CONSTITUTIONAL LAW—IT IS NOT A VIOLATION OF THE TENTH AMENDMENT FOR CONGRESS TO IMPOSE STANDARDS TO BE APPLIED BY STATE REGULATORY AGENCIES IN THE REGULATION OF PRIVATE CONDUCT IN A PREEMPTIBLE FIELD.—*Federal Energy Regulatory Commission v. Mississippi* (U.S. Sup. Ct. 1982).

The State of Mississippi and the Mississippi Public Service Commission brought an action in the United States District Court for the Southern District of Mississippi seeking a declaratory judgment to the effect that certain provisions of the Public Utility Regulatory Policies Act of 1978 (PURPA) were unconstitutional.[1] The Act's purpose was to promote the conservation of electric energy and natural gas as well as to expedite the development of hydroelectric power.[2] Titles I and III of PURPA concerned the regulation of electric and gas utilities, respectively, having in common the goals of conservation of energy, efficient use of energy, and the encouragement of equitable utility rates.[3]

In order to meet these congressional objectives, PURPA required state utility regulatory agencies and nonregulated utilities to make a determination as to whether it would be in the state's interest to adopt and implement any of these several rate design and regulatory standards.[4] State agencies and nonregulated utilities were required to follow procedures that called for the consideration of each standard at a public hearing, as well as provide notice of the standard's forthcoming consideration. In the event any of the standards were not adopted, agencies were required to make public the reasons for not adopting the standards.[5] In addition, PURPA allowed any person to enforce the state's obligation to hold a public hearing by bringing an action in state court.[6] Although the states had to consider the adoption and

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1. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. 2126, 2133 (1982). Appellees contended that Titles I and III and section 210 of Title II were unconstitutional. *Id.* The district court opinion was unreported. Mississippi v. Federal Energy Regulatory Comm'n, No. J79-0212(c)(S.D. Miss., Feb. 20, 1981 and Feb. 27, 1981).

2. 16 U.S.C. §2601 (1978).

3. 102 S. Ct. at 2130.

4. *Id.* at 2130-31. The standards adopted for consideration for electric utilities were cost of service, "elimination of declining block rates" and adoption of time-of-day rates, seasonal rates, interruptible rates, and load management techniques. *Id.* Furthermore, PURPA required that certain regulatory policy measures be considered for adoption, including the prohibition or restriction of master metering, procedural requirements for automatic adjustment clauses, rate schedule information to consumers, lifeline rates, electric service termination procedures, and advertising expense recovery guidelines. *Id.* at 2131. The last two standards-service termination and advertising expense-applied to natural gas utilities. *Id.*

5. *Id.* at 2131. State authorities and nonregulated utilities were also required to comply with several reporting requirements. *Id.* at 2132.

6. *Id.* at 2132. Title I allowed the Secretary of Energy and any affected utility or customer

implementation of PURPA's standards and comply with the procedural and reporting rules, the states were not required to adopt or implement any of the standards.[7] The states were allowed to adopt other standards or variations of the suggested standards so long as the PURPA standards were considered and its regulations were followed.[8]

Section 210 of PURPA was designed to promote "the development of cogeneration and small power production."[9] Section 210, unlike Titles I and III, was mandatory and required state regulatory agencies to implement Federal Energy Regulatory Commission (FERC) rules with regard to the purchase and sale of electricity by utilities to and from qualifying facilities.[10] FERC also was directed to exempt qualifying facilities from certain state and federal laws.[11]

In their suit, the State of Mississippi and the Mississippi Public Service Commission contended that Titles I and III and section 210 were unconstitutional because the regulations exceeded the power delegated to Congress under the commerce clause[12] and violated the tenth amendment.[13] The district court found that the pertinent provisions of PURPA were unconstitutional under both the commerce clause and the tenth amendment.[14] The district court stated that the commerce clause did not grant to the federal government the authority to regulate the intrastate activities of utilities.[15] The tenth amendment was also cited by the district court as justification for finding the PURPA provisions unconstitutional.[16]

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to intervene in state regulatory proceedings. *Id.* Title III limited that right to the Secretary of Energy. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 2133. This provision of section 210 was in response to the problem perceived by Congress that conventional utilities were unwilling to transact business with cogenerators and small power producers. *Id.* at 2132.

11. *Id.* at 2133. This provision was designed to alleviate the second problem perceived by Congress, that of overly burdensome state and federal regulation. *Id.* at 2132.

12. *Id.* at 2133. The commerce clause states: "To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." U.S. CONST. art I. §8, cl. 3.

13. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2133. The tenth amendment declares: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

14. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2133-34.

15. *Id.* at 2133. The district court relied on *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). According to the district court, PURPA did not regulate commerce but was merely an attempt to usurp state authority in contravention of the tenth amendment. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2133-34. The district court also observed that public utilities were not in existence at the time of the writing of the Constitution. *Id.* at 2134.

16. *Id.* Reliance was placed by the district court on *National League of Cities v. Usery*, 426 U.S. 833 (1976). In finding PURPA unconstitutional pursuant to the tenth amendment, the district court judge declared "The sovereign State of Mississippi is not a robot, or lackey which

On appeal, the United States Supreme Court *held*, reversed.[17] It is not an intrusion on state sovereignty for Congress to require consideration of standards by state agencies in a field that is regulated by the states when the commerce clause grants the authority to Congress to preempt the field. *Federal Energy Regulatory Commission v. Mississippi*, 102 S. Ct. 2126 (1982).

This opinion is the latest in a series of decisions by the Supreme Court concerning the viability of the tenth amendment as a constitutional constraint on federal regulation.[18] In reversing the decision of the district court, the Court declined to hold the tenth amendment as a bar to federal regulation of state regulation of intrastate public utilities,[19] a field traditionally within the sole domain of state government. This holding is a departure from the *Usery* analysis for tenth amendment issues[20] and leads to the question of whether the tenth amendment continues to constrain federal regulation.

The State of Mississippi and the Mississippi Public Service Commission asserted on appeal that PURPA did not regulate "commerce," but, rather, regulated states, and therefore the Act did not fall within the authority granted Congress by the commerce clause.[21] The Court concluded without difficulty that the district court's decision and appellees' arguments concerning the commerce clause were without consequence.[22] Reiterating the unrestricted congressional power of the commerce clause, the Court stated "[T]o say that nothing in the the commerce clause justifies federal regulation of even the intrastate operations of public utilities misapprehends the proper role of the courts in assessing the validity of federal legislation

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may be shuttled back and forth to suit the whim and caprice of the federal government." Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2134 n.17.

17. *Id.* at 2143. Justice Blackmun delivered the opinion of the Court, joined by Justices Brennan, White, Marshall, and Stevens. *Id.* at 2130. Justice Powell partially dissented. *Id.* at 2143 (Powell, J., dissenting in part). Justice O'Connor also partially dissented and was joined by Chief Justice Burger and Justice Rehnquist. *Id.* at 2145 (O'Connor, J., dissenting in part).

18. In *United States v. Darby*, 312 U.S. 100, 124 (1941), the tenth amendment was considered "but a truism that all is retained which has not been surrendered." *Id.* Recently, however, the tenth amendment has been interpreted by the Court to be an affirmative limitation on the powers of the federal government. Fry v. United States, 421 U.S. 542, 547 n.7 (1975) (tenth amendment limits congressional authority that impairs state ability to function in a federal system); National League of Cities v. Usery, 426 U.S. 833, 842 (Court acknowledged limits to congressional authority to override state sovereignty).

19. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2143. The Court also found authority for PURPA in the commerce clause. *Id.* at 2136. Justice Powell concurred by implication with the majority's commerce clause analysis by limiting his dissent to the tenth amendment issue. *Id.* at 2144 (Powell, J., dissenting). Justice O'Connor also concluded that PURPA was supported by the commerce clause. *Id.* at 2145 (O'Connor, J., dissenting).

20. National League of Cities v. Usery, 426 U.S. 833, 845, 852, 854 (1976). *See infra* notes 90-101 and accompanying text.

21. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2134-35.

22. *Id.* at 2134.

promulgated under one of Congress' plenary powers."[23] The applicable standards used by the Court were whether there was a rational basis for the congressional conclusion that the activity to be regulated affected interstate commerce, and whether there was a reasonable connection between the means selected and the end to be achieved.[24] Relying on the congressional findings enunciated in the Act, the majority opinion determined that Congress could indeed have rationally concluded that the regulated activities at issue "have an immediate effect on interstate commerce."[25] The Court relied on *Federal Power Commission v. Florida*[26] in holding that precedent had established the fact that intrastate electric power may be properly regulated by the federal government.[27] Thus, the Court, pursuant to the first commerce clause standard, considered whether the congressional findings illustrated in the Act had a rational basis.[28] The Court found that the congressional recognition of the nation's energy problems and need for energy conservation provided sufficient support for the findings by Congress.[29]

The Supreme Court also found that the second commerce clause standard was met because the means chosen to protect interstate commerce were not irrational.[30] This finding by the Court led to the ultimate conclusion that " 'the means chosen by [Congress are] reasonably adapted to the end permitted by the Constitution.' "[31]

Appellees next argued that the intrusive effect of PURPA on state sovereignty was violative of the tenth amendment.[32] In response, the majority considered the three disputed provisions of PURPA separately and the ramifications of the tenth amendment on each.[33] The first provision was the cogeneration and small power production regulations of Title II, section 210.[34] As previously noted, this particular provision of the Act was designed to accelerate the creation of cogeneration and small power production facilities.[35] FERC was directed, pursuant to section 210(a), to promulgate rules necessary to facilitate the development of cogeneration and small power production.[36] The Act also required FERC to exempt qualifying cogeneration and small power production facilities from certain state and federal

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23. *Id.*
24. *Id.* (quoting Hodel v. Indiana, 452 U.S. 314, 323-24 (1981)).
25. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2135.
26. 404 U.S. 453 (1972).
27. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2135.
28. *Id.*
29. *Id.*
30. *Id.* at 2136.
31. *Id.* (quoting Hodel v. Virginia Surface Mining and Reclamation Assoc., 452 U.S. 264, 276 (1981)).
32. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2137.
33. *Id.*
34. *Id.*
35. *Id.* at 2132. *See supra* notes 9-11 and accompanying text.
36. *Id.* at 2133.

utility laws.[37] In addition to the preemption of state regulation in this area, the Act required state regulatory agencies and nonregulated utilities to implement the rules promulgated by FERC and authorized FERC to enforce such implementation in federal court.[38]

The Court dismissed the tenth amendment challenge to the regulation of cogeneration and small power production facilities pursuant to FERC rules, as well as the complementary provision of the Act that exempted qualified units from state regulation, by finding that these provisions "[do] nothing more than pre-empt conflicting state enactments in the traditional way."[39] When this type of regulation is an exercise of congressional power pursuant to the commerce clause, state regulation may be preempted even in cases where state "prerogatives to make legislative choices" may be curtailed or prohibited.[40]

The PURPA requirement that the section 210 rules created by FERC be implemented by state authorities was also upheld by the majority.[41] The Court found one of its earlier decisions, *Testa v. Katt*,[42] to be controlling on this point.[43] In *Testa*, the Court had sustained a federal program which directed state courts to entertain claims arising from the Emergency Price Control Act.[44] The fact that the state regulatory commission was required pursuant to section 210 to implement FERC rules was found to be similar to the situation in *Testa* and no more intrusive upon the State of Mississippi than its customary regulatory activities.[45] Therefore, it was a valid exercise of congressional authority.[46]

The Court also held that the mandatory consideration of the standards provisions of Titles I and III withstood the tenth amendment challenge to its constitutionality.[47] Although acknowledging that the sovereignty of the states was derived from their ability to make decisions and set policy,[48] the

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37. *Id.*

38. *Id.*

39. *Id.* at 2137. Justice O'Connor concurred with the Court's holding with regards to section 210. *Id* at 2146 n.1 (O'Connor, J., dissenting).

40. *Id.*

41. *Id.*

42. 330 U.S. 386 (1947).

43. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2137.

44. Testa v. Katt, 330 U.S. at 394.

45. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2137. Support for the majority position was also drawn from the Supremacy Clause, U.S. CONST. art VI. *Id.* at 2138. *Id.* at 2137.

46. *Id.* at 2138.

47. *Id.* at 2143.

48. *Id.* at 2141. The Court noted that the states must give effect to federal enactments concerning nongovernmental activity and when regulations conflicted federal law controlled. *Id.* (citing Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 340-41 and National League of Cities v. Usery, 426 U.S. 833, 845 (1976). The Court also found this present situation to be similar to the "cooperative federalism" of *Hodel*. *Id.* (citing Hodel v. Virginia Surface Mining and Recla-

Court declared this function to be limited by the authority of the federal government.[49] Consequently, the Court stated, the states and the federal government were not co-equal sovereigns;[50] any assertions to the contrary were found to be "not representative of the law today."[51]

The majority opinion buttressed these conclusions with a discussion of three previous decisions of the Court allowing the federal government to direct states to do or not do specific acts.[52] In *Fry v. United States*,[53] the Court concluded that the Economic Stabilization Act, which froze state wages, did not violate the tenth amendment and was fully within the powers granted by the commerce clause.[54] The *Fry* Court went on to find that a federally mandated freeze of state wages did not intrude on state sovereignty.[55] *Washington v. Washington State Commercial Passenger Fishing Vessel Association*[56] was cited by the Court for its acknowledgment of "a federal court's power to enforce a treaty by compelling a state agency to 'prepare' certain rules 'even if state law withholds from [it] the power to do so.' "[57]

The holdings in *Fry* and *Washington*, were premised on the Court's determination in *Testa* that the policy of federal enactments is the policy of the states, stand for the proposition that the federal government can compel the states to implement federal policy and procedure.[58] Thus, the Court concluded that the federal government did have the authority to require the states to further federal goals.[59] Therefore, PURPA fell within this standard since Titles I and III required consideration, not implementation, of federal standards.[60]

Justice O'Connor's partial dissent in *Federal Energy Regulatory Commission* agreed with the Court's commerce clause analysis and disagreed

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mation Assoc., 452 U.S. 264, 289 (1981).

49. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2141.

50. *Id.* at 2138.

51. *Id.*

52. *Id.* at 2138-39. Reliance was placed upon *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658 (1979), *Fry v. United States*, 421 U.S. 542 (1975) and *Testa v. Katt*, 330 U.S. 386 (1947). *Id.*

53. 421 U.S. 542 (1975).

54. 421 U.S. at 548.

55. *Id.* at 547 n.7.

56. 443 U.S. 658 (1979).

57. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2138-39 (quoting Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 433 U.S. at 695).

58. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2139. It must be noted, however, that the holding in *Testa* was based on the Court's construction of the supremacy clause of article VI, rather than any analysis of the scope of the tenth amendment. Testa v. Katt, 330 U.S. at 389.

59. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2140.

60. *Id.*

with the Court on the issue of the tenth amendment.[61] Consequently, she found each of the cases cited by the majority inapposite.[62] She distinguished *Testa* on the ground that *Testa* involved the exercise of judicial power rather than the present exercise of legislative power.[63] Justice O'Connor stated that since state legislatures have the power "to set an agenda" and state judiciaries do not, the holding in *Testa* was inapplicable to the case at bar.[64] To hold otherwise would be an inaccurate expansion of the scope of the *Testa* decision,[65] due to the fact that federal power over state judiciaries did not imply an equivalent power over state legislatures.[66]

Fry was distinguished by the partial dissent on the basis that the wage freeze only required states to maintain present wage levels and, thus, did not displace any state's choice or require any state to make decisions.[67] *Washington* was found to be inapplicable by the partial dissent because the power of a federal court to order state compliance with federal law was not equivalent to the action of Congress in the present case.[68] Finding the cases cited by the Court distinguishable, Justice O'Connor concluded that precedent did not exist to support PURPA.[69]

The Court responded to this determination that the holdings in *Testa*, *Fry*, and *Washington* were distinguishable from the issue of whether PURPA was constitutional by declaring that "the purported distinctions are little more than exercises in the art of *ipse dixit*."[70] The Court noted that state courts have always been a co-equal part of state government.[71] Therefore, a federal intrusion upon state courts, as in *Testa*, had an effect upon state sovereignty that could not be distinguished from the effect of PURPA on state agencies.[72] In refuting Justice O'Connor's distinction of *Fry* from the present case, the majority opinion found it "absurd to suggest . . . that a federal veto of the [s]tates' chosen method of structuring their employment relationships is less intrusive in any realistic sense than PURPA's mandatory consideration provisions."[73] Similarly, the Court rejected the distinction of *Washington* by noting that in that case the Court clearly held that the federal government could require states "to prepare administrative

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61. *Id.* at 2145 (O'Connor, J., dissenting).
62. *Id.* at 2150.
63. *Id.* at 2150. Interference with this power, according to the partial dissenters, undermines state sovereignty. *Id.* at 2151.
64. *Id.* at 2150-51.
65. *Id.* at 2150.
66. *Id.* at 2151.
67. *Id.* at 2150 n.13.
68. *Id.*
69. *Id.* at 2150.
70. *Id.* at 2139 n.27. In the footnote, the Court refuted the distinctions drawn by Justice O'Connor. *Id.*
71. *Id.* (citing Bates v. State Bar of Arizona, 433 U.S. 350, 360 (1977)).
72. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2139 n.27.
73. *Id.*

regulations."[74]

The majority opinion further justified its holding that PURPA was constitutional by reliance on the commerce clause and the precedent established in *Hodel v. Virginia Surface Mining and Reclamation Association.*[75] This case upheld the Surface Mining Control and Reclamation Act from a similar tenth amendment challenge to its constitutionality.[76] The states were allowed pursuant to the Act to regulate surface mining if the states complied with certain federal standards enunciated in the Act.[77] Otherwise, the federal government would implement a regulatory program.[78] As the Court noted in upholding the Act, " '[T]here can be no suggestion that the Act commandeers the legislative processes of the [s]tates by directly compelling them to enact and enforce a regulatory program.' "[79]

Noting that the commerce clause would permit the federal government to preempt the entire field of utility regulation, the Court compared the PURPA regulations favorably to the situation in *Hodel.*[80] In the Court's view, merely because the Congress chose not to preempt the entire field of utility regulation, but instead, to allow the states to actively continue to participate in the field subject to certain conditions, did not render the statute unconstitutional.[81] Under this analysis, PURPA should not be invalid simply because Congress allowed the states to be the final arbiter in a field clearly preemptible by the federal government.[82]

Central to the Court's holding that PURPA was not unconstitutional was the recognition that, like the situation in *Hodel*, the states were faced with the choice of either abandonment of the field completely or consideration of the federal standards.[83] The Court admitted that the alternative of abandonment might be more difficult than it was in *Hodel* since under PURPA no federal regulatory alternative to state utility regulation existed.[84] Nevertheless, the Court stated "this does not change the constitutional analysis."[85] The tenth amendment did not limit the federal government's authority " 'to resort to all means for the exercise of a granted power which are

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74. *Id.*

75. 452 U.S. 264 (1981). Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2140.

76. Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. at 305.

77. *Id.* at 271-72.

78. *Id.* at 288.

79. *Id.* at 289.

80. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2140.

81. *Id.*

82. *Id.* States are not compelled to enact legislation or promulgate regulations, only to consider standards. *Id.* The procedural requirements of Titles I and III were sustained based on similar reasoning. *Id.* at 2143.

83. *Id.* at 2140-41.

84. *Id.*

85. *Id.* at 2141.

appropriate and plainly adopted to the permitted end.' "[86]

Justices O'Connor and Powell in their dissents differed sharply with the majority over the issue of whether the commerce power overrode any tenth amendment challenge.[87] Although the partial dissenters agreed that the commerce clause gave Congress the authority to preempt the field in its entirety,[88] they did not agree with the majority's tenth amendment conclusions with regard to Titles I and III of PURPA.[89] Rather, Justice O'Connor found, "[t]itles I and III of PURPA conscript state utility commissions into the national bureaucratic army. This result is contrary to the principles of *National League of Cities v. Usery*, . . . antithetical to the values of federalism, and inconsistent with our constitutional history."[90]

The dissent applied the three-prong test developed in *Usery*, as refined in *Hodel*, to conclude that the PURPA regulations were violative of the tenth amendment.[91] The *Usery* Court held the minimum wage and maximum hours provisions of the congressionally enacted Fair Labor Standards Act could not be prescribed to state employees involved in "traditional governmental functions."[92] In so holding, the Court in *Usery* established a three-part test that would find an enactment in violation of the tenth amendment if the act: (1) regulated the " 'States as States,' " (2) regulated matters " 'that are indisputably attribute[s] of state sovereignty,' " and (3) "directly impair[ed] [their] ability to 'structure integral operations in areas of traditional governmental functions.' "[93] In *Hodel*, the Court succinctly reiterated this test when it held the Surface Mining Control and Reclamation Act to be constitutionally permissable.[94]

The dissent of Justice O'Connor applied each of the *Usery* tests and concluded that the PURPA regulations met each of the tests and therefore violated the tenth amendment.[95] On the issue of whether Titles I and III in PURPA regulated the "States as States," the dissent explained that although the Act's goal was to regulate utility companies, it was the states

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86. *Id.* (quoting United States v. Darby, 312 U.S. 100, 124 (1941)).

87. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2145 (O'Connor, J., dissenting); *id.* at 2143 (Powell, J., dissenting).

88. *Id.* at 2145, 2146 n.1. Justice Powell's dissent was solely on the basis of PURPA's failure to meet the requirements of the tenth amendment. *Id.* at 2144 (Powell, J., dissenting). He concluded that, in light of the fact that the commerce clause and the tenth amendment were "distinct limitations on federal power," to satisfy one did not satisfy the other. *Id.* at 2145.

89. *Id.* at 2145 (O'Connor, J., dissenting).

90. *Id.* at 2145-46.

91. *Id.* at 2147.

92. *Id.*

93. *Id.* (citing Hodel v. Virginia Mining and Reclamation Ass'n., 452 U.S. at 287-88 and quoting National League of Cities v. Usery, 426 U.S. at 854, 845, 852).

94. Hodel v. Virginia Mining and Reclamation Ass'n., 452 U.S. at 287-88.

95. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2147 (O'Connor, J., dissenting).

that were mandated to comply with the PURPA provisions.[96] Therefore, this was clearly a regulation of states as states.[97] Similarly, the dissent found that PURPA Titles I and III addressed "attribute[s] of state sovereignty."[98] This conclusion was based on the perception that the PURPA titles at issue intruded upon the states' authority "to make decisions and set policy."[99] The dissent also found that Titles I and III of PURPA impaired the ability of state utility commissions to discharge their duties "[b]y taxing the limited resources of these commissions."[100] Thus, the third prong of the *Usery* analysis was met because the Act directly impaired "the [s]tates' ability to 'structure integral operations in areas of traditional governmental functions.' "[101]

Justice O'Connor also distinguished the Act upheld in *Hodel* from PURPA, taking exception to the Court's reliance on *Hodel* as precedent for upholding the PURPA provisions.[102] The distinguishing factor in *Hodel*, according to the dissent, was the fact that the Surface Mining Control and Reclamation Act did not compel state consideration of federal standards, but rather allowed the states a choice "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."[103]

On the issue of whether the preemption authority derived from the commerce clause applied to federal regulations that did not preempt, but simply required state consideration of specific standards, the dissent declared that the tenth amendment was a limit on the commerce power.[104] Thus, in view of PURPA's failure to meet the test articulated in *Usery* and *Hodel*, the Act was unconstitutional.[105] The dissent also found the PURPA regulations to be more intrusive on state sovereignty than complete preemption of the field.[106] This conclusion first was drawn from the fact that unlike preemption wherein states are precluded from involvement in the field, PURPA adversely affected state agencies by requiring consideration of standards which leave the agencies "less able to pursue local proposals for con-

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96. *Id.* Justice O'Connor noted that PURPA was addressed to the states, requiring them, not public utilities, to consider the standards. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 2147. This power included the authority to decide proposals that were to be considered. *Id.* at 2147-48.

100. *Id.* at 2148-49.

101. *Id.* at 2148. Justice O'Connor also concluded that "[u]tility regulation is a traditional function of state government." *Id.*(footnote omitted).

102. *Id.* at 2149.

103. *Id.* at 2150.

104. *Id.* at 2151.

105. *Id.*

106. *Id.* By discussing the degree of federal intrusion, Justice O'Connor appeared to contradict her own statement that an "evaluation of intrusiveness . . . is simply irrelevant to the constitutional inquiry." *Id.*

serving gas and electric power."[107] Secondly, the dissent reasoned that PURPA was more intrusive than preemption because the Act "blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs."[108]

On its face, *Federal Energy Regulatory Commission* appears to be the type of case well-suited for the tenth amendment test set forth in *Usery*. Like *Usery*, *Federal Energy Regulatory Commission* deals with competing constitutional mandates: the grant of power to the federal government by the commerce clause, and a limitation on that power by the tenth amendment.[109] However, although the Court distinguished this case from *Usery* and thereby circumvented the application of the three-part test,[110] the distinction was illusory. The Court noted that in *Usery* the issue was "the extent to which state sovereignty shields [s]tates from generally applicable federal regulations,"[111] to be distinguished from the present case where the federal government "attempts to use state regulatory machinery to advance federal goals."[112]

However, the cases are similar in some significant ways. Even though the ultimate impact of the statute implicated in *Federal Energy Regulatory Commission* falls on public utilities and not on the states, as in *Usery*, the states are compelled to take action to advance a federal goal in both instances. State sovereignty as defined by the tenth amendment was also at issue in each case. Therefore, the issue in both cases was similar and can be considered to have been whether state sovereignty shields states from federal regulations that advance federal goals. Viewed in this light, the impact of the Supreme Court's holding on the *Usery* tenth amendment analysis is startling. The Court's failure to apply the *Usery* test to a fact situation analogous to the factual context in *Usery* brings into question the continuing viability of the *Usery* tenth amendment analysis.

Furthermore, *Hodel* presented the Court with the issue of whether a federal enactment fully within the bounds of the commerce clause was yet invalid due to the limiting effect of the tenth amendment on congressional

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107. *Id.* at 2152.

108. *Id.*(footnote omitted). The dissent concluded by exulting the virtues of state government, *id.* at 2152-53, and finding further support for her conclusions in constitutional history. *Id.* at 2154-57.

109. The definitive interpretation of the commerce clause was stated by Mr. Chief Justice Marshall over 150 years ago when he declared "[i]t is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824). *Cf.* (the Court characterized the tenth amendment as an affirmative limitation on congressional power).

110. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2137.

111. *Id.*

112. *Id.*

authority.[113] In *Hodel*, the Court did apply the *Usery* test in holding that the Surface Mining Control and Reclamation Act (SMCRA) did not violate the tenth amendment.[114] It should follow that the *Usery* test could have been applied to the present case. However, the Court refused to apply the three-part analysis, choosing instead to rely on other less similar precedent and the factual similarities between PURPA and SMCRA.[115] This would appear to suggest that the Court was shying away from the application of a standard format for deciding *Usery*-type issues in favor of a case-by-case approach.

Any attempt at determining the ramifications of the *Federal Energy Regulatory Commission* holding must be considered in light of the other commerce clause versus tenth amendment cases that have come before the Court since *Usery*. *Usery* was the first constraint to be placed on congressional legislation based on the commerce clause since *Carter v. Carter Coal Co.*[116] was decided over 45 years ago. Since *Usery*, however, the Court has refused to invalidate any congressional enactments based on the *Usery* analysis.[117] The majority's failure to apply the *Usery* test may also be indicative of a philosophical split on the Court over the role of the commerce power *vis a' vis* the tenth amendment. The Justices in the *Federal Energy Regulatory Commission* majority have consistently been against tenth amendment limitations on the commerce power in prior opinions.[118] These members of the Court have espoused the view that because the commerce clause grants to the federal government the authority to preempt the field of utility regulation in its entirety,[119] any attempt to regulate to an extent less than preemption was also allowed pursuant to the commerce clause, the tenth amendment notwithstanding.[120] By this analysis, the majority in *Federal Energy Regulatory Commission* was advocating the view expressed by the Court in

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113. Hodel v. Virginia Mining and Reclamation Ass'n, 452 U.S. 264, 283 (1981). *See generally* Case note, *"Prime Farmland Provisions of the Surface Mine Control and Reclamation Act of 1977, Environmentally Protects "Prime Farmland" from Strip Mining, and have not been Interpreted not Violative of the Commerce Clause, the Fifth or the Ten Amendments,"* 31 DRAKE L. REV. 461.

114. *Id.* at 286, 293.

115. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2138-40. The majority relied upon *Testa*, *Fry* and *Washington*. *Id.* The Court found this case to be "only one step beyond" *Hodel*. *Id.* at 2140. *See supra* notes 75-86 and accompanying text.

116. 298 U.S. 238 (1936). *See* Note, *Separating Myth From Reality In Federalism Decisions: A Perspective of American Federalism—Past And Present*, 35 VAND. L. REV. 161, 186 (1982).

117. *See* Hodel v. Virginia Surface Mining and Reclamation Ass'n., 452 U.S. at 305; United Transp. Union v. Long Island R.R. Co., 102 S. Ct. 1349, 1356 (1982).

118. Justice Blackmun concurred in *Usery*, 452 U.S. at 855, yet wrote the majority opinion in *Federal Energy Regulatory Comm'n v. Mississippi*, 102 S. Ct. at 2130.

119. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2140.

120. *Id.*

United States v. California,[121] where it was stated that the sovereign power of the state was subordinate and must yield to "the constitutional exercise of the granted federal power."[122] In this case, PURPA was enacted pursuant to the commerce power, and therefore, the tenth amendment could not limit the constitutional exercise of this granted power.

The dissenters adopted a different view as to the effect of the tenth amendment upon the commerce power.[123] It was their assertion that the tenth amendment was an affirmative limitation on the constitutional grant of powers to the federal legislature.[124] Therefore, once it had been established that a congressional enactment was valid pursuant to the commerce power,[125] the next step in the constitutional analysis was to determine whether a statute passes constitutional muster in the form of the three-prong *Usery* test.[126] If a statute met all three of the *Usery* standards, then it was found to be violative of the tenth amendment and, thus, unconstitutional even though the commerce clause supported the congressional legislation.[127] The rationale adopted by the dissenters was illustrative of the concept of dual federalism,[128] in which the state and national governments are considered separate and isolated spheres of sovereignty.[129] Under this concept neither sphere or government may intrude upon the sovereignty of the other.[130]

The majority opinion refuted the dissent's historical analysis in support of dual federalism as "demonstrably incorrect," in light of the Court's decisions in *Testa*, *Fry* and *Fishing Vessel Association*.[131] The majority asserted that when regulations of the national and state governments conflict, the federal law would control.[132] The states were then allowed to enact their own programs consistent with federal law.[133] Thus, the majority advocated the concept of cooperative federalism, where each level of government comple-

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121. 297 U.S. 175 (1936).

122. *Id.* at 184.

123. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2145. (Powell, J., dissenting); *id.* at 2146 (O'Connor, J., dissenting).

124. *Id.* at 2146 (O'Connor, J., dissenting); *id.* at 2145 (Powell, J., dissenting).

125. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2145. PURPA was declared to be within the scope of the commerce power by the dissent. *Id.*

126. *Id.* at 2147. Justice O'Connor applied the *Usery* principles to PURPA. *Id.* at 2147 (O'Connor, J., dissenting).

127. *Id.* (O'Connor, J., dissenting).

128. *Id.* at 2154-57. Justice O'Connor discussed the constitutional history of federalism. *Id.* at 2153-57.

129. *Id.* at 2147.

130. *Id.* The dissent recognized this concept to be less than absolute. *Id.* at 2147 n.4 (quoting Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. at 288 n.29).

131. *Id.* at 2138 n.25.

132. *Id.* at 2141.

133. *Id.*

mented the other level as partners rather than as adversaries.[134]

It is clear, therefore, that the *Federal Energy Regulatory Commission* decision is illustrative of the dichotomy that presently exists between the members of the Court on the issue of federalism and the continuing validity of *Usery*. In holding that Congress may impose standards to be met by the states in their regulation of private conduct in a preemptible field,[135] the advocates of cooperative federalism are in the majority. Cooperative federalism, as illustrated in *Federal Energy Regulatory Commission*, requires that the tenth amendment not be considered as an affirmative limitation on congressional power. However, in order to apply the *Usery* test, the tenth amendment would first have to be considered an affirmative limitation on Congress, a contention that is anathema to the *Federal Energy Regulatory Commission* majority.

J. Marc Ward

134. *See* Note, *supra* note 116, at 179.

135. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. at 2143.