather than take the place of, state regulation; thus, state farmland preservation efforts should not normally conflict with the federal scheme.

In addition, it seems unlikely that congressional efforts to preserve farmland will "occupy the field" of legislation. Farmland preservation is a legitimate local concern, one with a long history of state and local regulation. Although the conservation of farmland affects interstate commerce therefore allowing federal regulation, it also affects individual states. States may experience substantial need to retain power over the farmland within their borders. Retained power may be necessary to ensure that regulation accommodates the varied conditions existing throughout the nation. Moreover, state and local farmland protection regulations, even those more stringent than the federal scheme, could be enforced without imposing an undue burden on interstate commerce. Indeed, it seem unlikely that a court would find that state and local regulation is preempted by a federal scheme. Because farmland protection involves land use, which has traditionally been controlled by state and local governments, courts are likely to presume that federal preemption was not intended.[470]

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The above discussion has suggested that a carefully structured federal farmland protection law is consistent with congressional power under the commerce clause and probably will not interfere with the protections of state autonomy guaranteed by the tenth amendment. It is unlikely that such a law would constitute a "taking" of property without just compensation, at least when mere enactment is considered. Moreover, a federal law could successfully coexist with state and local efforts to preserve farmland, even if those laws are more stringent.[471]

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cial, and economic implications." *Id.*

469. In a footnote to a recent decision, the Court set forth the propositions "that Congress may preempt the states in the regulation of private conduct, that Congress may condition the validity of State enactments in a preemptible area on their conformity with federal law, and that Congress may attempt to 'coerce' the States into enacting nationally desirable legislation." F.E.R.C. v. Mississippi, 456 U.S. 742, 767-68, n.30 (1982).

470. *See* Finnell, *supra* note 26, at 243.

471. *See generally* Yannacone, *Agricultural Lands, Fertile Soils, Popular Sovereignty, The Trust Doctrine, Environmental Impact Assessment and The Natural Law*, 51 N.D.L. REV.

The federal government has rather extensive power to affect the use of land.[472] Although historically much of that power has not been exercised, recent years have seen increasing federal involvement in land use, often to protect irreplaceable natural resources. There is "little doubt that . . . losses of agricultural land . . . substantially affect interstate commerce, [and that] federal land use regulations to protect [this] value would almost certainly be sustained as 'necessary and proper' to the exercise of the commerce power."[473] It remains to be considered, however, what federal efforts are likely to survive the legislative process.

3. *The Federal Role*

Although the federal government may have the power to enact a broad, albeit carefully structured, legislative program for the protection of farmland, the realities of the political process may temper somewhat the congressional exercise of commerce clause power. The failure of efforts to enact national land use laws in the early 1970s and the limited scope of land use regulation in environmental protection legislation[474] suggest that any federal farmland protection program will be approached cautiously with every effort to avoid encroaching either on areas of state sovereignty or on the constitutional rights of private property owners. Indeed, the emotions and conflicts that surround this area[475] indicate that Congress may decide not to legislate to the extent of its power, to avoid the appearance of encroaching on these sensitive land use questions.[476] Nonetheless, the question of agricultural

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615 (1975).

Yannacone begins his article with a strongly-worded statement:

> Preservation of the agricultural productivity of the Class I, Class II, and Class III soils of the United States is one of those unenumerated rights retained by the sovereign People of the United States in the ninth amendment, and entitled to protection under the equal protection and due process clauses of the fifth amendment and the rights, privileges and immunities, due process and equal protection clauses of the fourteenth amendment.

Id. (citations omitted).

472. *See* A. Reitze, *supra* note 241, at 1-14.

473. Holmes, *Federal Participation in Land Use Decisionmaking*, *supra* note 272, at 352.

474. Land use regulation is more prevalent in the environmental statutes enacted most recently. Strohbehn, *The Bases for Federal/State Relationships in Environmental Law*, 12 Envtl. L. Rep. (Envtl. L. Inst.) 15,074, 15,079 (Dec. 1982).

475. Few subjects are more fraught with emotion and less understood than the rights of private property and the Constitutional limits to public control of those rights. If this is a highly charged emotional issue, it is no less serious a matter of national concern, as evidenced by the current debate over land use legislation in the Congress and in State legislatures throughout the country.

Train, *Foreword* to F. Bosselman, D. Callies & J. Banta, The Taking Issue (1973).

476. Strohbehn has suggested that the Coastal Zone Management Act may represent an assessment of the extent to which Congress wanted to impose federal guidance of land use. Strohbehn, *supra* note 474, at 15,080.

land preservation is one of national concern, and it is evident that the federal government can play an important role in protecting this valuable resource.

The first step toward an enhanced federal role in agricultural land preservation is the articulation of a clear national policy of protecting agricultural land. Any legislative scheme must demonstrate a commitment to prevent the unnecessary development of prime (and perhaps, in appropriate situations, productive) farmland. Although recent years have seen increasing federal efforts toward this goal, these fall short of a clear congressional statement directed toward both public and private land and toward individual landowners, as well as federal agencies. Much of the background work to such a statement has been completed. Research like the National Agricultural Lands Study has provided a wealth of information to support congressional action. Congress has started to move toward conserving farmland. The Farmland Protection Policy Act commits the federal government to minimize its contribution to the unnecessary and irreversible conversion of farmland to nonagricultural uses. The provisions, however, focus primarily on the effects of federal programs. In addition, the law directs the Department of Agriculture to assist state and local governments in limiting farmland conversion. As a recent USDA policy statement indicates, that agency is attempting to assist individuals and governments in protecting farmland.[477] Yet these efforts will lack persuasive authority, if they are not backed by a clear policy articulated by Congress, that is directed toward preserving all farmland. Congress must speak with the "central voice of a national commitment"[478] to protect agricultural land.

A clear congressional policy, enacted into law, must be implemented by a program that supports the goals of that policy. At the outset, Congress must decide on the nature of the program. In essence, the decision is whether the program will be process-oriented or outcome-oriented.[479] That is, should it provide incentives for state and local efforts to protect farmland within general guidelines, or should its approach be regulatory with specific requirements that certain types or quantities of land be retained for agricultural purposes?

In light of the history of land use regulation, traditionally assigned to state and local governmental bodies, with recent sometimes reluctant participation by the federal government, the process-oriented approach is more likely to succeed both in enactment and effectiveness.[480] As the history of

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477. Memorandum 9500-2 at 4-5 (Mar. 10, 1982). *See also* 48 Fed. Reg. 31,866 (1983) (to be codified at 7 C.F.R. § 658.6) (proposed July 12, 1983).

478. Eichbaum, *State/Federal Relations*, *supra* note 370, at 15,093.

479. *See* Reilly, *New Directions in Federal Land Use Legislation*, *supra* note 287, at 355-57. *See also* Eichbaum, *supra* note 370, at 15,094.

480. Reilly suggests three reasons why federal land use legislation should avoid substantive directives: the objective of this legislation is institutional reform; substantive directives

attempts at federal land use regulation has suggested,[481] Congress may be reluctant to impose specific farmland preservation regulations on the states, but may be more willing to act less intrusively to articulate a national policy and provide incentives for compliance. Moreover, some states have already implemented a number of farmland preservation measures. In situations where these have been successful, superimposing a new system of specific federal regulation may be counterproductive. Where state programs have not been implemented or have been implemented without significant success, federal guidelines and incentives are likely to be accepted with more cooperation than a system of federal directives.[482] Federal guidelines may also be more effective in encouraging state adoption and continuation of a vital farmland preservation program, representing an enhanced state commitment to its valuable farmland.

It seems clear that the states themselves are looking for federal guidance, rather than control, of farmland preservation efforts. They evidently prefer to see a formulated national policy that clearly articulates the federal government's leadership and encourages state preservation efforts, but that is cautious about giving the federal government a direct role. Financial support and technical advice would be welcomed; direct control would not.[483]

In addition, it is evident that flexibility will be required in any national agricultural land preservation enactment. The nation enjoys considerable diversity in its agricultural industry. Some states have an abundance of prime agricultural land with few development pressures; others face increasing losses of farmland to urbanization and industrialization. Still others, with no farmland considered prime, will be eager to preserve productive agricultural land. Although most states have enacted some measures designed to keep farmers farming, considerable variation exists in the measures already taken and therefore in the steps that will be required to meet national and state farmland protection goals. A process-oriented approach, designed to support and encourage individualized state efforts to preserve farmland, will permit the flexibility that state diversity requires, while at the same time requiring states to acknowledge and resolve farmland preservation issues.

To operate successfully, a federal farmland protection program should provide at least three types of assistance to the states: information, guidelines, and incentives. These should be designed as an effective means of implementing the national policy designed to preserve farmland. The nation's

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pose political difficulties; and precise standards for land use planning are difficult to establish. Reilly, *supra* note 287, at 355-56.

481. *See supra* text accompanying notes 285-96.

482. *See* Reilly, *supra* note 287, at 357: "[I]t would be a bold act of uncertain consequence for federal law to specifically prescribe in the first major federally inspired land use reform in 50 years, what one level of government shall permit another level of government to allow private landowners to do."

483. PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 52-55.

agricultural community has long depended—and thrived—on federal leadership in matters of agricultural policy. The articulation and implementation of federal policy in the area of farmland preservation is therefore particularly appropriate.

Indeed, the federal government, particularly through the Department of Agriculture, has already assumed a leading role in providing information and technical advice on agriculture to the agricultural community.[484] The National Agricultural Lands Study represents a massive collection of data; decades of experience with the nation's farmland have resulted in the accumulation of extensive information on agricultural land, its capabilities, and productive uses. In part, the informational aspect of a federal agricultural land protection program is already in place, through the 1981 Farmland Protection Policy Act and earlier efforts. That law encourages the Secretary of Agriculture to provide technical assistance to states and units of local government that desire to limit the conversion of farmland.[485] In addition, the Secretary is to design and implement educational programs and materials that emphasize the importance of productive farmland.[486]

Another significant federal contribution focuses on the classification of farmland. The Soil Conservation Service is involved in a national soil survey program to determine the location of prime farmland and has sponsored earlier programs to classify land according to capability.[487] The National Agricultural Land Evaluation and Site Assessment System (LESA) provides a viable method of ascertaining the agricultural importance of land sites. Developed by the Soil Conservation Service, the system combines evaluation of the soil for agricultural use (through data from the National Cooperative Soil Survey) with consideration of important factors other than soil quality that contributes to the suitability of land for agricultural use. Because the site assessment factors are designed to be tailored to local needs and objectives, LESA is a flexible and rational system for making land use decisions. It promises to assist all levels of governmental units in implementing farmland protection policies.[488]

The second component of a successful national program is a system of workable guidelines for farmland protection. These should be determined in light of a reasonable national goal for farmland protection, consistent with

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484. The Department of Agriculture has been providing information since at least as early as 1935, when Soil Conservation Service activities were instituted, through Act of Apr. 27, 1935, Pub. L. No. 74-46, 49 Stat. 163.

485. 7 U.S.C. § 4202 (1982). *See supra* note 357.

486. 7 U.S.C. § 4205 (1982). *See supra* note 356.

487. PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 2.

These efforts will not be completed until 1986. Meanwhile, the soil classification system mentioned *supra* note 10 is available. Juergensmeyer, *Farmland Preservation: A Vital Agricultural Law Issue for the 1980's*, 21 WASHBURN L. J. 443, 448 (1982).

488. *See* SOIL CONSERVATION SERVICE, U.S. DEP'T OF AGRIC., NATIONAL AGRICULTURAL LAND EVALUATION AND SITE ASSESSMENT HANDBOOK (1983).

the expected need for productive agricultural land now and in the years to come.[489] The national goal for productive farmland could be divided into regional or state goals that specify an optimum number of acres to be retained as farmable land. Such a goal might also focus on the quality of agricultural land that should receive priority for retention. Its implementation will then require the identification of prime and productive agricultural lands within each state on the basis of reasoned criteria, perhaps the LESA system.[490]

The next logical step is to encourage state planning for the protection of critical agricultural lands, for example, those for which the LESA evaluation indicates high significance for productive agriculture. A workable federal system probably cannot effectively prohibit the development of these significant agricultural lands; instead, it should discourage development by fostering a process of reasoned decisionmaking before development is permitted.[491] This approach recognizes that state and local priorities may occasionally require the development of significant agricultural land, when other equally critical values are in conflict with farmland preservation.

Federal guidelines for achieving farmland protection goals must be flexible. The diverse geography of this nation has resulted in vastly different amounts and types of agricultural land; moreover, the value of land for agricultural production depends in large part on the economics and development pressures in its locale.[492] Thus, factors important to local and state decisionmakers, like those permitted in the implementation of LESA, must be accommodated in the federal prescription.[493] In addition, federal guidelines should not vitiate state and local farmland protection mechanisms already in place. Some states may decide to protect farmland more stringently than federal guidelines suggest. This decision should be permitted and encouraged.[494] Others may already have enacted a combination of laws and ordinances designed to encourage the retention of farmland in agricultural use. These should also be continued, especially when evidence suggests that

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489. *See* PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 55.

490. Another possibility (less useful because it does not generally permit the flexibility and adaptability of LESA) is the Soil Conservation Service classification system, discussed *supra* note 10. The SCS identification of prime farmland, when completed, may prove useful.

491. This approach is more flexible than the Coastal Zone Management Act, which requires a state to establish techniques for controlling land and water uses within the coastal zone. 16 U.S.C. § 1455(e) (1982).

492. *See, e.g.*, the variety of local factors that must be considered in the formulation of guidelines for state solid waste management plans. 42 U.S.C. § 6942(c) (1976 & Supp. V 1981).

493. *See* Stewart, *supra* note 188, at 1266: "[E]nvironmental quality involves too many intricate, geographically variegated physical and institutional interrelations to be dictated from Washington. Substantial reliance on state and local action and judgment is inevitable. But the need for central stimulus and direction is equally clear."

494. *See* Finnell, *supra* note 26, at 243. Finnell suggests that a presumption against preemption is appropriate, in part because a federal farmland preservation program is likely to be ineffectual by itself. *Id.* at 244.

they have been successful.

The federal guidelines should induce, rather than compel, state cooperation. It should be clear from prior discussion[495] that a federal program probably cannot constitutionally require states to enact and enforce specific farmland protection laws.[496] Nonetheless, states can be encouraged to enact and implement a program that offers substantial benefit, particularly if the cost to the states will be relatively minimal.[497] Thus the strongest federal incentive for state enactment of effective farmland preservation programs is probably significant federal financial contribution to state programs. Federal funds can be used to influence enhanced state efforts in farmland preservation and to shape those efforts in directions consistent with national goals.[498] The financial incentives could well follow the pattern established in other environmental protection statutes, with federal grants to states for the development of a farmland preservation program, subject to federal review and approval.[499] Continued federal funding for program development and eventual implementation could be contingent on satisfactory development of the state program and its consistency with federal guidelines.[500] In a time of limited federal spending, grants might need to be restricted at first to states facing particularly severe development pressures or states with important farmland. The threat of lost federal funding may be sufficient sanction to ensure the efficacy of the program, at least in states otherwise committed to farmland preservation.[501]

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495. *See supra* text accompanying notes 405-09. *See also* District of Columbia v. Train, 521 F.2d 971, 994 n.27 (D.C. Cir. 1975), *cert. dismissed sub nom.* Costle v. District of Columbia, 431 U.S. 99 (1977) ("The principle at work here . . . [is that the states] are to be protected from federal compulsion to exercise state governmental functions in an area where they choose to remain inactive.") (citations omitted).

496. *See* Bogen, *supra* note 433, at 756-57, 763.

497. Under the Coastal Zone Management Program, for example, 31 of the 34 eligible states had qualified for federal funds within two years of the statute's enactment in 1972. Udall, *supra* note 12, at 65.

498. *See* Eichbaum, *supra* note 370, at 15,093.

It is probably not enough, as the proposed National Agricultural Land Policy Act (*supra* note 334) would have provided, to authorize federal cost sharing only for state pilot or demonstration projects.

499. *See, e.g.*, the Coastal Zone Management Act, 16 U.S.C. §§ 1454, 1455 (1976 & Supp. V 1981).

500. The federal land use planning bills considered in the early 1970s (see *supra* text accompanying notes 285-96) would have allocated federal grants to states that controlled areas of critical environmental concern.

501. Most states have demonstrated some level of commitment to farmland preservation. The vast majority have enacted some type of statute directed toward that goal; preferential assessment and right to farm laws are examples. Many states have enacted several different laws aimed at least in part at protecting farmland or keeping farmers farming. See references cited *supra* notes 27-49.

This suggested federal approach is consistent with the recommendation in Land Use and States, *supra* note 16, at 272-73. The authors indicate that a federal land use law should re-

An effective federal scheme of guidelines and incentives to induce state farmland preservation efforts will raise a number of tensions. One of these is its relationship with the "new federalism," which suggests that the already extensive power of the federal government should be diminished,[502] and that federal spending should be reduced with more responsibility relegated to the states.[503] An example of this return of responsibility to the states, in the area of land use, is the recent repeal of the A95 planning process in favor of reliance on state and local planning processes for coordination and review of federal financial assistance and development.[504] The proposed federal farmland protection legislation, in contrast, would shift responsibility to the federal government. There probably is no easy answer to this tension. Farmland preservation has both national and local implications; the unique characteristics of each state's land mass make it logical that farmland preservation programs should be implemented locally. But the pervasive national (and international) interest in a continuing supply of food and fiber, coupled with state failure to enact and implement effective programs on their own initiative, suggest that federal guidance and incentives may well be justified.

Another tension is the perception that federal land use legislation directed at privately owned farmland would constitute interference both with issues believed to be of local concern[505] and with individual property rights.[506] Indeed, these concerns probably led in part to defeat of earlier proposed federal land use and farmland protection laws. As the discussion above has indicated, however, federal farmland protection legislation should not interfere unconstitutionally with either state sovereign powers or individual property rights.[507] Thus, these tensions are political, rather than con-

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quire the federal government to coordinate its own programs that affect land directly or indirectly; aid states that have already made serious efforts toward land use policy; and permit considerable flexibility in state programs, to recognize diversity in the needs and interest of the states.

502. *See, e.g.*, Strohbehn, *supra* note 474, at 15,074: "A fundamental tenet of this philosophy is that the free market governs best. A corollary is that states should play a relatively greater role in governing the citizenry—to the extent governing is necessary at all."

503. *But see* Smith, *Opening Address: Reflections on Federalism*, 12 ENVTL. L. REP. (ENVTL. L. INST.) 15,067, 15,068 (Dec. 1982), who suggests that all federalism questions are "new."

504. EXEC. ORDER No. 12,372 (July 14, 1982), 3 C.F.R. 197 (1982). *See supra* note 319.

505. Many federal programs, however, originated when the federal government assumed authority over areas believed to be within state police power. Holmes, *Federal Participation in Land Use Decisionmaking*, *supra* note 272, at 351, 354.

506. *See* Johnson, *Land Use Planning and Control by the Federal Government*, *supra* note 285, at 76-77, 84-85; *see also* Finnell, *supra* note 26, at 229. Some are convinced that, in the long run, rational land use planning enhances, rather than diminishes, property values. Udall, *Land Use*, *supra* note 12, at 71-72.

507. One study included the suggestion that landowners should receive compensation if the value of their land for development purposes is higher than for farmland. PRESERVING AMERICA'S FARMLAND, *supra* note 8, at 34, 54. While this might be desirable, it is probably not

stitutional, and they are not unique. In the last several decades, the federal government has become more active in areas involving land use. These activities have affected to some degree the allocation of power among levels of government.[508] Despite some disruption of traditional patterns, a strong national policy of farmland protection, implemented through legislation that induces state cooperation and does not vitiate stringent state and local programs, should not weaken state and local authority in the land use area. On the contrary, increased federal support for planning and implementation will enhance the resources available to the states and directed toward farmland preservation. Like other laws intended to protect environmental values, however, a federal law may shift the regulatory balance in favor of state, rather than local, governments, depending on the structure of the program implemented in each state.[509]

Despite these tensions, however, the time may be right to enact a federal law designed to keep agricultural land in agricultural uses. Such a law could provide just the encouragement and financial impetus needed to ensure continued state efforts to preserve agricultural land resources. The law would reinforce the national commitment to farmland preservation and provide tangible financial evidence of that commitment. By setting specific goals for agricultural acreage to be preserved, the law could provide incentives to states whose farmland preservation efforts have been inadequate and encouragement to states with already vital programs. Yet, by providing for voluntary state action (induced through financial support) and standards adaptable to varying local conditions, the federal law should permit considerable flexibility for each state to design a program of farmland preservation suitable for its own needs and priorities.

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constitutionally required; moreover, the cost of such a program would be prohibitive. It is important, however, to limit the economic burdens on private farmland owners, perhaps through already-existing mechanisms like preferential ad valorem taxation and the protections in agricultural district statutes.

508. *See* DeGrove, *The Political Dynamics of the Land and Growth Management Movement*, 43 LAW & CONTEMP. PROBS. 111, 112-14 (1979).

> The political implications of the shared powers system in a federal government are great. The system carries the certainty that considerable tension will exist at any given time as to what part of what major function should be performed by what level of government. These disputes have been characteristic of the politics of federalism in the United States, and the arguments, while often set in a narrow legal framework, have in fact involved important substantive policy issues about where and how major power would be exercised by governments in the federal system. This tension has become characteristic of the land and growth management area and has become a major focus in the last decade.

Id. at 112.

509. *See generally*, F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (Council on Environmental Quality, 1971).