

July 1982

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Recommended Citation

Peter F. Habein, *Constitutional Challenges to the Surface Mining Control and Reclamation Act*, 43 Mont. L. Rev. (1982).
Available at: <http://scholarship.law.umt.edu/mlr/vol43/iss2/6>

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NOTES

CONSTITUTIONAL CHALLENGES TO THE SURFACE MINING CONTROL AND RECLAMATION ACT

Peter F. Habein

I. INTRODUCTION

During the summer of 1981 the United States Supreme Court declined an opportunity to herald the New Federalism¹ by upholding the Surface Mining Control and Reclamation Act² (SMCRA) against two facial challenges to its constitutionality. In *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*³ and *Hodel v. Indiana*⁴ the plaintiffs, states and entrepreneurs, pressed several constitutional attacks against Title V of SMCRA.⁵ And in both cases the Supreme Court dissolved permanent injunctions issued by federal district courts in Virginia and Indiana.⁶ Mr. Justice Marshall wrote both opinions for a unanimous Court, and Justice Rehnquist published an important concurring opinion joined by the Chief Justice.⁷

As the Court's unanimity should suggest, its holding in each case was not unexpected. Following traditional lines of commerce clause analysis, the Court reached its conclusions with little difficulty. Nonetheless, from a federalism perspective the opinions are significant for their treatment of three recurrent problems of con-

1. Throughout this note, "New Federalism" refers generally to President Reagan's proposal to transfer to the states regulatory and administrative authority for over 40 domestic programs. State of the Union Address, H.R. Doc. No. 133, 97th Cong., 2d Sess. (1982).

2. 30 U.S.C. §§ 1201-1328 (Supp. III 1979). The Court summarizes the Act. *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 101 S. Ct. 2352, 2356-58 (1981). A complete legislative history may be found in Dunlap, *An Analysis of the Legislative History of the Surface Mining Control and Reclamation Act of 1975*, 21 ROCKY Mtn. MIN. L. INST. 11 (1976).

3. 101 S. Ct. 2352 (1981) (at time of publication, U.S. cite available at 452 U.S. 264 (1981)).

4. 101 S. Ct. 2376 (1981) (at time of publication, U.S. cite available at 452 U.S. 314 (1981)).

5. 30 U.S.C. §§ 1251-1279 (Supp. III 1979). Title V contains the Act's controversial performance standards with which each state must comply.

6. *Virginia Surface Mining and Reclamation Ass'n v. Andrus*, 483 F. Supp. 425 (W.D. Va. 1980); *Indiana v. Andrus*, 501 F. Supp. 452 (S.D. Ind. 1980).

7. *Virginia*, 101 S. Ct. at 2389 (1981) (Rehnquist, J., concurring in both decisions).

stitutional adjudication: first, the test applied to a challenged exercise by Congress of its commerce power and the conflict between Justices Marshall and Rehnquist over its articulation; second, the tenth amendment restriction on the commerce power; and, finally, fifth amendment taking by regulation. This note examines the Court's treatment of these issues and the impact of that treatment on federalist interests.

II. THE TEST

Traditionally, three restrictions limit congressional power under the commerce clause:⁸ (1) specific first and fifth amendment prohibitions;⁹ (2) the tenth amendment protection of states in their sovereign capacities;¹⁰ and (3) the Court's ostensible test of whether the regulated activity has a "substantial" effect on interstate commerce.¹¹ The plaintiffs in both cases attempted to invoke all three restrictions against SMCRA.¹² Justice Rehnquist addresses only the "substantial effect" test in his concurring opinion.

In both cases plaintiffs claimed that the regulated activity—surface mining—did not satisfy the substantial effect test. Virginia claimed generally that SMCRA regulated the use of private, *intrastate* land and, thus, exceeded the power of Congress to regulate *interstate* commerce.¹³ The federal district court rejected this argument, and Virginia renewed the attack on appeal. Indiana focused its principal commerce clause attack on the six "prime farmland" provisions of the Act.¹⁴ The federal district court concluded that "surface coal mining operations on prime farmland . . . have an infinitesimal or trivial impact on interstate commerce."¹⁵ Together, these attacks raise threshold questions of de-

8. U.S. CONST. art. I, § 8, cl. 3.

9. See, e.g., *Fry v. United States*, 421 U.S. 552 (1975) (Rehnquist, J., dissenting); *United States v. Darby*, 312 U.S. 101, 115 (1941).

10. See, e.g., *National League of Cities v. Usery*, 426 U.S. 833 (1976); *NLRB v. Jones & Laughlin Steel Corp.*, 310 U.S. 1, 37 (1937).

11. See, e.g., *Virginia*, 101 S. Ct. at 2362; *United States v. Darby*, 312 U.S. 101, 119-20 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 310 U.S. 1, 37 (1937).

12. The regulations promulgated by the Secretary of Interior have been and continue to be extensively litigated. This litigation is catalogued by the Court at 101 S. Ct. at 2357 nn. 4, 7.

13. The district court rejected this challenge and the Supreme Court heard it on cross-appeal.

14. 30 U.S.C. §§ 1257, 1258, 1260, 1265, 1269 (Act requires restoration of prime farmland to pre-mining levels of productivity or better).

15. *Indiana*, 501 F. Supp. at 458. The district court relied chiefly on the *Report of the Interagency Task Force on the Issue of a Moratorium or a Ban on Mining in Prime Agricultural Lands* (1977). The Supreme Court criticized this reliance and the conclusions drawn in the report. The Court noted that although proportionately small, the affected acre-

gree, of what lies within the reach of the commerce power. They assume the scope of the commerce clause is not unlimited and some activities "simply may not be *in* commerce."¹⁶

As Justice Rehnquist implies, the states' arguments take as their premise Justice Cardozo's declaration: "the law is not indifferent to considerations of degree."¹⁷ Cardozo's "considerations of degree" are also the basis for Rehnquist's reservations over the Court's test of SMCRA. Rehnquist notes that in rejecting the states' arguments and reaffirming the plenary power of Congress under the commerce clause, Justice Marshall mentions only once the "substantial effect" requirement.¹⁸ Rehnquist's response is to frame the test in its most demanding terms:

In my view, the Court misstates the test . . . It has long been established that the commerce power does not reach activity which merely "affects" interstate commerce. There must be a showing that the regulated activity has a substantial effect on that commerce. Moreover, simply because Congress may conclude that a particular activity *substantially* affects interstate commerce does not necessarily make it so. Congress' findings must be supported by a "rational basis"¹⁹

Rehnquist articulates the test in two steps: (1) an affirmative showing by Congress of substantial effect, and (2) a rational basis supporting the congressional conclusion. Justice Marshall alternately asks only whether Congress had a "rational basis for concluding that surface mining has substantial effects on interstate commerce,"²⁰ or "whether Congress could rationally conclude that the regulated activity affects interstate commerce."²¹ Evidently, then, Marshall and Rehnquist not only frame the test with different elements—"substantial effect" or "effect," "rational basis"—they also combine the elements for tests of differing strictness. Arguably, the conflicting phraseology results from the Justices' predisposition to the legislation.

Complicating the conflict, however, is the inherent difficulty of

age is not independently insignificant. *Indiana*, 101 S. Ct. at 2383.

16. *Virginia*, 101 S. Ct. at 2389 (Rehnquist, J., concurring).

17. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring).

18. *Virginia*, 101 S. Ct. at 2362.

19. *Virginia*, 101 S. Ct. at 2391 (Rehnquist, J., concurring) (emphasis in original). This differs from Rehnquist's characterization of the test in his opinion for the Court in *National League of Cities*, where "effect" was sufficient. *National League of Cities v. Usery*, 426 U.S. 833, 840 (1976).

20. *Virginia*, 101 S. Ct. at 2362.

21. *Indiana*, 101 S. Ct. at 2383.

applying a judicial test to a legislative act while remaining true to doctrines of legislative supremacy and judicial restraint. Marshall, for example, cites *Stafford v. Wallace* for the deferential proposition that "it is primarily for Congress to consider and decide the fact of danger and meet it."²² Typically in commerce clause questions, while reciting the substantial effect requirement, the Court has deferred to a congressional finding that a regulated activity "affects" interstate commerce where there was a rational basis for the finding.²³ Where Congress made no pertinent finding, the Court has concluded that "Congress may properly have considered" the activity to have a substantial effect on commerce.²⁴ SM-CRA is typical in this regard, reciting the conclusion that "surface and underground coal mining operations affect interstate commerce"²⁵ Marshall's predominant reliance on mere effect, then, corresponds to the expressed congressional finding and the precedent of an expansive and deferential interpretation of the commerce clause. Virginia's charge that the land was *in* commerce was, therefore, misdirected. Justice Marshall is in close agreement with precedent when he concludes that Congress has the power to regulate activity affecting commerce without regard to the locus of that activity.

In this light, Justice Rehnquist's assertion that some activity "may be so private or local" as not to be "in commerce" is a resurrection of archaisms long discarded by the Court.²⁶ In *United States v. Women's Sportswear Manufacturing Association*, for example, the Court held, "[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."²⁷ Rehnquist's "in commerce" characterization recalls Justice Holmes' metaphor "a current of commerce among the States."²⁸ The metaphor appeared in a majority opinion upholding the application of the Sherman Act to meat dealers throughout the country. That opinion is peculiar precedent since its judgment remains valid, even visionary for its time, but its language has long since been discredited. *Wickard v. Filburn*, for example, stands for

22. 258 U.S. 495, 521 (1922).

23. See, e.g., *Perez v. United States*, 402 U.S. 146 (1971); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *United States v. Darby*, 312 U.S. 101, 119-20, 122 (1941); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938); *NLRB v. Jones & Laughlin Steel Corp.*, 310 U.S. 1, 31, 37 (1937).

24. *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942).

25. 30 U.S.C. § 1201(j).

26. 101 S. Ct. at 2389 (Rehnquist, J., concurring).

27. 336 U.S. 460, 464 (1949), quoted in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964).

28. *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905).

the proposition that the private wheat farmer need never inject his product into the stream of commerce, and still be subject to regulation.²⁹ As construed over the last 40 years, therefore, the modern commerce clause has indeed been "indifferent to considerations of degree."

The Court's response to Indiana's challenge reflects this indifference even more graphically. The plaintiffs argued and the district court agreed that surface mining of prime farmland has a trivial effect on commerce because the acreage affected is negligible relative to total prime farmland acreage.³⁰ Marshall dismisses this challenge on two accounts. First, he quotes *NLRB v. Fainblatt*—"the power of Congress . . . extends to all commerce be it great or small"³¹—to support his conclusion that the volume of commerce affected is irrelevant.³² The quotation is inapposite, however, as it addresses congressional power over commerce per se, not over activity affecting commerce. Marshall then declares the proper inquiry to be not the existence of a substantial effect but "whether Congress could rationally conclude that the regulated activity affects interstate commerce." To misapply *Fainblatt* and repair to the rational basis test, Marshall must overlook the issue of degree raised by the Indiana challenge and obliquely addressed by the Court in *Fainblatt*.

The *Fainblatt* Court held the National Labor Relations Act did not "depend on any particular volume of commerce affected more than that to which the courts would apply the maxim *de minimis*."³³ Apparently, as the Court implies, the *de minimis* doctrine demands something more than a trivial volume of commerce affected by the regulated activity.³⁴ Though the district court in *Indiana* did not expressly invoke the doctrine, it probably meant

29. 317 U.S. 111 (1942).

30. *Indiana*, 501 F. Supp. at 460. Ordinarily, this *de minimis* challenge succumbs to the "cumulative effect" principle applied in *Wickard v. Filburn*, 317 U.S. at 128-29, and refined in *Perez v. United States*, 402 U.S. 146 (1971). The *Wickard* Court held that one person's "contribution to the demand for wheat may be trivial" but, "taken together with that of many others similarly situated, is far from trivial." *Wickard*, 317 U.S. at 128. As modified by *Perez*, the determinative factor is the cumulative effect of a "class" of activity such that each member of the class vicariously "exerts a substantial economic effect on interstate commerce." *Perez v. United States*, 402 U.S. 146, 151-52 (1971) (quoting *Wickard*, 317 U.S. at 125). But *Wickard* is inapposite because the district court found the entire class of activity—surface mining on prime farmland—to "have no substantial and adverse effects on interstate commerce." *Indiana*, 501 F. Supp. at 460.

31. 306 U.S. 601, 606 (1939).

32. 101 S. Ct. at 2383.

33. *Id.* at 607. *De minimis non curat lex*: the law takes no notice of trivial things.

34. The reasoning in *Wickard* carries the same implication as does language in *United States v. Darby*, 312 U.S. 101, 123 (1941).

to raise the *de minimis* issue in its finding that “[s]urface coal mining operations on prime farmland . . . have an infinitesimal or trivial impact on interstate commerce.”³⁵ That the *Fainblatt* Court, the district court, and Justice Marshall never fully distinguished or applied the *de minimis* doctrine reflects again the Court’s traditional indifference to considerations of degree in commerce clause interpretations. Justice Rehnquist’s insistence to the contrary depends upon his return to “local” and “private” distinctions and his repair to Cardozo’s remarks on federalism in pre-1937 opinions. Such a distortion of precedent probably forecasts the judicial disposition of New Federalism toward the commerce clause.

III. THE TENTH AMENDMENT

In *National League of Cities v. Usery*,³⁶ for the first time in four decades, the Supreme Court held a congressional regulation of interstate commerce unconstitutional.³⁷ The Court premised its decision on the tenth amendment protection of state sovereignty but left countless issues unresolved. The *Virginia* and *Indiana* decisions mark the Court’s first attempt to address two of these questions: first, whether a congressional regulation of private activity is constitutional when it effectively regulates the state “in areas of traditional government functions”; and second, whether control over land use constitutes an “attribute of state sovereignty?” To resolve these issues, the Court delimits the rhetoric of *National League of Cities* and diminishes that decision’s importance as federalist precedent.

“*National League of Cities v. Usery*,” writes one commentator, “has come to symbolize the Burger Court’s concern for the rights of states in the federal system.”³⁸ Rehnquist was the spokesman for that concern. Under his guidance,³⁹ the Court found that

35. *Indiana*, 501 F. Supp. at 458.

36. 426 U.S. 833 (1976).

37. The last such action was *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

38. Editor’s epigraph to Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977). Professor Tribe regards the case within a line of precedent exhibiting “concern for the rights of states in a federal system.” Compare, Michelman, *States’ Rights and States’ Roles: Permutations of Sovereignty in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977) (critical of the opinion’s abstract language and treatment of precedent); Schwartz, *National League of Cities v. Usery—The Commerce Power and State Sovereignty Redivivus*, 46 FORDHAM L. REV. 1115 (1978).

39. The *National League of Cities* opinion was conceived the year before in Rehnquist’s dissent in *Fry v. United States*, 421 U.S. 542 (1975) (Rehnquist, J., dissenting). The dissent begins with a federalist rallying cry, quoting Chief Justice Chase in *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869): “the Constitution in all its provisions looks to an inde-

1974 amendments to the Fair Labor Standards Act, mandating pay levels for state employees, regulated the "States as States."⁴⁰ The Act further displaced "the states' freedom to structure integral operations in areas of traditional government functions"—a freedom guaranteed by the tenth amendment.⁴¹

Relying on *National League of Cities*, Virginia focused its tenth amendment challenge on the "steep slope" provisions of Title V.⁴² The district court found the following: 95 percent of strip-pable coal in Virginia was subject to the provisions; the only economic value of much of the land in western Virginia lay in its coal; and leveling the land actually increased its market value.⁴³ Based on these findings, the court concluded that, through SMCRA's steep slope provisions, Congress had usurped the state's traditional function of regulating use of private land within its borders; and such a usurpation was impermissible under *National League of Cities*.⁴⁴ In *Indiana* the district court reached the same conclusions about the prime farmland provisions.⁴⁵ Both courts recognized the chief hurdle in reaching their conclusions: "whether the federal surface mining act is directed to the state as a sovereign entity

...⁴⁶

Responding to these arguments, Justice Marshall frames a test from *National League of Cities*. Plaintiffs must satisfy each of three requirements: (1) "the challenged statute regulates the 'States as States'"; (2) the statute affects indisputable "attributes of state sovereignty"; and (3) the statute directly impair[s] [the state's] ability to structure integral operations in areas of traditional functions."⁴⁷ Under this test, "[plaintiffs'] Tenth Amendment challenge must fail because the first of the three require-

structible union, composed of indestructible states."

40. *National League of Cities*, 426 U.S. at 852. *National League of Cities* overruled *Maryland v. Wirtz*, 392 U.S. 833 (1968), which had upheld similar amendments to the Act.

41. The Court previously declined to apply the tenth amendment limitation to Congress' power under section five of the fourteenth amendment. *City of Rome v. United States*, 446 U.S. 156 (1980); *Fitzpatrick v. Bitzer*, 427 U.S. 425 (1976). For a discussion of other issues, see, e.g., Kaplan, *Tenth Amendment Challenge to the Surface Mining Control and Reclamation Act of 1977*, 49 *FORDHAM L. REV.* 589 (1980).

42. 30 U.S.C. § 1265. The Act requires restoration of slopes greater than 20 degrees to their original contour. The absurdity of applying this requirement in western Virginia is brought to its illogical conclusion in Virginia, 101 S. Ct. at 2370 n.38: the Court suggests that if flat land is so valuable, operators can always strip the land again once it has been reclaimed according to the Act.

43. Virginia, 438 F. Supp. at 434.

44. *Id.* at 433-34.

45. *Indiana*, 501 F. Supp. at 458.

46. Virginia, 438 F. Supp. at 432.

47. Virginia, 101 S. Ct. at 2366.

ments is not satisfied."⁴⁸ The reason for its failure is the "sharp distinction" in *National League of Cities* between congressional commerce power over private persons and business ("necessarily subject to the dual sovereignty . . . of the Nation and of the State"⁴⁹) and regulation of the states as states.⁵⁰ As interpreted by the Court, this distinction appears to leave no middle ground for considering the primary effects of regulation on states when the states are not the principal object of regulation. Such an interpretation severely limits the rhetoric of *National League of Cities*.

The Court appears to offer little help resolving whether land use regulation is an attribute of state sovereignty. Marshall does not expressly find the second and third requirements of the test satisfied. The opinion might be read either to imply satisfaction or simply not to reach the question.⁵¹ But upon close reading, the Court's affirmation of Congress' "supreme and exclusive" authority over commerce seems to raise the question by implication. The Court asserts that "Congress could constitutionally have enacted a statute prohibiting any state regulation of surface mining."⁵² As phrased, such a statute evidently would regulate the states as states, thus satisfying the first requirement of the *National League of Cities* test. If the second and third requirements were met, the statute would be unconstitutional under the test presently articulated by the Court. Marshall's discussion following the hypothesized statute suggests no basis for distinguishing state regulation of land use from any other exercise of state police power; but neither does the discussion distinguish land use regulation from those traditional services of state government protected in *National League of Cities*.⁵³

The single clue to resolving whether land use regulation is an attribute of state sovereignty appears in note 18 to the *Indiana*

48. *Id.*

49. *National League of Cities*, 426 U.S. at 845.

50. *Virginia*, 101 S. Ct. at 2365.

51. The latter reading seems preferable.

52. *Virginia*, 101 S. Ct. at 2367.

53. The Court listed some essential government services but did not claim the list was exhaustive: "fire prevention, police protection, sanitation, public health, and parks and recreation." *National League of Cities*, 426 U.S. at 851. Professor Stewart finds "the justification suggested by *National League of Cities* . . . for recognizing a special constitutional place for traditional state and local government service extends as well to at least some of the regulatory activities of the administrative state, including, in particular, the maintenance of environmental quality . . . through controls on land use . . ." But Stewart acknowledges that such an extension "appears flatly inconsistent with the well-established authority of Congress under the commerce power to regulate local activity . . ." Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 *YALE L.J.* 1196, 1267-68 (1977).

opinion. There the Court attempts to distinguish SMCRA from land use regulations typically enacted by state and local governments. SMCRA, the Court declares, regulates:

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 post reclamation use of mined lands.⁵⁴

The note appears to address the second and third requirements of the *National League of Cities* test by deprecating the Act's intrusion on state regulatory authority. That is, the Court seems to imply that if land use regulation is a traditional function of state government and an attribute of state sovereignty, the states' ability to "structure integral operations" is not permanently impaired by SMCRA. But this reasoning still does not necessarily permit express, total preemption of state regulation. (In fact, it is the peculiar nature of SMCRA that it neither mandates nor prohibits state regulation.) In any case, the Court's treatment of this question is far from clear and provides little guidance to future plaintiffs. This lapse in clarity aside, the final importance of the opinion lies in the Court's refusal to extend *National League of Cities* beyond its facts. To that extent, the Court moves toward confirming Justice Brennan's assertion that *National League of Cities* is simply at odds with commerce clause precedent.⁵⁵

IV. THE FIFTH AMENDMENT

Focusing again on the prime farmland and steep slope provisions, the district courts concluded that SMCRA effected an uncompensated taking of private property.⁵⁶ The *Virginia* court based its decision on the impossibility of complying with the steep slope provisions in the rugged topography of western Virginia. Given that impossibility, the regulations effectively deprived the owner "of any use of his land, not only the most profitable use."⁵⁷

54. *Indiana*, 101 S. Ct. at 2386.

55. *National League of Cities*, 426 U.S. at 860 (Brennan, J., dissenting). Justice Brennan, joined by Justice Marshall, accused the Court of betraying 152 years of commerce clause precedents and manufacturing "an abstraction without substance, founded neither in the words of the Constitution nor on precedent. An abstraction having . . . profoundly pernicious consequences" *Id.* Justice Blackmun conditioned his concurrence on the understanding that the Court "did not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater" *Id.* at 856. The Court refers to this balancing in *Virginia*, 101 S. Ct. at 2366 n.29.

56. U.S. CONST. amend. V: "nor shall private property be taken for public use, without just compensation."

57. *Virginia*, 483 F. Supp. at 441.

Similarly, the *Indiana* court found it "technologically impossible to reclaim prime farmland . . . [to] equal or higher levels of yield." But a mining permit would not issue under the Act without a showing of the operator's ability to restore the mined land. The court, therefore, held that the Act effected a "taking" of the mineral owner's interest in the land.⁵⁸

The Supreme Court makes short work of these arguments, finding them fatally flawed for failure to identify any property actually taken or to allege the denial of a permit.⁵⁹ Thus, the only test applicable to the Act under a facial challenge of taking is whether it "denies an owner economically viable use of his land." The Court has no difficulty upholding the Act under this test.⁶⁰

Professor Linda Samuels has recently written a thorough exegesis of the "taking" problem.⁶¹ She emphasizes that a successful taking challenge to SMCRA will depend on the findings that restoration and reclamation are impossible and the owner's interest in the land is virtually worthless under the regulations. She also casts doubt on the continued precedential value of *Pennsylvania Coal Co. v. Mahon*⁶²—heavily relied upon by the district courts—in light of the Court's recent "ad hoc" decisions revealing "a growing willingness to uphold legislative restraints on the use of private property."⁶³ It seems reasonable to predict that future litigation of SMCRA reaching the Court will probably raise another taking challenge that the Court will be forced to decide.

Rehnquist does not address the taking challenge in his concurring opinion, but his position on the issue will be crucially important given the dictates of his federalist perspective and his willingness to challenge legislative judgments. Professor Fiss has argued that "Rehnquist prefers state autonomy because it is more consonant with classical *laissez-faire* theory . . . protecting the rights and expectations of property holders."⁶⁴ Hence, the plaintiffs' arguments favoring state regulation of surface mining fit naturally

58. *Indiana*, 501 F. Supp. at 470. This finding apparently conflicts with the Report of the House Committee. H.R. REP. NO. 218, 95th Cong., 1st Sess. 184-85, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 593.

59. *Virginia*, 101 S. Ct. at 2369; *Indiana*, 101 S. Ct. at 2388.

60. *Virginia*, 101 S. Ct. at 2370.

61. Samuels, *Surface Mining: Will Supreme Court Precedent Be Reclaimed?*, 19 AM. BUS. L.J. 47 (1981); Samuels, *Constitutional Taking After Penn Central*, 8 REAL ESTATE L.J. 230 (1980).

62. 260 U.S. 393 (1922).

63. See, e.g., *Pruneyard Shopping Center v. Robins*, 444 U.S. 949 (1980); *Andrus v. Allard*, 444 U.S. 81 (1979); *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962).

64. Fiss, *The Rehnquist Court*, NEW REPUBLIC, March 10, 1982, at 14, 21.

into Rehnquist's thinking.

Moreover, Professor Fiss notes, state autonomy even gives way to property rights when the two collide in Rehnquist's thinking. For example, Rehnquist strongly dissented from the Court's approval of a New York law requiring Grand Central Station to be maintained as a landmark at the owner's expense.⁶⁵ Like the plaintiffs in the *Virginia* and *Indiana* cases, he relied heavily on Justice Holmes' opinion for the Court in *Pennsylvania Coal Co. v. Mahon*.⁶⁶ He repeatedly asserted that the fifth amendment "was designed to bar Government from forcing some people alone to bear public burdens"⁶⁷ This assertion implicates the Constitution's protection of private property—a protection similarly invoked when Holmes expressed the fear that "private property disappears" when the fifth amendment is compromised.⁶⁸ Rehnquist's concern for private property theoretically sets him against the growth of environmental legislation which has progressively burdened the property holder. Noting this burden, Barry Commoner has remarked:

[T]he growth of environmental law has been changing the definition of private property. For instance, the environmental land law says that land can no longer be regarded strictly as a commodity. It is a social resource⁶⁹

The district courts in the *Virginia* and *Indiana* cases explicitly invoked the fifth amendment against the kind of trend Commoner has described and SMCRA allegedly exemplifies. One would expect Justice Rehnquist to be sympathetic to these arguments and to attempt to marshal support for them among his colleagues.

V. CONCLUSION

From a federalist perspective, the present decisions are important for three reasons. They reaffirm the expansive, plenary power of Congress under the commerce clause to regulate activities "affecting" commerce. To some extent the decisions also qualify and delimit the rhetoric of *National League of Cities*, at least delaying the great expectations of that decision becoming the rock upon which judicial New Federalism would be built. Finally, the deci-

65. *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 138 (1978) (Rehnquist, J., dissenting).

66. 260 U.S. 393 (1922).

67. *Penn Central*, 438 U.S. at 148 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

68. *Mahon*, 260 U.S. at 415.

69. Commoner, *Cleaning the Air, Preserving Our Sanity*, 4 BARRISTER 24, 25 (1977).

sions reveal the basic philosophical and political dilemma of a judicial conservative and federalist. Archibald Cox speaks of this dilemma in another context:

Conservatives usually stress the legal side of constitutional adjudication and adhere to the law revealed in precedent, but these cases could put their belief in the importance of the idea of law to a severer test.⁷⁰

The broad, intrusive congressional power under the commerce clause, as interpreted and deferred to in numerous cases over the last 40 years, is antithetical to federalist notions of decentralized government and state sovereignty. But the force of precedent finally compels Justice Rehnquist to agree with the Court's decision; precedent restrains him from adopting the activist's role, as he did in *National League of Cities*, and striking down a politically unpalatable piece of legislation. Nonetheless, his concurring opinion exhumes other precedents which, given Rehnquist's youth and influence, may supply foundation enough to support the construction of judicial New Federalism—the house that William would build.

70. A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 111 (1976).