

University of Michigan Journal of Law Reform

Volume 15

1981

Coal Policy--Need It Be the West Against the Rest?

C. Peter Goplerud III
Southern Illinois University

Duffy Ruimerman
New Mexico Department of Energy and Minerals

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Energy and Utilities Law Commons](#), [Natural Resources Law Commons](#), and the [Oil, Gas, and Mineral Law Commons](#)

Recommended Citation

C. P. Goplerud III & Duffy Ruimerman, *Coal Policy--Need It Be the West Against the Rest?*, 15 U. MICH. J. L. REFORM 77 (1981).

Available at: <https://repository.law.umich.edu/mjlr/vol15/iss1/4>

This Article is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mLaw.repository@umich.edu.

COAL POLICY — NEED IT BE THE WEST AGAINST THE REST?

C. Peter Goplerud III*
Duffy Ruimerman**

Oil, natural gas, and coal constitute the three primary sources for industrial and personal energy use in this country. In recent years, however, supplies of oil and natural gas have been dwindling.¹ The 1973 Arab oil embargo focused the attention of the American public for the first time on the important role and detrimental effects of heavy foreign oil consumption. More recently, developments in Iran brought renewed emphasis on attempts to shift energy usage away from imported oil. As part of this emphasis, President Carter urged that increased attention be paid to the nation's most abundant energy resource: coal.

The United States possesses thirty-one percent of the world's economically recoverable coal reserves,² and coal comprises roughly ninety percent of total United States fossil-fuel reserves.³ Despite these enormous reserves, coal lags behind as a source of energy. In 1977, coal supplied only eighteen percent of total American energy needs, compared to a seventy-five percent share for oil and natural gas.⁴ Thus, beginning in 1977 with the announcement of the National Energy Plan,⁵ development and use of the nation's vast coal resources became a focal point of controversy, government policymaking, and industrial planning.

Since the Plan's inception, however, no drastic change has oc-

* Associate Professor of Law, Southern Illinois University at Carbondale. B.A., 1971, J.D., 1974, University of Kansas. This Article is part of a forthcoming book by Professor Goplerud, *COAL DEVELOPMENT AND USE: THE LEGAL CONSTRAINTS AND INCENTIVES* (Lexington, Mass.: Lexington Books, D.C. Heath & Co.) (to be published 1982).

** Federal-State Liaison Officer, New Mexico Department of Energy and Minerals. B.A., 1975, Smith College.

The views expressed herein are solely those of the authors and should in no way be attributed to the State of New Mexico.

© Copyright, 1981, C. Peter Goplerud III and Duffy Ruimerman.

1. See *ENERGY POLICY AND PLANNING, EXECUTIVE OFFICE OF THE PRESIDENT, THE NATIONAL ENERGY PLAN 11-19 (1977)* [hereinafter cited as *NATIONAL ENERGY PLAN*].

2. Pelham, *Bright Future Seen for Coal, But Many Problems Remain*, 38 *CONG. Q. WEEKLY REP.* 1481 (1980).

3. *NATIONAL ENERGY PLAN*, *supra* note 1, at xii.

4. *Id.*

5. *Id.*

curred to remedy the disproportionate emphasis on oil and natural gas, over coal, as energy sources. Although coal use has increased by about five percent annually, and production is projected to reach one billion tons by 1985,⁶ the industry operates presently at a level far below its actual capacity: twelve percent of the estimated 1980 coal production of approximately 825 million tons⁷ never was produced.⁸ The 20,000 miners who are presently unemployed⁹ further demonstrate the lack of a strong market for coal.

This picture seems inconsistent with the announced policy aim to promote coal production and consumption. In tracing the roots of this inconsistency, no simple or clear answer exists, for a multitude of factors come into play. The lack of a definitive national energy policy,¹⁰ though, certainly constitutes an important deficiency, despite the comprehensive scope of the original National Energy Plan.¹¹ A more important factor, however, may be

6. Pelham, *supra* note 2, at 1483. This contrasts with the National Energy Plan, which sought to increase production to about 1.2 billion tons annually by 1985. See NATIONAL ENERGY PLAN, *supra* note 1, at 63-64, 94-96.

7. See Franklin, *Coal's Future*, N.Y. Times, Nov. 16, 1980, § 1, at 1, col. 1.

8. The industry has 100 million tons of excess capacity. Pelham, *supra* note 2, at 1481.

9. *Id.*

10. See generally Entin, *Energy Politics in the House of Representatives: The National Energy Plan*, 11 CONN. L. REV. 403 (1979).

11. A number of pieces of federal legislation — several focusing on coal use and development — could form the basis for such a national energy policy. The Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. §§ 791-792 (1976 & Supp. III 1979) ("ESECA"), was the first pro-coal legislation to emerge in the 1970's. ESECA provided authority for ordering utilities using oil or natural gas to convert to coal and generally required new plants to be designed to utilize coal. The impact of ESECA was negligible, however, leading Congress to enact in 1978 the Powerplant and Industrial Fuel Use Act, 42 U.S.C. §§ 8301-8483 (Supp. III 1979) ("FUA"). FUA, one of five parts of the National Energy Act of 1978, serves essentially as a replacement for ESECA. It encourages substitution of coal for oil and natural gas in electric generating plants and industrial boilers, see *id.* § 8341, and it also prohibits new facilities from using oil or natural gas as a primary source, *id.* § 8311.

Most recently, Congress enacted the Energy Security Act of 1980, P.L. 96-294, 94 Stat. 611 (to be codified primarily at 42 U.S.C. §§ 8701-8912), establishing the United States Synthetic Fuels Corporation. The Corporation is authorized to provide up to \$20 billion in subsidies to industrial concerns wishing to construct facilities to produce synthetic fuel from, among other resources, coal. Finally, in 1980 yet another effort was undertaken to encourage conversion to coal by utilities, particularly in the Northeast. The so-called "Oil Back-out" bill, S. 2470, 96th Cong., 2d Sess., 126 CONG. REC. S8092 (1980), which would have provided loans and grants to enable some 80 power plants to convert from oil and natural gas to coal as a fuel source, passed the Senate but never found its way to the floor of the House.

Given the apparent congressional interest, there must be stumbling blocks which have blocked major increases in coal production. Arguments can be made that the various pieces of environmental legislation and their accompanying regulations stifle increased coal development. The Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. III 1979), for exam-

the conflict between regionalism and nationalism — a contemporary version of the time-honored battle between states' rights and a strong central government.¹² Specifically, the interests of the Western States¹³ — actors critical to the development of the country's coal reserves — are not necessarily harmonious with the national policy to promote coal production and consumption.

The Western States possess roughly fifty-four percent of the nation's economically recoverable coal reserves,¹⁴ with a full

ple, imposes strict limitations upon emissions of sulphur dioxide, particulates, and nitrogen oxides, all of which result from burning coal. Moreover, coal-fired power plants and coal mines present serious water pollution problems which are stringently regulated under the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979). Finally, coal-burning plants produce some hazardous wastes, especially at plants employing flue gas desulphurization equipment (scrubbers), disposal of which is regulated by the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1976 & Supp. III 1979). Remedying these various pollution problems arising from coal use has proved to be costly, time consuming, and, in some cases, politically difficult.

Further concerns arise that transportation issues will frustrate gains in coal production. Over the last several years there has been a critical shortage of railroad hopper cars used for transporting coal. Additionally, there have been bureaucratic delays in approving new rail lines important to coal production, such as the long-delayed Star Lake Railroad which, if ever approved, would form a link with substantial coal deposits in the Star Lake Bisti area of northwest New Mexico. *Coal Leases on BLM Lands in New Mexico: Hearing Before the Subcomm. on Energy Resources and Materials Production of the Senate Comm. on Energy and Natural Resources, 96th Cong., 1st Sess. 10 (1979)* (statement of Arthur W. Zimmerman). The alternative mode of transporting coal — the slurry pipeline, a system whereby coal is pulverized and pumped through a pipeline to a distribution center — appears mired in political and legal difficulties. Railroads strenuously resist this encroachment upon their near-monopoly over coal transportation, and many localities oppose granting rights of way to such a pipeline.

Finally, coal development may be slowed by resistance to the economic and social impacts arising from intensive production activities. Many fear the boomtown syndrome, where a sudden influx of people associated with mining or other coal-related activities can have a devastating effect on the fiber of a region. See, e.g., Goplerud & O'Neil, *Coal Gasification: The Critical Issues*, 58 DEN. L.J. 35, 44-46 (1980); Little, *Some Social Consequences of Boom Towns*, 53 N.D. L. REV. 401 (1977).

12. See Note, *The Sagebrush Rebellion: Who Should Control the Public Lands?*, 1980 UTAH L. REV. 505; *Rocky Mountain High*, TIME, Dec. 15, 1980, at 28; *The Angry West Vs. the Rest*, NEWSWEEK, Sept. 17, 1979, at 31.

13. For purposes of this Article, "Western States" refers to Montana, Wyoming, North Dakota, South Dakota, Colorado, Nevada, Utah, New Mexico, Idaho, and Arizona. Energy concerns in the West are significant enough that two different organizations have been formed by the state governments in the region to foster Western programs and policies. One is the Western Governor's Policy Office. Members of this organization include North Dakota, South Dakota, Nebraska, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, and Alaska. The other organization, the Western Interstate Energy Board, is composed of the same states plus Idaho, Washington, Oregon, California, and Hawaii.

14. FEDERAL COAL MANAGEMENT PROGRAM, BUREAU OF LAND MANAGEMENT, U.S. DEPT OF INTERIOR, FINAL ENVIRONMENTAL STATEMENT 2-1 (1979) [hereinafter cited as COAL ENVIRONMENTAL STATEMENT]; CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE ENERGY FACTBOOK 582-83 (Comm. Print 96-IFC-60, 1980) [hereinafter cited

forty percent of the nation's reserves located in Wyoming and Montana alone.¹⁵ Much of this coal, however, lies beneath public lands or has been retained by the federal government during various historical land grants, so that the federal government controls approximately eighty percent of the coal reserves¹⁶ and owns nearly half the land¹⁷ in the Western States. Government land ownership ranges from thirty percent in Montana to eighty-seven percent in Nevada.¹⁸ This ownership of land and resources gives the federal government almost complete control over coal production west of the Mississippi. Thus arises the conflict between the Western States and the federal government, perceived frequently as an absentee landlord. Many in the West do not want Washington to dictate how and when to develop the region's natural resources; these people bristle under domination by federal policies.¹⁹

Some federal officials and business leaders, however, argue that decisions regarding whether to open an area for coal development should rest with the owners of the land.²⁰ As noted, this approach would leave most development decisions in the West with the federal government. Westerners counter, though, that this orientation overlooks, or oversimplifies, the impact of such development upon nearby land and communities.²¹ These people face concerns far more immediate than the importance of coal to

as ENERGY FACTBOOK]. See also Horwitch, *Coal: Constrained Abundance*, in ENERGY FUTURE: REPORT OF THE ENERGY PROJECT AT THE HARVARD BUSINESS SCHOOL 79, 87 (1979). "Reserves" denotes coal that can be mined at prevailing market prices.

15. ENERGY FACTBOOK, *supra* note 14, at 582. See also *Coal Severance Taxes: Hearings on H.R. 6625, 6654, and 7163 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 2d Sess. 13* (1980) (statement of Samuel L. Devine) [hereinafter cited as *Severance Tax Hearings*].

16. COAL ENVIRONMENTAL STATEMENT, *supra* note 14, at 2-1.

17. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF INTERIOR, PUBLIC LAND STATISTICS 1979, at 9.

18. *Id.* See generally AMERICAN PETROLEUM INSTITUTE, TWO ENERGY FUTURES: A NATIONAL CHOICE FOR THE 80s 62-68 (1980); P. GATES & R. SWENSON, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968); PUBLIC LAND LAW REV. COMM'N, ONE THIRD OF THE NATION'S LAND (1970); Watson, *The Federal Coal Follies—A New Program Ends (Begins) A Decade of Anxiety??*, 58 DEN. L.J. 65 (1980).

19. See *A Second American Revolution*, Address by Sen. Orrin Hatch to Western Coalition on Public Lands, Reno, Nevada (Sept. 6, 1979) [on file with the *Journal of Law Reform*]; Melloan, *Rebellious Mood in the West*, Wall St. J., Aug. 16, 1979, at 16, col. 3; NEWSWEEK, *supra* note 12, at 32.

20. See White & Barry, *Energy Development in the West: Conflict and Coordination of Governmental Decision-Making*, 52 N.D. L. REV. 451, 500 (1976).

21. Rock Springs and Green River, Wyoming, are two examples of communities which have suffered adversely from the impacts of energy development. See Daley, *Financing Housing and Public Facilities in Energy Boom Towns*, in 22 ROCKY MT. MIN. L. INST. PROCEEDINGS 47, 49-50 (1976). See generally Gilmore, *Boom Towns May Hinder Energy Development*, 191 SCIENCE 535 (1976).

the nation's energy future.

This Article will analyze the legal issues involved in this "West against the rest" conflict. While numerous areas of disagreement exist within the larger picture of Western-federal relations, the Article will focus on two specific issues of present concern. First, the Article will explore the role of the states under the Surface Mining Control and Reclamation Act of 1977.²² This section includes an analysis of recent litigation involving regulations promulgated by the Secretary of the Interior relating to the establishment of state mining programs. Second, the Article will address the imposition of state severance taxes on coal, with particular emphasis on the Montana tax sustained recently by the Supreme Court. The Article's essential premise is that sound policy should balance the substantial federal interest in development of Western energy sources against state and local concerns regarding the social, economic, and environmental impacts of this development.²³

I. SURFACE MINING

Surface mining presently produces approximately sixty-one percent of the coal mined in this country.²⁴ Beyond doubt, this mining method, while an expedient means of production, seriously disrupts the land. This disruption in the past has been felt particularly in several Eastern states,²⁵ and by the mid-1970's it became apparent that various Western states soon would be affected. Programs enacted at the state level to combat the adverse effects of strip mining were largely unsuccessful.²⁶ Thus, Congress aimed for a federal regulatory scheme which would satisfy the need for a rational approach both to strip mining and to efforts at reclaiming the land after strip-mining efforts had been completed.

Toward this end, in 1977 Congress enacted the Surface Mining Control and Reclamation Act²⁷ ("SMCRA"). The SMCRA contains several very important and explicit findings and pur-

22. 30 U.S.C. §§ 1201-1328 (Supp. III 1979).

23. See Harvey, *Federal-State Relationships in Federal Land and Resource Management*, 54 DEN. L.J. 585, 588-89 (1977).

24. ENERGY FACTBOOK, *supra* note 14, at 548.

25. See H.R. REP. NO. 218, 95th Cong., 1st Sess. 58, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 593, 596 [hereinafter cited as H.R. REP. NO. 218].

26. H.R. REP. NO. 218, *supra* note 25, at 73.

27. 30 U.S.C. §§ 1201-1328 (Supp. III 1979).

poses. Congress made clear its understanding of the potential devastation caused by surface mining,²⁸ while emphasizing the importance of coal production to the nation's energy future.²⁹ Through the SMCRA, Congress aimed to create a national program for controlling the methods and effects of surface mining, in a manner calculated to protect the environment and to provide the coal deemed necessary for energy stability.³⁰ Most importantly, for purposes of this Article, Congress found that due to "the diversity in terrain, climate, biologic, chemical, or other physical conditions in areas subject to mining operations, *the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to [the SMCRA] should rest with the States.*"³¹ This concept of state control or "primacy" was emphasized several times during consideration of the SMCRA.³² The concept had been found workable for air and water pollution control and was perceived as essential to successful management of surface mining.³³

A. Constitutional Challenges to the SMCRA

Within a short time after enactment, the SMCRA began to come under close scrutiny from the states and various mining concerns. Litigants in Virginia,³⁴ Indiana,³⁵ Iowa,³⁶ and Tennes-

28. *Id.* § 1201(c).

29. *Id.* § 1201(d).

30. *Id.* § 1202.

31. *Id.* § 1201(f)(emphasis added).

32. See H.R. REP. No. 218, *supra* note 25, at 57, 129.

33. The key to the Act is Title V, designed to lay the groundwork for control of the environmental impacts of surface mining. Parties intending to conduct surface mining operations must obtain a permit either from the state where the operations will occur, or from the Federal Office of Surface Mining Enforcement and Reclamation, depending upon which authority has responsibility for the program. 30 U.S.C. § 1256 (Supp. III 1979). The SMCRA sets forth specific design criteria and performance standards which must be incorporated into the permit. *Id.* §§ 1257, 1265. The permit cannot be issued without preparation by the operator of a reclamation plan. *Id.* § 1258. Furthermore, the operator must file a performance bond prior to issuance of the permit, *id.* § 1259, guaranteeing adherence to the requirements of the permit. The SMCRA also describes procedures and criteria for designation of particular areas as unsuitable for surface mining. *Id.* § 1272. Finally, the Act requires operators to pay a fee of 35 cents per ton of coal produced to fund reclamation activities at abandoned mine sites. *Id.* § 1232.

34. *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 101 S. Ct. 2352 (1981).

35. *Hodel v. Indiana*, 101 S. Ct. 2376 (1981). See also *Andrus v. P-Burg Coal Co.*, 495 F. Supp. 82 (S.D. Ind. 1980), *aff'd*, 644 F.2d 1231 (7th Cir. 1981).

36. *Star Coal Co. v. Andrus*, 14 ENVIR. REP. 1325 (S.D. Iowa 1980), *vacated sub nom. Watt v. Star Coal Co.*, 101 S. Ct. 3132 (1981).

see³⁷ have challenged the legislation on the basis of the commerce clause and the fifth and tenth amendments. The most recent constitutional attacks on the SMCRA, *Hodel v. Virginia Surface Mining & Reclamation Association*³⁸ and *Hodel v. Indiana*,³⁹ form the basis of analysis here. Although the cases were not consolidated, Justice Marshall, author of both majority opinions, apparently focused upon *Virginia*⁴⁰ as the "lead" decision; this Article will do likewise.

The cases advanced two constitutional objections to the SMCRA. The first and least appealing contention was that the commerce clause⁴¹ did not authorize the legislation. Although one lower court⁴² had agreed with the contention that the SMCRA's restraints on land use regulated purely local activity having no impact on interstate commerce, the Supreme Court disagreed, finding the legislation to have a firm commerce clause basis. Congress had made explicit findings, expressed in the text of the Act, that surface mining influences interstate commerce — and the Court continued a long trend of deference to congressional findings regarding the impact of activities upon interstate commerce.⁴³ Beyond doubt, coal mining has some effect upon interstate commerce, even though mining operations themselves are purely local activities.⁴⁴ Given this effect, the concerns reflected in the SMCRA — for the long-term productivity of mine lands and for avoiding health and safety hazards in mining — fall within the scope of Congress' power to adopt reasonable means for regulating interstate commerce.⁴⁵ The decisions are consistent with previous cases and do not expand the already broad powers of Congress to regulate interstate commerce.⁴⁶

37. *Concerned Citizens of Appalachia, Inc. v. Andrus*, 494 F. Supp. 679 (E.D. Tenn. 1980), *rev'd mem.*, No. 80-1448 (6th Cir. Jan. 5, 1982).

38. 101 S. Ct. 2352 (1981).

39. 101 S. Ct. 2376 (1981).

40. *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 101 S. Ct. 2352 (1981).

41. U.S. CONST. art. I, § 8, cl. 3.

42. *Indiana v. Andrus*, 501 F. Supp. 452 (S.D. Ind. 1980), *rev'd sub nom. Hodel v. Indiana*, 101 S. Ct. 2376 (1981).

43. See *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 101 S. Ct. at 2359-64.

44. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

45. *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 101 S. Ct. at 2362-64.

46. Justice Rehnquist, concurring in *Virginia*, expressed his fear that the majority had broadened the expansive scope of congressional power under the commerce clause. He criticized the majority approach for its failure to emphasize that Congress may regulate only those activities having a "substantial effect" upon interstate commerce; the majority's various renditions of the commerce clause test had included the "substantial" phraseology only once.

This concern, however, appears to be a false alarm. The Court has not unfailingly included the term "substantial" when describing the test to be utilized in assessing con-

The more significant and substantial issue presented to the Court involved the argument that several sections of the SMCRA violated tenth amendment limits on congressional power.⁴⁷ This argument gave the Court an opportunity to reexamine its holding in *National League of Cities v. Usery*,⁴⁸ at a time when the banner of states' rights is attracting great followings, particularly in the West. *National League of Cities* involved a challenge to amendments to the Fair Labor Standards Act⁴⁹ requiring state and local governments to observe minimum wage and maximum hour regulations. The Court there concluded that the tenth amendment bars exercise of the commerce clause authority in ways impairing "States' 'ability to function effectively in a federal system'."⁵⁰

In *Virginia*, the Court stood by the approach of *National League of Cities*, enunciating a three-part test for approaching tenth amendment challenges to the exercise of federal power. Invalidation of congressional regulation on tenth amendment grounds would require, at a minimum, (1) "a showing that the challenged statute regulates the 'States as States,'" (2) a showing that the federal regulation addresses "matters which are clearly 'attributes of state sovereignty,'" and (3) a finding "that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions'."⁵¹ Under this approach, the Court correctly rejected the tenth amendment challenges to provisions of the SMCRA, because the legislation did not regulate the "States as States" as required by the first element of the test.⁵²

gressional regulation of interstate commerce. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 303 (1964). Furthermore, the activities under regulation have such apparent effects upon interstate commerce that no great significance should be attached to the absence of the "substantial effect" terminology. If the case involved more isolated or localized activity, perhaps the Court's particular language would have import, but strip mining arguably has a far greater impact upon interstate commerce than operating a motel or restaurant, both of which have been held to be subject to congressional power over interstate commerce. See *id.*; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

47. *Virginia* involved a challenge to a provision requiring surface mining operators on steep slopes to return the land to its "approximate original contour," 30 U.S.C. § 1365(d) (Supp. III 1979). 101 S. Ct. at 2364. In *Indiana*, the general "approximate original contour" requirement, 30 U.S.C. § 1265(b)(3) (Supp. III 1979), and the various "prime farmland" provisions were challenged. 101 S. Ct. at 2380, 2381 & n.6, 2385-86.

48. 426 U.S. 833 (1976).

49. 29 U.S.C. §§ 201-219 (1976 & Supp. III 1979).

50. 426 U.S. at 852 (quoting *Fry v. United States*, 421 U.S. 542, 547 n.7 (1974)).

51. 101 S. Ct. at 2366 (quoting 426 U.S. at 845, 852, 854).

52. *But see Virginia Surface Mining & Recl. Ass'n, Inc. v. Andrus*, 483 F. Supp. 425, 431-35 (W.D. Va. 1980) (arguing that the SMCRA contravenes the tenth amendment

The Court's ruling on the tenth amendment question seems inescapably correct. Strictly speaking, the SMCRA addresses the activities of private coal operators, and thus does not regulate the "States as States." The Act does not *require* state legislation or regulation, or the expenditure of state funds.⁵³ To invalidate federal legislation which does not impose specific requirements on the "States as States" would greatly weaken legitimate congressional authority over vital aspects of commerce. The SMCRA represents an exercise in "cooperative federalism,"⁵⁴ not unlike other environmental legislation.⁵⁵ Private citizens, not governmental entities, are those directly regulated — and "nothing in *National League of Cities* suggests that the Tenth Amendment shields the States from pre-emptive federal regulation of *private* activities affecting interstate commerce."⁵⁶

There is, however, one troubling aspect of the Court's resolution of the tenth amendment issue. The majority opinion seems to have adopted the view, first expressed in Justice Blackmun's concurrence in *National League of Cities*, that the federal government might have greater leeway to operate in areas traditionally reserved to the states where a "demonstrably greater" federal interest, such as environmental protection, is at stake.⁵⁷ In *Virginia*, the Court made specific reference to Blackmun's concurrence to support the proposition that a tenth amendment challenge to congressional action would not necessarily be successful even if all elements of the three-part test were satisfied, observing that "the nature of the federal interest advanced may be such that it justifies State submission."⁵⁸ The difficulty with this approach, though, is its lack of a constitutional foundation. The Constitution does not grant Congress expanded powers to intrude upon state sovereignty regarding specific subject matters such as health or environmental regulation. While the underlying policies may have appeal to some environmentalists, the

because it interferes with the state's plan for economic development, undermines the state's economy, forces the state to spend money in compliance with the federal scheme, and deprives the state of the ability to choose how best to protect the environment), *rev'd sub nom.* *Hodel v. Virginia Surface Mining & Recl. Ass'n, Inc.*, 101 S. Ct. 2352 (1981); *Indiana v. Andrus*, 501 F. Supp. 452, 461-68 (S.D. Ind. 1980) (upholding challenges to the SMCRA under the tenth amendment because land use control and planning decisions constitute areas of traditional state sovereignty that are displaced by the legislation), *rev'd sub nom.* *Hodel v. Indiana*, 101 S. Ct. 2376 (1981).

53. 101 S. Ct. at 2366.

54. *Id.*

55. *Id.* n.30.

56. *Id.* at 2367.

57. 426 U.S. at 856 (Blackmun, J., concurring).

58. 101 S. Ct. at 2366 n.29.

ramifications for the federalist system are severe indeed. The approach endorsed in *Virginia* might enable Congress, under the guise of environmental concerns, to enact elaborate regulatory schemes usurping traditional state functions. The Court should move to eliminate this possibility at its earliest convenience.

The *Virginia* and *Indiana* decisions should not be viewed as a setback for Westerners. The SMCRA, in fact, has been generally accepted in the West. Much of the feuding and interference with state governmental operations has stemmed, and will continue to stem, from the manner in which the Office of Surface Mining has administered the SMCRA.⁵⁹ The Interior Department recently has moved to address this problem by reorganizing the Office of Surface Mining so as to deemphasize the federal government's role under the SMCRA.⁶⁰ Although these actions are controversial and may be challenged through litigation, in the West this deemphasis may prove ultimately beneficial both to surface mining and the environment. Congress clearly intended that the Office of Surface Mining would merely oversee the states' conduct under the SMCRA;⁶¹ returning the Office of Surface Mining to its intended role would likely improve the efficiency of Western surface mining programs. The Western States generally have formulated good, workable programs under the SMCRA,⁶² and they have no intention of allowing devastation of their lands should the federal government adopt a less intrusive stance in the regulation of surface mining.⁶³

59. Governor Herschler of Wyoming, for instance, argues that the Office of Surface Mining has frustrated the congressional desire for a partnership between the states and federal government in the administration of surface mining programs: "They give us excuses, justifications, offer to work hand in hand, reassurance that we are to receive primacy — but they deny us the things that count." *Oversight — The Surface Mining Control and Reclamation Act of 1977: Hearings Before the Senate Comm. on Energy and Natural Resources*, 96th Cong., 1st Sess. 7 (1979) [hereinafter cited as *Surface Mining Oversight Hearings*].

60. See notes 101-03 and accompanying text *infra*.

61. See H.R. REP. No. 218, *supra* note 25, at 57, 129.

62. Several Western State regulatory programs have been approved. See 45 Fed. Reg. 82,211 (1980) (to be codified in 30 C.F.R. § 906) (Colorado); 30 C.F.R. § 926 (1980) (Montana); 45 Fed. Reg. 86,489 (1980) (to be codified in 30 C.F.R. § 931) (New Mexico); 45 Fed. Reg. 82,246 (1980) (to be codified in 30 C.F.R. § 934) (North Dakota); 46 Fed. Reg. 5,913 (1981) (to be codified in 30 C.F.R. § 944) (Utah); 45 Fed. Reg. 78,684, 84,765 (1980) (to be codified in 30 C.F.R. § 950) (Wyoming).

63. See *Surface Mining Oversight Hearings*, *supra* note 59, at 26-27 (remarks of Wyoming Governor Herschler).

B. *Permanent Program Regulations Under the SMCRA*

Implementation of the SMCRA requires issuance of regulations by the Office of Surface Mining.⁶⁴ Congress devised a two-step process for implementation of the legislation while intending that the states would assume primary administrative and enforcement responsibilities under the Act.⁶⁵ The SMCRA contemplated an interim regulatory period, wherein permits would be issued by the state on the basis of provisional regulations formulated by the Office of Surface Mining.⁶⁶ Ultimately, the Office of Surface Mining would promulgate regulations permanently implementing the SMCRA, providing far more specific and detailed design criteria and performance standards than contained in the legislation itself.⁶⁷

The attention of mine operators, government officials, and public interest groups must focus on the structure of regulations promulgated by the Secretary of the Interior for permanent mining programs, and on the state programs devised to comply with those regulations. This regulatory package, by controlling daily mining operations and the scope of government oversight, will dictate where the power over strip-mining operations will lie — with the states or with the federal government. Given the surge in Western strip mining, the regulations will be instrumental in determining whether coal policy indeed aligns “the West against the rest.”⁶⁸

64. 30 U.S.C. § 1251 (Supp. III 1979). The statutory language refers to the Secretary, but, in practice, the regulations have been formulated by the Office of Surface Mining.

65. *See id.* §§ 1251-1254.

66. *See* 30 C.F.R. § 710 (1980).

67. *See id.* §§ 700-890.

68. The status of the permanent program regulations, however, is uncertain. The program implementing the SMCRA faces a cloudy future after its stormy beginnings. Congress originally intended that the states would submit their programs to the Secretary of the Interior for approval by February 3, 1979. 30 U.S.C. § 1253(a) (Supp. III 1979). Because of delays, though, the Secretary's regulations themselves were not promulgated until March 13, 1979, 44 Fed. Reg. 14,902 (1979), and the states were given until March 3, 1980, to submit their programs, 30 C.F.R. § 731.12 (1980). At this writing, all but three states — Alaska, Georgia, and Washington — affected by the SMCRA have submitted programs.

Even in states with submitted programs, substantial uncertainty remains. Numerous state courts have enjoined operation of the state programs pending resolution of the various challenges to regulations issued by the Secretary. *See, e.g.,* Alabama Surface Mining Recl. Council v. Alabama SMRC, No. CV 80-369 (Walker County Ala. Cir. Ct. Nov. 12, 1980); Illinois Coal Ass'n v. Illinois Dep't of Mines & Minerals, No. 80-CH-303 (Ill. 7th Cir. Ct. Dec. 11, 1980); Meadowlark Farms v. Indiana Dep't of Natural Resources, No. C80-1952 (Marion Ind. Cir. Ct. July 29, 1980); Morris & Marshall, Inc. v. Kentucky, No. 90-C.I.-238 (Martin Ky. Cir. Ct. Oct. 31, 1980); Maryland Coal Ass'n v. Department of

The Secretary of the Interior's power to issue regulations extending beyond the existing contours of the SMCRA has not gone unquestioned. The Peabody Coal Company recently challenged the Secretary's authority to issue regulations requiring mining-permit applicants to submit information beyond that required by the SMCRA itself.⁶⁹ Peabody contended that — given the explicit, meticulous requirements set forth in the SMCRA regarding permit applications and reclamation plans⁷⁰ — the Act barred the Secretary from going beyond its provisions when formulating rules. In response, the Secretary urged that his statutorily mandated oversight role would have no meaning without the authority “to seek more information in the permit application than explicitly required by statute.”⁷¹

The court acknowledged the validity of Peabody's position, based upon the concept of state primacy, that the SMCRA did not empower the federal government to intrude unduly into state strip mining programs.⁷² Nonetheless, the court found statutory authority, consistent with state primacy, enabling the Secretary of the Interior to issue rules extending federal involvement in state-administered mining operations beyond the specific dictates of the SMCRA. Under section 201(c)(2) of the legislation, the Secretary has authority to “publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of [the Act].”⁷³ Such a general grant of authority, similar to provisions of the Clean Air Act⁷⁴ and the Clean Water Act,⁷⁵ has been construed broadly by the courts.⁷⁶

Natural Resources, No. 35343 (Allegheny County Md. Cir. Ct. May 1, 1981); Ohio Coal & Energy Ass'n v. Ohio, No. 80CV-11-6152 (Franklin County Ohio Ct. C.P. Nov. 24, 1980); Consolidation Coal v. Ohio, No. A-CIV-266 (Belmont County Ohio Ct. C.P. Nov. 1980); Pennsylvania Coal Mining Ass'n v. Pennsylvania, Nos. 21718, 21719 (Pa. Commw. Ct. Nov. 26, 1980, Dec. 24, 1980, Feb. 13, 1981); Virginia Surface Mining & Recl. Ass'n v. Virginia DCED, No. 4863 (Va. Ch. Dec. 3, 1980); Allegheny Mining Corp. v. Callaghan, No. 81-579 (Kanawha County W. Va. Cir. Ct. Feb. 13, 1981).

69. *In re Permanent Surface Mining Regulation Litigation*, 653 F.2d 514 (D.C. Cir. 1981) (en banc), cert. denied, 50 U.S.L.W. 3245 (U.S. Oct. 5, 1981) (No. 80-1863).

70. See 30 U.S.C. §§ 1257-1258 (Supp. III 1979).

71. 653 F.2d at 519.

72. *Id.* at 519-20. Under a properly functioning state program, the state, not the federal government, issues permits; thus the state controls which interests may mine a parcel, and the duration and operating conditions of that mining. See 30 U.S.C. §§ 1256, 1260 (Supp. III 1979). The state passes on the suitability of reclamation efforts, see *id.* § 1260(b), inspects the mining operations, see *id.* §§ 1259, 1267, and imposes sanctions for violations of permit conditions, see *id.* § 1268(i). But see *id.* § 1271(b) (empowering the Secretary of the Interior to take over a state mining program when the state fails to adequately administer and enforce the program).

73. 30 U.S.C. § 1211(c)(2) (Supp. III 1979).

74. 42 U.S.C. § 7601(a)(1) (Supp. III 1979).

75. 33 U.S.C. § 1361(a) (Supp. III 1979).

In keeping with this approach, the court rejected Peabody's argument — based upon the presence within the SMCRA of twenty-one specific grants of rulemaking power — that this section merely summarizes the Secretary's powers under the legislation and cannot provide an independent justification for federal regulatory action.⁷⁷

Furthermore, the court found implied authority to issue the challenged regulations in section 501(b) of the SMCRA, which requires the Secretary to promulgate permanent regulations governing surface coal mining and reclamation operations.⁷⁸ While Peabody Coal contended that section 501(b) simply enables the Secretary to issue "mechanical" provisions regarding formal aspects of the permit process,⁷⁹ the court accepted the Secretary's opinion that the informational provisions of the SMCRA require supplementation through section 501(b) to ensure effective implementation of the Act.⁸⁰

Aside from the specific question regarding the proper interpretation of the rulemaking sections of the SMCRA, Peabody advanced a more general argument based upon the overall structure of the Act. Peabody contended that the state, as opposed to the federal, government must have the power to specify information required of mining-permit applicants, because the SMCRA grants the state exclusive authority to make permit-issuing decisions.⁸¹ The court, in rejecting this "'common sense' rule of regulatory authority,"⁸² noted that although individual state permit decisions were not subject to federal review, overall state performance under the SMCRA would be reviewed; the Secretary thus could require information to enable vigilant federal attention to state performance under the SMCRA.⁸³

The decision is flawed in several respects. First, the court acted inappropriately in placing heavy reliance upon the Secretary's assessment "that the explicit information provisions included in the Act should be supplemented to guarantee its effective implementation."⁸⁴ While the court argued that "[d]eference to the administering agency is particularly appropriate" when questions arise involving a hard-fought statute

76. See, e.g., *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977).

77. 653 F.2d at 523-24.

78. 30 U.S.C. § 1251(b) (Supp. III 1979).

79. 653 F.2d at 524.

80. *Id.* at 522-24.

81. *Id.* at 525-26.

82. *Id.* at 525.

83. *Id.* at 526.

84. *Id.* at 522.

such as the SMCRA,⁸⁵ in fact deference to the Secretary's assessment seems peculiarly inappropriate when the federal agency is asked to strike the proper balance between state and federal interests.⁸⁶ Deference to a federal agency appears inconsistent with the statutory scheme of entrusting "primary government responsibility" to the states under the Act.⁸⁷ Second, the court evinced a distrust of state implementation of the legislation, thus giving too little weight to the overall statutory scheme. The court began its analysis of the Secretary's power to issue supplementary regulations by observing "that Congress was not interested in perpetuating the existing tradition of state mining regulation," concluding that "Congress did not withhold powers that the Secretary might require in his efforts to safeguard federal interests."⁸⁸ This conclusion, however, does not necessarily flow from the observed congressional discontent with prior state practices. Congress' response to the states' failure to police strip mining practices adequately, ironic though it may be, was to devise legislation placing primary responsibility with those self-same states. Congress intended the states to be responsible — under a carefully orchestrated set of provisions contained within the SMCRA — to carry out its will. The court's notion that the Secretary should be allowed "to tell the states that they need more information to meet their responsibilities"⁸⁹ disregards the goal implicit in the statutory structure that the states should operate with a minimum level of federal interference.⁹⁰

The SMCRA itself sets forth minimum requirements for information gathering, permit procedures, and the general operations of a state program.⁹¹ The states should be entrusted with broad discretion, provided these statutory minima are satisfied.⁹² The regulations promulgated by the Secretary, however, layered onto the already detailed standards provided in the SMCRA, effectively negate the possibilities for state discretion. While the Secretary contended that the states retained adequate discretion through the "state window" provision enabling adoption of alternatives "consistent with the regulations" issued by the Secre-

85. *Id.*

86. *Id.* at 533 & n.11 (Tamm, J., dissenting).

87. 30 U.S.C. § 1201(f) (Supp. III 1979); see 653 F.2d at 531 (Tamm, J., dissenting) ("look broadly at the Act's purposes and structure to decide which approach is more faithful to Congress's overall design").

88. 653 F.2d at 521.

89. *Id.* at 526.

90. See note 65 *supra*.

91. See 30 U.S.C. §§ 1253(a), 1256, 1257(b) (Supp. III 1979).

92. See 653 F.2d at 531-34 (Tamm, J., dissenting).

tary,⁹³ Judge Tamm's dissent aptly described this window as a "one-way mirror."⁹⁴ Under the "state window" guidelines, a state-proposed alternative to the Secretary's regulations will be found "consistent with" those regulations only when "the state laws and regulations are no less stringent than and meet the applicable provisions of this Act,"⁹⁵ thus leaving little leeway in fact to the States.⁹⁶

The Secretary of the Interior should not be allowed to intrude upon the discretion entrusted to the states by the SMCRA. The congressional deliberations, with their emphasis upon state primacy in the regulation of surface mining,⁹⁷ acknowledged the wisdom of providing the states maximum flexibility to tailor mining programs.⁹⁸ As Judge Tamm noted in dissent, however, honoring the flexibility contained within the SMCRA would not strip the Secretary of power under the Act. The Secretary can issue interpretative rulings regarding the informational provisions of the SMCRA, and he has the authority to *recommend* requirements more stringent than those found in the Act. Moreover, the Secretary retains power under the SMCRA to assume administration and enforcement of the Act if a state is found to be derelict in its responsibilities.⁹⁹ Limiting the scope of the Secretary's authority to the provisions of the SMCRA thus strikes

93. 30 C.F.R. § 731.13(c)(1) (1980).

94. 653 F.2d at 532 n.9 (Tamm, J., dissenting).

95. 30 C.F.R. § 730.5(b) (1980).

96. See 653 F.2d at 532 n.9 (Tamm, J., dissenting). See also *Surface Mining Oversight Hearings*, *supra* note 59, at 5 (remarks of Sen. Randolph):

The Congress designed the Surface Mining law to insure equitable and uniform regulation of the industry through use of the 'state window' concept. Flexibility was built into the statute to provide latitude in implementing the legislation. Unfortunately, I believe our flexibility was interpreted by the Office of Surface Mining as an absence of position.

Wyoming Governor Herschler agreed:

As a practical matter . . . the window is closed. The regulations require excessive proof that a departure from the Federal regulations is warranted. Many state officials believe that the required showing would be as expensive as a lawsuit. The result is particularly frustrating . . . [because] the federal regulations go beyond the standards of the act to require specific procedures and techniques. It follows that the States will be required to use procedures that clearly do not fit nationwide. This is not what the Congress intended

Id. at 8.

97. See H.R. REP. No. 218, *supra* note 25, at 57, 129.

98. The states face individual problems that cannot be addressed adequately by a uniform set of federal regulations. For instance, Western States receive considerably less rainfall than coal-producing states in the East. Performance and reclamation standards must take such climactic differences into account. Furthermore, different terrain in the various coal-producing states requires diversification in mining techniques, reclamation efforts, and environmental protection. See 30 U.S.C. § 1201(f) (Supp. III 1979).

99. See 653 F.2d at 534 (Tamm, J., dissenting).

the appropriate balance between the extremes of oppressive federal control and the haphazard state systems that arguably existed prior to passage of the Act.¹⁰⁰

The present administration is taking steps to achieve the proper mix of authority under the SMCRA. Recent proposals by the Secretary of the Interior would drastically reshape the surface mining program. The Office of Surface Mining has been pared back, through the elimination of five regional offices and some 400 jobs,¹⁰¹ in order to vest more power in the states. Furthermore, the Secretary has promulgated regulations that alter the "state window" concept,¹⁰² so that states adopting alternatives to federal requirements "no longer are required to demonstrate that each alternative is necessary because of local requirements or local environmental or agricultural conditions."¹⁰³ As the administration recognizes, the future of Western coal production depends heavily upon striking a balance of authority whereby every state will decide for itself "what is best for that state, provided certain minimum federal requirements are met."¹⁰⁴

II. SEVERANCE TAXES

The controversy over the proper scope of federal involvement in state surface mining programs represents only one facet of the tension between the West and the federal government regarding coal policy. Another controversy, recently considered in the Supreme Court, centers upon the powers of the States to levy severance taxes on minerals.

During most of this century, states endowed with mineral resources — such as oil, gas, iron ore, and coal — have imposed

100. The 96th Congress considered enactment of a bill that would have solidified the balance between state and federal interests. The bill, S. 1403, 96th Cong., 1st Sess. (1979) (referred to as the Rockefeller Amendment), would have deleted the language of SMCRA § 503(a)(7), 30 U.S.C. § 1253(a)(7) (Supp. III 1979), requiring state laws and regulations to conform to the Secretary's regulations as well as the provisions of the SMCRA. Although the bill died in committee in the House in both 1979 and 1980, it would have guaranteed the states the flexibility necessary to structure individually their programs to promote the goals and purposes of the SMCRA.

101. See [1981] 12 ENVIR. REP. (BNA) 151.

102. 46 Fed. Reg. 53,376 (1981) (amending 30 C.F.R. §§ 730.5(b), 731.1, 731.13, 732.15(a)).

103. *Id.* at 53,377.

104. Letter from Warren White, Chairman, Coal Committee, Western Interstate Energy Board, to U.S. Interior Secretary James G. Watt (June 17, 1981) [on file with the *Journal of Law Reform*].

taxes upon the severance of those resources.¹⁰⁵ Montana long has been among those states charging a severance tax on coal. Until 1975 this tax was reasonably minimal, varying from twelve to fourteen cents per ton according to heat content of the coal.¹⁰⁶ In 1975, however, Montana amended its severance tax schedules dramatically, essentially raising the tax rate to thirty percent of the extracted-coal price.¹⁰⁷ Subsequent to this tax hike, the state enacted a constitutional amendment requiring that half of all severance-tax revenues be placed in a special trust fund not subject to appropriation without approval of three-fourths of the state legislature.¹⁰⁸

The increased severance tax resulted from Montana's legitimate desire to avoid being left holding the environmental, economic, and social "bag" after exhaustion of the state's coal reserves. Montana had experienced a dramatic rise in demand for its coal over the past decade: coal produced through surface mining within the state had risen from seven to thirty-three million tons between 1971 and 1979.¹⁰⁹ The increased demand

105. These states include Alabama, Alaska, Arkansas, California, Colorado, Florida, Georgia, Idaho, Indiana, Kentucky, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming. See *Severance Tax Hearings, supra* note 15, at 215-16 (statement of Rep. Williams).

106. See *Commonwealth Edison Co. v. Montana*, 615 P.2d 847, 849 (Mont. 1980), *aff'd*, 101 S. Ct. 2946 (1981).

107. MONT. CODE ANN. § 15-35-103 (1979). The section reads as follows:

(1) A severance tax is imposed on each ton of coal produced in the state in accordance with the following schedule:

Heating Quality (Btu per pound of coal)	Surface Mining	Underground Mining
Under 7,000	12 cents or 20% of value	5 cents or 3% of value
7,000-8,000	22 cents or 30% of value	8 cents or 4% of value
8,000-9,000	34 cents or 30% of value	10 cents or 4% of value
Over 9,000	40 cents or 30% of value	12 cents or 4% of value

"Value" means the contract sales price.

(2) The formula which yields the greater amount of tax in a particular case shall be used at each point on this schedule.

(3) A person is not liable for any severance tax upon 20,000 tons of the coal he produces in a calendar year.

108. MONT. CONST., art. IX, § 5.

109. *Commonwealth Edison Co. v. Montana*, 615 P.2d 847, 850 (Mont. 1980), *aff'd*, 101 S. Ct. 2946 (1981).

stemmed in large part from provisions of the Clean Air Act favoring low-sulphur coal such as that found in Montana.¹¹⁰ Because this coal is recovered in Montana primarily through surface mining, the substantial deleterious environmental effects resulting from a surge in demand are apparent. Indeed, Montana already has suffered the effects of intensive mineral development. Copper mining near Butte resulted in a disgraceful mess, partly due to inadequate taxation of the activity.¹¹¹ The state legislature was determined to avoid a similar experience with surface mining.

The national interest in the increased state tax, however, was substantial. Montana possesses approximately one-quarter of the nation's coal reserves¹¹² — enough to supply the entire country with coal for the next fifty years.¹¹³ Some studies predict that Montana, along with Wyoming, will be supplying one-third of the nation's coal needs by 1990, a threefold increase from 1977.¹¹⁴ Due to the importance of Montana coal, reaction to the severance tax from producers and electric utilities across the country was predictably hostile. Several coal companies and electric power companies brought suit, seeking a declaratory judgment that the tax unconstitutionally burdened interstate commerce and frustrated federal energy policies.

The Supreme Court upheld the decisions of the Montana state courts finding the severance tax constitutional.¹¹⁵ In order to assess whether the tax violated the commerce clause as an

110. The Clean Air Act of 1970 was drafted in such a way, with regard to new sources of pollution, that use of low-sulphur coal became an inexpensive way of complying with standards set by EPA. These standards ostensibly required the best available control technology, but were only set as a numerical standard, *i.e.*, amount of sulphur dioxide emissions allowable. Most utilities discovered it was cheaper to meet these requirements by using low-sulphur Western coal than by installing scrubbers. The 1977 Amendments, 42 U.S.C. §§ 7401-7428 (Supp. III 1979), require the best available technology and a reduction of emissions. This now requires scrubbers regardless of whether the coal used is low- or high-sulphur. See H.R. REP. No. 294, 95th Cong., 1st Sess. 187-88, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1265-67; Ackerman & Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 YALE L.J. 1466 (1980). See also *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981) (upholding latest new-source performance standards).

111. See *Commonwealth Edison Co. v. Montana*, 615 P.2d 847, 850 (Mont. 1980), *aff'd*, 101 S. Ct. 2946 (1981). See generally A. GUTFIELD, *MONTANA'S AGONY* (1979).

112. See ENERGY FACTBOOK, *supra* note 14, at 582. Seventy-five percent of these reserves are federally owned but subject to the tax nonetheless. *Severance Tax Hearings*, *supra* note 15, at 30 (statement of Phil Gramm).

113. *Severance Tax Hearings*, *supra* note 15, at 22 (statement of Bruce F. Vento).

114. *Id.*

115. *Commonwealth Edison Co. v. Montana*, 101 S. Ct. 2946 (1981), *aff'g* 615 P.2d 847 (Mont. 1980).

undue burden on interstate commerce,¹¹⁶ the court applied a four-part test first formulated in *Complete Auto Transit, Inc. v. Brady*.¹¹⁷ Under this test, a state tax does not violate the commerce clause if (1) it is applied to an activity having a substantial nexus with the taxing state, (2) it is fairly apportioned, (3) it does not discriminate against interstate commerce, and (4) it is fairly related to services provided by the state.¹¹⁸

As the first two prongs of the *Complete Auto Transit* test were not disputed,¹¹⁹ the majority focused its inquiry on the test's third and fourth elements. Appellants contended that the severance tax discriminated against interstate commerce because ninety percent of Montana coal is shipped out-of-state, thus unduly burdening non-Montana consumers. The Court properly found no discrimination against interstate commerce merely because out-of-state coal consumers were paying more severance taxes. The tax rate did not vary according to the final destination of the coal,¹²⁰ so that in fact "the tax burden is borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers."¹²¹

Appellants argued further that Montana's severance tax bore no fair relation to the services provided by the State, in violation of the fourth element of the *Complete Auto Transit* test. The Court, noting that appellants had "completely misunderstood the nature of the inquiry under the fourth prong,"¹²² rejected the premise that the *Complete Auto Transit* test required a relationship between tax revenues and costs incurred from a particular activity.¹²³ Rather, the fourth prong of *Complete Auto Transit* requires that the general revenue tax in question¹²⁴ be

116. As a threshold matter, the Court held that commerce clause constraints were applicable to the state severance tax. 101 S. Ct. at 2952-53. The Montana Supreme Court, drawing upon the authority of *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922), had found the severance tax immune from commerce clause scrutiny because the taxable event, severance of coal by mining, preceded entry of the coal into interstate commerce. 615 P.2d at 854. The Supreme Court disapproved the suggestion of *Heisler* and its progeny that commerce clause constraints would not apply to taxes imposed on goods before their entry into interstate commerce, noting that taxes prior to "entry" into commerce could nonetheless substantially affect interstate commerce. 101 S. Ct. at 2953.

117. 430 U.S. 274 (1977).

118. *Id.* at 277-78.

119. 101 S. Ct. at 2954.

120. *Id.*

121. *Id.*

122. *Id.* at 2956.

123. *Id.* at 2958. Indeed, "interstate commerce may be required to contribute to the cost of providing all governmental services, including those services from which it arguably receives no direct 'benefit.'" *Id.* at 2959 n.16.

124. The Court found no reason to question the Montana Supreme Court's character-

“assessed in proportion to a taxpayer’s activities or presence in a State.”¹²⁵ The Montana tax satisfied this requirement because tax liability, measured as a percentage of the coal taken, increased in direct relation to appellants’ activities within Montana.¹²⁶ Given this relationship between the measure of the tax and the extent of contacts with the state, the Court was willing to defer to the legislative resolution¹²⁷ of the appropriate level or rate of taxation.¹²⁸

Appellants also challenged the Montana severance tax on supremacy clause grounds, contending that the tax conflicted with the amended version of the Mineral Lands Leasing Act of 1920¹²⁹ and federal statutes meant to encourage coal production.¹³⁰ In fact, however, language within the Mineral Leasing Act specifically authorizes states to impose severance taxes upon lessees of federal mines.¹³¹ Furthermore, the Court — while acknowledging the general federal policy, reflected by numerous statutes, in encouraging coal production — found no specific congressional intent to preempt state severance taxes.¹³²

The Court’s approach to the Montana tax, endorsing propor-

ization of the severance tax as a general revenue tax. *Id.* at 2956.

125. *Id.* at 2959.

126. *Id.* at 2958-59.

127. The Court noted that Congress could intercede should a particular state tax be found contrary to federal interests. *Id.* at 2959.

128. The Court was correct in its assessment that the rate and circumstances of a severance tax should be policy decisions left to the legislature. The social, political, and economic factors underlying severance taxes are quite complex and vary from state to state. Thus, the Court properly did not attempt to identify a point at which a state tax would constitute an undue burden on interstate commerce.

In regard specifically to the Montana tax, the real impact upon interstate commerce is less than might appear at first glance, because the tax is levied upon the coal’s value at the time of severance. A 30% tax assessed upon severance gives little indication of the impact the tax will have upon the final sale price of coal at its out-of-state destination. For example, the Montana Supreme Court noted that the sale price f.o.b. mine for Montana coal destined for Texas is \$7 per ton, creating a tax liability of \$2.10 per ton. The same coal, however, is priced at \$30 per ton in Texas — so that the severance tax represents only 7% of the total cost of Montana coal to a Texas utility. *See Commonwealth Edison Co. v. Montana*, 625 P.2d 847, 856 (1980), *aff’d*, 101 S. Ct. 2946 (1981).

129. 30 U.S.C. §§ 181-287 (Supp. III 1979).

130. Specifically, appellants argued that the tax would frustrate and impair the national energy policies reflected in the Energy Policy and Conservation Act of 1975, § 2(6), 42 U.S.C. § 6201(6) (Supp. III 1979), and the Powerplant and Industrial Fuel Use Act of 1978, § 8301(b)(3), 42 U.S.C. § 8301(b)(3) (Supp. III 1979).

131. The Court discovered “nothing in language or legislative history of either the 1920 Act or the 1975 Amendments to support appellants’ assertion that Congress intended to maximize and capture *all* ‘economic rents’ from the mining of federal coal.” 101 S. Ct. at 2961. The Montana tax did not abridge the congressional intent to obtain a “fair return to the public” from the mining of federal lands. *Id.*

132. *Id.* at 2960-64.

tional tax schemes while placing flat rates under closer scrutiny, heads in the proper direction. The decision gives lower courts a starting point for assessing the validity of severance taxes, while avoiding the difficulties of detailed factual inquiries into actual effects upon interstate commerce. Although the decision opens the door for percentage severance tax rates exceeding those imposed in Montana,¹³³ the Court made clear the congressional power to intercede when a tax interferes with federal interests.¹³⁴

The decision will have significant impact beyond Montana. Wyoming, for example, exacts severance and *ad valorem* taxes at an effective combined rate of approximately seventeen and one-half percent.¹³⁵ While other Western States levy substantially lower severance taxes on coal, the sentiments that motivated the Montana legislature might influence other states as well. Indeed, most Western States are similar to Montana: they are sparsely populated and have insubstantial in-state coal needs relative to their production capacity. Severance taxes represent a means of financing responses to the impact arising from intensive coal mining operations which satisfy the needs of electric utilities and industries located elsewhere. These taxes are not imposed by the Western States in order to reap "windfall profits" from the increasing demand for coal. Rather, vast amounts of money are necessary to ameliorate the adverse impacts of increased production,¹³⁶ to provide additional government services and planning efforts as support for mining operations, and to expand

133. In dissent, Justice Blackmun argued that the majority's reasoning would permit a tax rate of 100 or even 1,000 percent of value. 101 S. Ct. at 2968 (Blackmun, J., dissenting). Moreover, he asserted that "the Court's analysis indicates that Montana's severance tax would not run afoul of the Commerce Clause even if it raised sufficient revenue to allow Montana to eliminate all other taxes upon its citizens." *Id.*

134. *Id.* at 2959. See note 127 and accompanying text *supra*.

135. WYOMING STAT. §§ 39-6-302, 303 (1977 & Supp. 1981).

136. An example of the impact upon communities involved in energy development can be gleaned from testimony of Congressman Cheny of Wyoming during consideration of legislation to establish a ceiling on severance taxes. Although the resource involved is not coal, the example is instructive of community needs similar to those anticipated in coal regions:

If we look at the city of Evanston in the southwest corner of the State [Wyoming], a small community of 7,500 now; it faces an average annual growth rate of 29 percent because of the oil boom in the overthrust belt. This one community needs 800 new single-family homes or apartments within the next year; they need 1,800 trailer court lots now; they need new sewer system improvements immediately; they need additional well and water storage facilities, a new police building, a new jail, additional police officers, a brand new hospital, new doctors, a 15-percent cost-of-living increase for the employees of the town.

Severance Tax Hearings, supra note 15, at 173.

the States' economic bases beyond a dependency upon energy developers.

The Western States recognize the need to develop their resources for the sake of the nation's energy future, and do not relish being pitted in a struggle of the "West against the rest."¹³⁷ Thus, understandable consternation arises in these States when they are not trusted with development of resources within their boundaries.

Such distrust was manifested in legislation introduced in the 96th Congress which would have placed a ceiling of twelve and one-half percent on severance taxes.¹³⁸ Diverse advocates of the legislation contended that such a limitation was necessary to prevent Montana and other coal-producing states from taking unfair advantage of their abundant coal reserves.¹³⁹ Although congressional authority to regulate interstate commerce likely would extend to a limitation on severance taxes,¹⁴⁰ this approach should be avoided as a matter of policy. Professor Tribe asserts that "Congress cannot deny the states *some* revenue with which to operate, *some* sphere of autonomous lawmaking competence, and *some* measure of choice in selecting a political structure."¹⁴¹ Legislation which contemplates absolute limits on severance taxes, by preventing unique solutions to the particular problems arising from coal development, effectively denies states the necessary measure of autonomy described by Tribe.¹⁴² The states'

137. See generally *Surface Mining Oversight Hearings*, supra note 59; *Severance Tax Hearings*, supra note 15. New Mexico's policy, for instance, intends

to assure that taxation of energy resources provide[s] a fair share of tax revenues to the State and that these revenues are sufficient to provide for the costs imposed by energy development and include compensation to present and future generations for the depletion of energy resources without jeopardizing future energy development. In addition, with respect to coal . . . , tax revenues from [its] extraction should be maximized with due consideration given to the continued profitability of existing operations and the maintenance of an attractive investment climate for future operations.

N.M. ENERGY AND MINERALS DEP'T, NEW MEXICO STATE ENERGY PLAN 43 (1978).

138. See S. 2695, 96th Cong., 2d Sess. (1980); H.R. 6625, H.R. 6654, & H.R. 7163, 96th Cong., 2d Sess. (1980). Similar bills have been introduced in the 97th Congress. See S. 178, 97th Cong., 1st Sess. (1981).

139. See generally *Severance Tax Hearings*, supra note 15; Note, *The Increasing Conflict Between State Coal Severance Taxation and Federal Energy Policy*, 57 TEX. L. REV. 675 (1979). The Northeast-Midwest Congressional Coalition warned that high severance taxes may create "a kind of United American Emirates" of energy-rich states seeking to beggar their energy-poor neighbors. Hagstrom, *The Severance Tax Is the Big Gun In the Energy War Between the States*, 13 NAT'L J. 1544, 1544 (1981).

140. See 101 S. Ct. at 2959; note 126 and accompanying text supra.

141. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 302 (1978).

142. Remarks by Congressman Cheny of Wyoming illustrate the quandary facing the Western States:

rights and regionalism issues arising from intensive energy development in the West may indicate serious problems for the region and the nation. "Regardless of what happens [to the severance tax legislation], the coal severance tax issue will continue as a catalyst for a broadening debate over fiscal disparities between the energy-rich and energy-poor states."¹⁴³ A limitation on severance tax rates only compounds and unnecessarily complicates these matters.

CONCLUSION

Reasonable accommodation of competing state and federal interests is critical to satisfactory resolution of the problems and possibilities arising from the Surface Mining Act and the issues surrounding state severance taxes. While the federal government may find restrictive actions attractive to achieve its energy objectives, in fact any federal initiatives which place the West further at odds with the rest of the nation can only exacerbate the country's energy ills. Further division between the Western States and the federal government regarding development of mineral resources makes the possibility of a comprehensive national energy plan increasingly less feasible.

This bleak picture, though, need not be the outcome of resolving the conflicts presented here. A brightened energy future can be consistent with a healthy social, environmental, and economic climate in the West — provided the federal government pursues a sensitive policy which accommodates the legitimate concerns of the Western States regarding the ill-effects of intensive coal development.

We find ourselves in Wyoming in a difficult situation. We are not all that eager to have the kind of development that is forecast for our state. We frankly have the feeling that we are going to have a massive synthetic fuels industry in north-eastern Wyoming because the folks in Seabrook or Harrisburg don't like nuclear power, or the folks out of New Jersey don't like to drill for oil, or the Congress won't open up the national petroleum reserve in Alaska.

We have moved forward because we feel it is important for the country to support this kind of effort to increase our energy resources here at home. The price that has been extracted in terms of the severance tax is modest and only goes to meet [identifiable] needs

Severance Tax Hearings, supra note 15, at 191.

143. Hagstrom, *supra* note 139, at 1544.

