SUPREME COURT OF THE UNITED STATES

No. 92–896

THUNDER BASIN COAL COMPANY, PETITIONER *v.*
ROBERT B. REICH, SECRETARY
OF LABOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[January 19, 1994]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in part, and concurring in the judgment.

I join all except Parts III–B, IV, and V of the Court's opinion. The first of these consists of a discussion of the legislative history of the Federal Mine Safety and Health Amendments Act of 1977, 30 U. S. C. §801 *et seq.* (1988 ed. and supp. IV), which is found to "confir[m]," *ante*, at 8, the Court's interpretation of the statute. I find that discussion unnecessary to the decision. It serves to maintain the illusion that legislative history is an important factor in this Court's deciding of cases, as opposed to an omnipresent make-weight for decisions arrived at on other grounds. See *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. ___, ___ (1991) (slip op., at 1) (SCALIA, J., concurring in judgment).

As to Part V: The only additional analysis introduced in that brief section is the proposition that "the parties' arguments concerning final agency action, a cause of action, ripeness, and exhaustion" need not be reached "[b]ecause we have resolved this dispute on statutory preclusion grounds." *Ante*, at 17–18, n. 23. That is true enough as to the claims disposed of in Part III, but quite obviously not true as to the constitutional claim

disposed of in Part IV, which is rejected not on preclusion grounds but on the merits.[1] The alleged impediments to entertaining that claim must be considered. It suffices here to say that I do not consider them valid.

And finally, as to Part IV: The Court holds that the preclusion of review is constitutional "because neither compliance with, nor continued violation of, the statute will subject petitioner to a serious prehearing deprivation." *Ante*, at 15–16. I presume this means that any such deprivation will be *de minimis* (since I know of no doctrine which lets stand unconstitutional injury that is more than *de minimis* but short of some other criterion of gravity). It seems to me, however, that compliance with the inspection regulations *will* cause petitioner more than *de minimis* harm (assuming, as we must in evaluating the harm resulting from compliance, that petitioner is correct on the merits of his claims). Compliance will compel the company to allow union officials to enter its premises (and in a position of apparent authority, at that), notwithstanding its common-law right to exclude them, cf. *Lechmere, Inc.* v. *NLRB*, 502 U. S. ___, ___ (1992) (slip op., at 6–7). And compliance will

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[1]I understand Part IV to be dealing with the issue of whether the exclusion of judicial review adjudged in Part III is constitutional. Even though, as Part III has determined, the Federal Mine Safety and Health Amendments Act of 1977 precludes judicial review of the agency action that is the subject of the present suit, the district court retains jurisdiction under the grant of general federal-question jurisdiction, see 28 U. S. C. §1331, for the limited purpose of determining whether that preclusion *itself* is unconstitutional and hence ineffective. Cf. *Ng Fung Ho* v. *White*, 259 U. S. 276, 282–285 (1922) (permitting habeas corpus review of deportation orders); *Battaglia* v. *General Motors Corp.*, 169 F. 2d 254, 257 (CA2 1948).

provide at least some confidential business information to officers of the union. (The UMWA's contention, on which the Court relies, that it is "speculative" whether a nonemployee miners' representative will be able to accompany the walk-arounds means only that such a representative may not *always* be able to do so. He will surely *often* be able to do so, since the statute *requires* that he "be given an opportunity to accompany" the inspector. 30 U. S. C. §813(f).)

In my view, however, the preclusion of pre-enforcement judicial review is constitutional *whether or not* compliance produces irreparable harm—at least if a summary penalty does not cause irreparable harm (*e.g.*, if it is a recoverable summary fine) or if judicial review *is* provided before a penalty for *non*-compliance can be imposed. (The latter condition exists here, as it does in most cases, because the penalty for noncompliance can only be imposed in court.) Were it otherwise, the availability of pre-enforcement challenges would have to be the rule rather than the exception, since complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs. Petitioner's claim is that the imposition of a choice between (1) complying with what the government says to be the law, and (2) risking potential penalties (without a prior opportunity to challenge the law in district court) denies due process. This is similar to the constitutional challenge brought in the line of cases beginning with *Ex parte Young*, 209 U. S. 123 (1908), but with one crucial difference. As the Court notes, see *ante*, at 17, petitioner, unlike the plaintiff in *Young*, had the option of complying *and then* bringing a judicial challenge. The constitutional defect in *Young* was that the dilemma of either obeying the law and thereby forgoing any possibility of judicial review, or risking "enormous" and "severe" penalties, effectively cut off all access to the courts.

See 209 U. S., at 146–148. That constitutional problem does not exist here, nor does any other of which I am aware. Cf. *Bailey* v. *George*, 259 U. S. 16, 19 (1922). I would decide the second constitutional challenge (Part IV) on the simple grounds that the company can obtain judicial review if it complies with the agency's request, and can obtain pre-sanction judicial review if it does not.