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JURISDICTIONAL POWERS OF GOVERNMENTS AND INDIVIDUAL RIGHTS IN ENERGY PRODUCTION AND CONSUMPTION IN THE UNITED STATES*

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Litigation over energy production and consumption issues in the United States has raised arguments of geographic sectionalism among the energy "have" and "have not" states. Some believe that the amount of litigation could be reduced if the American legal system provided new mechanisms for resolving such sectional conflicts. This Article examines the background and current status of governmental jurisdictional powers and individual rights within federalism for resolving energy-related disputes. Ms. Dodson concludes that any change in our American legal mechanisms for resolving energy sectionalism conflicts requires a careful and proper identification of these legal powers and issues from among many other issues which exist in the highly complex political arrangements of sectionalism among the states.

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I. INTRODUCTION

One cannot understand energy development in the United States without understanding how federalism affects our legal and governmental systems' ability to resolve sectional conflicts related to the production and consumption of energy resources. In order to use the legal mechanisms which are available to resolve those conflicts, one must have knowledge of the respective jurisdictional powers of the national, state, Indian, and local governments and knowledge of the rights of individuals to affect energy matters.

Federal constitutional powers provide legal tools for Congress, the Supreme Court, individuals, states, and groups of states to use in their attempts to resolve energy policy disputes. Congress can prescribe through legislation and administration;[1] state governmental entities[2] and individuals with standing to sue[3] can litigate; individual states can act to protect resources and citizens;[4] and states can cooperate with the na-

1. The Constitution provides that Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

2. The Constitution provides that "[t]he judicial Power shall extend . . . to Controversies between two or more States . . . ." U.S. CONST. art. III, § 2, cl. 1.

3. The Constitution's article III, section 2 "cases and controversies" limitation is viewed, arguably, as the constitutional mandate for a doctrine of standing. Standing of citizens to sue for a claimed invasion of a constitutional right has been subject to the changing ideas of the Supreme Court. Today, nontaxpayer suits require that the plaintiff have a "personal stake," consisting of a "distinct and palpable injury" to the plaintiff and a " 'fairly traceable' causal connection between the claimed injury and the challenged conduct." Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 74 (1978). The causal connection requirement can be met by showing a "substantial likelihood" that the relief requested will redress the claimed injury. *See id.* at 75, n.20.

4. The tenth amendment to the Constitution states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. In the early case of McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), however, Chief Justice Marshall's opinion set forth the intended scope of federal powers. First, the federal government draws its authority directly from the people; next, the necessary and proper clause allows Congress broad authority to implement the enumerated powers, and state legislation, especially state taxation, is invalid if it interferes with the exercise of federal powers. *See id.* at 403-05, 412-24, 436. Two early Supreme Court cases articulated the scope of the respective federal and state powers to regulate commerce much as that scope is viewed by the Court today. In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), the Court held a state navigation grant, which was in conflict with a federal licensing statute, to be void under the supremacy clause. Chief Justice Marshall, discussing the intended scope of the delegated power of commerce, deemed it to be "restricted to that commerce which concerns more States than one" and to extend to even indirect commercial activity, which would implicitly limit the legislative power of the states. *Id.* at 240. In Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837), the Court recognized that the inherent police power of the states, which the Court had carved out in earlier decisions, could be reasonably exercised by the states without violating the contract clause of the Constitution. The Court held that a state's granting a charter to operate a service did not imply that the state could not authorize a competitive service. *Id.* at 539, 540, 551-53. The case stands for the assertion

tional government,[5] other states, and their citizens.[6]

that state contract terms and legislative agreements must operate in favor of the public, with consideration for some restraint of congressional powers in relation to state activities.

5. *See* Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619 (1978). Early cooperation of the states developed as the federal government, through the spending power of Congress, provided conditional appropriations to encourage cooperation of the states in programs to promote the general welfare. The constitutional question of whether the use of the spending power within the general welfare phrase is appropriate has been largely resolved by the expansion of the scope of the power of Congress to regulate directly through the commerce clause. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-10, at 247-50 (1978). *See generally* Helvering v. Davis, 201 U.S. 619 (1937) (Supreme Court ignored a prior limitation on congressional spending power).

6. Article I, section 10 defines limits on intergovernmental relationships among the states. The area is largely unlitigated. Clause 2 defines Congress' power to control the scope of the states' taxation of imports and exports. *See* U.S. CONST. art. I, § 10, cl. 2. Clause 3, which states that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign power . . . ," provides the basis for cooperative interstate compacts among the states. U.S. CONST. art. I, § 10, cl. 3. *But see* Dixon, *Constitutional Bases for Regionalism: Centralization; Interstate Compacts; Federal Regional Taxation*, 33 GEO. WASH L. REV. 47, 76-78 (1964) (discussion of the effectiveness of interstate compacts). *See also* D. ENGDAHL, CONSTITUTIONAL POWER: FEDERAL AND STATE IN A NUTSHELL §§ 15.04-15.06, at 395-403 (1974). Engdahl claims that interstate and federal-interstate compacts are important means by which state and federal governments can respond to changing needs and problems which cross jurisdictional lines. The use of the compact device, however, is hampered by the present status of compact law. *Id.* at 402-03. The federal statute concept is difficult to reconcile with the rule that consent to the compact may be implied or given in advance by Congress. *Id.* at 398. In practice, interstate compacts can take years to negotiate. Although compacts are binding and have the effects of federal law—in the sense that construction of compact terms is a federal question for Supreme Court review—the regulatory agencies established under compacts are often inadequately funded and without enforcement authority. For these reasons, the compact is not always viewed by the states as a practical means for interstate cooperation. *See* F. ZIMMERMAN & M. WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS 54-56 (1976); *see also* Lutz, *Interstate Environmental Law: Federalism Bordering on Neglect?* 13 SW. U.L. REV. 571, 645-50 (1983) (discussing the use of interstate compacts for the interjurisdictional regulation of interstate pollution).

Basic issues of the law affecting these arrangements—whether agreements or compacts—still are in doubt. For example, the proposition that an interstate arrangement becomes a federal statute when sanctioned by Congress is contrary to several rules. Congressional consent is not congressional legislation, yet the Court has recognized that the sanctioned compact invokes the supremacy clause to override inconsistent state constitutional provisions. *See* West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 33-34 (1951) (Reed, J., concurring). The federal statute concept is difficult to reconcile with the rule that consent to the compact may be implied or given in advance by Congress. The concept also subverts the federal enumerated powers doctrine, since compacts can deal with any matter of state concern. In practice, interstate compacts can take years to negotiate. Compacts are binding and have the effect of federal law in the sense that construction of compact terms is a federal question for Supreme Court review; however, the regulatory agencies established under compacts are often inadequately funded and without enforcement authority. For these reasons, the compact is not always viewed by the states as a practical means for interstate cooperation.

For the purpose of promoting comity and courtesy among the states, article IV, section 1 of the Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1. Article IV, section 2, clause 1 provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." *Id.*, § 2, cl. 1 Corporations are not "citizens" for the purposes of this comity clause and, thus, are not afforded its protection.

Individual states may provide public financial incentives to private energy enterprises within the controls of state constitutional debt restrictions and the public purpose doctrine derived from the due process clause of the fourteenth amendment. *See* Skiffington, *Constitutionality of State Eco-*

While these powers represent the classic values of federalism—liberty, diffusion of power, and efficiency in governing competing separate entities—they are not always effective in resolving real world controversies. All energy development and consumption problems do not fall into precise state and regional geographic boundaries. The geographic regions which are the basis of energy sectional conflict are not legal entities with standing to sue in a governmental capacity. The politics surrounding energy policy issues may require governmental units to use informal powers to coerce with authority and to be coerced. The geological, technological, and economic market risks of energy development create demands by the private sector for more independence and control over its decisions than government and legal authorizations may provide. These energy realities do not fit into neat categories of formal authority. Therefore, other structures for cooperative political relationships must be created for federalism to work.

This Article is limited to describing the constitutional framework governing the rights and interests of governments and individuals in energy matters. It discusses commentators' critiques of the particular powers and limitations of jurisdictions and persons in handling energy issues within a constitutional framework.

II. GOVERNMENTAL POWERS OVER ENERGY PRODUCTION AND CONSUMPTION

A. *Federal Powers*

> In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will [control] each other; at the same time that each will be [controlled] by itself.[7]

A basic doctrine of our Constitution is that the government of the United States is one of delegated powers. The federal government has no police power and Congress can only act within an enumerated power, except with regard to foreign affairs. Powers neither expressly granted to

nomic Incentives for Energy Development, 2 J. ENERGY L. & POL'Y 13 (1981) (discussing these state and federal constitutional controls on state aid).

7. THE FEDERALIST No. 51, at 325 (J. Madison) (H. Lodge ed. 1888).

the federal government in the Constitution nor prohibited to the states are reserved to the states or to the people.[8] The authority of the federal government to deal with energy problems is found primarily in four enumerated powers of Congress and in the Supreme Court's interpretation of them. Within the requirements of the "necessary and proper" clause of the Constitution,[9] Congress can control the nation's energy resource development and consumption through the power to spend and tax,[10] the power to regulate commerce,[11] and, on occasion, through the war power.[12] In addition, the property clause of article IV[13] gives Congress, as proprietor and sovereign, exclusive jurisdiction over public domain lands.

The boundaries of the enumerated powers of Congress and the congressional ancillary powers under the necessary and proper clause have evolved to the extent that, today, federal legislation can effectuate uniform federal standards related to national governmental energy concerns by command or by providing states and individuals with incentives to cooperate.[14] The conditions and incentives for intergovernmental coop-

8. These federal-state power relationships are set forth in the two formal directives of the Constitution, the supremacy clause and the tenth amendment. Article VI, clause 2 states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

9. U.S. CONST. art I, § 8, cl. 18. The necessary and proper clause, supported by Supreme Court decisions, gives Congress power to deal with matters outside the federal enumerated concerns insofar as those "extraneous" matters are used as a means or for the purpose of effecting federal policy with respect to an enumerated federal concern or power. *See* D. ENGDAHL, *supra* note 6, §§ 2.01-3.09, at 11-65.

10. Article I, section 8, clause 1 states: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and General Welfare of the United States . . . ." U.S. CONST. art. I, § 8, cl. 1.

11. Article I, section 8, clause 3 states: "[The Congress shall have Power to] regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*, cl. 3.

12. Article I, section 8, clauses 10 through 16 state:

> [The Congress shall have Power to] define and punish Piracies and Felonies committed on the high seas, . . . ;
> To declare War . . . ;
> To raise and support Armies . . . ;
> To provide and maintain a Navy;
> To make Rules for the Government and Regulation of the land and naval Forces;
> To provide for calling forth the Militia . . . ;
> To provide for organizing, arming, and disciplining, the Militia . . . .

Id., cls. 10-16.

13. Article IV, section 3, clause 2 states: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." *Id.*, art. IV, § 3, cl. 2.

14. *See, e.g.*, Emergency Petroleum Allocation Act of 1975, 15 U.S.C. §§ 751-760h (1982); Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (1982); Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2601-2645 (1982); Mineral Leasing Act for Acquired Lands, 30 U.S.C.

eration take a variety of forms in federal statutes. Two recent examples include the Coal Leasing Amendments Act,[15] which allows the states a form of veto over coal leasing of certain federal lands within their borders, and the Emergency Energy Conservation Act of 1979 (EECA),[16] which promotes a uniform national scheme for a federal emergency energy conservation plan. The EECA provides for state involvement in energy planning related to local needs by authorizing federal, state, and local governments to establish emergency conservation measures with respect to motor fuel, as well as space and industrial heating supplies, should they be in short supply. Applying its powers to regulate and protect interstate commerce, and to provide for national security, Congress has enacted measures within the EECA which require the states to submit advance local emergency conservation plans, which will be used in implementing a standby federal emergency energy conservation plan authorized by the President. Enforcement measures and fines are determined by the federal statute but left to the states to implement. States may retain the enforcement fines.

The two Acts illustrate the congressional use of the necessary and proper clause to promote extraneous ends related to the commerce and war powers. No constitutional principle prohibits such regulation, even when it falls within the traditional domain of the states. Judicial authority requires only that the extraneous matter being regulated by Congress through the use of the necessary and proper clause have a "close and substantial relation [to an enumerated concern] . . . . The question is necessarily one of degree."[17]

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§§ 351-359 (1982); Minel Leasing Act, 30 U.S.C. §§ 187, 193, 201, 203 (1982); Mineral Lands Leasing Act, 30 U.S.C. §§ 181-241; Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (1982); Energy Policy and Conservation Act, 42 U.S.C. §§ 6201-6422 (1982); National Energy Conservation Policy Act, 42 U.S.C. §§ 8201-8286b (1982); Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. §§ 8301-8484 (1982).

15. Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982).

16. 42 U.S.C. §§ 6261-6263, 6422, 8501-8541 (1982); *see also* H.R. REP. NO. 373, 96th Cong., 1st Sess. 14, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 1764, 1766-70 (discussion of the purpose of the enactment). State cooperation in emergency conservation planning is provided for in 42 U.S.C. §§ 8512, 8513 (1982). A state must provide assurances that its plan can be implemented. Upon approval of the state plan by the Secretary of Energy, the governor of the state and other delegated state and local officers are authorized to administer and enforce the measures. The civil penalties provided by the federal statute may be collected and retained by the state in agreement with the Secretary to cover the costs of administration and enforcement of requirements of the Act. *Id.* In addition, the Energy Emergency Preparedness Act of 1982, 42 U.S.C. §§ 6281, 6282 (1982), which amends the Energy Policy and Conservation Act of 1975, 42 U.S.C. §§ 6201-6422 (1982), requires the President to prepare a comprehensive energy emergency response procedure pursuant to the authority available under the existing law. The enactment came in response to the President's veto of the Standby Petroleum Act of 1982.

17. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937); *see also* D. ENGDAHL, *supra*

1. The Spending Power

The constitutional power to spend is requisite to the power to tax and provide for the common defense and general welfare. If the spending power is used to achieve a goal within the enumerated powers, and Congress has acted constitutionally, a conflicting state regulation will be preempted. The spending power is not limited to the enumerated powers, however, and can be used to provide for the general welfare as long as the substantive provisions of a program do not violate a specified check on federal power. Spending for the "general welfare," for all practical purposes, is a political, rather than a legal, issue. Generally, the Supreme Court will not invalidate Congressional spending programs merely because they invade state police powers and influence local actions.

An important use of the spending power today is for the conditioning of grants on the grantee's compliance with federal requirements which Congress is not otherwise empowered to impose. Congress can subsidize any policy it chooses with such a grant, but the power to subsidize does not then permit federal regulation of that activity. Unless the enactment reaches the extraneous matter through an enumerated power, the granting condition does not preempt state law. State regulation of the acceptance or fulfillment of a federal grant by a private person within the state's jurisdiction cannot be superseded by federal policy. Unless the

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note 6, § 2.02, at 16-22. The judicial department had applied the principle from early twentieth century cases that the necessary and proper clause authorizes Congress to use broad discretion in the means it chooses to effect federal policy for those concerns which the Constitution enumerates as concerns of the federal government. In McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), the Court determined that "to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." *Id.* at 423. The more restrictive construction of the necessary and proper clause by the Court during the 1930's took two forms: first, the necessity of the congressional extraneous regulation—the means-to-end—must be proved to the Court's satisfaction, and second, the regulation of extraneous matters must have a "direct effect" on the federal enumerated concerns of the Constitution to justify use of the necessary and proper clause. The dissent of Justice Cardozo in Carter v. Carter Coal Co., 298 U.S. 238 (1936), reaffirms the early traditional view of *McCulloch v. Maryland*. Cardozo stated that "a great principle of constitutional law is not susceptible of comprehensive statement in an adjective. The underlying thought is merely this, that 'the law is not indifferent to considerations of degree.' . . . The power is as broad as the need that evokes it." *Id.* at 327-28 (Cardozo, J., dissenting) (citations omitted).

Although the Supreme Court has determined that a sizeable role exists for the judiciary in determining certain constitutional issues of equal protection and due process related to "legislative facts," under the necessary and proper clause, the issues relating to "legislative facts" resolved by Congress. D. ENGDAHL, *supra* note 6, § 2.02, at 21-22. A statute based on a legislative determination of fact may be subject to a later constitutional attack, however, on the basis that conditions which have changed over time no longer support the earlier legislative means-to-end relationship. *See* Leary v. United States, 395 U.S. 6, 38 n.68 (1969).

individual can obtain a waiver of the federal condition, he or she will have to forego the grant because of contrary state regulation.

The spending power is important to energy development because energy projects, such as nuclear power research and development, construction of large-scale hydroelectric power facilities, and synthetic fuels development have massive capital needs requiring federal assistance. Federal funding programs aiding state and local energy-impacted areas also have been enacted pursuant to the spending power in housing, environmental, and energy legislation.[18]

Much of the energy-related concern voiced by regional spokesmen for the midwestern and northeastern states is based on the claim that federal spending patterns and incentives, which should be related to national energy concerns, actually protect and stabilize certain forms of domestic energy production concentrated in a few areas of the country. Cited as examples for that argument are the production incentives for oil and gas in the southwest, federal investment in the production and marketing of cheap hydroelectric production through regional authorities in all states except those in the midwest and northeast subregions of the United States, and federal budgeting for nuclear research and development rather than for other renewable resource alternatives.[19]

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18. *See, e.g.*, Mineral Lands Leasing Act, 30 U.S.C. §§ 1145-1147 (1982); Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301-5320 (1982); Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8401 (1982); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1747 (1982). *But see* Myler, *Mitigating Boom Town Effects of Energy Development: A Survey*, 2 J. ENERGY L. & POL'Y 211 (1982). Myler examines the federal legislation and concludes that the effect of the programs is limited since the specific conditions for the federal loans and grants often require innovative plans, land acquisition, and site development—conditions which do not fit the priority needs of boom towns and post-boom towns for basic services. For a discussion of state problems of impact in terms of economic externalities, and the conflict and decisions which must be dealt with by firms, citizens, and state institutions, see Russell, *Regional Conflict and National Policy*, 70 RESOURCES 11, 11-13 (July 1982).

19. *See* D. DEVAUL, BALANCE OR BIAS: BUILDING AN EQUITABLE ENERGY BUDGET 13, 17 Northeast-Midwest Institute (September 1982). DeVaul claims that by 1977, out of total energy incentives valued at $217.4 billion, $101.3 billion—or 46.6%—had gone to petroleum industry incentives and subsidies. The policy bias could be reduced by several recommended measures:

1) repeal the percentage depletion allowance for independent oil companies,
2) repeal the expensing of intangible drilling costs,
3) repeal the cuts in the windfall profits tax on oil,
4) impose a national severance tax,
5) impose a windfall profits tax or excise tax on natural gas,
6) increase federal royalties for onshore oil, gas, and coal production and increase the amount retained by the federal government,
7) increase the state role in setting energy production policy, and
8) broaden the Synthetic Fuels Corporation to include funding for urban energy resources.

See also Light, *Drawing the Wagons into a Circle: Sectionalism and Energy Politics*, 8 PUBLIUS 21 (1978); Light, *Energy Policy: A New War Against the States*, 3 S. REV. PUB. AD. 58 (June 1979). *But see* Markusen & Fastrup, *The Regional War for Federal Aid*, 53 PUBLIC INTEREST 87 (1978).

2. The Interstate Commerce Power

> A very material object of this power was the relief of the States which import and export through other States from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out, to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter, and the consumers of the former. We may be assured by past experience, that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility.[20]

The congressional power to legislate with respect to interstate commerce is the single most important control Congress has over interstate energy matters. A discussion of the scope of the interstate commerce power of Congress is necessary for an understanding of the limits of congressional involvement in the regulation of energy resources—traditionally regulated by state law—and its demand that state agencies implement federally sponsored energy policies.[21] The Supreme Court's

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Markusen and Fastrup examine studies that analyze federal spending by region. They contend that data for such studies too often incorporate federal budget elements whose geographic incidence, in reality, is impossible to determine. *Id.* at 88. The authors conclude that since federal programs are not designed to show a regional impact, citing the data by region does nothing to clarify the issues and criteria for an equitable distribution of federal monies by region. *See id.* at 91, 99; *see also* Goodman, *Federal Funding Formulas and the 1980 Census*, 29 PUB. POL'Y 179 (1981). Goodman argues that the census-induced redistribution of federal funds at the local level, according to the 1980 census, will be far less than the proportionate redistribution of population which has occurred since 1970. Goodman contends that population change in many programs is a poor predictor of change in federal funding due to the basic features in the funding systems of federal grant-in-aid programs. These factors include (1) the use of intercensal data, (2) formula specification, (3) geographic specificity of formula allocations, and (4) non-formula determinants of formula based grants. *See id.* at 181, 187.

Similarily, in Johnston, *The Allocation of Federal Money in the United States: An Aggregate Analysis by Correlation*, 6 POL'Y & POL. 279 (1978), the author studies the results of an aggregate analysis of four sets of variables which possibly influence patterns and change of allocations to states. He concludes that these results indicate that political variables, such as which representatives and senators are on relevant committees, are more important in determining the distribution of financial benefits to constituents than need, the appropriations committee memberships, or the general political dispositions of congressional members. *Id.* at 297.

20. THE FEDERALIST No. 42, at 262-63 (J. Madison) (H. Lodge ed. 1888).

21. *See* Fischer, *Allocating Decisionmaking in the Field of Energy Resource Development: Some Questions and Suggestions*, 22 ARIZ. L. REV. 785 (1980) (posing such questions as they related to the the Priority Energy Project Act of 1980 (PEPA)); *see also* H.R. REP. NO. 1119, 96th Cong., 2d Sess. (1980). PEPA was proposed for the purpose of creating efficiency in regulating the construction of energy projects. The proposal was a response to the abandonment of a number of such projects allegedly due to the statutory and regulatory guidelines administered by federal, state and local agencies which created time delays and expenses which caused the projects to be uneconomical. *See* 125 CONG. REC. H9988 (daily ed. Oct. 31, 1979). According to Standard Oil of Ohio (Sohio), its decision to abandon the oil transport system designed to carry crude oil from the Alaska North

modern approach to the commerce clause doctrine gives Congress such broad power that its discussion seems perfunctory. The scope of the power includes regulation of interstate commerce, the use and apportionment of lakes, rivers, and streams, and possible preemption of state and local laws for commerce regulation and taxation. Regulation is not limited to commercial goods, but includes every kind of intercourse, however unrelated to business or trade.

Such interstate activity affects energy matters in a number of ways. The congressional power ranges from authorizing water resource projects on solely intrastate navigable waters,[22] to authorizing the President's allocation of petroleum to control national shortages and the distribution of the fuel and its products.[23] Wholesale sales of natural gas and electricity are also federally regulated within the scope of the clause. If Congress desires to regulate pollution waste carried across state borders, it is empowered to do so by the commerce clause.[24] Any enactment of federal authorization and regulation of prospective interstate coal

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Slope to the central and eastern portions of the lower 48 states was based on the changing economics of the project. Sohio claimed that it spent five years and expended over $50 million to secure 700 state and local permits. *See* GENERAL ACCOUNTING OFFICE, COMPTROLLER GENERAL OF THE UNITED STATES, THE REVIEW PROCESS FOR PRIORITY ENERGY PROJECTS SHOULD BE EXPEDITED 21-36 (1979). Others claim that over 600 of the permits were for local rights-of-way, not regulatory overload. *See* 125 CONG. REC. 30,409 (1979) (statement of Rep. Moffett). *See generally* OFFICE OF TECHNOLOGY IMPACTS, DEP'T OF ENERGY, REGIONAL ISSUE IDENTIFICATION AND ASSESSMENT (1979). The Office of Technology Impacts (OTI) project analyzed the impacts and conflicts of planned energy development within the federal regional structure by states. Based on an Energy Information Administration (EIA) Trendlong Mid Scenario for the Carter administration's National Energy Plan, the analysis reported the energy resource lease, feasibility of its development, and the institutional, geological, social and economic impediments to energy development for each state and formed an aggregate regional summary. No aggregation of legal issues was made by the national laboratories which performed the nationwide analyses. The Department of Energy (DOE) project director for the Regional Issue Identification and Assessment (RIIA) states that nothing similar has been undertaken by the Reagan administration. He viewed the American Bar Association study in 1982-1983 on energy sectionalism as being highly relevant since states do not generate the requisite funds for maintaining the necessary standards for energy development and consumption, which they will be expected to assume as less federal energy legislation is enacted. Telephone interview with D. Mathur, DOE/EIA (March 10, 1983).

22. For a discussion of the scope of the commerce clause power over intrastate waters, see Arizona v. California, 373 U.S. 546 (1963), and United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899). The navigation power extends to all streams that have been, could be and are navigable, as well as to non-navigable streams which affect the capacity of navigable streams. *See* United States v. Ashland Oil & Transportation Co., 504 F.2d 1317 (6th Cir. 1974) (holding that Congress has power under the commerce clause to prohibit discharges of pollutants into a nonnavigable tributary and does not have the burden of proof to establish that such discharges affect a navigable river).

23. *See* Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-760 (1982).

24. *See, e.g.*, Federal Water Pollution Control Act Amendments of 1972 and 1977, 33 U.S.C. §§ 1251-1376 (1982); Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982). Some commentators feel that Congress, if it chooses, has nearly plenary authority to control sources and activities that may cause interstate pollution. *See generally* Stewart, *Pyramids of Sacrifice? Problems of Federalism in Man-*

slurry pipelines will come within the commerce power.[25]

The interstate pollution issues created by the pollution drift of upstream and upwind states are controlled, theoretically, by the provisions of the Clean Air Act (CAA) and Clean Water Act (CWA), which were enacted under the commerce clause power. The Acts are viewed as a means of remedy for interstate pollution not adequately regulated by state control programs. Although the Acts require not only that states adopt plans to maintain standards within their borders but also prohibit emissions which would prevent attainment of these standards in another state, their interstate provisions have given little guidance to date as to how much interstate pollution is prohibited.[26]

Commerce clause adjudication over time is said to reflect the changing concepts of federalism as well as the development of doctrines by the Supreme Court to support the specific enumerated powers.[27] Modern commerce clause jurisprudence has developed from Court interpretations in three areas: the congressional regulation of interstate activity, the neg-

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dating State Implementation of National Environmental Policy, 86 YALE L.J. 1196 (1977); Lutz, *Interstate Environmental Law: Federalism Bordering on Neglect?*, 13 SW. U.L. REV. 571 (1983).

25. The Coal Pipeline Act of 1981 (H.R. 4230), authorized pipeline builders to invoke the right of federal eminent domain to acquire rights-of-way. S. 1844 was introduced in 1982 with a similar purpose. Both bills were reported out of committee, but no further action was taken in either chamber in the 97th Congress. In the 98th Congress, S. 1844 was reintroduced as S. 267, the Coal Distribution Act of 1983. H.R. 1010, the Coal Pipeline Act of 1983, was similar in purpose and was defeated in the House in October, 1983. Backers of coal slurry pipelines claim that without federal legislation, the process of battling individual groups for rights-of-way is too costly to make projects economically feasible. *See* Tulsa World, Nov. 6, 1983, at G-1, col. 3.

26. *See generally* OFFICE OF TECHNOLOGY ASSESSMENT, REGIONAL IMPLICATIONS OF TRANSPORTED AIR POLLUTANTS: AN ASSESSMENT OF ACIDIC DEPOSITION AND OZONE INTERIM DRAFT (July, 1982). The Office of Technology Assessment (OTA) draft critiques the reluctance of the Environmental Protection Agency (EPA) to assess the contributions of SO2 emissions in one state to SO2 sulfate and acid rain problems in another state. The draft analyzes the avenues for control of interstate pollution, especially long-range transport air pollutants (LRTAPs) under the Clean Air Act, and provides that the statutory language of the existing interstate provisions precludes direct control of acidic deposition. The draft reports that states which export more pollution than they import appear to have little incentive to enter into compacts. *But see* U.S. DEP'T OF ENERGY, ENVIRONMENTAL TRENDS TO THE YEAR 2000, A SUPPLEMENT TO THE NATIONAL ENERGY POLICY PLAN REQUIRED BY TITLE VIII OF THE U.S. DEPARTMENT OF ENERGY ORGANIZATION ACT 21 (July, 1981). The report points out that energy development and use are not responsible for all pollution. The range of the relative contribution of energy pollutants to the environment depends in a large part on what energy is developed and the level of wastes produced by the production and consumption of those resources. Oil shale production wastes, for example, could increase the energy sector pollution contribution, projected to the year 2000, from 58% to 89% for all increases projected for various emissions. *Id.* at 19. Net air pollutant emissions for total suspended particulates (TSP), sulfur oxides (SOx), and nitrogen oxides (NOx) are expected to increase in three federal standard regions—south central, mountain, and northwest—by the year 2000. *See id.* at 6.

27. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 139 (1983).

ative impacts of state attempts to burden or regulate interstate commerce, and congressional approval of state actions which otherwise violate the commerce clause.

a. Regulation of interstate commerce

If an activity affects commerce in even a trivial way, Congress has the power to regulate in that area. The Supreme Court's interpretations of the commerce power have resulted in the development, over time, of doctrines which permit Congress to intrude upon intrastate activities in two ways.[28] First, Congress can control the interstate flow of products, services, and people within the commerce power and the supremacy clause, even if the action indirectly prohibits or regulates activities occurring solely within a single state.[29] Second, within the meaning of the

28. The line between interstate and "the completely internal commerce of a state" has not always been easy to draw. In fact, after Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), although the Court developed a theory of dual federal and state sovereignty for commerce, it reviewed the commerce clause infrequently until the enactment of the Interstate Commerce Act in 1887 and the Sherman Antitrust Act in 1890. Until 1937, the Court had held on only eight occasions that Congress had exceeded the limits of its commerce power. In NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), the Court returned to Marshall's original premise under *Gibbons* that a broad range of activities justifies congressional action related to interstate commerce, within the principle that the necessary and proper clause power can be used to relate the congressional means chosen to the purpose of the enumerated commerce power. Since 1937, the Court has held only once that commerce power action by Congress is unauthorized. *See* National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled,* Garcia v. San Antonio Metropolitan Transit Auth., 53 U.S.L.W. 4135 (U.S. Feb. 19, 1985).

29. The modern commerce clause jurisprudence of federal and state regulation of electric and natural gas utilities is illustrative of this development. The regulation of utilities is one of the important functions traditionally associated with state police power. Production and transmission of energy was an activity viewed early by the Court as likely to have a significant impact on broad national interests. A series of cases early in the twentieth century created the doctrine that the retail sale of natural gas was subject to state regulation, even if the gas came from another state or directly from interstate lines, regardless of local distribution being made by either a transporting company or an independent distributor. *See, e.g.*, Missouri v. Kansas Natural Gas Co., 265 U.S. 298, 309 (1924); Pennsylvania Gas Co. v. Public Serv. Comm'n, 252 U.S. 23 (1920); Public Utils. Comm'n v. Landon, 249 U.S. 236, *modified,* 249 U.S. 590 (1919). However, beginning with *Kansas Natural Gas Co.,* the Court stated that the wholesale sale of gas in interstate commerce was not subject to state regulation, even if some of the gas sold was produced in that state. The sale and delivery of gas transported between states was also a part of interstate commerce. Once delivered to the distributing company, interstate commerce ended, and the gas had only an indirect and incidental effect on interstate commerce. *Kansas Natural Gas Co.*, 265 U.S. at 309. The Court later extended this wholesale/retail "mechanical line" for the permissible and impermissible state regulation of natural gas to public utilities. *See* Public Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927). In *Attleboro,* the Court struck down the Rhode Island Commission's attempt to regulate the rates which a Rhode Island utility could charge on the wholesale sale of electricity to a Massachusetts distributor. The rationale for holding the state regulation impermissible was that, if Rhode Island could protect its citizens' interest by an increase in the price paid by out-of-state citizens, then Massachusetts could protect its citizens' economic interests by ordering the Rhode Island company to decrease its rate. *Id.* at 90. The Court concluded such a conflict could be avoided only by holding that neither state could control the price. The decision was presented in terms that the transaction imposed a "direct"

commerce and necessary and proper clauses, Congress can directly regulate wholly intrastate commerce activity when the activity has a substantial economic effect on interstate commerce or where federal regulation is necessary to effectuate interstate commerce.[30]

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rather than "indirect" burden on interstate commerce and was impermissible regardless of the state purpose. *Id.* at 89.

Congress filled the gap left by the Court's interpretation by establishing federal regulation over wholesale electricity and gas sales to local distributing companies. *See, e.g.*, Natural Gas Act of 1938, 15 U.S.C. §§ 717-717z (1982); Natural Gas Policy Act of 1979, 15 U.S.C. §§ 3301-3432 (1982); Federal Power Act, 42 U.S.C. § 7172 (1982) (creating the Federal Power Commission (FPC), now the Federal Energy Regulatory Commission (FERC)); Public Utility Regulatory Policies Act, 16 U.S.C. §§ 2601-2645 (1982).

In subsequent jurisdictional issues over wholesale sales for resale and direct sales for consumption, the Court has continued to hold, partly to avoid drawing the precise line between state and federal powers through litigating particular cases, that Congress adopted the mechanical line of *Kansas Natural Gas* and *Attleboro* as a statutory line to divide federal and state jurisdictions, and provided the FPC, now FERC, with the power to control wholesale rates in interstate commerce for resale. *See also* Federal Power Comm'n v. Southern Cal. Edison Co., 376 U.S. 205 (1964) (Court held that a California utility which received some of its power from out-of-state is subject to federal regulation in its sales of electricity to a California municipality that resold the bulk of its power to others). In Federal Power Comm'n v. Florida Power & Light Co., 404 U.S. 453 (1972), the Court indicated that federal regulation of intrastate power transmission also may be proper because of the interstate nature of the generation and supply of electric power. *Id.* at 469. Later cases have dealt with more direct federal regulation of electricity and natural gas sales. *See, e.g.*, FERC v. Mississippi, 456 U.S. 742 (1982). In *FERC v. Mississippi*, the Supreme Court held that the Public Utility Regulatory Policies Act of 1979, which contained provisions to encourage adoption by the states of certain retail regulatory practices for electricity and gas utilities as well as the development of cogeneration and small power production facilities, was constitutional. The Court determined that activity which was purely intrastate in nature may be regulated by the commerce power where the activity, combined with like conduct by others in similar situations, affects commerce among the states. *Id.* at 7. The Natural Gas Policy Act of 1978 has been interpreted in a similar fashion by federal district courts and the Supreme Court in relation to federal regulation which imposed wellhead price ceilings on wholly intrastate natural gas for the first time. *See, e.g.*, Oklahoma v. FERC, 661 F.2d 832 (10th Cir. 1981) (upholding congressional power to impose price controls and otherwise regulate wholly intrastate gas), *cert. denied sub nom.* Harvey v. FERC, 457 U.S. 1105 (1982). In Pennzoil v. FERC, 645 F.2d 360 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982), the federal district court determined that the NGPA neither barred escalation of area rate clauses, which authorize increases in wellhead prices in existing producer-consumer interstate gas purchase contracts to the maximum lawful wellhead ceiling price schedule authorized under title I of the NGPA, nor required that area rate clauses must escalate prices to NGPA levels. *Id.* at 379. In Energy Reserves Group, Inc. v. Kansas Power & Light Co., 103 S. Ct. 697 (1983), the Supreme Court held that the NGPA did not prescribe prices for intrastate natural gas but set a maximum price ceiling for the operation of contractual provisions. State legislation which prohibited activation of governmental price escalator clauses to the federal ceilings in gas purchase contracts executed prior to April, 1977, was subject to state law interpretation, but the federal Act did not trigger such clauses automatically. *Id.* at 709.

30. Wickard v. Filburn, 317 U.S. 111 (1942), is considered the landmark case in modern commerce clause jurisprudence. The *Wickard* Court determined that in exercising the necessary and proper clause, Congress may impose federal regulations on the whole class of all wheat grown for on-farm consumption, not because some may reach interstate commerce, but because production by this class of wheat growers affected federal policy with regard to wheat in interstate commerce. *Id.* at 127-28. *See also* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981), in which the Court upheld a federal statute controlling surface mining and replacing state control over the amount and conditions of such mining. The Court held that the tenth amendment does not limit

The modern tests which the Supreme Court uses for permitting federal regulation of intrastate action in order to effectuate control of interstate commerce have developed since *NLRB v. Jones & Laughlin Steel Corp.*[31] The Court, in most part, defers to the express or implied findings of Congress that the activity regulated has a "close and substantial," or an "aggregate" or "cumulative" effect on interstate commerce and does not review the congressional decision on economic relationships. Instead, the Court tends to uphold legislative findings whenever they appear to rest upon some rational basis.

Commerce clause legislation does have some constraints. The legislation cannot promote an end which is constitutionally forbidden, and it must be consistent with the Bill of Rights to protect individual and state interests. The Court will pay close attention to the legislative history and statutory language of the enactment to meet its requirement that a rationally based legislative finding exists from which a substantial relationship of the statute to an enumerated federal concern can be inferred. Legislation is not judicially interpreted to extend to all the activities Congress could affect under the commerce clause unless there is a clear legislative statement of congressional intent for the act to so apply.[32]

In *National League of Cities v. Usery*,[33] the Court conceded that minimum wage and maximum hour determinations were within the scope of the federal commerce clause power, but held that the 1974 amendments to the Fair Labor Standards Act (FLSA), which extended the regulations from private persons and businesses to state and municipal employees, were invalid as an unconstitutional intrusion on state and local sovereignty rights under the tenth amendment. The case is the first

congressional power to displace state regulation of private mining activities which affect interstate commerce. *Id.* at 276-77.

31. 301 U.S. 1 (1937). The case marks the Court's shift to the earlier principle that the necessary and proper clause is a broad discretionary authority of Congress to effectuate federal policy. The need for the regulation and its directness to an enumerated concern need not be proven to the Court's satisfaction.

32. *See* L. TRIBE, *supra* note 5, § 5-8, at 243. The Court will invoke the "clear statement" requirement when an extention of the full powers of the commerce clause would be inconsistent with state institutional concerns. *Id.* Some commentators argue that it would be preferable, where the relationship of a statute to interstate commerce is not readily apparent, for the Court to require Congress to relate the law to its impact on interstate commerce and, in this way, assist Congress in focusing its concerns on the proper issues. *See, e.g.*, Bogen, *The Hunting of the Shark: An Inquiry into the Limits of Congressional Power Under the Commerce Clause*, 8 WAKE FOREST L. REV. 187, 198 (1972). As stated in note 28, since 1937 the Court has held that the congressional regulation of commerce is an unconstitutional intrusion upon the sovereignty of state and local governments only once, in the case of National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled*, Garcia v. San Antonio Metropolitan Transit Auth., 53 U.S.L.W. 4135 (U.S. Feb. 19, 1985).

33. *Usery*, 426 U.S. at 833.

since the 1930's in which the Court has held that Congress cannot use an enumerated power to regulate state and local government matters related to the separate and independent functions and services which are integral to state sovereignty.

b. Negative implications

Over time, the Supreme Court has given the commerce clause an additional meaning. Today, the clause contains an implied limitation on the power of the states to interfere with or impose burdens on interstate commerce. The restraint is not found in the commerce clause, but has developed from a line of Supreme Court decisions which hold that when Congress has remained silent in legislation affecting interstate commerce, it intends that commerce be free and unregulated.[34] In these cases, the Court has interpreted the commerce clause to be self-executing in part, in that certain state actions which affect interstate commerce are prohibited.

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34. These interpretations are referred to in treatise commentary as examples of the negative or dormant aspects of the commerce clause. In these cases, several discrete factors have become significant in limiting state power. State regulations which aim at securing an economic advantage for the enacting state at the expense of other states are void. Discriminatory state regulations which are less favorable to interstate than intrastate commerce are also void. The incompatibility of different state regulations may void the enactments. For a discussion of the origins of commerce clause restriction of state power, see Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 493 (1887); Welton v. Missouri, 91 U.S. 275, 281 (1875); Cooley v. Board of Wardens, 53 U.S. (12 How.) 143, 150 (1851); The Passenger Cases, 48 U.S. (7 How.) 122, 283 (1848).

Local protectionism of energy and natural resources has been struck down by the Court as the type of conduct that the commerce clause was designed to prohibit. In Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229 (1911), and Pennsylvania v. West Virginia, 262 U.S. 553 (1922), the states attempted to conserve natural resources by banning their export. In each case, the Court held that behind the stated conservation goal was impermissible economic favoritism, motivated by the state's desire to assure the availability of resources for local industry at the expense of other states. More recently, in City of Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978), the Court reiterated the self-executing aspect of the commerce clause, and held that, in the absence of authorizing federal authority, the commerce clause does not give residents of one state the right to control the terms of resource development and depletion in another state. *Id.* at 626. It also held that a state is without power to prevent privately owned articles of trade from being shipped or sold in interstate commerce on the grounds the articles are needed by people of the state to satisfy local demand. *Id.* at 627.

The area which remains unresolved in local protectionism statutes related to natural resources is whether the express grounds of public interest in preserving natural resources and state ownership of the resources remain as a valid argument for protectionism. A few older cases hold that states may be selfish with certain resources such as water and game, but these holdings seem hard to reconcile with the modern trend of the Court toward the national economic unity of the United States. *See, e.g.*, Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908) (upholding the New Jersey statute prohibiting the export of fresh water of New Jersey into any other state); Geer v. Connecticut, 161 U.S. 519 (1896) (upholding the statute prohibiting the taking of Connecticut gamebirds out of Connecticut), *overruled in part*, Hughes v. Oklahoma, 441 U.S. 322 (1979). Neither case has been explicitly overruled on the point that an individual state has the authority to control whether a resource shall be exploited.

In a second series of cases, the Court began an approach requiring the Court to look at the nature of the state regulation involved, the objective of the state, and the effect of the regulation on the national interest in commerce.[35] In this line of cases, the Court has used considerable restraint in determining whether intrastate regulation of state and local activities was in conflict with interstate commerce. While the Court now uses various tests to distinguish permissible from impermissible state regulatory impacts on interstate commerce, no single test includes all the factors which can be involved in a particular case.

In general, state regulation affecting interstate commerce will be upheld if, first, the regulation is rationally related to a legitimate state end and, second, the regulatory burden imposed on interstate commerce, or any discrimination against it, is outweighed by the state interest in enforcing the regulation.[36] The same approach is used for state taxation, with special concern for whether the tax on interstate commerce is duplicated by other states.[37] Commentators argue that the Supreme Court

35. *See* Illinois Natural Gas Co. v. Central Ill. Pub. Serv. Co., 314 U.S. 498, 506 (1942); *see also* Arkansas Elec. Coop. Corp. v. Arkansas Public Comm'n, 457 U.S. 1130 (1983) (discussing the history of modern commerce clause jurisprudence relative to state regulation of natural gas and electricity).

36. *See, e.g.*, Cities Serv. Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 186-87 (1950); Southern Pac. Co. v. Arizona, 325 U.S. 761, 770-71 (1945); Milk Control Board v. Eisenberg Farm Prods., 306 U.S. 346, 352 (1939); South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 190 (1938). While the cited cases stand for the premise that conservation of resources is a legitimate state end, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), summarizes the most recent summary of the law in this area:

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, . . . but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens.

Id. at 142 (citations omitted).

37. *See* D. ENGDAHL, *supra* note 6, §§ 11.09-.11, at 294-316. Applying the minimal commerce clause limitations to state taxation regulation is no restraint on state taxation, since raising revenue and using taxation to do so are legitimate end-means for the state. As a generalization, the Court does balance state revenue interests against burdens on commerce. Since interstate problems have both commerce and due process clause issues, the distinctions need to be made clear for sound analysis. Using the negative implications of the commerce clause to characterize the issues, the Court has created more flexible principles for limiting the application of state taxes. The resulting limitations generally have proved favorable to interstate business concerns. Some commentators feel the Court has had little real success in dealing with the problems inherent in interstate taxation and, with the exception of due process issues, either comprehensive legislation or cooperative state agreements, such as the Multistate Tax Compact, provide better means of changing problems in this area.

assumes a nonjudicial role which is properly a function of legislative policy-making when the Court determines that the state statute's effects on interstate commerce require the balancing test to determine whether the burden of the regulation will be tolerated or is clearly excessive in relation to putative local benefits.[38] Arguably, since the balancing-of-interests test is made on a case-by-case basis, the decisions on state regulations in these instances provide limited precedent for determining permissible state regulation.

The constitutionality of state regulation and taxation of natural resources is tested by the aforementioned commerce clause standards.[39] One commentator has observed that, where natural resources are concerned, the present Court is not balancing legitimate local interests against interstate burdens, but is stopping after determining whether a regulation is rationally related to a legitimate state end, unless the state regulation or taxation of natural resources is discriminatory on its face against out-of-state enterprises or citizens.[40]

Id. at 310; *see also* Stewart, *The Legal Structure of Interstate Resources Conflict*, 1982 W. NAT. RES. L. DIG. 6, 11-12.

38. *See* D. ENGDAHL, *supra* note 9, § 11.08, at 291-92. Engdahl states several reasons for the impropriety of the practice. First, the Court confuses the question of the burden with the legitimacy of state ends. Second, it usurps the state legislative role. Finally, Congress, not the courts, is vested with the national commerce clause power to prevent trade barriers and to promote national free trade. The problem is compounded when the Court balances state revenue interests with both commerce clause and due process clause issues which become intermingled in judicial decisions rather than being kept as discrete distinctions.

39. In general, any state's economic protectionist statute which is discriminatory on its face against other states and persons is impermissible unless it survives a strict scrutiny test by the Court. A statute denying access to state resources to out-of-state citizens is almost invalid *per se*. *See* Tarlock, *infra* note 73, at 13; *see also* City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); Illinois v. General Elec. Co., 683 F.2d 206, 213 (7th Cir. 1982) (holding that a statute prohibiting entry of out-of-state wastes is a burden on interstate commerce because it impedes movement of an economic activity—the efficient disposal of wastes in commerce), *cert. denied*, Hartigan v. General Elec. Co., 461 U.S. 913 (1983). *But see* Washington State Bldg. & Constr. Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1981). The *Spellman* court held that the state of Washington may limit and prohibit the disposal of radioactive or toxic wastes within its borders. When a quarantine statute is discriminatory on its face, the court uses the standards for goods embargoes and applies these to out-of-state waste. *See* Tarlock, *infra* note 73, at 13.

40. *See* Stewart, *The Legal Structure of Interstate Resource Conflict*, W. NAT'L REV. DIG. 9, 11 (1982) (citing the decisions of Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), and Minnesota v. Clover Leaf Creamery Co, 449 U.S. 456 (1981), as examples of this practice). In *Commonwealth*, the Court determined that the severance tax that Montana charged on coal extraction, which was 30% of the coal's value at the mine's mouth, was formally nondiscriminatory and, with no further inquiry, sustained the tax against the challenge of interstate coal consumers. The majority opinion emphasized the Court's inability to determine the ultimate incidence of tax measures on the policy question of how a state allocates the burden of taxation. In *Clover Leaf*, the Court agreed that the Minnesota legislature might reasonably find that a ban on nonrecycleable plastic milk containers produced out of state provided conservation and environmental benefits which outweighed any burdens on interstate commerce, despite the challenge that such a statute protected the local paper container industry. Stewart concludes that the Court is not evaluating undue burden

The *Sporhase v. Nebraska*[41] decision is illustrative of the Supreme Court's present approach when it does employ the balancing-of-interests test. After initially determining that the groundwater of multistate aquifers is an article of commerce subject to congressional regulation,[42] the Court examined the Nebraska statute, which regulates the withdrawal of groundwater in Nebraska and its transport for use in an adjoining state. The Court held that the first three conditions in the Nebraska statute for granting the permit—that withdrawal of groundwater be reasonable, not contrary to conservation and use of groundwater, and not otherwise detrimental to the public welfare—did not, on their face, impermissibly burden interstate commerce.[43] However, the Court then determined that the statute's reciprocity requirement—that the permit would be granted if the state in which the water is to be used grants reciprocal rights to withdraw and transport water from that state to Nebraska—was a barrier to commerce between Nebraska and its adjoining states. The Court determined that Nebraska's burden to demonstrate the relationship between the reciprocity requirement and the statute's asserted purpose to conserve and preserve groundwater did not survive the strict scrutiny which the Court reserves for facially discriminatory legislation.[44]

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because of three factors: first, the technical complexity of determining the economic consequences of resource taxation; second, the regional character of interstate resource conflicts which presents distributional issues wherein a few states are dominant, thereby requiring the Court to constantly invalidate measures of one group of states for the benefit of consumers of another group of states, a task better suited for resolution mechanisms other than adjudication; and third, the nonmarket value at stake. Stewart contends that the impact of market and nonmarket values should be distinguished in the litigation of state regulation of natural resource development. Nonmarket values which express community and cultural attitudes and diversity about pristine environment and life styles related to differing geography do not fit the free economic market principles which support the litigation testing the validity of state regulation of trade and industry. *See* Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1236-45 (1982). Stewart also recommends that regulation which allows states and localities more freedom to limit resource development in accord with nonmarket values should be encouraged. *See generally* Stewart, *Interstate Resource Conflicts: The Role of the Federal Courts*, 6 HARV. ENVTL L. REV. 241, 254 (1982).

41. 458 U.S. 941 (1982).

42. *Id.* at 954. The Court further identified the interstate nature of the resource by stating that states' interests in conserving and preserving scarce water resources in the arid western states clearly have an interstate dimension. *Id.* at 953. The Court stated that the agricultural markets supplied by irrigated farms are the archtypical example of commerce among the states for which the framers of the Constitution intended to authorize federal regulation. The multistate character of the Ogallala aquifer underlying the appellant's tract of land, as well as parts of Texas, New Mexico, Oklahoma and Kansas, demonstrates that there is a significant federal interest in conservation as well as in fair allocation of diminishing water resources. Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal water projects nor the fact that Congress has allowed state compacts to resolve state differences over water rights was seen by the Court as persuasive evidence that Congress consented to unilateral imposition by states of unreasonable burdens of commerce. *See id.* at 953-54.

43. *Id.* at 955.

44. *Id.* at 958.

c. *Congressional assent to interstate burdens*

When the Court determines the extent of permissible state regulation by relying on the negative implications of the commerce clause, Congress has the power to change the effect of the decision with a subsequent enactment. For example, the import of the Court's decision in *Arizona v. California*[45] is that federal power over navigable streams and nonnavigable tributaries can be exercised without regard to the structure of state laws. Within this legal framework, navigable waters are available, for example, for the development of coal slurry pipelines. However, the latest proposed coal slurry legislation appeared to contain assent for a state's blocking water for coal slurry use.[46]

Congress can preempt judicial disapproval of state actions which affect interstate commerce by permitting the states to take action which would otherwise violate the commerce clause.[47] The authority may be exercised by Congress' enacting a single statute which assents generally to state regulation. An example of that type of enactment is the McCarran Act,[48] in which Congress declared that there should be no barrier to the regulation or taxation of the insurance business by the several states. Congress may also require coordinated action between the federal government and the states. An example of this use of congressional commerce power was discussed earlier in relation to the Emergency Energy Conservation Act of 1979, which provides for state planning and enforcement in relation to the federal statute on emergency energy conservation. Without the conservation enactment, which authorizes states to impose restraints and burdens on their energy supplies, a similar conservation regulation enacted by a state within its police power would be invalid under the commerce clause principle that such economic isolation or

45. 373 U.S. 546 (1963).

46. *See* S. 267, Coal Distribution Act of 1983; *see also* Note, *Do State Restrictions on Water Use by Slurry Pipelines Violate the Commerce Clause?*, 53 U. COLO. L. REV. 655, 655-56 (1982).

47. This departure from national regulation of commerce by Congress developed from the decision in Leisy v. Hardin, 135 U.S. 100 (1890). The Court reasoned that a subject matter which was exclusively that of Congress because of constitutional directive is not within the jurisdiction of the police power of the state unless placed there by congressional action. States are not disabled by the Constitution from enactment, but by congressional policy to permit the use of a state's police power. *Id.* at 108. Authorizing legislation and enforcement of previously unenforceable state regulation was held constitutional in *In re* Rahrer, 140 U.S. 545 (1891). By the mid-1940's the Court had restated, in a series of cases, that Congress had power within the exercise of the commerce clause to authorize states to regulate interstate commerce in specific ways and impose burdens on it. *See, e.g.*, Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 420 (1946); International Shoe Co. v. Washington, 326 U.S. 310, 315 (1945); Southern Pac. Co. v. Arizona, 325 U.S. 761, 769 (1945).

48. McCarran-Ferguson Act of 1945, 15 U.S.C. §§ 1011-1015 (1982).

"balkanization" of resources from interstate commerce is legislation with an illegitimate state end.

3. The War Power

The congressional war power is preemptive. The war power, both executive and congressional, is considered a necessary authority for national security. It has been used to enact legislation in three energy fields: control of oil policy,[49] generation of electric power,[50] and the development of nuclear power.[51] The basic issues in exercising the war

49. *See, e.g.*, United States v. Midwest Oil Co., 236 U.S. 459 (1915) (upholding President Taft's withdrawal of several million acres of public lands in 1904 as naval oil reserves to assure naval fuel requirements), *overruled*, Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983); Trade Agreements Act of 1933, 19 U.S.C. § 1862(b) (1982); Trade Expansion Act of 1962, 19 U.S.C. § 1862(b) (authorizing the supplementation of domestic oil supplies with oil imports to meet requirements of national security); Proclamation No. 3279, 47 Fed. Reg. 10,507 (1982), *reprinted in* 19 U.S.C. § 1862 (1982) (providing an import control program of petroleum and petroleum products to the United States).

50. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936). The *Ashwander* Court upheld the construction of a dam and electric generation plant as necessary to national security pursuant to the war power, even though the construction occurred during peacetime. The case is also of interest because the Court upheld the congressional exercise of an enumerated federal power for ends extraneous to an enumerated concern without the application or appropriate use of the necessary and proper clause. By 1941, in United States v. Darby, 312 U.S. 100 (1941), the Court finally recognized the condition set forth in dictum in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411-12 (1819), that a valid application of the necessary and proper power is required in order to effectuate a federal policy preference which is extraneous to the enumerated concerns of Congress.

51. *See* Atomic Energy Act of 1946, as amended, 42 U.S.C. §§ 2011-2296 (1970) (enacted under the war power to provide for the peacetime use of the atomic energy which was developed to create the nuclear bomb in World War II); Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011-2296 (1970) (extended the use of the war, commerce and property powers to provide for federal licensing and regulation of the development of nuclear electric generation by private industry). The 1954 Act made no mention of state authority to regulate the safety and radiation aspects of nuclear power generation within a state. The only case which has tested the constitutionality of congressional regulation of the nuclear field, Pauling v. McElroy, 164 F. Supp. 390, 393 (D.D.C. 1958), *aff'd*, 278 F.2d 252 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 835 (1960), held the Act a valid exercise of the war power. *Id.* at 393. In 1959, the 1954 Act was amended to recognize state interests in the peaceful use of atomic energy and establish a program which gives states limited authority over certain nuclear materials. 42 U.S.C. § 2021a-d (1982). Congress appears to have eliminated the property power basis for regulation when it abandoned mandatory government ownership of particular nuclear material in the Private Ownership of Special Nuclear Materials Act, 42 U.S.C. §§ 2111-2114 (Supp. IV 1976).

The constitutional status of the states in the regulation of the use of nuclear power has always been at issue. The 1959 enactment authorizes Congress to enter into agreements with the governor of any state for the discontinuance of the authority of the Commission, now the Nuclear Regulatory Commission (NRC), over by-product, source and/or quantities of special nuclear materials to regulate the materials covered by the agreement for protection of the public health and safety of its citizens from radiation hazards. The state standards for radiation hazards are to be coordinated with the NRC, but radiation hazard is not defined by the statute. The statute and its amendments reserve certain areas of regulation and licensing of waste disposal to the Commission. No federal statute or regulation expressly preempts state laws concerning radioactive waste and transportation. Courts' determinations of federal nuclear field preemption vary and are based on an implied rather than an express preemption. The overall result has been that the federal statutes and regulations

power is whether the matter is properly defined as a measure meriting use of the war power and whether it relates substantially to preparing for, conducting, concluding, or preventing war.[52]

4. The Property Clause of Article IV

The property clause of article IV[53] of the Constitution grants Con-

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which regulate nuclear power appear to authorize a pervasive federal presence which preempts state laws. *See* Mills & Woodson, *Energy Policy: A Test for Federalism*, 18 ARIZ. L. REV. 405, 416-17 (1977); *see also* Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972). In *Northern States*, the Court provides a compilation of the federal treatment of nuclear power to illustrate the unique attitude of the federal government toward its use. *Id.* at 1147-52. *But see* Pacific Gas & Elec. v. Energy Comm'n, 461 U.S. 190 (1983). In *Pacific Gas & Electric*, the Supreme Court upheld the section of the California Public Resources Code which imposed a moratorium on the certification of new power plants until the State Commission finds that there has been developed a federal agency-approved technology or means for the permanent and terminal disposal of high-level nuclear waste. The Court held that the state moratorium was not preempted by the Atomic Energy Act of 1954, and that Congress, in the 1954 Act and all of its revisions, had preserved the traditional authority of the states over economic questions, such as the need for additional generating capacity, the type of generating facilities to be licensed, land use and ratemaking. The Court determined that the section of the California statute was outside the federally occupied field of nuclear safety regulation, and was not void as hindering commercial development of atomic energy. In addition, the Court stated that the promotion of nuclear power is not to be accomplished "at all costs," and that Congress has given the states the authority to decide, as a matter of economics, whether a nuclear plant versus a fossil fuel plant should be built. The California statute was not in conflict with federal regulation of nuclear waste disposal nor with the NRC decision to resume the licensing of reactors. Despite the uncertainty surrounding the waste disposal problem and the recent passage of the Nuclear Waste Policy Act of 1982, the Court stated that Congress did not appear to intend the Nuclear Waste Policy Act to decide for the states the question as to whether there now is sufficient federal commitment to fuel storage and commercial nuclear high-level radioactive waste disposal so that licensing of reactors may resume. The Court declared that the Nuclear Waste Policy Act may be interpreted as being directed toward solving the existing nuclear waste disposal problem, without encouraging or requiring that future plant construction occur. *Id.* at 1730.

52. *See* Fischer, *supra* note 21, at 823-24. Fischer asserts that the war power clauses are constrained by the common sense notion that they are to be used for the limited purpose of waging war rather than a congressional response to situations which affect national concerns in unfavorable ways. Peacetime use of the power in nontraditional areas such as energy control should occur only when other means cannot achieve the same goals. Even then, congressional use of the power should be directed to specific military needs, such as a fuel oil stockpile for the military, and distinguished from such purposes as encouraging development of domestic sources of energy. *Id.* at 828.

53. Article IV, section 3, clause 2 provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." U.S. CONST. art. IV, § 3, cl. 2. The power to acquire property by war or negotiation has been tied to the powers to make war and treaties. The article IV property clause is distinguished from article I, section 8, clause 17, which provides Congress with the power:

> [t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . .

Id., art. 1, § 8, cl. 17. The "federal enclave" properties of the article I clause come within the article IV clause as to disposal and regulation of ownership of that property, but the reverse is not true.

gress the right to hold, dispose of, and regulate territory or other property of the United States, as well as granting exclusive jurisdiction over the laws of federal public domain. Approximately 700 million acres of federal land in the United States are in the public domain and fall within the scope of the article IV property clause. The Sagebrush Rebellion in the western states stems from the large federal holdings which comprised a sizeable portion of the acreage of thirteen western states. Over 86% of all federal public domain land is located in these states,[54] ranging from 7% of the Hawaii acreage to 86% of Nevada and 89% of Alaska acreage. The desire of these states to reclaim ownership and title to public domain land within their borders is based, in a large part, on the mineral and fossil fuel deposits which are under direct federal management.

The article IV property power does not specify the relationship of the federal government with the state in which the land is located. According to judicial interpretation, Congress exercises the power of both titleholder and legislature over the federal land.[55] In *Kleppe v. New Mex-*

The article IV clause is broader and covers personal property as well as territories and federally owned lands. The doctrinal variances of the two clauses are not discussed here, but it is important to note that article I interpretations have rejected the traditional rule of extraterritoriality that gave exclusive federal jurisdiction and legislative control over federal enclaves. The traditional article I clause principle of "extraterritoriality" views federal enclave areas of federal land as literally excised from state territory within whose borders they lie and as subject to exclusive federal jurisdiction. This view has been modified by decisions which imply or express the view that states can reserve degrees of jurisdiction over article I property upon cession of the state lands, and that upon federal acquisition of article I property, state civil laws will continue in force over that property until changed or abrogated by federal enactment. *See, e.g.*, James Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940); James v. Dravo Contracting Co., 302 U.S. 134 (1937).

54. There are 1,045,831 square miles of federal public land in the thirteen western states, not including federally acquired lands and trust lands under the Bureau of Indian Affairs jurisdiction. The percent of state acreage which is public lands in the western states is as follows: Alaska, 89%; Arizona, 43%; California, 44%; Colorado, 34%; Hawaii, 7%; Idaho, 62%; Montana, 27%; Nevada, 86%; New Mexico, 31%; Oregon, 50%; Utah, 62%; Washington, 26%; and Wyoming, 48%. *See generally* G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND RESOURCES LAW (1981). *See also* U.S. DEP'T OF THE INTERIOR, ENERGY RESOURCES ON FEDERALLY ADMINISTERED LANDS 12-13 (1981).

55. The proprietorship of the federal government acting as landowner stems from the pervasive federal policy in the nineteenth century of creating new states out of the territories, but retaining federal title to land which the federal government subsequently disposed of to encourage westward migration and settlement. *See* D. ENGDAHL, *supra* note 9, §§ 8.04-.10, at 169-90. Federally owned property within the article I property clause became, by operation of law, subject to the general governmental jurisdiction of the states. *See, e.g.*, Pollard v. Hagan, 44 U.S. (3 How.) 212, 223 (1845); New Orleans v. United States, 35 U.S. (10 Pet.) 662, 737 (1836). The congressional power to make rules and regulations for federal property, as stated in article IV, was construed as conferring powers of control related to land ownership rather than powers of sovereignty or governmental jurisdiction. The Court created a different rule for Indian reservations within territories from which states were created. Where federal treaties with the Indians so provided, Indian country would neither become part of a state nor be subject to state governmental jurisdiction. *See* Harkness v. Hyde, 98 U.S. 476 (1879). Additional broad federal powers over relations with the Indians existed under the commerce clause and foreign affairs powers derived from the Constitution.

ico,[56] the Court attempted to clarify the relationship of the states and the federal government as landowner. The issue was whether passage of a congressional act to protect wild horses and burros living on public land exceeded the power of Congress within the article IV property clause. The Court rejected a narrow reading of the property clause, holding that Congress exercises the power of both a proprietor and a legislature over the federal land.[57] The Court stated:

> Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause . . . . And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.[58]

The scope of the congressional power to legislate remains open even after *Kleppe*. Although the state retains criminal and civil jurisdiction over federal land on state acreage, federal enactments for this land have preemptive capability. Federal land statutes can be obscure. For example, the Mineral Leasing Act of 1920[59] provides that federal law provisions shall not conflict with state law, but the deference does not extend to local ordinances in conflict with federal provisions. The extent to which a use of federal land can impose burdens on the rights and privileges created by state and local government also is not clearly determined. This particular disparity affects legal issues such as water rights when an energy facility is built on federal land. The use of the article IV property power, distinct from the use of the commerce power, permits the federal government to directly handle its own land, but the property power does not prevent a state from concurrently acting within its sovereign powers. As a landowner in a state, the federal government is subject to the legal constraints which the state imposes on typical landowners;

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56. 426 U.S. 529 (1976).

57. *Id.* at 540.

58. *Id.* at 543 (citations omitted). Several commentators have observed the effects of this broader reading of the property clause. *See* Fischer, *supra* note 21, at 826-27. Fischer notes the effect of the expansive reading of the clause in *Kleppe* upon federal land management and state sovereignty in relation to large-scale energy projects. He contends that after *Kleppe*, energy projects on federal lands should be freer of state control and, from dicta inference, energy projects on state land that affect federal interests on federal land may be subject to some degree of federal control. *But see* Comment, *The Sagebrush Rebellion: Who Should Control the Public Lands?*, 1980 UTAH L. REV. 505, which states that, should western states succeed in their Sagebrush Rebellion, as evidenced in statutes such as NEV. REV. STAT. §§ 321.596-.599 (1979) (declaring that Nevada has both the legal and moral claim to the public land retained by the federal government within Nevada's borders), the issues of federal land ownership are moot.

59. 30 U.S.C. §§ 181-287 (1982).

however, the federal government, as a sovereign in its own right, is not the typical state landowner.

5. The Supremacy Clause

> [A]s the Constitutions of the States differ much from each other, it might happen that a treaty or national law of great and equal importance to the States, would interfere with some and not with other Constitutions, and would consequently be valid in some of the States at the same time that it would have no effect in others.[60]

The supremacy clause of article VI[61] is the Constitution's direct statement on federal-state power. Federal enactments relating to the federal powers enumerated in the Constitution have the capability of preempting state action with respect to the same matter. The capability also exists as to federal enactments supported by the necessary and proper clause for effectuating a federal policy preference in relation to an enumerated concern. Preemption can be created by an express congressional prohibition or can be inferred from circumstances surrounding a congressional enactment which suggest an intent to preempt.[62]

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60. THE FEDERALIST No. 44, at 284 (J. Madison) (H. Lodge ed. 1888).

61. U.S. CONST. art. VI, cl. 2, provides: "This constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ."

62. In the early case of Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), the Court held that a state law must always yield if it collides with a federal statute because of contradicting requirements. The Court's view that the exercise of federal power was inherently exclusive of state power over the same subject continued until the 1930's. A change in that doctrine occurred in Mintz v. Baldwin, 289 U.S. 346 (1933). The court held that a showing of congressional intent of exclusionary action was required to accompany the regulation of a particular subject in order for preemption to occur. Inferences of congressional intent are derived from legislative history, though not as a single source, and statutory construction. Factors used to support preemptive intent include a comprehensive statutory scheme, statutory contemplation of national uniformity, a federal administrative entrustment and the possibility of contradiction in rule making, federal and state enforcement measures which raise the likelihood of double punishment. It should be noted that the Court has also used the same factors to provide inferences of non-preemptive intent.

In a number of statements in recent cases, the Supreme Court has refused either to presume or infer intent of Congress to preempt a field of regulation. *See, e.g.*, Schwartz v. Texas, 344 U.S. 199, 202-03 (1952) ("If Congress is authorized to act in a field, it should manifest its intention clearly. . . . The exercise of federal supremacy is not lightly to be presumed."), *overruled*, Lee v. Florida, 392 U.S. 378 (1968). In City of Philadelphia v. New Jersey, 437 U.S. 617 (1978), the Court held that no clear and manifest purpose of Congress existed to preempt the entire field of interstate waste management or transportation either by express statutory command or by implicit legislative design. *Id.* at 621 n.4. *See also* Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 132 (1978) (in holding that a Maryland statute regulating retail gas marketing was neither preempted by the Robinson-Patman Act nor preempted by the Sherman Anti-Trust Act, the Court stated that it "is generally reluctant to infer preemption . . . ."). *But see* White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). In *Bracker*, the congressional power to regulate tribal affairs under the Indian commerce clause and the semi-independent position of Indian tribes were found to exist as barriers to state regulatory authority. *Id.* at 142. The Court asserted, in holding estate taxes invalid as applied to harvesting of timber by non-Indians on an Indian reservation, that such instances require inquiry to determine whether, in the specific context, the exercise of state authority would violate federal

The mere existence of a federal statute, however, does not imply that a preemption issue exists. Concurrent regulation to control a local condition despite extensive federal controls over the subject has been upheld by the Supreme Court.[63] Where Congress does not legislate, the Court takes two views on states' power—either Congress intended to leave the area unregulated or it chose to defer to state regulation in the area.

Preemption questions and cases are not found in simple situations. Most of the litigation has arisen under the commerce clause. The constitutional directive, of course, is to avoid conflicts of regulation among the jurisdictions with authority over the subject. The Supreme Court's approach to preemption has become an application of the doctrine on a case-by-case basis. Because the substantive or jurisdictional statutory purpose is determined in such a particularized manner, few precedents have been established. The Court appears to be influenced by the nature of the state power which has been exercised. Also, preemption of a traditional state power is not favored if preemption is not clear on the face of the federal statute.

In the area of energy management and development, federal preemption has been found where it is necessary to achieve the aims of the federal legislation. This is especially true in areas such as the development of federal electric power,[64] reclamation,[65] and in areas, such as nuclear power,[66] which are so unique that unified federal enactment is

law. Consistent with its holding in Warren Trading Co. v. Arizona Tax Comm'n, 380 U.S. 685, 689-90 (1965), the Court determined that, although no federal statute barred state regulation, comprehensive regulation by Congress of the harvest and sale of tribal timber and the underlying policies of that federal regulatory scheme were threatened by the state's imposition of taxes for the generalized purpose of raising revenue. *See id.* at 151-52.

63. *See* L. TRIBE, *supra* note 5, § 6-24, at 379-84. Contrary to its earlier stance that state law is invalid in the face of federal regulation of a given subject, the Court now sanctions state regulation that is concurrent with a federal enactment if the state law does not significantly impede accomplishing the purpose of the federal law. Tribe concludes that perhaps the Court has developed a new level of judicial sensitivity to the fairness of schemes that delegate economic power over others. *See, e.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) (upholding California's regulation of avocado marketability which excluded competition with Florida avocados marketed within federal standards); California v. Zook, 336 U.S. 725, 730 (1949) (upholding state regulation which prohibits transportation not licensed by the ICC); Parker v. Brown, 317 U.S. 341 (1943) (holding a California agricultural regulation valid when its effect was to eliminate competition in terms of sale and price of the state raisin crop which comprised 90% of that consumed in the United States); *see also* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) (Detroit's regulation of smoke emitted while a ship's boiler was being cleaned was contradictory to extensive federal licensing requirements of ships in interstate and foreign commerce, but was a legitimate end of state police power).

64. Tennessee Valley Authority Act of 1933, 16 U.S.C. §§ 831a-831dd (1982).

65. The Reclamation Act of 1902, 43 U.S.C. §§ 371-666 (1982).

66. The NRC and the courts have consistently held that states are permitted to regulate nuclear power in areas such as economics and the environment. The area of preemption over state law has

warranted. Federal energy-related statutes may mandate interstate federal standards and, at the same time, encourage state standards which are more stringent. Such provisions are found in the statutes which set the federal controls for pollution protection and water quality.[67]

The supremacy clause is a major limitation on unilateral state efforts to control environmental problems. Some commentators feel that federal interstate environmental statutes are so comprehensive in nature that unilateral state legislation in this area will survive federal preemption only if the federal law provides for state implementation of the prescribed federal program or if state or common law remedies are allowed by fed-

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centered primarily on the federal control over radiation hazards. Also preempted, however, are other state regulations which directly conflict with NRC regulations. For example, a state cannot require a plant to be built in a certain way for environmental reasons if the NRC requires construction in a certain way for safety reasons. *See, e.g.*, New Jersey Dep't of Envtl. Protection v. Jersey Central Power & Light Co., 69 N.J. 102, 351 A.2d 337 (1976); *see also* Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972). In *Northern States*, the court determined that the federal government, under the preemption doctrine, has the sole authority to regulate radioactive waste releases from nuclear power plants; thus, state statutes which provide more stringent regulation of radioactive emissions are preempted. The federal court determined that congressional intent was "unmistakingly" manifested because of the absolute control of Congress in licensing nuclear power for civilian use.

The dissent pointed out that the Supreme Court has consistently refused to find preemption where state laws affecting health and safety are concerned, absent an express provision reflecting congressional intent to preempt. Therefore, the fact that the Atomic Energy Act, as amended, contained no express provision that the federal government shall have sole authority over radiation hazard emissions was not the product of congressional oversight, but rather reflected congressional willingness to permit more restrictive state regulation. *Id.* at 1155-57 (Van Oosterhout, J., dissenting).

In Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n, 659 F.2d 903 (9th Cir. 1981), *aff'd*, 461 U.S. 190 (1983), the federal court determined that congressional intent with regard to section 274(k) of the Atomic Energy Act required the NRC to retain full regulatory control over matters concerning radiation hazards, thus preempting only state regulation of radiation hazards associated with nuclear power. The state regulations for a moratorium on nuclear power construction and a three-site requirement for proposed utility plants were held not to conflict with federal regulation in the area reserved to the NRC, in that the statutes at issue were not aimed at radiation hazards. In *Pacific Gas and Electric*, the Supreme Court upheld the California moratorium on nuclear power plant construction until the federal government discovered a method for permanent high-level nuclear waste disposal which is both technically adequate and satisfactory to the California resource agency.

67. Clean Water Act of 1977, 33 U.S.C. §§ 1251-1376 (1982); Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982); *see* Clean Air Act, § 116, 42 U.S.C. § 7416 (allowing states to enact more stringent emission standards); *id.* § 209(b), 42 U.S.C. § 7543 (allowing states to impose more stringent standards on new motor vehicle emissions). *But see* Connecticut v. EPA, 656 F.2d 902 (2d Cir. 1981) (source state which revises its State Implementation Plan (SIP) under the Clean Air Act (CAA) is under no obligation to design SIP strategies to avoid interference with the more stringent standards of neighboring states). The Clean Water Act (CWA) provides that each state may develop and submit a procedure for enforcing the federal water quality standards under state law for new source construction from which there may be discharge of pollutants. The EPA administrator may authorize the state to apply and enforce performance standards if the state law requires standards at least to the extent of the federal provisions. 33 U.S.C. § 1316(c).

eral statute.[68] One should remember that the federal common law decisions of the federal courts have the same preemptive capability as does federal statutory law.[69]

B. *State Powers*

> The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, [negotiation], and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the inter-

68. *See generally* Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975); Lutz, *supra* note 24, at 613. Under the CAA, states are delegated the responsibility to implement stationary source emission control strategies to maintain or achieve national ambient air quality standards, and may include a program of facility-by-facility review of indirect sources of pollution, but these acts are not a condition of approval of the state plan for air quality standards. 42 U.S.C. § 7410; *see also* Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6926 (1982) (allowing states to develop state hazardous waste programs). The CWA, like other transboundary water management statutes, transfers planning to state or regional agencies if governors of states in a water basin, or portion thereof, request that the EPA administrator make grants of authority to such planning agencies for developing a comprehensive water quality control plan. 33 U.S.C. § 1252(c). The federal government retains some type of supervisory or participatory function, but neither a state nor local government is given substantive powers. *See generally* Hillhouse, *The Federal Law of Water Resource Development*, in FEDERAL ENVIRONMENTAL LAW 844, 896 (E. Dolgin & T. Guilbert eds. 1974).

In Illinois v. City of Milwaukee, 406 U.S. 91 (1972), the Supreme Court unanimously held that Illinois could bring a federal common law action against the city of Milwaukee and others for allegedly discharging raw sewage in Lake Michigan and creating a public nuisance for Illinois citizens. In what is considered a landmark decision, the Court stated that new federal laws and regulations may preempt the field of federal common law of nuisance over time, but until that occurs, federal courts could appraise equities of suits alleging public nuisance by water pollution. In City of Milwaukee v. Illinois, 451 U.S. 304 (1981), the Court held that the federal common law remedy of nuisance had been preempted by the administrative scheme established by Congress and rejected the interpretation that the savings clause, which provided citizens a federal common law remedy in citizen suits for interstate pollution, revoked other remedies. The CAA preserves common law remedies for enforcing emission standards and limitations. 42 U.S.C. § 7604.

69. *See generally* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. 1973). The term "federal common law" is not analytically precise, but refers generally to federal rules of decision where the authority for a federal rule does not explicitly exist either in federal statutory or constitutional form. In general, three categories of cases can be said to promote federal decision rules rather than promote the presumption that state law should govern. The cases include matters in which (1) the idea of national uniformity calls for a federal solution, (2) the congressional delegation of lawmaking authority is given to the courts, and (3) federal courts are asked to exercise the judicial function of formulating remedies for the breach of duties imposed by federal law. The latter depends on the presence of a federal interest and a displacement of the presumption that state law should apply. In doubtful cases, the presumption of applying state law may be resurrected where a supplemental doctrine is desired and where state interests are important. *See* R. LEFLAR, AMERICAN CONFLICTS LAW, § 66, at 130-31, § 143, at 292-93 (3d ed. 1977); Comment, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969).

nal order, improvement, and prosperity of the State.[70]

The State governments may be regarded as constituent and essential parts of the federal Government; whilst the latter is nowise essential to the operation or [organization] of the former.[71]

1. The Police Power

In contrast to the enumerated powers of the federal government, the states have all the powers that any government can exercise in accordance with Anglo-American public law. The police power is the label attached by the Supreme Court to the authority of states to legislate for the purpose of promoting the public health, safety, morals, and general welfare of their citizens.[72] Subject to commerce clause limitations, the states' police powers permit them to control the exploitation, conservation, allocation and protection of their resources.[73] An individual state can decide whether a resource shall be exploited,[74] what the rules for exploitation will be, and what classes of individuals will have access to a resource.[75] A state can hold, manage, and dispose of property held in a dual proprietary-sovereignty capacity, subject to the limitations of the

70. THE FEDERALIST No. 45, at 290 (J. Madison) (H. Lodge ed. 1888).

71. *Id.* at 288.

72. Chief Justice Marshall first employed the rubric "police power" to describe the rights of sovereignty which states had not forfeited to the federal government. *See* Willson v. Blackbird Creek Marsh Co., 27 U.S. (2 Pet.) 105 (1829); Brown v. Maryland, 25 U.S. (12 Wheat.) 262, 269 (1827).

73. *See generally* Address by A. Dan Tarlock, National Power, State Resource Sovereignty and Federalism in the 1980's: Scaling America's Magic Mountain, Institute for Natural Resources Law Teachers in Boulder, Colorado (May 25, 1983). Professor Tarlock discusses the constitutional basis for state and national resource interests and defines particular state powers for regulation of resources. *See also* Tanzman, *Commerce Clause Limitations on State Regulation and Taxation of the Energy Industry*, 13 LOY. U. CHI. L.J. 277 (1982). Tanzman contends that because the crest of federal energy regulation has subsided, state governments will act to replace some of these laws with their own, and, in fact, are being encouraged by the present administration to do so. Tanzman states that the nature and extent of restraints on state action, especially the commerce clause limitations, will shape the state energy laws which will be enacted.

74. *See, e.g.*, Geer v. Connecticut, 161 U.S. 519, 535 (1896), *overruled*, Hughes v. Oklahoma, 441 U.S. 322 (1979); *see also* Tarlock, *supra* note 73, who contends that *Geer* is still good law on whether a resource shall be exploited even after *Hughes v. Oklahoma*, which repudiated the legal fiction of *Geer* that interstate commerce is not involved when state ownership theory applies. *Hughes*, 441 U.S. at 335. In *Hughes*, the Court restated the principle that resources, in this instance minnows seined or procured in the state, cannot be embargoed from interstate sale or transportation by state regulation because of local demand or need by people of the state. State conservation of natural resources must be accomplished in a nondiscriminatory way which recognizes national economic unity. *See id.* at 334, 336-39. *But cf.* Fischer, *supra* note 21, at n.158 (contending that *Hughes* does not address the effect of the commerce clause on state-owned resources). By rejecting the fiction of *Geer* as to state ownership of wild animals, *Hughes* is distinctly not a case involving state-owned resources.

75. *See* Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900) (holding that resource claimants to a common pool are subject to state statutory correlative rights).

public trust doctrine;[76] protect its citizens from interstate public nuisances;[77] recover damages for injury to state-owned resources;[78] impose a quarantine and bar entry of dangerous substances;[79] and restrict the use of state and local resources for ambient pollution disposal.[80]

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76. The state has a duty to protect and maintain public lands held in trust. The use of public trust lands for private use may be authorized by the state even without a finding that such a use is beneficial to the public interest. The state may authorize a permit for private use of public trust lands if the use will improve the public trust or will not substantially impair the remaining public trust lands. *See* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 486-88 (1970); *see, e.g.*, City of Los Angeles v. Venice Peninsula Properties, 31 Cal. 3d 288, 644 P.2d 792, 182 Cal. Rptr. 599 (1982), *rev'd*, 104 S. Ct. 1751 (1984). In *Venice Peninsula Properties*, the California Supreme Court held that the state holds a trust interest on behalf of the public in tidelands and lands between high and low water in nontidal navigable lakes. *See* 31 Cal. 3d at 291, 644 P.2d at 801, 182 Cal. Rptr. at 600. The established doctrine is that title to such lands in the hands of private persons is usually subject to the rights of the public. *See* Stone, PUBLIC RIGHTS IN WATER USES AND PRIVATE RIGHTS IN LAND ADJACENT TO WATER, in 1 WATERS AND WATER RIGHTS 193-202 (R. Clark ed. 1967); *see also* City of Berkeley v. Superior Court, 26 Cal. 3d 515, 523, 606 P.2d 362, 363, 162 Cal. Rptr. 327, 331 (1980); State of California v. Superior Court, 29 Cal. 3d 210, 226, 625 P.2d 239, 250, 172 Cal. Rptr. 696, 705 (1981). Fee title in the government is not essential to the existence of a public trust in tidelands. *See Venice Peninsula Properties*, 664 P.2d at 79, 87; People v. California Fish Co., 166 Cal. 576, 596, 138 P. 79, 87 (1913).

77. *See, e.g.*, Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Illinois v. City of Milwaukee, 406 U.S. 91 (1972). In both of these cases, the respective states sued *parens patriae* on behalf of citizens for protection against interstate nuisances of air and water pollution. In *Tennessee Copper Co.*, the Court determined that the protection of the general health, comfort and welfare of its inhabitants gave the state an interest sufficient to justify the litigation between a state and citizens of another state for article III purposes. *But see* Hawaii v. Standard Oil Co., 405 U.S. 251 (1972). In that case, the indication of state proprietary interests was sufficient for standing to sue in a federal district court, but a state *parens patriae* interest was not sufficient to support standing in that forum to complain of damages to the "general economy."

78. *See* Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). The Appeals Court in *Colocotroni* held that where the Commonwealth had legislatively authorized the bringing of suits for environmental damage, it had a cause of action to seek relief on behalf of its citizens for the loss of natural resources on the land, such as animals and trees, from oil spills. *Id.* at 670-71.

79. *See, e.g.*, Mintz v. Baldwin, 289 U.S. 346 (1933); Bowman v. Chicago & N.W. Ry., 125 U.S. 465 (1888). In *Bowman*, the Court held that an Iowa statute prohibiting the importation of liquor by common carrier was a regulation of commerce, not a quarantine, and that Iowa had the right to regulate liquor after its transportation ended as a transaction of strictly internal concern to the jurisdiction. In *Mintz*, a New York state regulation prohibiting importation of cattle without certification that the cattle were free of Bangs disease was upheld. The Court determined the state regulation did not conflict with a federal statute requiring inspection of cattle in quarantine areas and that the particular concern of Bangs disease was not reached by congressional action. Therefore, such regulation was left to the control of the states. Both cases represent the legitimate ends of state regulation for the enhancement of public health, safety, security and quiet, which is upheld under commerce clause challenges. *Mintz*, as stated in note 62, is the first case in which the Court abandoned the view that the exercise of a federal power is inherently exclusive, and asserted that a showing of exclusionary congressional intent is required. *But see* City of Philadelphia v. New Jersey, 437 U.S. 617 (1978). There, the Court held that in the absence of authorizing federal authority, the commerce clause prevents residents of one state from controlling the terms of resource development and depletion in another state by prohibiting privately owned articles of trade from being shipped or sold in interstate commerce on the grounds that the articles are needed by the people of the state to satisfy local demand. *Id.* at 627-29.

80. *See, e.g.*, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Illinois v.

2. The Tenth Amendment

The tenth amendment reserves for the constituent states or for the people all powers neither delegated to the federal government nor prohibited to the states.[81] The amendment makes explicit the doctrine that the original states possessed sovereign powers and reserved them when they delegated the few enumerated powers to the federal government created by the Constitution. The use of the tenth amendment argument protects and enhances the states' formal powers, claims of formal authority, and defenses of established autonomy.

In *National League of Cities v. Usery*,[82] the Court found that wage and hour determinations for state and municipal employees with respect to "functions . . . which [state and local] governments are created to provide, services . . . which the States have traditionally afforded their citizens,"[83] are matters "essential to [the] separate and independent existence"[84] of states, and, therefore, beyond the scope of the commerce power of Congress to regulate. The *Usery* decision has been overruled by *Garcia v. San Antonio Metropolitan Transit Authority*.[85] However, the

City of Milwaukee, 406 U.S. 91 (1972). *Huron* represents a case in which the Court used the balancing test to weigh the burden of the effects of a local pollution control statute on interstate commerce against the benefits of the statute. The burden in this case was determined to be the creation of a situation in which different states might, but had not, imposed contradictory regulations which would prevent certain kinds of commerce. The Court does not invalidate state law in instances of a possible future occurrence.

81. *See* U.S. CONST. amend. X. The Federalist suggested that states' rights are ultimately derived from rights of a state's citizens. THE FEDERALIST NO. 46, at 315 (J. Madison) (J. Cooke ed. 1961). The original Constitution placed few restraints on congressional power which would favor state sovereignty, but the tenth amendment has been viewed, even in the 1970's, as standing for the constitutional policy that Congress may not exercise power in a way which impairs states' integrity or ability to function effectively in a federal system. *See, e.g.*, Fry v. United States, 421 U.S. 542, 547 n.7 (1975). The Court found the tenth amendment argument significant, but overstated. Nevertheless, the Court declared that the Economic Stabilization Act (ESA) was constitutional as applied to control of state statutory wage and salary increases to state employees. *But see* National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled*, Garcia v. San Antonio Metropolitan Transit Auth., 53 U.S.L.W. 4135 (U.S. Feb. 19, 1985). *Usery* is the only instance since 1937 in which the Court held that Congressional regulation intruded on state sovereign powers.

82. *Usery*, 426 U.S. at 833.

83. *Id.* at 851.

84. *Id.* at 845 (quoting Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1868)).

85. 53 U.S.L.W. 4135 (U.S. Feb. 19, 1985). The *Garcia* Court held that municipal ownership and operation of a mass transit system does not exempt the San Antonio Metropolitan Transit Authority (SAMPTA) from the obligations of minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) under *Usery*. The Court held that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental functions" is not only unworkable but is inconsistent with established principles of federalism, and the federalism principles on which *Usery* is purported to rest. Therefore, *Usery* is overruled.

Tribe points out that the response to *Usery* was that the federalism balance had been taken from congressional control by a federal judicial decision providing a doctrine of state protection and local autonomy. Tribe contends that, in fact, the decision is best understood as one which creates a

relevance of the *Usery* decision to state sovereignty and energy consumption issues is reviewed here.

The use of the tenth amendment argument increased after the *Usery* decision, but the Usery test was a strict one.[86] Federal legislation would be invalid only if (1) the challenged statute regulated the "States as States," (2) the federal regulation addressed matters which are, without dispute, "attributes of state sovereignty," and (3) the "States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.' "[87] The Court appeared to shift the federalism line identifying protected traditional state functions. In both *FERC v. Mississippi*,[88] and *EEOC v. Wyoming*,[89] by assessing whether the challenged federal statute intruded on traditional state interests, the Court moved away from the *Usery* decision.

In *FERC v. Mississippi*, the state and its utility regulatory commission challenged titles I and III, and section 210 of title II of the Public Utility Regulatory Policies Act of 1978 (PURPA). Titles I[90] and III[91] direct state utility regulatory commissions and nonregulated utilities to consider adopting and implementing specific rate design[92] and regulatory standards,[93] with procedural requirements of notice and opportunity for public hearings in conjunction with the consideration and appropriateness determinations.[94] They also allow such commissions and utilities to implement or decline to implement the standards so long as written reasons are made available to the public.[95] Section 210 of title II[96] seeks to encourage and develop cogeneration facilities and small power production facilities, directing FERC, with public notice and comment, to pro-

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category of states' rights derived from the legitimate claims of individuals to certain government services which require financial interests of the state and local governments. *See* L. TRIBE, *supra* note 5, §§ 5-20 to 5-22, at 300-18.

86. The Supreme Court has cited to the tenth amendment argument of *Usery* in 32 opinions since that decision.

87. *See* Hodel v. Virginia Mining & Reclamation Ass'n, 452 U.S. 264, 287-88 (1981) (quoting National League of Cities v. Usery, 426 U.S. 833, 854, 845, 852 (1976)).

88. 456 U.S. 742 (1982).

89. 460 U.S. 226 (1983).

90. 16 U.S.C. §§ 2611-2613, 2621-2627, 2631-2634, 2641-2644 (1982); 42 U.S.C. §§ 6801-6808 (1982).

91. 15 U.S.C. §§ 3201-3211 (1982).

92. 16 U.S.C. §§ 2621-2622 (1982).

93. *Id.* §§ 2623-2627.

94. *Id.* § 2621(b).

95. *Id.* § 2621(c).

96. *Id.* § 824a-3.

mulgate rules in consultation with state and regulatory authorities.[97] The rules would then be implemented by state authorities.

FERC is also authorized within title II to exempt cogeneration facilities and small power production facilities from certain state and federal regulation as utilities.[98] The federal district court held that titles I and III and section 210 of title II were unconstitutional and void because they exceeded congressional power under the commerce clause and constituted an invasion of state sovereignty in violation of the tenth amendment.[99]

The Supreme Court reversed the lower court judgment, holding that the challenged provisions did not invade state sovereignty in relation to the tenth amendment. The Court came to the following conclusions: (1) the authorization of FERC in section 210 of title II to exempt qualified power facilities from state law and regulation only preempted conflicting state laws in traditional ways;[100] (2) Congress, if it wished, may preempt the states completely in regulation of retail sales by electric and gas utilities and transactions between utilities and cogenerators[101] because of the substantial interstate effect of the activity;[102] (3) PURPA and the FERC rules governing its implementation only required the state to settle disputes arising under the statute, an activity customarily engaged in by the utility commission;[103] (4) the "mandatory consideration"

97. *Id.* § 824a-3(e)(1).

98. *Id.* § 824a-3(e)(2).

99. The opinion of the United States District Court for the Southern District of Mississippi is unreported. The Secretary of Energy and FERC appealed directly to the Supreme Court pursuant to title 28, section 1252 of the United States Code, which permits direct appeals from decisions which invalidate Acts of Congress. 28 U.S.C. § 1252 (1982).

100. FERC v. Mississippi, 456 U.S. 742, 759 (1982). The Court stated that, on its face, this PURPA provision appeared to be the most intrusive but the easiest to resolve since Congress can preempt states completely in the regulation of retail sales by utilities and transactions between utilities and cogenerators. *Id.*

101. *Id.*

102. *Id.* at 755. The Court stated that the specific congressional finding in section 2 of the Act was that the regulated activities have an immediate effect on interstate commerce and require programs for increased conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and equitable retail rates for electricity consumers, as well as a program to improve the wholesale distribution of electric energy, and a program for the conservation of natural gas, while ensuring that rates to gas consumers are equitable. *Id.*

The Court found that the legislative history provided ample support for Congress' conclusions. The congressional findings are clear and specific. Congress was not irrational in concluding that limited federal regulation of retail sales of electricity and natural gas and of the relationships between cogenerators and electric utilities was essential to protect interstate commerce. The Court stated that its role is not to say whether Congress chose the wisest means to improve the nation's energy situation, but whether Congress was rational in concluding that the PURPA regulation was essential to protect interstate commerce. *Id.* at 753-56.

103. *Id.* at 760. The implementing requirement of the statute was viewed by the Court as more

provisions of titles I and III neither compelled the exercise of Mississippi's sovereign powers nor set a mandatory agenda for state decisionmakers, but instead, set requirements for continued state activity in a preemptible field;[104] and finally, (5) the procedural requirements of the Act did not compel a state to exercise its sovereign power or set the standards to be followed in all areas of the state commission's activities, but where Congress might require a state administrative body to consider proposed federal regulation, it also might require that certain procedures be used during the state body's deliberation.[105]

In *EEOC v. Wyoming*,[106] a supervisor of the Wyoming Game and Fish Department, who was involuntarily terminated at age fifty-five pursuant to a Wyoming mandatory retirement statute, filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging violation of the Age Discrimination in Employment Act of 1967[107] (ADEA) under section 11(b), which extended the definition of "employer" to state and local governments.[108] The EEOC's suit on behalf of the supervisor and similarly situated persons was dismissed by the federal district court, which held that, insofar as the Act regulated Wyoming's employment relationship with game wardens and other law enforcement officials, it violated the tenth amendment. That amendment, the court argued, gave the states immunity from congressional attempts to extend the provisions of the federal act to employees of a long-standing traditional service (parks and recreation) of state and local governments.[109]

The Supreme Court reversed and remanded the case to the district

troublesome. *Id.* at 759. The Court determined, however, that the federal rights granted by PURPA should be respected in the courts of the states and could be appropriately enforced through the adjudicatory machinery of the Mississippi Commission. *Id.* at 760-61.

104. *Id.* at 769. The majority opinion held that the title I and III requirements must be upheld under Hodel v. Virginia Mining & Reclamation Ass'n, 452 U.S. 264 (1981), since these requirements of PURPA attach only if the state chooses to continue its regulatory efforts in the field. *See also supra* notes 86-87 and accompanying text. The tenth amendment challenge based on financial burden on the states was found unconvincing since the determinative factor in congressional activity is the nature of federal action, not the ultimate economic impact on the states. *Id.* at 770 n.33. While the partial dissent contended that *Usery* was undervalued by the decision, the Court distinguished the holding of *Usery* by stating that the field covered by PURPA is preemptible and of interstate concern. *Id.* at 769 n.32.

105. *Id.* at 770-71. The Court held, as in the issue of mandatory considerations, that Congress may require a state administrative body to require procedural minima in its involvement in a preemptible field. The federal requirements of notice and comment do not compel an exercise of a state's sovereign power and they are not required in all areas of the state commission's tasks. *Id.* at 771.

106. 514 F. Supp. 595 (D. Wyo. 1981), *rev'd*, 460 U.S. 226 (1983).

107. 29 U.S.C. §§ 621-634 (1982).

108. *Id.* § 630(b).

109. 514 F. Supp. at 600.

court, holding, as it did in *FERC v. Mississippi*, that the federal act in question is a valid exercise of Congress' powers under the commerce clause, both on its face and as applied in the case, and is not barred by the constraints of the tenth amendment.[110] The Court stated that the claim of invalid commerce clause legislation can succeed only under the *Hodel v. Virginia Surface Mining & Reclamation Ass'n* test for determining whether a federal regulation is invalid within the *Usery* tenth amendment rule.[111] In using that test to analyze the federal age discrimination statute, the Court determined that the first test requirement that the challenged federal statute regulates the "States as States" was met.[112] The second requirement, that the federal statute address a matter that is an indisputable "attribute of state sovereignty" was not resolved because, in this instance, the third requirement, that the federal law will directly impair the states' ability "to structure integral operations in areas of traditional governmental functions," was not met.[113] The Act did not impair the state in a way sufficient to override the choice of Congress to extend its authority in this matter to the states, nor did it require the state to abandon its public policy goal that Wyoming game wardens be physically prepared to perform their duties. Under the Act, Wyoming could still assess the fitness of its game wardens on an individual basis and dismiss whom it reasonably found unfit, or continue to require retirement at age fifty-five if the state could demonstrate that age is a "bona fide occupational qualification" for the job of game warden. Nothing in the federal Act suggests it will have substantial or unintended consequential effects on other state decision making.[114]

The clash of the tenth amendment powers reserved to the states and the enumerated powers of Congress will continue after *Garcia* but in the shape of the constitutional scheme rather than in the shape of predetermined ideas of sovereign power. The federalism issues are not at rest, but the Court now views the federal government as being designed, in large part, to protect the states from overreaching by Congress, and the states as being more properly protected by procedural safeguards inherent in the federal system rather than by judicially created limitations on federal power.[115]

110. EEOC v. Wyoming, 103 S. Ct. 1054, 1064 (1983).
111. *Id.* at 1060. *See also supra* notes 86-87 and accompanying text.
112. *Id.* at 1061.
113. *Id.* at 1061-62.
114. *Id.* at 1062.
115. *See* Garcia v. San Antonio Metropolitan Transit Auth., 53 U.S.L.W. 4135, 4144 (U.S. Feb. 19, 1985); J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 27, at 180 & n.77.

3. The Eleventh Amendment

The eleventh amendment provides that no state may be brought to suit in federal court by a citizen of another state or a foreign citizen without the state's consent.[116] The immunity of states from suit for retrospective relief may be viewed as an indirect state power of sovereign autonomy since the amendment limits the freedom of citizens to litigate against the state and deplete its state treasury.

The eleventh amendment becomes important in energy-related matters because of the provisions of a number of environmental statutes which provide private citizens, including corporations and partnerships, a federal cause of action for litigating interstate pollution problems. These statutes are aimed at securing protection against inadequate state and federal enforcement of the nation's environmental laws and standards.[117] The authority to commence a citizen's environmental suit against any person, including the United States, extends to any governmental instrumentality or agency to the extent permitted by the eleventh amendment. Thus, federal legislation may provide private parties an inherently limited method of resolving interstate pollution problems.

Although the eleventh amendment operates to prohibit a citizen of one state from using the federal courts to bring suit against another state even under the laws of the United States, the Supreme Court has made some distinctions. The amendment is no bar to suits against state officers for violations of fourteenth amendment rights. Suits seeking injunctive relief, which have an indirect effect on state resources or name a state officer, and which do not name the state as the defendant, are not barred. Agencies created by interstate compacts are not immune from suit, but have been viewed as political subdivisions of states, rather than the arm of the states.[118] The Court has also employed the concept of constructive

116. The eleventh amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI. *See generally* Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1978) (analyzing the argument that the amendment granted no constitutional right of sovereign immunity to the states, but only allowed for the continuation of a common law doctrine of sovereign immunity).

117. *See, e.g.*, Clean Water Act, 33 U.S.C. §§ 1365, 1369 (1982); Clean Air Act, 42 U.S.C. §§ 7604, 7607 (1982). The sections generally authorize citizen civil suits to (1) secure compliance with an emission standard of limitation under an act or implementation plan, (2) compel the EPA to perform a nondiscretionary duty, and (3) restrain persons who propose to construct a facility without the appropriate permit. The civil suit provisions eliminate requirements of diversity.

118. *See* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 402-03 (1979).

waiver of a state's permission to be sued.[119] However, the current theory that Congress, acting in accord with its article I powers, may provide that states waive their immunity by compelling states to submit to suit in federal court, or by compelling states to entertain specific federal claims in their own courts, is limited by constitutional principles. First, Congress cannot confer authority on an article III court to resolve conflicts outside the text of that article; second, congressional abrogation of immunity related to conferring jurisdiction must be reasonably ancillary to a valid exercise of a federal law-making power; and third, the Supreme Court must not infer inroads on state autonomy in a manner that goes beyond the tenth amendment principle that Congress may not impair the states' integrity or functioning within the federal system.[120]

C. *Local Government Powers*

> Municipal corporation powers are first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable.[121]

The allocation of power between states and municipal subdivisions is similar in doctrine to state and federal allocation of governmental power.[122] Local political self-governing subdivisions of the states are au-

119. *See* Parden v. Terminal Ry., 377 U.S. 184, 190-92 (1964). The eleventh amendment limits only the judicial power. Congressional inroads on state sovereignty differ. In *Parden*, Alabama citizens brought an action under the Federal Employers Liability Act (FELA) against a railroad owned by the State of Alabama and operated by the state in interstate commerce. The Alabama constitution and its supreme court decisions foreclosed the possibility of consent to the suit. The FELA provided that every common carrier by railroad engaged in interstate commerce would be liable in damages to injured employees in an action brought in a United States district court. The Court held that sovereign immunity can be no bar when Congress authorizes federal courts to entertain suits within the powers "necessary and proper" to regulate interstate commerce. Where the state has expressed nonconsent, consent can "arise from the act . . . within a sphere . . . subject to the constitutional power of the federal government." *Id.* at 196. The Court stated that the question of whether the state's act constitutes the alleged consent is one of federal law. *Id.* The dissenting opinion appears to represent current practice: "Only when Congress has clearly considered the problem and expressly declared that any State which undertakes given regulable conduct will be deemed thereby to have waived its immunity should courts disallow the invocation of this defense." *Id.* at 198-99 (White, J., dissenting).

120. *See* National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled*, Garcia v. San Antonio Metropolitan Transit Authority, 53 U.S.L.W. 4135 (U.S. Feb. 19, 1985); Fry v. United States, 421 U.S. 542, 548 n.7 (1975). *See generally* L. TRIBE, *supra* note 5, § 3-37, at 139-43 (discussion of an alternative theory of eleventh amendment abrogation).

121. E. MCQUILLIN, 1 MUNICIPAL CORPORATIONS § 367 (2d ed. 1940).

122. *See* D. ENGDAHL, *supra* note 6, § 1.03, at 8-10. Engdahl notes that theoretically within the federalism framework the state is the basic governmental unit with inherent, non-delegated powers for all possible government concerns. The federal government powers were delegated to the states and specifically enumerated in the final version of the Constitution. Local governments also derive

thorized to regulate and tax within the powers of the specific enabling act of each state. State law determines the acquisition of property within the boundaries of municipal subdivisions and property rights acquired in private transactions. The doctrine of enumerated federal powers governs the applicability of state law in the acquisition of property rights by the United States.[123]

The power to zone and regulate for land use at the municipal and county levels directly affects energy exploration and development activity. Cities and counties have used the zoning power to govern land use and the issuance of conditional use permits for planning and regulating the environmental effects of energy resource development within their jurisdictions. Challenges to general zoning ordinances are usually resolved at the state court level. As long as the local regulation furthers some public interest, such zoning ordinances generally are upheld as permissible exercises of police power for which no compensation for taking is due.[124]

The requirement of permits by counties for oil drilling and mining on private lands within county boundaries is an old and frequent regulatory device of local governments. During the 1970's, states, counties, and municipalities attempted to extend permitting regulation to the exploration of federal lands within their boundaries, a practice which was considered precluded by the supremacy of the federal mining statutes for public lands.[125] County regulations governing the permitting of explora-

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their powers from the state. One exception exists where state constitutions delegate home rule powers to municipalities for general categories of "local concern", as distinguished from statewide concern. *Id.*

123. Federal acquisition of property for other than article I purposes or without a state's consent is not subject to state law where such state law frustrates the federal acquisition of title or diminishes a clear, enumerated federal policy end, even if displacement of state law is not made explicit by Congress. *See* United States v. Little Lake Misere Land Co., 412 U.S. 580, 593, 597 (1973). Where federal acquisitions of property are not to effectuate federal policy within the enumerated concerns, state law may constitutionally govern or even frustrate the acquisition from willing transferors to the United States. *See, e.g.*, United States v. Burnison, 339 U.S. 87, 93 (1950); United States v. Fox, 94 U.S. 315, 320-21 (1877).

124. The Supreme Court continues to hold that the application of a general zoning law to specific property is found to be a taking only when the ordinance does not advance legitimate governmental purposes or denies the owner sole or primary economic use of his land. *See* J. NOWAK, R. ROTUNDA, AND J. YOUNG, *supra* note 27, at 487. In Agins v. City of Tiburon, 447 U.S. 255 (1980), the Court indicated that even though the justices had not found zoning ordinances to constitute a taking for a number of years, they still perceived a legitimate judicial role in determining whether a zoning regulation maybe so unreasonable that it would constitute a taking. *Id.* at 260-61.

125. Although uncertainties exist as to what Congress may assert in relation to federal lands and federal interests within a state, in many areas federal courts generally have upheld the application of state permitting practices to federal interests within a state's borders. *See* California v. United States, 438 U.S. 645 (1978). In *California*, a federal government application for a California permit to appropriate water impounded by the New Melones Dam, constructed under the Reclamation Act

tion and drilling on claims or leases on federal lands have not fared well in litigation.[126] Similarly, local permitting requirements to establish mining claims on federal lands have been challenged.[127] The basic controversy in relation to state and local regulation which affects energy development is that the requirements represent duplication, delay, and increased costs. Local permitting may also conflict with existing state

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of 1902, was approved by the state subject to a number of conditions. The United States sought a declaratory judgment that the federal government may impound necessary unappropriated reclamation water without complying with state law. *Id.* at 647. The lower court held that the United States was required to apply for an appropriation permit, but if sufficient unappropriated water remained, the permit was to be issued without conditions. *Id.* The Court reversed and remanded, holding that a state may impose any condition on the control, appropriation, use, or distribution of water in any federal reclamation project as long as the state requirement is not inconsistent with clear congressional directives respecting the project. *Id.* at 674-76.

The *California* decision is based on an analysis of congressional intent to sever water rights from the public domain and consign the legislative control over the water to the states. *See* Act of Feb. 26, 1897, 43 U.S.C. § 664 (1982); Reclamation Act of 1902, §§ 5, 8, 43 U.S.C. §§ 372, 383, 423e (1982). Section 664 of the Act of 1897 provides for rights of way over reservoir sites and control and regulation by the states in which such reservoirs are located. Section 5 of the Reclamation Act (reenacted in the Omnibus Adjustment Act of 1926, 43 U.S.C. § 423e (1982)), provides that no right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner who is a bona fide resident or resides in the neighborhood. The right attached upon full payment for the land. Section 8, enacted in 43 U.S.C. §§ 372, 383 (1982), defined the right to use of the water acquired as appurtenant to the land and limited to beneficial use. Nothing in the Act was intended to affect or interfere with state laws relating to the control, appropriation, use, or distribution of water used in irrigation or any vested right acquired thereunder. The Secretary of the Interior was to proceed in implementing the Act in conformity with such laws. 438 U.S. at 677.

In *California*, the Court read section 8 of the Reclamation Act as requiring the Secretary of the Interior to comply with state law in all instances of "control, appropriation, use or distribution" of reclamation water not only when it is necessary to purchase or condemn vested water rights. *Id.* at 676. The dissent asserted that on a number of previous occasions, the Court had held that section 8 did not require the Secretary to follow state law in distributing project water since section 8 dealt with the acquisition, not the distribution, of reclamation water. *Id.* at 691 (White, J., dissenting). The majority did not reach the issue of the federal government's power to condemn state water rights.

126. *See* Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979), *aff'd*, 445 U.S. 947 (1980). The Ninth Circuit held a county's attempt to require a use permit for continued drilling by a federal licensee on national forest lands within the county's open space zoning designation to be a violation of federal mineral leasing legislation. *Id.* at 1084, 1086. The court determined, in light of the broad reading of the property clause in Kleppe v. New Mexico, 426 U.S. 529, 537-39 (1976), where Congress has retained the power to enact legislation for public domain lands, federal enactment prevails over conflicting state laws for the federal lands within that state's jurisdiction. 601 F.2d at 1083.

127. *See* Brubaker v. Board of County Comm'rs, 652 P.2d 1050 (Colo. 1982). The Supreme Court of Colorado ruled the El Paso County Board of Commissioners was without jurisdiction to apply its zoning ordinances in such a way as to deny a special use permit to test drill on unpatented mining claims in order to establish a mining claim on federal land within the county. *Id.* at 1054. The court determined the Board was barred because the local ordinance was in conflict with requirements of federal mining law that all valuable mineral deposits in land belonging to the United States "shall be free and open to exploration and purchase," and because denial of the permit prohibited a use of federal property which was authorized by federal law. *Id.* at 1057-58.

plans for conservation and reclamation for the same project which continues the cycle of delay for the developer.

D. *Indian Governmental Powers*

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.[128]

1. Indian Tribal Powers

The rights and duties of Indian tribes and their members are not delegated but are based on inherent internal tribal sovereignty which has never been dissolved by the federal government.[129] The only formal limit on tribal sovereign powers is by virtue of the protectorate relationship with the federal government and the resulting federal statutes, of terms of treaties, and of restraints implied by tribal incorporation within the United States.[130] However, under the protection of the federal govern-

128. THE FEDERALIST No. 42, at 263-64 (J. Madison) (H. Lodge ed. 1888).

129. The powers lawfully vested in an Indian tribe are "inherent powers of a *limited* sovereignty which has never been extinguished." United States v. Wheeler, 435 U.S. 313, 322 (1978) (emphasis in original). Sovereignty as a term is not applied in the sense of sovereignty in an international law context, but rather, as in the context of state sovereignty, that tribes exercise a substantial, independent authority within the American constitutional system. *Id.* at 322-23. Most external powers of Indian sovereignty were lost by tribal incorporation within the Republic. *Id.* at 323. The federal government did, however, recognize the tribes' capability to make treaties except with foreign nations. *Id. See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 229-57 (1982 ed.) (source and scope of tribal authority in Indian affairs).

130. The courts have recognized the political independence and self-government status of Indian tribes since the beginning of the Republic. In cases from 1823 to 1832, Chief Justice Marshall set forth the analyses of tribal-federal and tribal-state relationships. In Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), *overruled,* Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), Marshall stated that the United States had succeeded to European claims and followed the policy of entering into alliances with tribes through treaties, thus acknowledging the sovereign status of the Indian tribes. *Id.* at 558-59. Indian nations were considered "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied [sic] by the United States." *Id.* at 557. Marshall stated that the United States had assumed a role of "protector" to assure tribal integrity for self-governing entities within a geographical territory. *Id.* at 555. This fiduciary relationship with

ment, the tribes have lost the sovereign powers to carry on relations with nations other than the United States,[131] to transfer tribal land without federal approval,[132] to regulate non-Indians when no tribal interest justifies regulation,[133] and to impose criminal jurisdiction on non-Indians.[134] Moreover, these limitations on Indian self-government are strictly construed by the Supreme Court.

The scope of the implied limitations on Indian sovereignty[135] and the protection of the remaining sovereignty by the authority of the United States provide the framework for litigation relative to Indian, federal, and state powers in Indian country. The precise limits of Indian tribal powers cannot be defined since the powers are not delegated or restrained by any limitations of the Constitution on federal and state authority. Tribal powers extend over tribal members and territories.[136] Tribal lawmaking powers include those of tribal sovereignty as well as

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the federal government preserved tribal government and protected it from state interference. *Id.* at 555-56.

131. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). In *Cherokee Nation*, Chief Justice Marshall defined tribes as "domestic dependent nations" which could not make treaties or political alliances with foreign nations. *Id.* at 17. In Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 147 (1810), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556 (1832), *overruled*, Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), the Court determined Indian tribes could not enter into direct commercial or government relations with foreign nations.

132. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). Chief Justice Marshall concluded in *Johnson* that the "discovery" by European nations diminished the natives' sovereignty as independent nations to the extent they have a legal claim to retain possession and use of land, but the power to dispose of Indian land at will was denied. *Id.* at 574.

133. *See* Montana v. United States, 450 U.S. 544 (1981). The Court held that the Crow Tribe lacked inherent civil authority to regulate fishing of non-Indians on non-Indian land within the boundaries of the Crow reservation when no important tribal interest was at issue. *Id.* at 563-65.

134. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The Court restated that tribal territorial jurisdiction to try non-Indian criminal defendants impliedly was terminated when the tribes were incorporated into the United States and the dependent relationship with the federal government was created. *Id.* at 206, 209. The Court's analysis was based on a review of congressional actions indicating tribes had no criminal jurisdiction over non-Indians except where permitted by treaty. *Id.* at 203-08. *See generally* F. COHEN, *supra* note 129, at 244-46 (discussion of the tribal powers implicitly lost under Supreme Court decisions).

Lack of criminal jurisdiction over all Indians who are non-members of their tribes is not as clear. Under federal statutes concerning federal criminal jurisdiction in Indian country, non-member Indians have been treated in the same manner as tribal members. *See* 18 U.S.C. §§ 1152-1153, 1165, 3113, 3242, 3243 (1982) (interracial crimes, trespassing for fish and game, liquor violations, and bail for offenses); *see also* Talton v. Mayes, 163 U.S. 376, 384 (1896) (constitutional restraints on federal and state governments do not limit Indian tribes). However, civil rights of persons under the authority of Indian tribes are now codified with certain restraints on the tribes. 25 U.S.C. §§ 1302, 1303 (1982) (codification of the Indian Civil Rights Act of 1968).

135. *See generally* Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479 (1979).

136. *See generally* F. COHEN, *supra* note 129, at 246-57. Cohen provides a generic list of tribal sovereign powers including the substantive powers to (1) determine the form of tribal government, (2) determine tribal membership, (3) legislate, (4) administer justice, (5) exclude persons from tribal territory, and (6) determine how these powers may be exercised over non-Indians.

those delegated by Congress.[137] The regulation and protection of reservation property, including land and resources, are internal tribal matters within a tribe's legislative jurisdiction.[138]

One of the primary purposes for creating reservations was to provide Indian nations with control over resources necessary for the achievement of economic self-sufficiency.[139] Therefore, the extent of the tribal legislative power can be highly significant, especially as it relates to the regulation of Indian energy resources. The tribal power to exclude persons from tribal territory is related to a tribe's ability to protect its territory and members as a matter of sovereignty.[140] This power is becoming increasingly important as tribes form their own plans for developing their mineral resources.[141] The tribe needs no grant of authority from the federal government to exercise the exclusion power, either as a government or landowner,[142] although the power is subject to limitation or abolition by congressional action.

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137. *See, e.g.*, United States v. Mazurie, 419 U.S. 544 (1975). The *Mazurie* Court held that Congress had the authority to regulate the distribution of alcoholic beverages by non-Indians on fee-patented lands within an Indian reservation and delegate that authority to a reservation tribal council. *Id.* at 716, 718.

138. *See* Merrion v. Jicarrilla Apache Tribe, 455 U.S. 130 (1982). The Supreme Court upheld tribal jurisdiction to regulate and tax non-Indians with respect to grazing cattle and trading license fees, zoning of fee land owned by non-Indians within reservation boundaries, and taxation of extraction of resources from tribal lands. *Id.* at 140-41; *see also* Morris v. Hitchcock, 194 U.S. 384 (1904) (Indian legislation imposing a tax on livestock owned by non-Indians was permissible); Buster v. Wright, 135 F. 947 (8th Cir. 1905) (permit tax to conduct business on Indian land could be assessed against non-Indians), *appeal dismissed*, 203 U.S. 599 (1906).

139. *See* Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979 (1981). Clinton observes that economic development on Indian reservations usually occurs through non-Indian resources and labor which transfers the economic value of Indian resources to non-Indians. This disparate proportion of return to Indian tribes varies according to the use of resources and the management practices employed. *See also* Pelcyger, *The Winters Doctrine and the Greening of the Reservations*, 4 J. CONTEMP. L. 19, 25 (1977) ("Indian reservations were intended to be a permanent home where the Indians could become secure and self-sustaining.").

140. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), *overruled*, Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973). The *Worcester* Court stated that persons were allowed to enter Cherokee land only "with the assent of the Cherokees." *Id.* at 561. Congressional acts for trade and intercourse are evidence of federal concern in relation to the power to exclude persons such as trespassers on Indian lands. *See, e.g.*, Act of March 30, 1802, ch. 13, 2 Stat. 139, 141-42 (1802); Act of May 19, 1796, ch. 30, 1 Stat. 469-70 (1796); Act of March 1, 1793, ch. 19, 1 Stat. 329-30 (1793). However, a tribe cannot exclude persons who hold valid federal patents from such fee lands within the tribe's reservation although the tribe may regulate activity on those lands as delegated by Congress and zone fee land owned by non-Indians. *See supra* notes 137-38 and accompanying text.

141. *See* Goldberg, *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians*, 40 LAW & CONTEMP. PROBS. 166 (1976); Israel, *The Reemergence of Tribal Nationalism and Its Impact on Reservation Resource Development*, 47 U. COLO. L. REV. 617, 634-52 (1976); and Note, *Indian Tribes: Self-Determination Through Effective Management of Natural Resources*, 17 TULSA L.J. 507 (1982).

142. *See, e.g.*, 1 Op. Att'y Gen. 465 (1821) (right of Indians to exclusive possession of their lands recognized); 55 INTERIOR DEC. 14, 48-50 (1934) (powers of Indian tribes).

The right of Indian tribes to tax the production of their resources by non-Indian lessees was resolved in large part by *Merrion v. Jicarilla Apache Tribe.*[143] As recently as August, 1983, the United States Tenth Circuit Court of Appeals held, in *Southland Royalty Co. v. Navajo Tribe,*[144] that the Navajo Tribal Council for the Utah reservation of Navajo Indians has the power to tax oil and gas leases and mineral sales despite extensive federal regulation of the oil and gas activities on the reservation.[145]

The uncertainties and difficulties of developing Indian land and energy resources cause the tribes to be cautious and slow to act within their powers. Tribal concerns for the future of their lands cause Indian tribes and their councils to weigh carefully whether energy resource development will stimulate the growth of a real economy for the individual reservation and its Indians.[146]

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143. 455 U.S. 130 (1982). The *Merrion* Court upheld the tribal jurisdiction of the Jicarilla Apache tribe to tax non-Indians for extraction of resources from tribal lands. *Id.* at 140.

144. 715 F.2d 486 (10th Cir. 1983).

145. The Navajo tribe imposed taxes on the value of mineral interests and on gross receipts on the leases which the plaintiffs had held for thirty years on the reservation in Utah. The state of Utah and San Juan County had also collected such taxes on these leases. *Id.* at 488. The plaintiffs argued 1) preemption, despite the Indian Mineral Leasing Act; and 2) that Indian land taxation not subject to federal review or approval might be disruptive of federal energy policy. *Id.* at 488-89. The appeals court determined that the Navajo tribe had the power to tax under *Jicarilla* and parties attacking the power had the burden to show the power had been modified, conditioned, or divested by congressional action. *Id.* at 489. The court rejected the appellants' argument that the Navajo tribe had not chosen to organize and adopt a constitution under the Indian Reorganization Act and, therefore, taxes imposed by the Navajo tribe would not be reviewed and approved by the Secretary of the Interior, as provided in the constitution of the organized Jicarilla tribe, resulting in a possible disruption of federal energy policies. *Id.* The court stated that it reached its holding in order to "comport with traditional notions of sovereignty and the federal policy to encourage tribal independence." *Id.* at 490 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980)).

The Supreme Court had held in *Jicarilla* that it was not necessary to reach the question of commerce clause applicability since Congress had specifically allowed the organized tribes to tax under the Reorganization Act and, therefore, the *Jicarilla* tax did not discriminate against interstate commerce. *Id.* at 490-91. In *Southland Royalty* the Tenth Circuit held that the Navajo tax was similarly immune from commerce clause scrutiny and should be upheld under *Jicarilla. Id.* The appellants also argued that the Navajo tax was a duplication of taxes and claimed they should be permitted discovery to determine how the tribe intended to use the proceeds relative to the state severance tax on oil produced on Navajo lands. *Id.* at 490. The appeals court noted that taxation by two entities is not necessarily unconstitutional, *id.*, and the issue of the validity of the state severance tax on oil produced on Indian lands was outside the jurisdiction of the federal courts. *Id.* at 491-92.

146. *See, e.g.*, 18 N.T.C. § 1154 (1977). This section requires the restoration of damages caused by any oil and gas activities. Such regulations do not cause preemption issues to arise with related federal statutes. *See generally* Pendley & Kolstad, *American Indians and National Energy Policy*, 5 J. ENERGY & DEV. 221 (1980) (discussion of role of Indians in energy development and policy). The Council of Energy Resource Tribes (CERT) advocates the profitable development of mineral reserves on Indian lands, more tribal control over exploration and development, and a fair share of the economic benefits from mineral agreements comparable to those available to private landowners. CERT contends, for example, that recent escalation of domestic mineral and fossil fuel development has increased bonus and royalty rates on mineral interests dramatically, but rates for development

2. Federal Powers

The commerce clause of the United States Constitution provides: "The Congress shall have Power To . . . regulate Commerce . . . with the Indian Tribes."[147] The clause is the only enumerated constitutional power that expressly mentions Indian tribes.[148] As a result, federal legislation pursuant to other enumerated powers has been construed to apply to Indian affairs. While the power of Congress over the American Indians may be considered plenary, it is limited in fact to the Indian commerce clause and the other clauses of the Constitution which have been applied in federal management of Indian affairs.[149]

The power over Indian affairs is unique in the federal system because the power has developed into a federal police power authority to legislate for the health, safety, and morals of minority citizens within a self-governing unit.[150] Although tribal powers regulate the internal matters of Indian tribes, federal legislation governs the exercise of Indian sovereignty and tribal relationships with federal and state governments.[151] Most of the regulation of individual Indians and tribes has

on Indian lands with the approval of the federal government remain essentially the same. THE COUNCIL OF ENERGY RESOURCE TRIBES, 1982 ANNUAL REPORT (1982).

147. U.S. CONST. art. I, § 8.

148. Indians are mentioned three times in the Constitution. In addition to the Indian commerce clause in article I, section 8, "Indians not taxed" are excluded by article I, section 2, clause 3, U.S. CONST. art. I, § 2, cl. 3, and amendment XIV from the "free persons" to be counted for apportionment of representatives and taxes among the states. *Id.* amend. XIV. Constitutional powers which have been applied indirectly to Indian affairs include the following: the presidential power in article II, section 2, clause 2, to make treaties, *id.* art. II, § 2, cl. 2, the judicial power in article III, section 2, clause 1, which extends to cases arising under treaties, *id.* art. III, § 2, cl. 1, the supremacy power of article VI, section 2, that all treaties are law of the land, *id.* art. VI, § 2, and the congressional powers within the article IV property clause, *id.* art. IV, and the welfare clause for expenditures in article I, section 8, clause 1. *Id.* art. I, § 8, cl. 1. The practice of treaty making was discontinued by Congress in 1871, but many Indian treaties and their obligations remain in force. Congress may abrogate treaties by specific legislation with the sole requirement that, under the fifth amendment, just compensation be paid for any extinguished tribal right. The federal government began to assert federal power to regulate internal relations of Indian tribes after 1871. *See, e.g., Ex parte* Crow Dog, 109 U.S. 556 (1883); Act of Mar. 3, 1885, ch. 341, 23 Stat. 362 (1885); *see also* Morton v. Mancari, 417 U.S. 535 (1974). The Court in *Morton* stated that the plenary power of Congress to deal with the special problems of the Indians is implicit and explicit in the Constitution. *Id.* at 551-52. Preferential employment for qualified Indians in the Bureau of Indian Affairs (BIA), as provided by the Indian Reorganization Act, therefore, was not discriminatory but held to be in furtherance of Indian self-determination. *Id.* at 553-55.

149. *See* Kearl, *Congressional Power, Trust Responsibilities and Judicial Review in Indian Affairs*, 2 J. ENERGY L. & POL'Y 47 (1981) (citing the use of the taxing and defense powers and Congress's power regarding national citizenship).

150. *See* F. COHEN, *supra* note 129, at 219. Indians are American citizens by virtue of a number of acts. The Citizenship Act of 1924, 8 U.S.C. § 1401(b) (1982), made "all non-citizen Indians born within the territorial limits of the United States" American citizens.

151. The concept of dependent sovereign status of Indian tribes as protectorates of the United States, which was established by early treaties and federal judicial decisions, had changed to the

been by statute although presidential executive orders have also created rights for Indians in setting aside land for Indian tribes.[152] Treaties still remain important, however, since they are the documents which reserve property rights to tribes, establish equitable title to surface and subsurface estates, and protect hunting, fishing, and water rights on reservations in exchange for the original land cessions made by the Indians.[153]

In general, the federal fiduciary role and trusteeship is a body of legal rules which protect Indian tribes from state and non-Indian intru-

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concept of a federal trusteeship authority by the end of the nineteenth century. The Court has attempted to dispel the resulting confusion over whether a federal authority exists separate and distinct from the power of the Indian commerce clause. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973), *overruled*, Bryan v. Itasca County, 426 U.S. 373 (1976). The Court held that the rights of a reservation Indian were violated when the state collected an income tax which it had no jurisdiction to impose. *Id.* at 172. The Court stated that modern cases tend to reject platonic notions of Indian sovereignty and look to the applicable treaties and federal statutes to define the limits of state power. *Id.* A critical reading of the *McClanahan* opinion suggests that the Court did not fully comprehend the doctrinal structure in *Worcester*, and that the Indian sovereignty doctrine to which the Court makes reference is the dormant Indian commerce clause portion of *Worcester*.

The exercise of a congressional and Bureau of Indian Affairs fiduciary relationship over the affairs of individual Indians in large part has disappeared. *But see* 25 U.S.C. § 404 (1982) (approval of the Secretary of Interior is required for the sale of Indian land). The federal government still plays a fiduciary role as legal trustee of the twelve million acres of Indian land held in trust for allottees and their successors in interest and the forty million acres held for particular tribes. *See* COMPTROLLER GEN. OF THE UNITED STATES, 94th Cong., 2d Sess., MANAGEMENT OF INDIAN NATURAL RESOURCES 1 (Comm. Print 1972); Clinton, *supra* note 139, at 1002 n.135; Note, *supra* note 141, at 518. However, in United States v. Mitchell, 445 U.S. 535 (1980), the Court held that the Dawes General Allotment Act of 1887 did not impose any trust obligation on the federal government within the Act to manage allotted trust lands since Congress intended that an individual Indian allottee would farm and manage the allotted land. *Id.* at 542-43.

152. Although Congress has since prohibited the use of executive orders to withdraw public lands for Indian reservations, 43 U.S.C. § 150 (1982), the Supreme Court has upheld the constitutionality of the reservations created by executive order. *See, e.g.*, Sioux Tribe of Indians v. United States, 316 U.S. 317, 325 (1942). Congress has ratified most of the actions, but two million acres still are held by Indian tribes outside of Alaska pursuant only to executive order. H.R. REP. NO. 2503, 82d Cong., 2d Sess. 60-74 (1953).

153. The President's power to make treaties with the advice and consent of the Senate includes treaties made with Indian tribes. *See* 2 INDIAN AFFAIRS: LAWS AND TREATIES (C. Kappler ed. 1904), for a compilation of Indian treaties. Although treaty making with tribes was ended by statute in 1871, obligations in existing treaties were not to be impaired. Act of March 3, 1971, ch. 120, 16 Stat. 566 (1871) (codified at 25 U.S.C. § 71 (1982)). Today, treaties still constitute a primary source of federal Indian law. *See* F. COHEN, *supra* note 129, at 811-12, 816. Treaties with Indian tribes differ from treaties with foreign sovereigns in two important aspects. First, special canons of construction apply which construe Indian treaties in favor of the Indians as they would have understood them. *See, e.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943); Choate v. Trapp, 224 U.S. 665, 675 (1912). In addition, courts will not find that Indian treaties have been abrogated by subsequent treaties or legislation unless the latter enactments show clearly and specifically that abrogation was intended. *See, e.g.*, Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979). *See generally* Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CALIF. L. REV. 601 (1975) (discussion of judicial tests used in determining if an Indian treaty has been abrogated).

sions and require mandated programs to be federally administered by the Department of the Interior for the benefit of the tribes and their resources. While federal trusteeship obligations toward the Indians are clear, especially in relation to holding legal title to Indian lands, the right of the federal government to regulate Indian affairs within an enumerated power is not so clear.[154]

Since Congress has begun a process which turns over tribal resource management by the Office of Trust Responsibility within the Bureau of Indian Affairs (BIA) to tribal governments,[155] the Secretary of the Interior may transfer the authority of programs to manage land use planning, forest and range management, timber sales, agricultural leasing, and the maintenance of land use records to the tribes. Nevertheless, Congress explicitly prevents the Secretary from abrogating federal trust responsibilities to the tribe in matters relating to tribal resources.[156]

154. While the courts, on one hand, have allowed Congress more discretion over Indian affairs, they have also enforced stringent legal duties on the federal officers and agencies for Indian affairs based on strict review of the principle of "trust responsibility" of the federal government for Indian interests. *See* United States v. Creek Nation, 295 U.S. 103, 110 (1935) (unless Congress directs otherwise, the federal executive must exercise a strict standard of compliance with fiduciary duties of due care, loyalty, and subordination of a trustee interest to those of its beneficiary); *see also* Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252, 256-57 (D.D.C. 1972) (Secretary of Interior, as trustee for the tribe, was required by trust responsibility to administer reclamation statutes in such a way that they did not interfere with Indian rights), *rev'd on other grounds*, 499 F.2d 1095 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). *But see* Nevada v. United States, 103 S. Ct. 2906 (1983). The Court held that where Congress has a dual responsibility to protect water rights for Indian tribes and obtain water rights for reclamation, the federal trustee obligation to a tribe is not compromised because the government represented other interests as well. *Id.* at 2917, 2921. The Court stated that the law of private trustees and fiduciaries does not apply in instances where Congress has decreed the federal government has the dual responsibilities of supervision of Indian tribes and the commencing of reclamation projects in areas adjacent to Indian lands. *Id.* at 2917. Where Congress chose to so legislate, it would be unrealistic for the government not to perform its obligation to represent Indian tribes in litigation where Congress has obliged the government to represent other interests as well. *Id.* at 2921.

155. *See* Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n (1982).

156. *See id.* §§ 450j(f), 450n(2). However, trust responsibilities also represent a bureaucratic conflict of interest when national energy policy commits the federal government to developing energy supplies such as strippable coal and oil and gas which can be produced from Indian lands. Several proposals have been made in administrations to avoid the governmental conflict. *See, e.g.*, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, TRANSMITTING RECOMMENDATIONS FOR INDIAN POLICY, H.R. DOC. NO. 363, 91st Cong., 2d Sess. (1970), *reprinted in* 7 WEEKLY COMP. OF PRES. DOC. 894 (July 8, 1970). President Nixon proposed the creation of an independent Indian Trust Council Authority to manage, enforce and protect Indian property rights. *Id.* Since the Linowes Commission report in January, 1982, the Department of the Interior has established the Minerals Management Service (MMS) for federal and Indian lands to rectify Interior's procedures for the management and auditing of revenue reports on production. Several large tribes have begun using sophisticated managerial and legal techniques to assure mineral extraction is environmentally sound, efficient, and economically rewarding. 4 CERT (The Council of Energy Resource Tribes) REP. 2-4 (Sept. 13, 1982).

The effective use of tribal mineral and water resources requires the resolution of a number of legal problems and practices. The legal status of land ownership on many reservations needs to be made more clear and less complex.[157] While Congress can resolve boundary and land title disputes by statutorily establishing an executive or judicial procedure and setting forth criteria to be applied in the adjudication of issues among Indian tribes or between tribes and non-Indians, the conflicts may require a series of enactments and litigation over long periods of time.[158] In addition, tribal self-determination in the development of tribal energy resources must occur within a complex arrangement of existing federal administrative, executive, and legislative directives for Indian tribal self-determination.[159]

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157. *See generally* F. COHEN, *supra* note 129, at 471-507. The property interests of Indian tribes are a unique form of property right in the American legal system. The interests are determined by the federal trust over the land and restrained from alienation by statute. While the interest itself is a form of ownership in common, individual tribal members have no inheritable or alienable interest in tribal property. Federal law generally protects beneficial use of the lands by tribes. Congress provides compensation for the extinguishment of rights whether acquired by action of a prior government, aboriginal possession, treaty, act of Congress, executive action, or purchase. The precise title granted to a tribe is not significant because the restrictions on alienation and other attributes of Indian land apply equally to all tribal lands held in trust by the federal government.

158. In regard to the Navajo-Hopi land dispute, see Hamilton v. MacDonald, 503 F.2d 1138 (9th Cir. 1974); Hamilton v. Nakai, 453 F.2d 152 (9th Cir. 1971), *cert. denied*, 406 U.S. 945 (1972); Healing v. Jones, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1962); Act of July 22, 1958, Pub. L. No. 85-547, 72 Stat. 403 (1958); Act of Dec. 22, 1974, Pub. L. No. 93-531, 88 Stat. 1712 (1974) (codified at 25 U.S.C. §§ 640d-24 (1982)). Partition negotiation failed and judicial partition was litigated in Sekaquaptewa v. MacDonald, 575 F.2d 239 (9th Cir. 1978); Sekaquaptewa v. MacDonald, 544 F.2d 396 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); Sekaquaptewa v. MacDonald, 448 F. Supp. 1183 (D. Ariz. 1978), *aff'd in part and rev'd in part*, 619 F.2d 801 (9th Cir.), *cert. denied*, 449 U.S. 1010 (1980).

159. *See* Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (1982)); Oklahoma Indian Welfare Act of 1936, ch. 831, 49 Stat. 1967 (1936) (codified as amended at 25 U.S.C. §§ 501-509 (1982)) (allow for greater tribal self-determination by vesting self-government, corporate organization, credit, and land purchase authority in the tribes).

President Reagan created a nine member Presidential Commission on Indian Reservation Economies Commission to advise on the promotion of new business and industry in private enterprise under tribal leadership. Exec. Order No. 12,401 (Jan. 14, 1983). The functions of the Commission include:

1) [d]efining the existing Federal legislative, regulatory, and procedural obstacles to the creation of positive economic environments of Indian reservations[;]
2) [i]dentifying and recommending changes or other remedial actions necessary to remove these obstacles[;]
3) [d]efining the obstacles at the State, local, and tribal government levels which impede both Indian and non-Indian private sector investments on reservations[;]
4) [i]dentifying actions which these levels of government could take to rectify the identified problems[; and]
5) [r]ecommending ways for the private sector, both Indian and non-Indian, to participate in the development and growth of reservation economies, including capital formation.

Id. The Commission panel members reported key problems which they found to include the following: (1) American Indians lack expertise in management and in planning development; (2) many

3. Indian Commerce Clause

The framers of the Constitution gave the federal government complete control over commerce with Indian tribes because of the friction between tribes and states over state boundaries and because of western land claims which conflicted with Indian title to land in or adjacent to the states.[160] Modern federal Indian law still attempts to maintain the geographic boundaries and jurisdiction for Indian country so that state regulation can not intrude. Any congressional efforts enacted under the Indian commerce clause to assimilate Indians into the dominant society by abrogating federal supervision over property and rights of Indian tribes are in fact intrusions on Indian internal affairs,[161] but the efforts appear to be accepted by the courts in dicta.[162] Congress has allocated

tribal governments are too unstable to attract industry; and (3) the question of who has legal jurisdiction over contracts—state, federal, or tribal officials—remains unanswered. Tulsa World, Jan. 11, 1984, at C10 col. 1.

160. *See* Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17, 19-23 (1979). The First Congress specified federal restraints on alienation of Indian land applied to any state, whether or not the state had preemptive rights to the land. Act of July 22, 1790, ch. 33, 1 Stat. 137, 138 (1790).

161. *See* Kearl, *supra* note 149, at 47-50. The assimilation of Indians into the dominant society was intended by the enactment of the Indian Allotment Act of 1887, which allotted tribal lands to individual tribal Indians to farm and manage. Indian Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C. §§ 331-334, 336, 339, 341, 342, 348, 349, 381 (1982)). In the 1950's, a federal policy process of termination of tribes was set forth which would "abolish federal supervision over tribes as soon as possible and subject the Indians to the same laws, privileges, and responsibilities as other citizens of the United States." H.R. REP. NO. 108, 83d Cong., 2d Sess. 100 (1953). The fourteen individual termination acts which followed ended the federal trust relationship with these tribes and their members for most purposes, although federal authority over personal property in some instances was delegated to private trustees and some tribal hunting, fishing, and water rights were not abrogated. *See* F. COHEN, *supra* note 129, at 811-12, 816. The issue has not been litigated, but the federal trust responsibility to protect these resources seems to continue with these rights. *Id.* at 812 n.11. State legislative and judicial jurisdiction was imposed for most purposes and most exemptions from state taxing authority were terminated. *Id.* at 816. Termination acts do not, however, abolish the treaties or tribal sovereignty. *Id.* at 812-13. Tribal jurisdictional rights are not ended technically, but without land on which to exercise jurisdiction, they are without effect. *Id.* at 815. The federal courts have upheld the authority of Congress to enact termination legislation. *See, e.g.*, Otradovec v. First Wis. Trust Co., 454 F.2d 1258 (7th Cir. 1972); Crain v. First Nat'l Bank, 324 F.2d 532 (9th Cir. 1963). Litigation has occurred, which relates to the broad administrative authority delegated to the Department of Interior, to carry out the details of termination. *See, e.g.*, Duncan v. United States, 597 F.2d 1337, 1341-44 (Ct. Cl. 1979), *vacated*, 446 U.S. 903 (1980); Duncan v. Andrus, 517 F. Supp. 1 (N.D. Cal. 1977).

162. Limitations of congressional power under the Indian commerce clause are not well-defined in relation to the regulation of tribes' internal affairs, and the issue has never been addressed by the courts except in dicta. *See* United States v. Wheeler, 435 U.S. 313, 323 (1978). The *Wheeler* Court stated that the sovereignty of Indian tribes is unique and limited, exists at the sufferance of Congress, and is subject to congressional defeasance. *Id.*; *see also* Delaware Tribal Business Comm'n v. Weeks, 430 U.S. 73, 84 (1977); Morton v. Mancari, 417 U.S. 535, 554-55 (1974). Indian commerce clause limitations on congressional action may be similar to interstate commerce clause limitations on Congress. The Court has held only once that the federal government did not have the authority to regulate Indian activities. *See* United States v. Kagama, 118 U.S. 375, 378-79 (1886) (federal crimi-

some governing authority over Indian country to the states,[163] and exercises some governing authority itself,[164] but the current federal practice basically is to protect and support tribal self-government.[165]

The Indian commerce clause gives Congress the power to regulate the federal government, states, and non-Indians in their relations with individual Indians and tribes. Congress can directly regulate individual Indians on and off the reservation as well as Indian tribes in their relations with one another, the federal government, states, and non-Indians. Moreover, federal power is not limited to the reservation. Congress can make treaty provisions granting Indians off-reservation fishing, hunting, and gathering rights[166] and providing tax exemptions by statute for off-reservation tribal real property.[167] The Supreme Court has upheld and enforced such provisions under the presumption that federal authority is not as strong in off-reservation matters so that states, with restrictions, may regulate off-reservation fishing rights[168] and impose types of taxa-

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nal jurisdiction over Indian lands was interpreted narrowly as not constituting "commerce"). The Supreme Court, to date, has been unwilling to exercise any effective check on the exercise of congressional authority in Indian affairs, relying instead on the theory of inherent federal trusteeship. *See* Clinton, *supra* note 139, at 996-1001 (description of the shift of the Court over time to the recognition of the Indian commerce clause as the exclusive source of federal power).

163. *See, e.g.*, 18 U.S.C. § 1162 (1982) (state jurisdiction authorized in Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin over offenses committed by or against Indians in specific areas of Indian country within those states to the extent that the state has jurisdiction over the offenses committed elsewhere in the state); 25 U.S.C. §§ 231-233 (1982) (enforcement of state laws affecting health, education, and the entry of state employees on Indian lands); 25 U.S.C. §§ 1321-1326 (1982) (assumption by the state of criminal and civil jurisdiction over offenses and civil actions in Indian country as well as the steps for assuming the exercise of the authority); *see also* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975) (analysis of the effects of 18 U.S.C. § 1162 (1970) on Indian and state relationships).

164. *See, e.g.*, 18 U.S.C. § 1153 (1982) (exclusive federal jurisdiction over certain offenses committed in Indian country against the person or property of another Indian or other person); *see also* Tulsa World, Jan. 16, 1984, at A1, col. 1 (report on the modern justice system for the Indians, as well as the complexities and confusion under this section).

165. *See* 25 U.S.C. §§ 476-477 (1982) (tribes given the right to organize, incorporate, and adopt a constitution and bylaws); 25 U.S.C. § 1302 (1982) (imposes Bill of Rights guarantees on tribal governments).

166. These treaty provisions have been the basis of the controversy over fishing disputes in the Pacific Northwest and the Great Lakes region. *See, e.g.*, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), *cert. denied*, 454 U.S. 1124 (1981). *See generally* Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207 (1972) (discussion of states' power to regulate off-reservation fishing).

167. *See, e.g.*, Squire v. Capoeman, 351 U.S. 1 (1956); *but see* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 149-50 (1973) (state may tax any revenue the tribe derives from exempt land when the state charge can fairly be denominated as a fee for services).

168. *See* Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 175-76 (1977) (off-reservation fishing rights are subject to reasonable regulation by the state pursuant to its power to conserve an important natural resource); Antoine v. Washington, 420 U.S. 194, 207 (1975) (such things as the

tion on off-reservation tribal land not protected by a federal statutory grant of immunity from state taxation.

Federal law establishing an Indian reservation preempts states from regulating any tribal activity on the reservation. The most distinct factor which distinguishes preemption law in federal Indian law from other fields is the role of the tribes as distinct political sovereign units in the federal system. Broad preemption of state laws has been viewed consistently as an implication of the federal policy to protect tribal sovereignty.[169] Over time, the Supreme Court has developed rules of construction in relation to the scope of preemption of state law which include: (1) interpretation of treaties with Indians as the Indians would have understood them,[170] and (2) interpretation in favor of retaining tribal self-government and property rights against state law claims.[171] Ambiguities in treaties and agreements are resolved in the Indian's favor, and federal Indian laws are interpreted liberally to carry out the purposes of trustee protection.[172] However, the Court also respects the independ-

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manner of fishing and hunting, the size of the take, and the like may be regulated by the State in the interest of conservation, provided the regulation does not discriminate against the Indians).

169. *See* F. COHEN, *supra* note 129, at 270-79. Cohen explains that the Supreme Court has consistently followed the principle that the Constitution delegates the authority over Indian affairs to the federal government. In addition, Indian treaties, statutes, and executive orders preempt the application of state laws which would apply because of the states' jurisdiction over persons and property within their geographic boundaries. *But see* Clinton, *State Power Over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D.L. REV. 434 (1981). Clinton claims that the Burger Court has attempted to maximize the extent of state authority in Indian country and retain a limited, self-governing tribal enclave, thus destroying the traditional analytical framework established in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), *overruled*, 462 U.S. 324 (1983), which mandated that tribal sovereignty be maintained. *Id.* at 439-40.

170. For an example of the progression of the Supreme Court's application of this rule of construction, see Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31 (1970) (treaties were not arm's-length transactions; thus, any doubtful expressions in them should be resolved in the Indians' favor), *cert. denied*, 417 U.S. 946 (1974); United States v. Winans, 198 U.S. 371, 380 (1905) (Court will construe a treaty with the Indians as they understood it and as justice and reason would demand); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551-54 (1832) (interpreting the treaty of Hopewell, a treaty between the United States and the Cherokees), *overruled*, 462 U.S. 324 (1983).

171. *See, e.g.*, Washington v. Yakima Indian Nation, 439 U.S. 463, 484 (1979) ("[A]mbiguities in legislation affecting retained tribal sovereignty are to be construed in favor of the Indians."); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174-75 (1973) ("[R]eservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision."), *overruled*, 426 U.S. 373 (1976); *Ex parte* Crow Dog, 109 U.S. 556, 568-70 (1883) (purpose of arrangements with the Indians was to secure to them an orderly self-government, regulated by themselves but subject to their allegiance, as Indians, to the laws of the United States).

172. *See* Antoine v. Washington, 420 U.S. 194, 200 (1975) ("[D]oubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.") (citing Choate v. Trapp, 224 U.S. 665, 675 (1912)); Tulee v. Washington, 315 U.S. 681, 684-85

ent role of the states within the federal system by withholding findings of preemption in cases which are doubtful.[173] In addition, as in all preemption cases, Congress can authorize state jurisdiction by superseding, repealing, or amending a treaty or statute which preempts state laws and specifically apply state laws to Indian country.[174]

A primary federal purpose in recognizing tribal sovereignty and territory is to preserve the economic resources—land, forests, minerals, fish, game, and water—reserved for Indian self-support. The mineral reserves located on the 52 million acres of Indian lands,[175] and the water reserved for Indian use in the western states,[176] provide the potential for energy

(1942) (it is the Supreme Court's responsibility to generously recognize the full obligation of the United States to protect the interests of the Indians).

173. *See, e.g.*, California v. United States, 438 U.S. 645 (1978).

174. *See* 25 U.S.C. § 348 (1982) (incorporates applicable state law to determine heirship, descent, and partition of allotted lands); 25 U.S.C. §§ 1321-1326 (1982) (assumption of state jurisdiction over criminal and civil actions); 28 U.S.C. § 1360 (1982) (delegates state jurisdiction over civil actions in areas of Indian country within six states).

175. *See* Barry, *An Energy Dichotomy for the 80's*, 2 AMER. INDIAN J. 18 (1980). No official government data has existed on mineral resources and reserves on Indian lands. *See* Note, *supra* note 141, at 527; telephone interview with David Baldwin, Director of Division of Energy Mineral Resources, Bureau of Indian Affairs (Jan. 15, 1982). Until 1980, the area offices of the BIA handled mineral development. *See* Note, *supra* note 141, at 527. At that time, because of the increased activity of Indian energy resource development, the BIA determined that one centralized office, the Division of Energy and Mineral Resources, located in Lakewood, Colorado, as part of the Office of Trust Responsibility within the BIA, could provide more expertise and oversight. This Division and the Department of the Interior's Bureau of Land Management have completed the first inventory of Indian mineral resources; however, data is confidential and not available to the public. Interview with David Baldwin, Director of Division of Energy and Mineral Resources, Bureau of Indian Affairs, in Lakewood, Colorado (Oct. 14, 1982) (notes on file at National Energy Law & Policy Institute, University of Tulsa College of Law). However, the Council of Energy Resource Tribes (CERT) reports that thirty-one tribes produce oil and gas on Indian lands and twelve additional tribes have leases without production. Testimony of E. Gabriel, Executive Director of the Council of CERT before the House Subcommittee on Energy and Water Development Appropriations (March 25, 1981). Three tribes have production of coal and uranium. *Id. But see* COMMISSION ON FISCAL ACCOUNTABILITY OF THE NATION'S ENERGY RESOURCES, REPORT OF THE COMMISION, at 115 (Jan. 1982), which reports that of the 300 federally recognized tribes, 240 have energy resources most of which are not developed. Twenty-seven tribes are producing oil and gas, two produce coal and uranium, and two produce non-energy resources. CERT estimates its twenty-nine member tribes own one-third of the strippable coal in the western states, four to five percent of onshore oil and gas resources, and forty percent of the privately-owned uranium in the United States. *See* Note, *supra* note 141, at 528; *see also* Pendley and Kolstad, *supra* note 146, at 223-33 (description of the national perspective of tribal lands and resources).

176. *See* Moses, *The Federal Reserved Rights Doctrine—From 1866 Through Eagle County*, 8 NAT. RESOURCES LAWYER 221 (1975) (history of the reserved rights doctrine under which the federal government claims a right to regulate water used within the states). The theory of Indian reserved rights for water arose from the federal reserve rights doctrine established in Winters v. United States, 207 U.S. 564 (1908), wherein the Supreme Court construed the treaty creating the Fort Balknap reservation in Montana. The Court determined that with the withdrawal of land by the federal government for the purpose of forming the Fort Balknap reservation, water rights to the Milk River also had been "reserved" for the Indians for the purpose of agriculture on the reservation. *Id.* at 576-77. The reserved rights doctrine has acquired a broader base since *Winters*. In

resource development and wealth for Indian tribes. Mineral leasing practices of tribal lands are governed by the Indian Mineral Leasing Act of May 11, 1938,[177] which delegates authority to the Secretary of the Interior to promulgate the rules and regulations governing the implementation of the Act. The Secretary, as trustee, determines whether a lease provides adequate financial return to the tribe. The tribes have no authority, other than a controlled leasing power,[178] to enter into agreements or control the development of their land for mineral leasing. In general, since tribal technical expertise in the area of mineral development is relatively new, most tribes are dependent on federal expertise and private developers for production of tribal energy resources.[179]

Concern for the environment in relation to mineral leasing is a new factor in tribal consideration of energy resource exploitation. Until 1972, the BIA had not considered the Environmental Protection Act (EPA)

Cappaert v. United States, 426 U.S. 128 (1976), the Court held that when the federal government withdraws its land from the public domain, it reserves appurtenant water—both surface and ground water—by implication. *Id.* at 138. The water so reserved was unappropriated to the extent needed to accomplish the purposes of the reservation of the water and vested on the date of reservation with rights superior to future appropriators. *Id.* The doctrine applies to Indian reservations and encompasses water rights in navigable and nonnavigable streams. *Id.* The water rights of prior appropriators were unaffected and remained senior to federal reserved water rights. *Id.* at 140-41. However, in United States v. New Mexico, 438 U.S. 696 (1978), the Court limited the scope of federal water reservation to the original purpose of the withdrawal of the land. *Id.* at 700, 715. The extent of the doctrine remains undecided in many areas, such as the criteria for the amount of water reserved and the extent of the needed use. Although early water reservations gave the federal government a priority superior to many present users, the question of priority remains important in relation to acquiring state permits or changing existing water rights. *See, e.g.*, Marseille, *Conflict Management: Negotiating Indian Water Rights*, WESTERN CONFERENCE COUNCIL OF STATE GOVERNMENTS/ LINCOLN INSTITUTE OF LAND POLICY (1983).

177. Indian Mineral Leasing Act of May 11, 1938, ch. 198, 52 Stat. 347 (1938) (codified as amended at 25 U.S.C. §§ 396(a)-396(g) (1982)).

178. *See id.* (oil, gas and mineral leasing authorized for unallotted lands of various reservations). Approval of the Secretary of Interior is necessary for such leases to assure that the Indian lessor receives the highest possible rate of return, but such government approval using a standard of economic fairness may be counterproductive in terms of preservation of the tribal culture and the effects of resource exploitation on the community. *See, e.g.*, Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 657 (1976) (the Northern Cheyenne preferred to avoid strip mining of coal reserves even though that development of the land was more valuable economically than agricultural use).

179. For an evaluation of federal management of mineral royalties on Indian land, see COMMISSION ON FISCAL ACCOUNTABILITY OF THE NATION'S ENERGY RESOURCES, *supra* note 175, at 237-67 (1982). The Commission examined the federal management of royalty collections on oil and gas produced on federal and Indian lands, the allegations of underpayment of royalties due Indian landowners, and theft of oil from these lands. The Commission found the management system for royalties collection by the United States Geological Survey (USGS) to be based primarily on an honor system for the industry. The USGS does not verify the data reported by oil and gas companies. The Survey's lease account records are unreliable for showing royalties owed, while late payment to the government is common. Lessees' records are seldom audited and penalties for underpayment of royalties seldom exist. Commission members recommended that internal controls for collection management, site security, and enforcement be immediately implemented so that the Secretary of Interior could enter into demonstration cooperative agreements with interested Indian tribes.

applicable to Indian lands. However, subsequent regulations for the assessment of the environmental impact of mineral development on Indian land have been challenged as inadequate, especially in regard to the effects of strip mining.[180] The Surface Mining Control and Reclamation Act of 1977[181] now governs coal production on Indian lands and statutorily requires that a prior study with tribal participation determine the regulation of coal development so that the development fulfills the purposes of the Act.

4. State Powers

State law generally is not applicable to Indian affairs within the territory of an Indian tribe located within a state's boundaries unless Congress acts to give the state authority. The application of state civil laws to non-Indians in Indian country in matters which do not affect Indians or their property is not in conflict with any federal statute. The citizenship enactments for Indians have allowed Indians to participate in state programs as citizens of the state of residence, and state laws can be applicable for participation in social services and other benefits regardless of whether the Indian lives on a reservation or pays taxes.[182] Outside Indian country, tribes and individual Indians usually are subject to state jurisdiction.

The federal purpose of reserving economic resources to tribes for their self-support can affect lands outside of the reservation and preempt state laws which regulate or tax Indians and/or their resources[183] or which grant competing private rights.[184] The negative implications of the Indian commerce clause, however, have been treated in a different manner by the Supreme Court in recent years. Some commentators feel

180. *See* Anderson, *Strip Mining on Reservation Lands: Protecting the Environment and the Rights of Indian Allotment Owners*, 35 MONT. L. REV. 209 (1974) (argues that regulations pursuant to provisions of Indian mineral leasing statutes were grossly inadequate and failed to provide Indians with any real protection).

181. 30 U.S.C. §§ 1201-1328 (1982).

182. *See, e.g.*, Acosta v. San Diego County, 126 Cal. App. 2d 421, 272 P.2d 92 (1954) (Indians living on reservations are citizens and residents of the state, endowed with the same rights, privileges, and immunities enjoyed by all citizens and residents of the state); Piper v. Big Pine School Dist., 193 Cal. 664, 226 P. 926 (1924) (Indian child eligible to attend public school although also eligible to attend a federal school for Indians only).

183. *See* Antoine v. Washington, 420 U.S. 194 (1975); Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968); Tulee v. Washington, 315 U.S. 681 (1942); *see also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (imposition of Arizona's use fuel and motor carrier licensing taxes on a non-Indian logging company that operated solely on reservation lands harvesting timber for the tribe held invalid).

184. *See* Seufert Bros. Co. v. United States, 249 U.S. 194 (1919); Winters v. United States, 207 U.S. 564 (1908); United States v. Winans, 198 U.S. 371 (1905).

the doctrinal preemption analysis which provides protection for the authority of Indian governments over their reservations has been reworked by the Burger Court, changing its operative sphere and maximizing the reach of state authority.[185]

Jurisdictional compacts between Indian tribes, states, and their subdivisions are desirable in instances where national laws do not meet local needs. The legal authority of states to make binding agreements with tribes without congressional consent is not clear. Public law 2801[186] does allow general authorization for transfer of authority to the states where approved by the Secretary of Interior upon consultation with the Attorney General of the United States.[187] Some state and tribal agreements also have evolved from court cases involving tribal and state claims. Such agreements may stipulate forbearance of the parties and require judicial enforcement.[188]

III. RIGHTS OF PRIVATE INDIVIDUALS

A. *Individual Rights as Limitations on Government Power*

> *Second.* It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.

185. *See* Clinton, *supra* note 139 (analysis of the most recent Supreme Court decisions, in light of the traditional view of *Worcester*, particularly the Rehnquist opinions, which have sustained state taxation of commerce with Indian tribes); *see also* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980). The Court in *Confederated Tribes* stated:

> It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all taxation of matters significantly touching the political and economic interests of the Tribes . . . . That clause may have a more limited role to play in preventing undue discrimination against, or burdens on, Indian commerce.

Id. at 157.

186. *See* Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-90 (1953) (codified as amended by Act of April 11, 1968, 82 Stat. 79 (1968) in 25 U.S.C. §§ 1321, 1322, 1323, 1360, 1324 (1982)).

187. *See* 25 U.S.C. § 1323 (1982) (retrocession of jurisdiction by state); Exec. Ord. No. 11,435, 33 Fed. Reg. 17,339 (1968), *reprinted in* 25 U.S.C. § 1323 (1982) (Secretary of Interior is designated to accept retrocession of jurisdiction by a state); *see also* Kennerly v. District Court, 400 U.S. 423, 428 (1971) (the Crow Indian tribe could not unilaterally vote to make state jurisdiction concurrent with the reservation).

188. *See, e.g., Hearings on S. 2502 Before the Senate Select Comm. on Indian Affairs*, 95th Cong. 2d Sess. 15-16 (1978) (hearings considering the Tribal State Compact Act of 1978, which authorizes states and Indians to enter into mutual agreements and compacts regarding jurisdiction and governmental operations on Indian lands, subject to Interior Department review and approval or revocation by either party); *see also* State v. Forge, 262 N.W.2d 341, 347-48 (Minn. 1977) (an agreement of the Minnesota Chippewa tribe and the Minnesota governor to regulate fishing by non-Indians on the Minnesota Chippewa reservation was subsequently adopted by the state legislature as law and upheld as constitutional by the Supreme Court of Minnesota), *appeal dismissed*, 435 U.S. 919 (1978).

> There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority—that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.[189]

The analysis of jurisdictional power and the inherent limitations of national government found in states' rights and Indian tribal sovereignty shift when the assumption is added that the promotion of individual liberty and freedom is the basic function of all government.[190] The specific guarantees of individual rights in the original Constitution are included in three legislative prohibitions which have not been extensively litigated.[191] The first eight amendments of the Bill of Rights provide specific guarantees of individual rights in any form of governmental action.[192] The passage of the fourteenth amendment did not make the ten amendments of the Bill of Rights directly applicable to the states, and the Supreme Court has incorporated only those provisions of the Bill of Rights which it has determined are fundamental to the American system of law and, therefore, applicable to the states. The Court has determined that three of the individual guarantees of the first eight amendments are

189. THE FEDERALIST No. 51, at 335-36 (J. Madison) (H. Lodge ed. 1888).

190. *See* Huffman, *Governing America's Resources: Federalism in the 1980's*, 12 ENVTL. L. 863 (1982); V. OSTROM, THE POLITICAL THEORY OF A COMPOUND REPUBLIC (1971).

191. Article I, section 10 provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." U.S. CONST. art. I, § 10. Amendment V provides the same prohibition for federal legislation in that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." *Id.* amend. V. The two ex post facto clauses in article I, sections 9-10, "[n]o Bill of Attainder or ex post facto Law shall be passed" and "[n]o State shall . . . pass any Bill of Attainder, ex post facto Law," act to prevent federal and state governments from punishing persons for actions which were not illegal when they occurred. *Id.* art. I, §§ 9-10. The third legislative prohibition is found in the same sections and includes the abolition of bills of attainder which impose punishment on specific individuals.

192. Two amendments are not considered specific guarantees of individual rights. Amendment IX provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *Id.* amend. IX. Amendment X states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People." *Id.* amend. X.

inapplicable to the states,[193] and two provisions of the Bill of Rights have never been litigated to determine whether they are applicable to the states.[194] The constitutional protections of individual rights from governmental action which are relevant to the issues of energy sectionalism are the due process guarantees governing governmental taking of individual property,[195] the privileges and immunities clauses[196] guaranteeing certain privileges to citizens against state infringement, the contract clause protecting individuals against retrospective legislation, and the fourteenth amendment equal protection arguments providing against unequal classifications of individuals.

B. *Due Process*

The fifth and fourteenth amendments of the Constitution provide that neither federal nor state governmental action may deprive an individual of private property without due process of law.[197] Incorporated in

193. The guarantee of amendment II that "[a] well-regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed," *id.* amend. II; the clause in amendment V which guarantees that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a Grand Jury" *id.* amend. V; and the amendment VII guarantee that "[i]n a suit at common law . . . the right of trial by jury shall be preserved," *id.* amend. VII, are not applicable to the states. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 27, at 455-56.

194. Amendment III that "[n]o Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law," *id.* amend. III, and the provision of "excessive fine" in amendment VIII which states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted;" *id.* amend. VIII, have apparently never been litigated to determine whether they are applicable to the states. The Court has never ruled on the latter provision in a specific case, but it appears to assume its applicability in state cases. *See, e.g.*, Schlib v. Kuebel, 404 U.S. 357, 365 (1971).

195. Amendment V provides that "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Amendment XIV, section 1, states that "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." *Id.* amend. XIV, § 1. The wording of the fifth amendment includes a clause requiring just compensation, which is not included in nor incorporated into amendment XIV as a guarantee. However, the Supreme Court has held that the due process guarantee in amendment XIV provides the same protection against the state's taking of property without just compensation. *See* Chicago Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 233-34 (1897). Amendment XIV also prohibits a state's taking of property for private rather than public uses. *See* Missouri Pacific Ry. v. Nebraska, 164 U.S. 403, 417 (1896).

196. Article IV, section 2 provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2. Amendment XIV, section 1, states that "[n]o State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States . . . ." *Id.* amend. XIV, § 1.

197. Traditional constitutional doctrine holds that the fourteenth amendment guarantees of protection from certain state laws or actions do not extend to violations by private individuals. *See* Civil Rights Cases, 83 U.S. (16 Wall.) 36 (1873); J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 27, at 415, 624. A challenge by a claimant requires some formal connection between the action of the defendant individual and the state in causing the alleged harm. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). Government employees of state, county, city, or local governments

the fifth amendment is the guarantee that private property shall not be taken for public use without just compensation. Taken together, the fifth and fourteenth amendments provide private individuals with substantive[198] and procedural due process[199] protection for their property inter-

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are held to be acting for the state unless their actions are clearly outside the authorities provided by their positions. *See* Griffin v. Maryland, 378 U.S. 130, 136 (1964) (arrest by deputy sheriff of blacks in private segregated park); Lombard v. Louisiana, 373 U.S. 627, 217 (1963) (statement of the Mayor of New Orleans demanding cessation of sit-ins and prohibition by the police department). State action will always comprise official acts such as legislation, executive orders, and court decrees. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 27, at 415, 624.

It should be noted that, generally, individual Indians have no rights or privileges attributed to them as persons of Indian descent. Federal law protects individual property rights vis-a-vis those rights of the tribe, which usually have been reserved by treaty in exchange for land cessions. Federal law differentiates between rights of different tribes and rights of Indians and non-Indians, such as imposing the burden of proof on white persons when an Indian demonstrates prior possession of ownership in land claim cases and providing Indians employment preferences in BIA hiring.

198. See generally J. NOWAK, R. ROTUNDA, J. YOUNG, *supra* note 27, at 425-96, for a discussion of substantive due process. Substantive review of legislation or governmental action by the judiciary is concerned with the constitutionality of the underlying rule or action rather than the fairness of the process by which government has applied the rule to an individual. The Supreme Court primarily has used the common law doctrine of the implied powers suitable for state sovereignty—police power, eminent domain and taxing powers—when defining the boundaries of state authority in connection with the preservation of due process rights of citizens. Over the years, the Court made use of the constitutional theory of substantive due process, that is, the review of the substance of congressional and state legislation, to determine the constitutional validity of governmental regulation and control of individual rights in relation to property interests.

From 1885 to 1900, the Court actively reviewed national and state legislation to determine whether legislative branches had surpassed their authority by encroaching on individual economic interests within the due process guarantees of the fifth and fourteenth amendments. While in fact these decisions protected national and state encroachment on the existing business policies of laissez faire, the judicial test required that legislation must bear some rational relation to a legitimate end of government to be valid or the Court would view the substance of the legislation as a restriction of economic liberty.

The change in this standard gradually occurred in a series of cases from 1905 through the 1930's. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144 (1938); Nebbia v. New York, 291 U.S. 502 (1934); Lochner v. New York, 198 U.S. 45 (1905). In the now famous "footnote 4" in *Carolene Products*, Justice Stone speculated, in regard to the Court's tendency to focus on strict scrutiny review to avoid deference to politics, that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment." *Carolene Products*, 304 U.S. at 152 n.4. The footnote in *Carolene* provided the basis on which the Court would subsequently distinguish general regulation legislation from government restrictions on individual rights when giving independent review to state legislation. By Ferguson v. Skrupa, 372 U.S. 726 (1963), the Court concluded that nothing in the Constitution or the judicial function gave federal judges the authority to question the rationality of economic legislation. *Id.* at 730. The role of the Court, as stated by Justice Black, was to no longer sit as a "superlegislature" to weigh the wisdom of the state legislature and its legislation. *Id.* at 731 (citing Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952)).

The Court defers to and allows other branches of government great freedom in dealing with issues of economic and social interests, but reserves strict review for legislation or action which is in conflict with "fundamental" constitutional values. The concept of fundamental rights is difficult to define and the exercise of the principle of their existence by the Court is questioned. The 17th and 18th century concepts of natural law values, which are viewed as essential to individual liberty, do not appear in the text of the Constitution. However, the Court has held that a number of individual

ests, including the right to just compensation whenever private property is taken or destroyed by governmental action designed to further public use.

The due process clause may invalidate retroactive legislation although the constitutional clauses do not provide specific criteria for such a violation.[200] Legislation which regulates private property for the public good is not constitutionally prohibited by due process.[201] This public good rationale provides the constitutional basis for state regulation of the entry and maximum rates of utilities providing service to the public.[202]

C. *Taking—Eminent Domain*

Government taking[203] of property becomes an important issue of

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fundamental rights do exist and can be implied from the Constitution. Among these rights is the right to fairness in procedures concerning individual claims against governmental limitations on life, liberty, or property. *See* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 177 (1970).

199. See L. TRIBE, *supra* note 5, §§ 10-9 to 10-13, at 514-43, for a discussion of extending procedural due process beyond the personal interests of common law, and the Court's approach to what process is due. Some have stressed that it is important to realize that procedural review of a law, in order to determine its fairness, is limited in scope. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 27, at 417. Due process guarantees only that a fair decision-making process take place before the government takes some action which directly impairs a person's life, liberty, or property. *Id.* Moreover, the law or rule to be enforced need not be a fair or just one. *Id.*

200. *See* Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 693-94 (1960). The fifth and fourteenth amendment due process clauses are designed to cover retroactive legislation. The Court has treated four categories of such cases within the constitutional prohibition, including cases that 1) involve emergency retroactive legislation, *id.* at 698-703; 2) challenge the constitutionality of curative statutes, *id.* at 703-06; 3) involve constitutional issues of retrospective tax legislation, *id.* at 706-11; and 4) allege that retrospective general legislation violates the Constitution. *Id.* at 693-97. The Court usually sustains retroactive emergency and curative legislation. *Id.* at 698, 704. The Court will sustain retroactive taxing legislation when it is a tax on income or a transfer tax which the taxpayer reasonably could expect would be a taxable transfer. *Id.* at 706. Retroactive general legislation will be upheld if the law is rationally related to a governmental purpose or affects a remedy rather than a right. *Id.* at 695.

201. *See* Munn v. Illinois, 94 U.S. 113 (1877). The theory for all regulation for the public good is based on the principle of common law incorporated in the fifth and fourteenth amendments that rights of property created by the common law cannot be taken away without due process. *Id.* at 125. When private property is devoted to public use, the owner, in effect, grants the public an interest in the use, and that interest must be submitted to control by the public for the common good, but this does not necessarily deprive the owner of his property without due process of law. *Id.* at 133-34. The fourteenth amendment extended this principle of regulation and supervision of private property for public good as a limit on authority of the states within their police power. *Id.* at 145-46.

202. *See* A. AMAN, ENERGY AND NATURAL RESOURCES LAW: THE REGULATORY DIALOGUE §§ 3.01-.03 (1983).

203. The concept of "taking" should not be considered here as a literal government action, but an expression of constitutional law for any publicly inflicted private injury for which the Constitution requires compensation. A taking occurs when the government controls a person's property so that its value is lessened or destroyed. L. TRIBE, *supra* note 5, at 460. The term "person", for purposes of interpreting the protection of the fifth and fourteenth amendments, can apply to private

individual rights in energy-related matters whether the taking is indirect because of loss of property value from government-inflicted damage or regulatory constraints, or direct as a result of governmental use of the right of eminent domain. Both physical damage by governmental entities and regulatory constraints usually decrease property values; consider nuisance laws, land use planning and zoning, public trust, reserved rights, rights of way, and waste regulatory schemes. The taking of a person's property interest in non-acquisitive governmental action, which does not constitute physical appropriation, occurs when any branch of the government impairs the use of private property by physical damage,[204] destruction of market value,[205] or control of innocent use.[206]

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individuals, corporations, and aliens. No general rule exists which describes what constitutes a compensable taking. Originally, just compensation was awarded only when a taking of property was for public purpose; otherwise, a taking was void. *Id.* at 458. Even today, it is only when a taking goes "too far", measured generally in beliefs of expectation, that compensation is awarded. *Id.* at 459. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967). Michelman describes four factors which may determine whether a court will find compensation is constitutionally due:

> (1) [W]hether or not the public or its agents have physically used or occupied something belonging to the claimant; (2) the size of the harm sustained by the claimant or the degree to which his affected property has been devalued; (3) whether the claimant's loss is or is not outweighed by the public's concomitant gain; (4) whether the claimant has sustained any loss apart from restriction of his liberty to conduct some activity considered harmful to other people.

Id. at 1184.

In general, the courts have consistently held that Indian property rights are protected under the fifth amendment taking clause. *See, e.g.*, United States v. Creek Nation, 295 U.S. 103, 110 (1935). Indian tribal property rights are fully enforceable and their loss should be compensated if they are changed or extinguished. Claims litigation was authorized by Congress originally on a case-by-case basis. The procedure since 1946 has been to give jurisdiction of tribal claims cases accruing prior to 1946 to the Indian & Claims Commission while the Court of Claims has jurisdiction over tribal claims arising since 1946. *See* 25 U.S.C. § 70 (1982).

204. *See, e.g.*, Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922) (government's regular firing of cannon over private property was held to be a compensable taking of servitude); Pumpelly v. Green Bay Co., 80 U.S. 166, 177-78 (1872) (flooding caused by the government which destroyed land was a compensable taking); *see also* L. TRIBE, *supra* note 5, § 9-3, at 459-63 (discussion of the traditional tests for compensable takings). United States v. Causby, 328 U.S. 256, 261-62 (1946), and Richards v. Washington Terminal Co., 233 U.S. 546, 557-58 (1914), represent the Court's approach in limiting damages for injury caused by the development of the railroad and airplane to damages for the direct, peculiar, and substantial injury to the limited number of readily ascertainable persons immediately near. Tribe suggests compensation may be extended as technological advances make it possible to limit recovery costs by less artificial rules. L. TRIBE, *supra* note 5, § 9-3, at 460 n.2.

205. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), in which the Court held that an uncompensated taking in excess of seventy-five percent of the property's value had occurred when the state tried to enforce a statutory ban on coal-mining against the mining company that had sold surface rights but had retained the right to damage the surface in a deed executed prior to enactment of the mining ban. *Id.* at 413-14. *But see* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), in which the Court permitted an expansive use of governmental power to regulate land use in holding that a local zoning ordinance which prohibited mining excavation below the water table and required the refill of existing excavation below that level did not reduce the value of the lot in question

Pennsylvania Coal Co. v. Mahon[207] provides the basis for the modern analysis of taking, that is, that taking is a matter of degree. If the state police power diminishes the value of existing property rights too severely, the exercise of the power becomes one of eminent domain for which compensation is due to sustain the act.[208] In fact, the Court today rarely holds that regulation constitutes a taking. Two situations may qualify: (1) if all uses of property are prohibited by regulation; or (2) if a right to use or burden property in a particular way is transferred from the owner to another person or governmental entity.[209] Some commen-

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in the case. *Id.* at 594. The Court saw no reason to decide how far regulation may go before it becomes a taking. *Id.* The Court did state a two-part test to determine the validity of such governmental control of land use. First, it must appear that the interests of the public require such interference and, second, the means for accomplishing the purpose must be reasonably necessary and not unduly oppressive on individuals. *Id.* at 594-95 (citing Lawton v. Steele, 152 U.S. 133, 137 (1894)).

206. Innocent use taking is the complete takeover of an owner's property justified by the owner's insistence on using the property to injure other people or their property. *See* L. TRIBE, *supra* note 5, at 461. In nuisance, or noxious use, offenders may be required to stop such use of the property or the property may be seized, but government control of innocent use, or "non-noxious" use, has created the most difficulties in compensable taking law. *Id.* Orders to desist or banishment by local zoning ordinances have been upheld as uncompensable taking. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394, 411-12 (1914) (Court held that a brickyard, which had been far beyond the city limits of Los Angeles when first built, could not be ordered to cease operations when the city's boundaries reached it, without compensation from the city for the diminution in property value despite the finding that the land was left unusable for any productive purpose by the restriction); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386-90 (1926) (Court deferred to the zoning power for land use as a valid use of police power regulation against due process and equal protection challenges). The Court still continues this approach in zoning power cases based on the Court's conclusion that there is sufficient public interest in the segregation of incompatible uses of land and that diminution of property values is justified. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 27, at 485-86. The government is not free, however, to transfer property rights from one group of owners to another or to take and use private property for the public good unless the action is justified by emergency conditions or compensation is paid. *Id.* at 488. The test stated in Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), is so broad that it essentially has eliminated the compensation restriction of the due process clauses, and any possible limitation of the zoning power is left to state court determination. *Id.* at 486; *see also supra* note 205. *But cf.* Agins v. Tiburson, 447 U.S. 255, 262 (1980) ("In assessing the fairness of the zoning ordinances benefits occurring from governmental regulations must be considered along with any diminution in market value that landowners might suffer."). Although the Court has not found zoning ordinances to constitute a taking in recent years, it retains its judicial role in deciding whether a zoning regulation is so unreasonable that it constitutes taking.

207. 260 U.S. 393 (1922).

208. Justice Brandeis contends in his dissent in *Pennsylvania v. Mahon* that any exercise of the police power which protects the public from detriment and danger leaves no room for conferring compensation on property owners under the concepts of reciprocity of advantage. *Id.* at 422 (Brandeis, J., dissenting). Some commentators contend that the balancing of the concerns within Brandeis' dissent, i.e. whether to set limits on the arbitrary sacrifice of the private property owner for the public good, becomes even more difficult in light of changing notions of the purposes of government and what constitutes harm. *See, e.g.*, L. TRIBE, *supra* note 5, §§ 9.3-9.4, at 462-465.

209. *See, e.g.*, Pruneyard Shopping Center v. Robins, 447 U.S. 74, 82-84 (1980); Nance v. EPA, 645 F.2d 701, 715-16 (9th Cir. 1981); Griffin v. United States, 537 F.2d 1130, 1139-40 (Temp. Emer. Ct. App. 1976); South Terminal Corp. v. EPA, 504 F.2d 646, 679 (1st Cir. 1974). *But see* Loretto v. Telepromoter Manhattan CATV Corp., 458 U.S. 419 (1982). The Court in *Loretto* held that a minor, but permanent, physical occupation of an owner's real property upon authorization of the

tators feel these limitations provide a narrow reading of the taking clause in light of the individual costs which regulatory programs may impose on specific regulated bodies.[210]

In cases of direct physical appropriation of private property within the power of eminent domain,[211] the Court tends to decide the cases on an *ad hoc* basis. It determines whether the taking has occurred, and, if

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state government to permit a company to install cable television facilities on such property upon payment of a one-time $1 fee was a taking of a portion of the owner's property without just compensation under the fifth amendment as made applicable to the states under the fourteenth amendment. *Id.* at 438.

Individual land owners also are limited in their abilities to affect zoning ordinance changes at the local level with taking challenges. In State *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928), the Court held that an ordinance which permitted land use variances upon the consent of two-thirds of the surrounding property owners was in violation of due process because the property owners could arbitrarily and capriciously withhold their consent. *Id.* at 121-22. However, in City of Eastlake v. Forest City Enters., 426 U.S. 668 (1976), the Court determined that due process is not violated if zoning requirement exemptions are granted only by general referendum. *Id.* at 679.

210. *See* Aman, *Administrative Equity; An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277.

211. The power of eminent domain is the power of sovereign government to take property for public use without the owner's consent. P. NICHOLS, LAW OF EMINENT DOMAIN § 1.11 (3d ed. rev. 1980). Authorities in the law of eminent domain recognize the term "police power" to regulate land and property use without the payment of compensation as distinct from the general state police power and power to tax. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 27, at 480. The power of eminent domain does not require constitutional provision, but jurisdictional limitations on the power are stated in most state constitutions. *Id.* at 481. The Supreme Court has held that Congress possesses the power of eminent domain as an inherent "attribute of sovereignty" and "the offspring of political necessity." Bauman v. Ross, 167 U.S. 548, 574 (1897); Kohl v. United States, 91 U.S. 367, 371 (1876). The power of eminent domain of a sovereign state extends to all real and personal property interests, subject to the just compensation and due process requirements of the fifth amendment. *See* P. NICHOLS, *supra* note 211, §§ 2.1, 4.1, 8.1. Congress may take property only "for public use," but that definition is within the discretion of Congress, unless the definition is shown to involve an impossibility. Old Dominion Land Co. v. United States, 269 U.S. 49, 66 (1925). The power has developed in different patterns in the state and federal governments of the United States. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 27, at 481-82. Federal use of eminent domain may be employed only if it is "necessary and proper" to effect one of the federal enumerated powers within federal territory or land within the states. *Id.* at 481; *see also* Kohl v. United States, 91 U.S. 367 (1876); P. NICHOLS, *supra* note 211, § 1.24. Although a state constitution may not require that taking for public use must be compensated, the Supreme Court has held that the due process clause of the fifth amendment requires that property be taken only for public use by a state and that the owner be compensated for his loss. *See* Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897). The exercise of the power by the state will be valid as long as it does not violate the United States Constitution. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 27, at 481. The limitation on the state exercise of the power for public use taking has become expansive as the exercise of due process within the police power of the state has expanded. The narrow test that the states must provide the public the right to use or enjoy property taken was broadened by the Supreme Court in Berman v. Parker, 348 U.S. 26 (1954). The *Berman* Court held that the exercise of eminent domain to condemn blighted housing and then assemble a development area for private redevelopment was an appropriate public use for exercise of the power. *Id.* at 33-34. In the *Berman* decision, the Court reaffirmed the rule that once the legislature has determined the purpose of a condemnation for public use is for the benefit of the health, safety, and welfare of its citizens, and thus within the state's police power, the role of the courts becomes very limited. *Id.* at 32.

so, balances the equities in each particular case to see what compensation is required. The Court does not view the constitutional guarantee of just compensation as a limitation on the power of eminent domain but only as a cost condition of its exercise.[212] In determining the amount of compensation due an individual, the courts usually will look at the value of the land at its "highest and best use," including present and potential uses which can be determined with reasonable certainty.[213]

The exercise of eminent domain in energy sectionalism issues becomes important in the development of energy transportation systems requiring rights of way across private property. The acquisition of a right of way without the authority to exercise eminent domain from federal or state governments involves a number of problems for interstate energy transportation pipelines.[214] Landowners might refuse to grant the right of way for the construction of the pipeline or demand prohibitive prices for the grant. If so, the pipeline constructor may seek a valid statutory grant authorizing the acquisition of a right of way, for federal or state eminent domain power permits condemnation proceedings that allow construction to proceed within the requirements and restrictions of the statutes. Citizen participation in public hearings may be a requirement of the grant of eminent domain or may be required prior to approval of a pipeline route by the appropriate state agency.

D. *The Contract Clause*

> Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private

212. *See* Long Island Water Supply Co. v. City of Brooklyn, 166 U.S. 685, 689 (1897).

213. *See* P. NICHOLS, *supra* note 211, § 12.110.

214. *See* NATIONAL ENERGY LAW AND POL'Y INST., THE LEGAL AND REGULATORY ISSUES OF TRANSPORTING COAL BY SLURRY PIPELINE, EM 1-37 (1977) (discussion of grants of eminent domain to pipelines based on the particular energy product to be transported and the specific problems for acquiring rights of way for coal slurry pipelines without the authority of eminent domain); *see also* Tulsa World, *supra* note 25 (reports the effect of the defeat of the Coal Pipeline Act of 1983). Pipeline backers stated that the battle with individual railroads to obtain rights of way along their lines, which the railroads refused, was too costly a process. Since purchasing a right of way was not economically feasible, slurry pipelines could not be constructed without federal eminent domain rights. *Id.*

> rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprizing and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.[215]

The contract clause of article I, section 10[216] of the Constitution was envisioned as an explicit limitation on state governmental powers to enact retroactive legislation affecting contractual rights and obligations. The clause originally was intended to prevent the states from enacting debtor relief laws, but the Supreme Court has expanded the meaning of the provision to invalidate state statutes which retrospectively impaired the contractual obligations of persons or infringed on private property rights. The Court also has applied the contract clause to restrict the states' ability to modify or alter state public charters and contracts with private parties.

The importance and use of the clause has waned over the years.[217]

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215. THE FEDERALIST No. 44, at 279 (J. Madison) (H. Lodge ed. 1888).

216. Article I, section 10 provides that "[n]o State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . " U.S. CONST. art. I, § 10, cl. 1.

217. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 27, at 419-28. Under Chief Justice Marshall, the Court used the clause to invalidate state statutes that retrospectively impaired almost any contract obligation of private parties. *Id.* at 419. Impairments of contract by state legislation were forbidden and invalidated by the Court as early as 1810. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 187 (1810). The clause came to be viewed as a substantial restraint upon states' dealings with their own citizens and served to represent the sanctity of settled economic expectations in American law. J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 27, at 422. Almost one-half of Supreme Court decisions before 1889 in which the Court invalidated state legislation were based on the contract clause. *Id.* at 424. However, the three constitutional amendments enacted after the Civil War changed the focus of the Court which then began to rely upon the doctrine of substantive due process tc void state legislation that would infringe on property or business interests. *Id.* at 425. During the 1930's, the Court held that state debtor relief laws, enacted to meet an emergency "societal interest" problem, were not violative of the contract clause unless major assets of debtors were totally exempt from creditors' claims or remedies for claims did not protect creditors' rights. *Id.* at 426. By 1977, the Court had so frequently sustained state laws against challenges of the contract clause that commentators speculated that its removal would not change the ability of the Constitution to check exercises of arbitrary state government power. *Id.* at 427 (citing E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 105 (H. Chose and C. Ducat rev. ed. 1973)).

In 1977, however, in the case of *United States Trust Co. v. New Jersey*,[218] the Court invalidated a state law on contract clause grounds for the first time in thirty years. Since that decision, the Court has somewhat enlarged the scope of the clause by interpreting it to reach a state act which increased a private contractual agreement or obligation rather than merely impairing or obligating existing contractual rights.[219]

Two Supreme Court cases have addressed contract clause challenges relating to energy matters. In *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*,[220] the Court held that a Kansas statute which im-

218. 431 U.S. 1 (1977). Bondholders of the Port Authority of New York and New Jersey sought a declaratory judgment that New Jersey's repeal of state legislation, which implemented an agreement of the two states to limit mass transit deficit operations which could be absolved or subsidized by the Authority, violated the contract clause. *Id.* at 3. The state of New Jersey argued that repeal was necessary since the energy crisis of 1973 and the air pollution problems of northern New Jersey residents required further price increases for mass transit programs in the New York City metropolitan area. *Id.* at 13-14. The Court noted that the 1962 financial restrictions were valid since the state had obligated itself in the contract and had not bargained away any of its police powers. *Id.* at 25-27. However, while mass transit, energy conservation, and air quality were important goals, the state could not refuse to meet its legitimate financial obligation to private creditors because it preferred to promote the public good. *Id.* at 28-29. Since alternative methods were available for such goals, the repealing measure was unnecessary and unreasonable. *Id.* at 30-31. The opinion was carefully narrow. The Court stated it would defer to legislative judgment when state legislation affected private contractual agreements, *id.* at 22-23, and use special scrutiny only when the impairing legislation affected a state contractual obligation. *Id.* at 17. Furthermore, an obligation must be financial in nature before the Court would review the reasonableness and necessity of the impairing legislation. *Id.* at 24-25.

219. *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978). The Court held that a Minnesota law for state pension reform, which required that companies terminating a pension plan or closing their facility grant contractual pension benefits to company employees who had worked for more than ten years, was in violation of the contract clause. *Id.* at 250. The impairment of contract was held to be substantial because 1) the state law invaded an area never before subject to state regulation; 2) the law was not a temporary emergency measure; and 3) the law was never intended to remedy a general societal problem. *Id.* The dissent contended the decision expanded the meaning and scope of the contract clause, especially in light of the remedial purpose of the law. *Id.* at 251 (Brennan, J., dissenting). The dissent further contended that the contract clause was to be read to reach legislation which impairs or abrogates contracts and cannot be read to reach legislative enactments which increase existing contractual obligations. *Id.* at 255.

220. 459 U.S. 400 (1983). In *Energy Reserves*, the appellee—Kansas Power and Light Company (KPL)—had entered into two intrastate contracts with the predecessor of Energy Reserves Group (ERG) to purchase wellhead and residue gas with the contract to remain in effect for the life of the field or the processing plants for the field. *Id.* at 403. Each contract contained two clauses: 1) a governmental price escalator clause that the contract price would be increased if any governmental authority fixed a price for natural gas higher than the existing contract price; and 2) a price redetermination clause which gave the producer the option to have the contract price redetermined no more than once every two years by an averaging of prices paid by the purchaser under the other gas contracts. *Id.* at 403-04. If the price was increased pursuant to either clause, each contract required the public utility to seek approval from the Kansas regulatory commission to pass the increase through to consumers. *Id.* at 404.

As authorized by the Natural Gas Policy Act (NGPA), the Kansas legislature enacted a Natural Gas Price Protection Act in 1979, imposing price controls on the intrastate gas market with regard to contracts executed before April, 1977. *Id.* at 407. The Kansas statute prohibited consideration "either of ceiling prices set by federal authorities or of prices paid in Kansas under other

posed price controls on the intrastate gas market, as permitted within the NGPA of 1978, did not impair existing gas contracts in violation of the contract clause of the Constitution.[221] The Court declared that two inquiries are relevant in resolving the contract clause issue: (1) whether the state law operates to substantially impair a contractual relationship; and if so, (2) whether there is a significant and legitimate public purpose in the regulation.[222] These inquiries guarantee that the state is within its police power to legislate and is not providing a benefit for special interests when it enacts laws which affect prior contractual arrangements.[223]

The Court in *Energy Reserves* found it significant that the parties were operating in a heavily regulated industry subject to extensive state regulation in many areas, and that Congress had authorized the state to regulate prices in this instance.[224] The Court held that the state had a legitimate interest in limiting intrastate prices to the ceiling price set out in the NGPA so that intrastate and interstate markets were balanced; therefore, any impairment of contract was prompted by significant, legitimate state interests.[225] Kansas had acted to protect consumers from price escalation caused by deregulation, and the state reasonably could find that higher gas prices had and would cause hardship for those persons who used gas heat and lived on limited incomes.[226] The concurring opinion pointed out that since the Court had determined that the producer's reasonable expectations had not been impaired, it was unnecessary to continue with the question of whether a contractual impairment

contracts in the application of governmental price escalator and price redetermination clauses." *Id.* The Act did permit indefinite price escalator clauses to operate after March, 1977, in order to raise the price of "old" intrastate gas to the NGPA section 109 ceiling price for categories of natural gas not covered by other sections of the state act. *Id.* at 408.

The producer notified KPL in November, 1978, that gas prices would be escalated to the section 102 price for newly-produced gas under the NGPA, pursuant to the government price escalator clauses in the contracts. *Id.* The public utility did not obtain pass-through authority and chose not to pay the increased price, contending the escalator clauses in its contracts were not triggered by the federal act and, later, that the Kansas statute also prohibited their activation. *Id.* The producer sought a declaratory judgment in state court that it had a contractual right to terminate the contracts. *Id.* at 409.

The trial court entered summary judgment for the utility, holding that the NGPA set a ceiling for contractual provisions, not a price, and the ceiling did not trigger the governmental price escalator clauses. *Id.* The trial court further noted that the Kansas act was not in violation of the contract clause of the Constitution since the state had a legitimate interest in controlling serious economic dislocations caused by a sudden increase in gas prices. *Id.*

221. *Id.* at 416.
222. *Id.* at 411-12.
223. *Id.* at 412.
224. *Id.* at 413.
225. *Id.* at 416-17.
226. *Id.* at 417.

violated the Constitution.[227]

In *Exxon Corp. v. Eagerton*,[228] the Court held that an Alabama statute which increased the state severance tax of the gross value of oil and gas at the point of production was not in violation of the contract clause of the Constitution, even though statutory amendments to the enactment excepted royalty owners from the legal duty to pay any of the increases and prohibited producers from passing the increase through to consumers.[229] The Act was construed as merely prohibiting the state from looking to the royalty owners for payment of the additional taxes, and did not prohibit producers from shifting the burden in whole or in part to royalty owners.[230] The Court determined that the contract in question appeared to entitle the producers to recover a portion of the tax increase in proportion to the royalty owners' interests in the producers' proceeds in the sale of oil or gas.[231] Even if the statute were interpreted to entitle the producers to reimbursement from royalty owners for only that portion of the severance taxes which the state law would impose on the royalty owners, it still would be valid under the contract clause.[232] However, the contracts in question imposed no obligation on the royalty owners to reimburse producers for a tax increase.[233]

The state prohibition against passing severance tax increases through to consumers was held to restrict contractual obligations of which the producers were beneficiaries.[234] Sales contracts entered into before enactment of the pass-through prohibition permitted producers to include any increase in severance taxes in their prices.[235] Yet, the Court determined that the pass-through prohibition did not constitute a "Law

227. *Id.* at 421 (Powell, J., concurring in part).

228. 103 S. Ct. 2296 (1983). Producers of oil and gas sought a declaratory judgment that amendments to an Alabama statute, which increased a severance tax on production, were in violation of the equal protection and contract clauses of the Constitution because they exempted royalty owners from payment of a liability for the increase and prohibited producers from passing on the increase to consumers. *Id.* at 2299. Producers claimed that pre-existing contracts provided for the apportionment of severance taxes among producers, royalty owners, and non-working interests and that pre-existing sales contracts required purchasers to reimburse producers for severance taxes paid. *Id.* at 2300. The trial court concluded that both the royalty owner exemption and the pass-through prohibition violated the equal protection and contract clauses of the Constitution, and that the pass-through prohibition was preempted by the NGPA of 1978. *Id.* The Alabama Supreme Court reversed the lower court. *Id.*

229. *Id.* at 2307-08.

230. *Id.* at 2304-05.

231. *Id.* at 2305.

232. *Id.* at 2304.

233. *Id.* at 2305.

234. *Id.*

235. *Id.*

impairing the Obligations of Contracts" within the meaning of the contract clause and that the contract clause must "accommodate the inherent police power of the State 'to safeguard the vital interests of its people.' "[236] The Court stated that the pass-through prohibition was not a rule limited in effect to contractual obligations but imposed a rule of conduct to advance "a broad societal interest" and applied the rule to all oil and gas producers, whether or not they were parties to sales contracts which did permit pass-through.[237] The Court held that the effect of the prohibition was incidental to the main effect of the statute to protect consumers from a tax increase and was subject to federal preemption insofar as the prohibition applied to contracts for interstate sales of gas.[238]

E. *Equal Protection Under the Fourteenth Amendment*

The equal protection clause in the Constitution is found in the fourteenth amendment, section 1.[239] Although the clause applies only to state and local governments, so that only state statutes and local ordinances are tested under the clause, equal protection has become the most important concept in the Constitution for protecting individual rights. If the state or local government statutorily classifies persons to justify its differing benefits or burdens as the means of achieving a statutory purpose, the classification may be tested under the fourteenth amendment guarantee to determine if it is arbitrary. Racial, religious, or national origin classifications are highly suspect under current equal protection clause jurisprudence. A law which on its face creates no classifications but, in effect, treats persons of like characteristics in different ways may be viewed as if it established arbitrary classifications on its face. Similarly, a statute without a classification system but which in effect seems to impose different requirements on identifiable groups of people that will serve the legislative purpose of the enactment will be challenged as viola-

236. *Id.* at 2305 (1983) (citing Energy Reserves Group v. Kansas Power & Light Co., 103 S. Ct. 697, 704 (1983)).

237. *Id.* at 2306 (citing Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 249 (1978)).

238. *Id.*

239. The fourteenth amendment, section 1, provides "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. IX, § 1. The Supreme Court has extended equal protection guarantees to federal actions through its reading of the fifth amendment's due process clause. The standards for validity under the due process and equal protection clauses are the same. The difference in analysis of the guarantees relates only to whether or not the government act classifies persons. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954). The argument that Indian law is anti-equalitarian and violates guarantees of equal protection has been raised within this extension of fifth amendment guarantees. The Indian commerce clause, however, generally protects pro-Indian legislation from equal protection challenges. *See* Clinton, *supra* note 139, at 1009-18.

tive of the equal protection clause. The numerous ways of measuring a statute's impact, however, make a claim for strict judicial review difficult to establish. In the determination of whether classifications exist within legislation, the Court considers statistical proof to be relevant but not determinative; additionally, state regulation or administrative rules will not be overturned on the basis of such proof.

The relevance of equal protection rights in energy matters is illustrated by *Exxon Corp. v. Eagerton*,[240] in which oil and gas producers claimed that the Alabama state severance tax statute was in violation of not only the contract clause but also the equal protection clause of the Constitution. The Court held that neither the statutory classification of royalty owners for exemption from the legal duty to pay the state severance tax nor the classification of consumers for protection from producer pass-through of the tax violated the equal protection clause of the Constitution.[241] The minimum rationality which the Court applies when considering equal protection challenges to state economic and commercial regulatory statutes requires "some rationality in the nature of the class singled out,"[242] with rationality tested by the classification's reasonableness in relation to the purposes intended by the legislative or administrative rule. In *Exxon Corp. v. Eagerton*, the Court declared that both statutory classification measures met the standard of rationality and concluded that the state legislature could have reasonably determined that the classification created by the royalty owner exception would encourage investment in oil and gas production.[243] The Court also stated that the pass-through prohibition bore a rational relationship to the state's legitimate purpose of protecting consumers from excessive prices.[244]

Statutory classification measures can be anticipated in state statutes and administrative rules which are concerned with environmental by-products of energy production and generation, power export policies, distribution of the costs and benefits for new resource development, utility rate structures for different rate classes, life-line rates for particular classifications of individuals, and the redistribution of unearned economic rents which are available for capture from energy production.[245]

240. 103 S. Ct. 2296, 2308 (1983); *see also* notes 228-38 and accompanying text.

241. *Id.*

242. *See* Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966) (state law requiring indigent convicts to reimburse the state for certain costs of their trials held unconstitutional).

243. 103 S. Ct. at 2308.

244. *Id.*

245. See Tussing, *The Regional Distribution of Energy-Resource Revenues*, FISCAL AND POLIT-

F. *The Privileges and Immunities Clauses*

> It may be esteemed the basis of the Union that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several States." And if it be a just principle that every government *ought to possess the means of executing its own provisions by its own authority* it will follow that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.[246]

The Constitution contains two privileges and immunities clauses which are intended to guarantee to citizens certain privileges against infringement by state government. The clauses prohibit the states from classifying individuals as citizens or non-citizens for the purpose of treating them differently in the application of the laws, public benefits, and public burdens, unless that difference of treatment is rationally related to the status of state citizenship. The federal clause[247] was intended to protect rights thought to be essential to all citizens within each state. The use of the words "[c]itizens in the several States" in article IV is limited to natural persons. This clause does not apply to artificial persons and persons who are only residents of the state and not citizens.[248] The fourteenth amendment clause[249] bars states from imposing regulations which

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ICAL ANALYSIS FOR THE WESTERN STATES 7 (1983), for a listing of state legislative roadblocks to redistribution of unearned economic rents. Tussing lists the data which do not exist and which are needed for rational consideration of redistribution of energy-resource rents. The data and estimates which are lacking include: 1) identification of the total value of domestically-produced oil and gas, coal, and uranium which is "unearned" economic rent available for capture by landowners, governments, and other nonproducing interests; 2) the origin of the rent by state and region; 3) the actual division of rent among the various levels of government and other claimants; 4) the impact of the 1970's energy price upheavals on the total economic rent generated in energy production, and the division of that rent; 5) the influence of federal legislation such as crude oil price controls, NGPA, and the Windfall Profits Tax on the magnitude and division of rent; and 6) the probable effect of falling oil prices on total rent, and the relative position of all parties.

246. THE FEDERALIST No. 80, at 497 (A. Hamilton) (H. Lodge ed. 1888).

247. Article IV provides "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

248. *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177 (1868) (the term "citizens" does not apply to legislatively-created artificial persons such as corporations).

249. The fourteenth amendment states "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.

deny nonresidents the advantages resulting from state citizenship. The clause pertains not only to natural persons but also to corporations and aliens; therefore, the fourteenth amendment clause applies to a broader range of discriminations against noncitizens than does the article IV clause.[250]

Although only the article IV clause is invoked in the areas of fish, game, and natural resources, and for constitutional challenges to state and local taxation, it may be useful in only a limited sense for resolving the interestate energy problems which arise from state protectionalism.[251] For example, one line of cases holds that preferred access by state citizens may be protected and are justified because of citizens' interest in local resources and support through taxes.[252] Nevertheless, the Supreme Court has determined more narrowly that the article IV clause protects only those basic individual interests which outweigh a state's purpose and bear upon the vitality of the nation as a single entity.[253] Under the modern view of the privileges and immunities clauses, the Court probably would hold that a state may conserve natural resources or exploit them, but that neither policy can be formed with enactments

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Court distinctions for the two clauses have turned on the changing concept of federalism and the early argument that the fourteenth amendment was only to protect the rights of newly freed slaves. *See* Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873). Only one case has found that a state has violated rights peculiar to federal citizenship, and it was subsequently overruled. *See* Colgate v. Harney, 296 U.S. 404 (1935), *overruled*, Madden v. Kentucky, 309 U.S. 83 (1940); *see also* J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 27, at 414.

250. *See* L. TRIBE, *supra* note 5, § 6-33, at 412.

251. *See* Lutz, *supra* note 6, at 614. *See also* Hicklin v. Orbeck, 437 U.S. 518 (1978). The Court in *Hicklin* invalidated the Alaska Hire Act under the article IV privileges and immunities clause. *Id.* at 526. The state law gave across the board employment preference to Alaska residents over nonresidents for work on all oil and gas leases and other such agreements to which the state was a party in order to alleviate the unemployment problem for untrained Eskimos and Indians. *Id.* at 520. The Court noted that prior cases had held such state discrimination against nonresidents seeking to pursue a trade, occupation, or common calling within the state to be in violation of the clause. *Id.* at 526. This particular statute for hiring preference could not withstand similar scrutiny because it was not crafted in a way to aid its intended Eskimo and Indian beneficiaries when the Act simply granted all Alaskans a flat employment preference for all jobs covered by the Act. *Id.* at 527. While Alaska's ownership of the oil and gas resources was a factor in judging the law, state ownership did not justify pervasive discrimination. *Id.* at 528-29.

252. *See, e.g*, Douglas v. Seacoast Prods., Inc., 431 U.S. 265 (1977); Travelers' Ins. Co. v. Connecticut, 185 U.S. 364 (1902). *But see* Toomer v. Witsell, 334 U.S. 385, 399 (1948) (state statute, which required nonresidents to pay a fee for a commercial license which was 100 times greater than that paid by residents, was invalid as discriminatory against noncitizens), *reh'g denied*, 335 U.S. 837 (1948).

253. *See* Baldwin v. Fish and Game Comm'n of Mont., 436 U.S. 371, 388 (1978) (Montana licensing system of hunting elk which required nonresidents to pay more than seven times what residents were charged was valid because elk hunting was a recreation and sport distinguishable from a right of citizenship protected by the privileges and immunities clause).

which discriminate against out-of-state citizens or residents.[254] While the use of the equal protection clause of the fourteenth amendment may be more adequate than the privileges and immunities clauses for safeguarding these rights, the clauses have the potential for providing an affirmative source for new personal rights which might not otherwise be protected.[255]

IV. CONCLUSION

The difficulty encountered when determining the influence of sectionalism on the legal issues of energy production and consumption in the United States is in properly identifying the legal issues from among many others. Sectionalism is the expression of social, economic, and political differences along geographic lines. In the United States, the sections—in general, the greater northeast, south, and west—are not homogeneous, socioeconomic units of states, but highly complex entities of diverse states and local governments which tend to share common political interests in the same social and economic ends.[256]

The American legal system, on the other hand, is the structure of a cohesive order of norms which seeks to govern within concepts of our federal ideology, the separation of powers, and formal justice.[257] The analysis of such a legal structure is complex. For our purposes, the analysis has involved the order of norms which exist in relation to the jurisdictional powers of the fifty individual states, of the Indian tribal governing bodies, and of the federal government, along with individual rights in relation to energy production and consumption. The scope and extent of settled expectations within the cooperative federalism which exists today among the competing, and yet cooperative, sovereigns cannot

254. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322, 334-35 (1979) ("ownership" of wild game was a fiction which should not be used as a justification for discrimination in interstate commerce against out of state residents).

255. *See* L. TRIBE, *supra* note 5, at 988, 1147. Congress may protect the privileges or immunities of national citizenship by regulating private conduct, while the fourteenth amendment grants courts the power to protect such rights only from state action. *Id.* at 1147 n.1.

256. *See generally* D. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 84-124 (2d ed. 1972). Elazar states that the political arrangements of sectionalism serve as the means to a common end and have grown so sufficiently permanent that they persist despite conflicts or differences which may arise among the states of the section over time. For example, the intrasectional conflict of the far western states over water resources does not affect their common concern for problems such as education and commerce. Cooperative efforts created within each section are now so institutionalized that a confederation of states can be maintained within a section to resolve common problems politically. This sectional bond gives the states within each section a unique relationship to national politics because of specific political issues of sectional importance.

257. *See* W. FRIEDMANN, LEGAL THEORY 16-21 (5th ed. 1967).

be accurately described or measured.[258] Each state will still respond individually to cooperative federalism in spite of its political ties to sectionalism.[259] Who gets what, when, and how, relative to energy production and consumption in the United States, and the nature of justice in doing so will occur within the framework of formal jurisdictional powers and individual rights, not sectional political arrangements.

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258. *See* Fischer, *supra* note 21, at 847. Fischer explains:

> The decision to vest certain decisionmaking responsibilities in Washington, as opposed to the state capital was basically the result of historical accident rather than conscious design. In securing the "more perfect union" there were some inevitable tradeoffs. One such tradeoff was the decision to share decisionmaking responsibility between state and federal government. As a compromise, the decision was less than perfect, perhaps less than logical, but it did have one value—it worked. Consequently, when called upon to examine the basis of that compromise, the Court should understandably be reluctant to tinker with something that seems to work even though it may not understand why or how it works.

Id. at 846-47.

259. *See* Elazar, *supra* note 256, at 84, 93. Elazar claims that understanding the responses of states requires an appreciation of two sets of relationships: (1) the way in which states functioning as political systems influence the operations of the general government; and (2) the way in which the states—still functioning as political systems—adapt national programs to meet their own needs and interests. He suggests that while sectionalism is a major source of geographical variations that influence state-to-state differences in responding to nationwide developments, two other factors interact with sectionalism at the same time and shape the individual states' political responses. These include the political culture of the United States and the concept of the continuing frontier—the continuing effort of Americans to extend control over their environment and reorganize their settlement patterns because of the impact of this idea.

Elazar further notes that three major political subcultures reflect American ideas about the marketplace and the governing of individuals, which he describes as representing individualistic, moralistic, and traditionalistic values. The migration and present location of the subcultures can be identified and traced by geographic section and the territorial lines of states. Elazar hypothesizes that it is necessary to know (1) the particular characteristics and processes of political culture and sectionalism, (2) their relationship to the idea of a continuing frontier and its processes, and (3) how all three of these factors relate to the varying responses of the states to the cooperative federal system in order to conceptually organize the complex phenomena of American society and politics.