PERSPECTIVE

The Federalist Principle: The Interaction of the Commerce Clause and the Tenth Amendment in the Clean Air Act*

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I. THE ISSUE

The question here to be examined is whether the Congress, acting through an Administrator of its creation, has power under the Commerce Clause and through the Clean Air Act,[1] to direct the executive and legislative functioning of a state and to penalize its noncompliance. By promulgating plans for state action, the Administrator of the Environmental Protection Agency has sharply focused the issue. Four federal courts of appeals have lately considered the question;[2] ultimately the Supreme Court seems likely

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1. 42 U.S.C. §§ 1857-1857*l* (1970), *as amended* (Supp. IV, 1974).

2. District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *cert. granted*, 44 U.S.L.W. 3685 (U.S. June 1, 1976) (No. 75-1055), *cert. granted sub nom.* State Air Pollution Control Board v. Train, 44 U.S.L.W. 3685 (U.S. June 1, 1976) (No. 75-1050); Maryland v. EPA, 8 E.R.C. 1105 (4th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3685 (U.S. June 1, 1976) (No. 75-960); Alaska v. EPA, 521 F.2d 842 (9th Cir. 1975); Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3685 (U.S. June 1, 1976) (No. 75-909); Arizona v. EPA, 521 F.2d 825 (9th Cir. 1975); Pennsylvania v. EPA, 500 F.2d 246 (3d Cir. 1974).

to resolve it.[3]

This question obviously has great constitutional import. With the enactment of the Clean Air Act of 1970, Congress required the states to enact, fund, administer and enforce programs that Congress detailed.[4] Congress did not utilize time-honored methods to secure compliance.[5] Instead, for the first time in our constitutional history,[6] it used the commerce power to conscript state officers as agents of federal will, and under threat of penalty subjected state governmental processes to congressional command.[7]

At root, perhaps, the question raises practical issues. The problem of pollution is real, immediate and pressing; solution is necessary. A polite demarcation of power which ignores the reality of this raw fact would verge on the politically obscene, leaving power without redeeming value, form without substance.

Accordingly, it is not surprising to find Congress, through the Administrator of the Environmental Protection Agency, advocating yet new constructions of the Commerce Clause: the Commerce Clause historically has proved to be a volatile and flexible measure of federal power, suited to practical needs. What *is* surprising is that anyone should believe the commerce power to be in need of more interpretative expansion.

It is settled law that the commerce power gives Congress authority as broad as the needs of commerce to regulate commerce,[8] and permits it to regulate any activity having substantial effect upon interstate commerce so as to remove all burdens such activities place thereon.[9] It is equally settled that the states may not resist

3. The Supreme Court has recently granted the petitions for certiorari filed by the Solicitor General. *See* note 2 *supra*. The basic issue of federalism and national power seems likely to arise in other contexts as well. *See* note 90 and accompanying text *infra*.

4. Clean Air Act § 110, 42 U.S.C. § 1857c-5 (Supp. IV, 1974). The Administrator of the Environmental Protection Agency made the compulsory nature of this activity explicit. *See* note 47 and accompanying text *infra*.

5. *See* Brown v. EPA, 521 F.2d 827, 839-40 (9th Cir. 1975); District of Columbia v. Train, 521 F.2d 971, 984 (D.C. Cir. 1975); *cf.* Maryland v. EPA, 8 E.R.C. 1105, 1114 (4th Cir. 1975). *See also* notes 53-86 and accompanying text *infra*.

6. *See Hearings on S. 354 Before the Senate Committee on the Judiciary*, 93d Cong., 1st & 2d Sess. 731-35 (1974) [hereinafter cited as No-Fault Hearings].

7. *See* Clean Air Act § 113, 42 U.S.C. § 1857c-8 (Supp. IV, 1974); note 48 and accompanying text *infra*.

8. United States v. Appalachian Power Co., 311 U.S. 377, 426 (1940).

9. Daniel v. Paul, 395 U.S. 298 (1969); Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942).

this power: "valid general regulations of commerce do not cease to be regulations of commerce because a State is involved."[10] Where Congress possesses power to act, and need for uniformity of regulation exists, Congress may, as it chooses, require the states to meet certain minimum standards if they wish to participate in regulation of that subject matter; and it may bar the states from certain of their functions where they conflict with national standards or uniform policy.[11]

As Congress has viewed it, however, the problem of controlling environmental pollution is not discordant or unwanted state regulation, but a *lack* of state activity. The national government, it determined, had neither the necessary manpower nor money,[12] and as a pragmatic necessity state action was required.

The states failed to act. Congress responded, as Mr. Justice Rehnquist described it in *Train v. Natural Resources Defense Council*,[13] by "taking a stick to the states."

> [T]he States were no longer given any choice as to whether they would meet this responsibility. For the first time they were required to attain air quality of specified standards, and to do so within a specified period of time.[14]

10. Maryland v. Wirtz, 392 U.S. 183, 196-97 (1968); *see, e.g.*, Fry v. United States, 421 U.S. 542 (1975); Employees of Dep't of Public Health & Welfare v. Dep't of Public Health & Welfare, 411 U.S. 279 (1973); Parden v. Terminal Ry., 377 U.S. 184 (1964); *cf.* Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). *See* AUTHOR'S NOTE, *infra*, *at 367 for updated discussion of* Maryland v. Wirtz.

11. *See, e.g.*, Employees of Dep't of Public Health & Welfare v. Dep't of Public Health & Welfare, 411 U.S. 279 (1973); Maryland v. Wirtz, 392 U.S. 183 (1968); Parden v. Terminal Ry., 377 U.S. 184 (1964); *cf.* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Pennsylvania v. Nelson, 350 U.S. 497 (1956); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); Welton v. Missouri, 91 U.S. 275 (1875); Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 298 (1851).

12. If we left it all to the Federal Government, we would have approximately everybody on the payroll of the United States. We know this is not practical. Therefore, the Federal Government sets the standards, we tell the States what they must do and what standards they must meet. These standards must be put into effect by the communities and the States, and we expect them to have the men to do the actual enforcing.

Statement of Congressman Staggers, in floor debate, 116 CONG. REC. 19204 (1970). *See* remarks of Senator Randolph, note 110 *infra*.

13. 421 U.S. 60, 64 (1975).

14. *Id.* at 64-65.

A. *The New Commerce Doctrine: Inaction Compels Action*

To support such authority, Congress must rely on two novel constructions of the Commerce Clause.[15] First, *mere state inaction* must be accepted as sufficient burden on commerce to trigger congressional power.[16] Second, Congress must be permitted to re-

15. The federal government has rarely attempted to compel state officers to act as federal agents.

> The Constitution counts upon the necessary participation of the states in the electoral process not by direct command but by the incentive of not losing the opportunity of participation. In similar fashion Congress now elicits desired affirmative performances from the states by attaching them as conditions to the receipt of federal grants-in-aid. If we search the Constitution for provisions which have the appearance of affirmative requirements, two of the most striking are those which call for the surrender of fugitive slaves and fugitives from justice. But the first was disembowelled by the *tour de force* of *Prigg v. Pennsylvania*, and the second was flatly held, in *Kentucky v. Denison*, to be judicially unenforceable. "And we think it clear," said Chief Justice Taney in the latter case, "that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it."

Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 515-16 (1954) (citations omitted). Perhaps the most conspicuous instance of state officers functioning as agents of the nation is state judicial enforcement of federal statutes. *See* Note, *Is Federalism Dead? A Constitutional Analysis of the Federal No-Fault Automobile Insurance Bill: S. 354*, 12 HARV. J. LEGIS. 668 (1975). Though this is common practice, it is doubtful whether states can be *compelled* to enforce federal law.

> Probably it must assume jurisdiction in such a case, even in the absence of discrimination [against a federal interest], if Congress has so directed. But whether the states are under a constitutional obligation to provide courts of competent jurisdiction for the enforcement of federal rights of action, if no such courts otherwise exist, and, if so, how the obligation can be made effective, remains uncertain.

Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 507 (1954) (citations omitted).

16. Congress theretofore had not regarded mere state inaction as sufficient burden on commerce to trigger congressional power over the states. In fact, under traditional preemption doctrine, *inaction* or withdrawal from the field is the state's remedy when it finds conditions imposed by Congress on its activity too onerous. By withdrawing from the field of action, the states remove themselves from a conflict with congressional power, and thus escape the burden of that power. *See* notes 17, 189-219 and accompanying text *infra*.

Prior to enactment of the Clean Air Act, federal power had been used negatively, as in traditional instances of preemption, *see, e.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Pennsylvania v. Nelson, 350 U.S. 497 (1956); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); Welton v. Missouri, 91 U.S. 275 (1875); Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 298 (1851); or remedially, to prevent state abridgement of federally guaranteed rights. *See, e.g.*, Griffin v. County

move that burden *by compelling the state to act.*[17]

Under this rationale, by failing to act as Congress subsequently decided was desirable, the states actively contributed to air pollution. Thus, whether their "activity" is broadly defined as a failure of the states to adopt pollution-control policies that they "could equally well have chosen," or more narrowly as state practices which have had the result of encouraging the pollution-causing activities of others, the states have substantially and detrimentally affected commerce.[18] Congress, using its power to remove burdens put on commerce by state activities, can remove the burden so "caused" by requiring the states to alter their pattern of "activity" to conform with congressional standards.

Further, since it is the *failure* of the states to regulate the polluting acts of others which is the active burden, the states cannot withdraw from the field, nor can they abandon it to Congress, nor merely reform their own pollution-creating actions, but must perforce take the steps that Congress, through its Administrator, dictates. Congress need not act directly against polluters, but may compel the states to serve as its agents, since Congress, in its discretion, has determined that a national program would be beyond its practical capabilities and contrary to sound policy.

This great change in commerce power doctrine occurred without fanfare or much debate.[19] The members of Congress who passed

School Bd. of Prince Edward County, 377 U.S. 218 (1964) (desegregation case); Reynolds v. Sims, 377 U.S. 533 (1964) (reapportionment case).

17. Traditionally, the Supremacy Clause has obliged states—where Congress possesses supreme power—to conform or get out of the way. A state's remedy, if it chose not to comply, was to abandon the field to the federal government and withdraw from all activity in that federal sphere. *See* Corwin, *National-State Cooperation—Its Present Possibilities*, 8 AM. L. SCHOOL REV. 687 (1937); *cf.* Steward Machine Co. v. Davis, 301 U.S. 548 (1937); District of Columbia v. Train, 521 F.2d 971, 994 n.27 (D.C. Cir. 1975); Brown v. EPA, 521 F.2d 827, 839-40 (9th Cir. 1975).

18. 38 Fed. Reg. 30632-33 (1973). *See* note 168 and accompanying text *infra*.

19. Senator Muskie rejected any idea that the sweeping scope of the Clean Air Act had been insufficiently considered.

> [This bill] was not unreasonable or arbitrary in the sense that it was ill-considered. The committee spent hundreds of hours over weeks and months before it came to this hard decision.
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> . . . .
>
> After all these hundreds of hours covering weeks and months of deliberations, all those Senators—obviously of widely varying political philosophies—voted unanimously to recommend to the Senate and Congress the passage of this bill, the goals it establishes, and the sense of urgency it incorporates, and the program for meeting the problem. I cannot think of a major piece of domestic legis-

the Clean Air Amendments of 1970[20] did indeed see the Act as marking a new stage in federal-state relations,[21] and such has been the sweep of judicial interpretation of the Commerce Clause that they did not regard their action as fundamentally altering the balance of federal-state power.[22] The constitutional ramifications were not debated, and only within the last year or two has the great issue of federalism implicit in the Clean Air Act forced its way into official consciousness.[23]

lation that has had such complete committee support from that spectrum of opinion.

116 CONG. REC. 32904 (1970).

However, a review of the debates recorded in the Congressional Record and the reports of hearings before the Senate Committee on Public Works and the House Committee on Interstate and Foreign Commerce fails to disclose any discussion of the *constitutional* issue. The issue was raised explicitly only once, by Governor Reagan of California. His statement was not made in person before the Senate committee, but was merely inserted into the record without debate or comment. *Hearings on S. 3229, S. 3466, S. 3546 Before the Senate Committee on Public Works*, 91st Cong., 2nd Sess. 1300-01 (1970) [hereinafter cited as Senate Clean Air Hearings].

20. Act of Dec. 31, 1970, Pub. L. 91-604, 84 Stat. 1676, *amending* 42 U.S.C. §§ 1857-1857*l* (Supp. V, 1969). The Clean Air Amendments of 1970 established the coercive structure of the Clean Air Act vis-a-vis the states. *See* notes 118-44 and accompanying text *infra*.

21. Senator Eagleton of Missouri, in making some further illustration of "the significance and the parameters of this very noteworthy piece of legislation," said:

> I think we should also pause to record that this bill also marks a very significant step forward in the continuing development of more responsive and responsible relationships among the Federal Government and the State and local governments of our country. . . . Would the Senator from Maine agree that this bill has very broad significance in the area of Federal-State relations?

Senator Muskie's reply was essentially nonresponsive:

> Yes. May I say to the Senator that during the deliberations on the bill I have been very much interested in preserving "local option" features . . . . In my judgment, the bill will give State and local authorities sufficient latitude in selecting ways to prevent and control air pollution.

116 CONG. REC. 42386 (1970).

22. Congress clearly intended to force state action, but there is no evidence in the record that Congress saw its action as altering the balance of federal-state power. The action it took was severe, in its view, but well within the scope of the commerce power. Support for this conclusion comes from the near-total silence of Congress on this issue. *See, e.g.*, note 19 *supra*, and note 107 and accompanying text *infra*.

23. For example, Attorney General Levi and former Solicitor General Griswold have lately differed over the constitutionality of Congress' view of its powers: Attorney General Levi is of the opinion that the proposed Federal No-Fault Automobile Insurance Act, S. 354, which uses a similar approach, would be unconstitutional; Solicitor General Griswold submitted a brief to the Senate Committee on the Judiciary in support of its constitutionality. *See* Opinion by Erwin N. Griswold, *Hearings on S. 354 Before the Senate Judiciary Committee*, 93d Cong., 2d Sess. 743-894 (1974) [hereinafter cited as Griswold opinion]; *cf.* Note, *Is Federalism*

B. *Federalism: A Pragmatic Choice*

If the Congress, using the virtually inexhaustible resources of "substantial effect" doctrine,[24] and the power permitted by the Necessary and Proper Clause, can subordinate to its uses all state functions which impinge on "commerce," whether the state or its citizens will it or not; if the states can be coerced by Congress and regulated as *states*, and not merely as polluters or economic entities; if the Supremacy Clause is to be used not as a check on state encroachment upon or interference with federal power, but as a means to reduce sovereign states to mere federal agencies whenever the Congress is able to find their activities cause a "substantial effect" on interstate commerce; and if state *inactivity* can be admitted as sufficient burden on commerce to compel a state to act as Congress dictates; then federalism as it was thought to exist has changed radically and fundamentally. No shred of state sovereignty and independent power remains untrammeled. We have not a federal, but a national system of government.

It can be argued that practical realities require this result, and that the Commerce Clause is flexible enough to accomplish the transformation, given judicial recognition of critical needs. It might also be objected that Congress has acted with the most benign of motives, and that it contemplates not empire, but cooperation.

But practical exigencies require the courts to take note of other facts as well. For better or worse, the makers of our Constitution chose to rely on a *federal* system of government, and on a *balance* of power, to guarantee both efficiency and liberty. They chose *pragmatically*, having studied and rejected other systems. Power concentrated threatened liberty; power dispersed impaired efficiency.

By rejecting their choice—wittingly or not, happily or unhappily—Congress has arrogated to itself power it does not possess. If, after two centuries, changing circumstances compel a reallocation of power, that decision, like the decision to adopt the Constitution, must be an act of the whole body politic. Neither courts nor Congress should effect such changes by fiat.

Dead? A Constitutional Analysis of the Federal No-Fault Automobile Insurance Bill: S. 354, 12 HARV. J. LEGIS. 668 (1975). *But see* Testimony of Attorney General Levi, *Hearings on S. 354 Before the Senate Committee on Commerce*, 94th Cong., 1st Sess., Ser. 94-20, at 496-516 (1975) [hereinafter cited as Levi testimony].

24. Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942).

It is not sufficient to point to the considerable power that Congress already possesses, or to the arguably advantageous consequences. Neither the deficiences of the states, nor the critical impact of state inaction on commerce provide answers. Such arguments address issues of policy, settled for our purposes in the Constitutional Convention of 1787.

The question remains: may Congress, pursuant to a power claimed under the Commerce Clause and expressed through the Clean Air Act, to meet perceived needs for action, require the states to affirmatively exercise their executive and legislative functions as Congress shall specify, to ends that Congress specifies, in a manner that Congress specifies, subject to the review, approval and revision of a congressionally established officer, whether or not a state desires to withdraw from the field?

In answer, this Perspective will examine, first, the state of present law; second, the construction of the Clean Air Act and the claims of power advanced for it; third, the scope of federal power under the Commerce Clause as applied to state governmental functions; and finally, the limits of federal power expressed by the tenth amendment and the federalist structure of government described by the Constitution.

II. The Problem of Sanctions

Four federal courts of appeals have heard the claims of the Administrator of the EPA (Administrator), and have directly assessed the scope of congressional power to coerce state action under the Commerce Clause and the Clean Air Act (Act).[25] The implications

25. *See* District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *cert. granted*, 44 U.S.L.W. 3685 (U.S. June 1, 1976) (No. 75-1055), *cert. granted sub nom.* State Air Pollution Control Board v. Train, 44 U.S.L.W. 3685 (U.S. June 1, 1976) (No. 75-1050); Maryland v. EPA, 8 E.R.C. 1105 (4th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3685 (U.S. June 1, 1976) (No. 75-960); Alaska v. EPA, 521 F.2d 842 (9th Cir. 1975); Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3685 (U.S. June 1, 1976) (No. 75-909); Arizona v. EPA, 521 F.2d 825 (9th Cir. 1975); Pennsylvania v. EPA, 500 F.2d 246 (3d Cir. 1974).

Two others, the First and the Fifth, have commented on aspects of the question, but did not reach the issue. *See* South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974); Texas v. EPA, 499 F.2d 289 (5th Cir. 1974); Natural Resources Defense Council v. EPA, 478 F.2d 875 (1st Cir. 1973). Similarly, the United States Supreme Court concluded that Congress has required the states to attain air quality of specified standards, and to do so within a specified period of time, but its decision was restricted to the question of whether a state could grant variances from EPA requirements. Train v. Natural Resources Defense Council, 421 U.S. 60 (1975).

of the Administrator's argument, the Third Circuit Court of Appeals admitted in *Pennsylvania v. EPA*, "extend far beyond the question of the validity of a single regulation."[26] The "underlying issue is the power of the Federal Government to require a state to enforce an implementation plan" established for it by a federally appointed Administrator, and "to subject [the states] to federal sanctions if they [fail] to meet this obligation."[27]

A. *The Scope of Required Plans*

Against this background, the plans promulgated for the states take on great significance. What was it that the Administrator sought to oblige the Commonwealth of Pennsylvania to do? What intrusions did he seek to justify?

In Pennsylvania, the Administrator required the state to ensure that all pre-1968 automobiles in the Philadelphia metropolitan area were equipped with air bleed retrofit devices. To comply, Pennsylvania was directed to submit for federal approval its regulations establishing such a program, to cease registering or allowing noncomplying vehicles to operate on its streets and highways, and to submit a detailed compliance schedule indicating the steps it would take to establish and enforce the program.[28] Other requirements, not challenged by Pennsylvania, mandated the Commonwealth to establish an automobile inspection system, to set up bikeways in certain parts of the state, to establish a computer carpool matching system, to create exclusive bus and carpool lanes, to limit public parking, and to monitor carbon monoxide and hydrocarbon emissions.[29]

In California, along with similar regulations, the Administrator ordered drastic curtailment of gasoline and diesel fuel supplies.[30] The chairman of the California Air Resources Board, Mr. A.J. Haagen-Smit, estimated that by 1977, to comply with the regulation in the Los Angeles region, *all* gasoline sales to passenger cars must be cut off, and more than one-half of all diesel fuel sales. To reduce vehicle miles traveled to the mandatory limit, an additional 15,000 buses would need to be purchased. Quite apart from the probability that buses in this quantity could not be produced

26. 500 F.2d 246, 256 (3d Cir. 1974).
27. *Id.*
28. *Id.* at 249.
29. *Id.*
30. Brown v. EPA, 521 F.2d 827, 830 (9th Cir. 1975).

within the deadlines imposed, the costs projected were enormous. Ironically, the chairman suggested that state resources might be inadequate and federal funding would be needed.[31]

Other regulations required California to report its compliance, and to report the date by which any necessary legislation would be recommended. The state was ordered to submit "[a] signed statement from the Governor and State Treasurer identifying the sources and amounts of funds for the program" and the "text of needed legislation."[32]

Failure to comply, the Administrator warned Pennsylvania, California and the other states where substantially similar plans were imposed, could result in penalties under section 113 of the Clean Air Act. Under its terms, where violations of an applicable implementation plan are so widespread that they appear to result from a failure of a state to enforce the plan effectively, the Administrator is authorized to enforce any requirement of such a plan with respect to any "person" by ordering the violator to comply with the plan's provisions;[33] by civil action for appropriate relief, including injunctive relief;[34] or by fines of up to $50,000 per day of violation, imprisonment for up to two years, or both.[35] "Person" is elsewhere defined by the Act to include a "State."[36]

Thus, to meet the Act's requirement that a state provide "assurances" that necessary funding, authority and personnel will be supplied,[37] a state must issue rules, pass laws, raise taxes, appropriate money, hire employees, and see to the enforcement of the Administrator's regulations, in a fashion the Administrator deems appropriate under the Act.[38] Should it fail to implement, revise, administer or enforce a plan demanded by the Administrator,[39] he

31. Letter from A.J. Haagen-Smit, Chairman, California Air Resources Board, to Robert Fri, Acting Administrator, Environmental Protection Agency, July 9, 1973, at 4; *see* Chernow, *Implementing the Clean Air Act in Los Angeles: The Duty to Achieve The Impossible*, 4 ECOL. L. Q. 537 (1975).

32. Brown v. EPA, 521 F.2d 827, 830 (9th Cir. 1975).

33. Clean Air Act § 113(a)(2)(A), 42 U.S.C. § 1857c-8(a)(2)(A) (1970).

34. *Id.* § 113(a)(2)(B), (b), 42 U.S.C. § 1875c-8(a)(2)(B), (b) (1970).

35. *Id.* § 113(c), 42 U.S.C. § 1857c-8(c) (Supp. IV, 1974).

36. *Id.* § 302(e), 42 U.S.C. § 1857h(e) (1970).

37. *Id.* § 110(a)(2)(F)(i), 42 U.S.C. § 1857c-5(a)(2)(F)(i) (1970).

38. *Id.* § 113(a)(2), 42 U.S.C. § 1857c-8(a)(2) (1970); *see id.* § 110(c)(1), 42 U.S.C. § 1857c-5(c)(1) (1970).

39. *Id.* § 113, 42 U.S.C. § 1857c-8 (Supp. IV, 1974); *id.* § 110(a)(2)(H), 42 U.S.C. § 1857c-5(a)(2)(H) (1970).

is authorized to promulgate his own plan "for the State,"[40] and to enforce it either by direct action or by penalties imposed on "persons" violating his orders and regulations.[41]

B. *The Claims of the Administrator*

The Administrator took the position in *Brown v. EPA*[42] that the Commerce Clause supplies the necessary power,[43] the Necessary and Proper Clause a sufficient justification, and the Supremacy Clause whatever coercive force[44] is needed to impose penalties for resistance to the Act on recalcitrant states.[45] Pursuant to his authority to issue regulations,[46] he had attempted to leave no doubt as to the states' obligation to comply with the Act and his regulations:

> Failure to comply with any provisions of this part, or with any approved regulatory provision of a state implementation plan, or with any permit condition or permit denial issued pursuant to approved or promulgated regulations for the review of new or modified stationary or indirect sources, shall render the person *or governmental entity* so failing to comply in violation of a requirement of an applicable implementation plan and subject to enforcement action under section 113 of the Clean Air Act. With regard to compliance schedules, a person *or Governmental entity* will be considered to have failed to comply with the requirements of this part if it fails to timely submit any required compliance schedule, if the compliance schedule when submitted does not contain each of the elements it is required to contain, or if the person *or Governmental entity* fails to comply with such schedule.[47]

In their brief for *Brown v. EPA*, counsel for the Administrator described the power and sanctions authorized by the Act as follows:

> The Congress gave the Administrator the authority to judically enforce the provisions of the California plan against the State, if

40. *Id.* § 110(c)(1), 42 U.S.C. § 1857c-5(c)(1) (1970).
41. *Id.* § 113, 42 U.S.C. § 1857c-8 (Supp. IV, 1974).
42. 521 F.2d 827 (9th Cir. 1975).
43. *See* notes 165-88 and accompanying text *infra*.
44. *See* notes 189-219 and accompanying text *infra*.
45. See Brief for Respondent at 36-40, Brown v. EPA, 521 F.2d 827 (9th Cir. 1975) [hereinafter cited as EPA Brief]; Supplemental Brief for Respondent at 17, *id.* [hereinafter cited in EPA Supplemental Brief].
46. Clean Air Act §§ 109(a), 110(c)(1), 111(b), (d), 112(b), 202(a), 206(d), 42 U.S.C. §§ 1857c-4(a), 1857c-5(c)(1), 1857c-6(b), (d), 1857c-7(b), 1857f-1(a), 1857f-5(d) (1970), *as amended*, (Supp. IV, 1974).
47. 40 C.F.R. § 52.23, *as amended*, 39 Fed. Reg. 33512 (1974) (emphasis added).

> it fails to comply. The Administrator will not, however, seek to utilize criminal sanctions against any legislator or executive official. The Clean Air Act expressly provides, however, that enforcement may be sought by way of injunctive relief, and both the Administrator and the judiciary acting through its equitable powers, may fashion the kind of relief appropriate to accomplish the provisions of the California plan. This may include placing certain state or local functions in receivorship, holding a state official in civil contempt with a substantial daily fine unless and until he complied with the plan's provision, or perhaps requiring the State to reallocate funds from one portion of the State budget to another in order to finance required pollution control measures.[48]

But, as counsel for the Administrator admitted in oral argument,[49] the Act itself is not so unambiguous. Even if the constitutional power claimed exists, the authority asserted cannot be found in the Act in explicit language. Nowhere does it say that a state which refuses to comply with a regulation of the Administrator requiring it to put its governmental power at the service of the EPA is subject to such sanctions. One finds only mention of cooperative state and federal responsibilities,[50] and a clear congressional purpose to abate pollution by enforcing penalties against "persons" who cause it.

Instead, counsel argued, one finds this coercive authority in the definition of the word "person," in the mandatory phrasing of the Act, and in congressional intent as expressed by legislative and judicial history.[51] Accordingly, by failing to submit a transportation control plan as required, California was in violation of the Act and liable to penalties if the Administrator chose to press for them.[52]

48. EPA Brief, *supra* note 45, at 48 n.13 (citations omitted).

49. Brown v. EPA, 521 F.2d 827, 834 (9th Cir. 1975). The Clerk of the Ninth Circuit Court of Appeals has in his files unofficial tapes of the oral argument, on which this admission is recorded.

50. *See, e.g.*, Clean Air Act §§ 102, 209, 42 U.S.C. §§ 1857a, 1857f-6a (1970).

51. EPA Supplemental Brief, *supra* note 45, at 13-14. Counsel for the Administrator conceded that "[t]here is no legislative history directly addressing the question of whether the Federal Government can require a State to implement an applicable plan," but maintained that congressional intent could be implied from the scheme of the Act and legislative history. They explained Congress' silence on the point as arising from its assumption that the states would implement any applicable plan. *Id.* at 11.

52. The Administrator argued that the case was not ripe, since he disclaimed any immediate intent to seek sanctions. The court rejected this assertion

> [i]n view of the issuance of a "Notice of Violation" by EPA to the State, which is the initial step in applying sanctions for non-compliance with EPA regulations,

C. *The Response of the Courts*

The Third Circuit Court of Appeals, first to reach the issue of sanctions, summarily upheld the Administrator. It concluded, in *Pennsylvania v. EPA*, "that the application of federal enforcement procedures to the Commonwealth for noncompliance with regulations [promulgated by the EPA] is a valid exercise of the federal commerce power."[53] The court merely pointed to the "principle that the constitutionality of federal regulations of state activities is subject to the same analysis as that of private activities,"[54] before concluding that "the determinative factor is simply whether [state activities] have an impact on commerce."[55] While the Third Circuit's analysis seems superficial, the ruling seemed unremarkable when handed down in 1973. The commerce power, as defined by the Supreme Court, appeared to have few if any limits, and a challenge directed at regulations based on it seemed brash and not likely to succeed.

This abrupt dismissal of state contentions certainly conformed to the tone of recent Supreme Court decisions. When "national policy, of which Congress is the keeper, indicates that [these employees'] status should be raised," the Court had written in *Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare*,[56] "Congress can act. And when Congress does act, it may place new or even enormous burdens on the States." Or, as it held earlier in *Maryland v. Wirtz*,[57] "[i]f a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation."

But the Supreme Court also stressed that the state activities Congress had regulated were indistinguishable in their effect on commerce from those of private employers;[58] Congress had "inter-

> and in view of the interrelationship between the enforcement procedures and the substantive regulations contained in the EPA's implementation plan . . . .
>
> Brown v. EPA, 521 F.2d 827, 829 n.1 (9th Cir. 1975).

53. 500 F.2d 246, 263 (3d Cir. 1974).
54. *Id.* at 261.
55. *Id.*
56. 411 U.S. 279, 285-86 (1973).
57. 392 U.S. 183, 197 (1968).
58. *See id.* at 198-99.

fered with" state performance of state functions only to the extent of imposing on the states the same restrictions to which private employers performing similar functions were similarly subject.[59] Should Congress go beyond this mark to threaten " 'the utter destruction of the State as a sovereign political entity,' " the Court retained "ample power" to bar the intrusion.[60]

Thus, equally vital to decision is assessment of the extent of federal interference with *state* functions, and the impact that interference has on a *state's* sovereign status. If, as the Supreme Court made clear in *Wirtz*,[61] one may not tenably insist on full separation of state and national functions, then the legitimacy of national "interference" depends both on its nature and degree.

The Ninth Circuit Court of Appeals, in *Brown v. EPA*,[62] disagreed with the *Pennsylvania* court. It held, on statutory grounds, that

> the Clean Air Act does not authorize the imposition of sanctions on a state or its officials for failure to comply with the Administrator's regulations which direct the state to regulate the pollution-creating activities of those other than itself, its instrumentalities and subdivisions, and the municipalities within its borders.[63]

At root, however, the court was guided by constitutional considerations. Finding the legislative history inconclusive, the Ninth Circuit chose to construe the Act to avoid the "serious constitutional issues which the Administrator's interpretation raises."[64] In doing so, it differed fundamentally from the view of federal power held by the Third Circuit.

> [W]e believe with all deference that the Third Circuit failed to recognize the difference between a state engaging in commerce, as all states must under the Supreme Court's interpretation of the Commerce Power, and a state's regulation of the commerce of others. . . .
>
> . . . .
>
> . . . To make *governance* indistinguishable from *commerce* for purposes of the Commerce Power cannot be equated to the "un-

59. *Id.* at 193-94.
60. *Id.* at 196 (footnote omitted).
61. *Id.* at 195.
62. 521 F.2d 827 (9th Cir. 1975); *see* Arizona v. EPA, 521 F.2d 825 (9th Cir. 1975); Alaska v. EPA, 521 F.2d 842 (9th Cir. 1975).
63. 521 F.2d at 831.
64. *Id.* at 837.

> intrusive" regulation of the states upheld by the Supreme Court in *Maryland v. Wirtz* and *Fry v. United States*. A Commerce Power so expanded would reduce the states to puppets of a ventriloquist Congress.[65]

The court found it significant that the text of the Act failed to speak clearly. At two points, Judge Sneed noted, the text required the Administrator to serve notice on both the "State" as well as on a "person."[66] Had Congress intended to coerce state compliance, he reasoned, it could have expressed its purpose with clarity.[67] The *Brown* court doubted that Congress would have acted with such obscurity "in the light of the delicacy with which federal-state relations always have been treated by all branches of the Federal Government . . . ."[68] Moreover, if the term "person" is construed as intending to apply sanctions against the state *only insofar as it is a polluter, and only to the extent necessary to abate that pollution*, as the court suggested was "far more natural and reasonable,"[69] then the Act gives the Administrator no authority to require the states to perform the tasks assigned to them by the Act.[70]

A month later, in *Maryland v. EPA*,[71] the Fourth Circuit concurred: "Far from believing the regulations are plainly valid, we are of opinion their constitutional validity is very doubtful at best . . . ."[72] But the Fourth Circuit chose a different peg on which to hang its statutory analysis. In its view, the Act combined threat and promise to achieve its ends; federal intervention in state affairs was not intended.[73] The Act threatened federal administration of

65. *Id.* at 838 n.45, 839.

66. *Id.* at 834; *accord*, District of Columbia v. Train, 521 F.2d 971, 985 (D.C. Cir. 1975). *But see* note 73 *infra*.

67. 521 F.2d at 834.

68. *Id.*

69. *Id.* at 836. The court found it "natural and reasonable" to read the legislative history "as indicating that the Administrator had ample power to enforce an implementation plan when a state has failed to do so." *Id.* The court distinguished this view from the Administrator's expansive view, based on the statutory definition of the word "person," that the Act authorized sanctions to force the *state* to enforce its plan. *Id.* at 832.

70. *Id.* at 834. While it was not prepared to hold that under no circumstances should the Act be read to apply sanctions to a state, the court was convinced that the Act was designed to penalize *polluters* rather than states. *Id.*

71. 8 E.R.C. 1105 (4th Cir. 1975).

72. *Id.* at 1113.

73. *Id.* at 1114. The *Maryland* court seemed to decline the *Brown* court's bifurcated construction of the term "person" with its statement that "a State is a person within the meaning of the statute." *Id.* at 1112.

federally imposed regulations if Maryland balked; it promised Maryland an opportunity to enact and administer its own plan, thus avoiding federal interference, if the state complied with federal standards.[74]

> Inviting Maryland to administer the regulations, and compelling her to do so under threat of injunctive and criminal sanctions, are two entirely different propositions. We are thus of the opinion, and so hold, that the EPA was without authority under the statute, as a matter of statutory construction, to require Maryland to establish the programs and furnish legal authority for the administration thereof.[75]

The court was unimpressed by the merits of the Administrator's argument, though somewhat taken aback by its sweep.

> In a nutshell, the EPA has directed Maryland and her legislature under pain of civil and criminal penalties, for a State is a person within the meaning of the statute. The government does not beg the issue, but boldly takes the position . . . as it describes the questioned regulations: "these EPA regulations which require the State to enact enabling legislation. . . ."[76]

The court rejected the EPA thesis that such power was "necessary," that direct federal action would be "inefficient and impractical," and that a construction which would not admit such power is "narrow and restrictive."[77]

The District of Columbia Circuit joined the Ninth and Fourth Circuits in rejecting the far-flung claims of the Administrator. However, in *District of Columbia v. Train*,[78] it distinguished be-

74. *Id.* at 1114. The court ruled that the Administrator could only issue regulations for the state to consider; it found no evidence in the Act that he could enforce them against a state which turned them down. *Id.* at 1113-14. *But see* Clean Air Act §§ 110(c), 113, 42 U.S.C. §§ 1857c-5(c), 1857c-8 (Supp. IV, 1974).

75. 8 E.R.C. at 1114-15.

76. *Id.* at 1112.

77. *Id.*

78. 521 F.2d 971 (D.C. Cir. 1975). The Administrator, by regulation promulgated under the Clean Air Act, required the states of Maryland and Virginia and the District of Columbia to purchase 475 buses; to create exclusive express bus lanes on specified routes; to adopt an inspection and maintenance program applicable to all vehicles registered in the region; to created a network of at least 60 miles of bicycle lanes and to require provision of bicycle storage areas in parking lots; to retrofit various vehicles with air pollution devices; and to retrofit all pre-1968 passenger vehicles with a vacuum spark advance disconnect device. Other provisions relating to gasoline vapor recovery, parking management regulation, and control of dry cleaning solvent evaporation were not challenged. Still other provisions—parking sur-

tween various regulations, finding some to be both lawful and constitutional, but others to be either outside the scope of the Clean Air Act or barred by the Constitution. Regulations applicable directly to state pollution-causing activities, it upheld as within the Act. But those regulations which were aimed at controlling the pollution-causing activities of the general public by requiring the states to enact legislation and administer and enforce federal programs, it struck down as outside the Act. Congress, it ruled, intended that the Act's enforcement mechanisms were to be used against *polluters*, rather than against states.[79]

The court made a similar distinction in its analysis of the constitutionality of the Administrator's regulations. To the extent that a state's "practices and regulations" conflict with valid federal regulations adopted under the commerce power, the state must yield[80] or else fall subject "to the penalties provided for violation of those regulations."[81] Thus, regulations prohibiting the states from licensing polluting vehicles were valid under the Commerce Clause,[82] but regulations which sought to compel a state against its wishes to administer and enforce a federal regulatory scheme failed under both the Commerce Clause and the tenth amendment.[83] Neither claims of efficiency nor the asserted needs of commerce[84] could justify what it termed "an impermissible encroachment on state sovereignty" going beyond mere "regulation" of commerce.[85]

> [T]he Administrator is here attempting to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory scheme . . . . We are aware of no decisions of the Supreme Court which hold that the federal government may validly exercise its commerce power by directing unconsenting states to regulate activities affecting interstate commerce, and we doubt that any exist.
>
> . . . [W]e believe that the recourse contemplated by the commerce clause is direct federal regulation of the offending ac-

charges, elimination of free street parking, elimination of free employee parking, establishment of fees for federal parking—were either revoked by EPA or barred by Congress. *Id.* at 979-80.

79. *Id.* at 983-86.
80. *Id.* at 989.
81. *Id.* at 990 n.24.
82. *Id.* at 991.
83. *Id.* at 992.
84. *Id.* at 994.
85. *Id.* at 992.

> tivity and not coerced state policing of an intricate federal plan under threat of federal enforcement proceedings. We therefore conclude that the . . . regulations are invalid . . . .[86]

D. *The Problem of Sanctions*

Since the recent *Brown*, *Maryland* and *District of Columbia* decisions, the weight of legal authority is against an expansive interpretation of the Clean Air Act. The statutory arguments of each court seem strained, however; they are shaped primarily by constitutional issues they attempted to avoid. Though the courts followed rules of construction which compelled them to choose a statutory ground of decision, if available, rather than a constitutional ground,[87] the ambiguity they found in the Act permitted a bolder course.

Whatever the vehicle of analysis, the outcome would seem to turn on the power of Congress to impose sanctions on noncomplying states. Absent sanctions, the states are free to strike an agreeable bargain, or to refuse to participate in congressional programs at all. With power to apply sanctions, Congress can work its will on its own terms.

Obviously, it is at best a close question whether Congress clothed the Administrator with authority to require state compliance with congressional directives. Close analysis suggests that it may be more reasonable to conclude that Congress did intend to "br[ing] the States to heel,"[88] and in fact acted from frustration with its earlier efforts at persuasion and inducement of state action.[89] The answer is unclear and not at all certain; a contrary interpretation is sustainable, particularly when motivated by a desire to avoid confronting the constitutional issues.

But since the basic issue is not the language of the Act but the powers of Congress, the constitutional questions ultimately are unavoidable. Congress has expressed its intent clearly in subsequent

86. *Id.* at 992-93.

87. District of Columbia v. Train, 521 F.2d 971, 981 (D.C. Cir. 1975); Maryland v. EPA, 8 E.R.C. 1105, 1113 (4th Cir. 1975); Brown v. EPA, 521 F.2d 827, 837 (9th Cir. 1975); *see* United States v. Raines, 362 U.S. 17, 20-22 (1960); Rescue Army v. Municipal Court, 331 U.S. 549, 568-69 (1947). The *District of Columbia* court nonetheless reached the constitutional issues with respect to several regulations.

88. Employees of Dep't of Public Health & Welfare v. Dep't of Public Health & Welfare, 411 U.S. 279, 283 (1973).

89. *See* notes 91-117 and accompanying text *infra*.

legislation;[90] and the Supreme Court, not as constrained by a preference for statutory construction, might yet reach past the statutory issues and decide the constitutional questions. Thus, in one guise or another, in these cases or a case involving some similar statute, the fundamental question of constitutional power must be settled.

Before turning to the constitutional issues implicit in the Clean Air Act, however, one must first review the Act in the light of its legislative history, and attempt to probe the obscurities of congressional language and intent.

III. THE ACT: IS THERE AUTHORITY?

On balance, a reasonable person might be led to believe that Congress intended to require and compel state action conforming to congressional standards. This conclusion is suggested by the following factors. First, "persuasive," noncoercive methods of inducing state action had failed; the failure was noted, and the more forceful measures which replaced them infer intent to compel state action. Second, the Amendments of 1970 deleted noncoercive language from the Clean Air Act, substituting mandatory mechanisms which are only workable if they may be enforced against unwilling states; Congress unmistakably wished to avoid the necessity of direct federal enforcement against polluters. Third, the statutory definition of the term "person," which by including "states" in its scope is key to application of the enforcement provisions to the states, was marked by the Senate committee in its report, and by key members of the House Committee on Interstate and Foreign Commerce; this awareness of the term suggests an intent to subject the states to the Act's coercive measures.

However, this evidence is contradictory and unclear. The Act is *not* explicit. Running counter to the factors listed is strong evidence suggesting that Congress confidently expected the states to

90. *E.g.*, Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376 (Supp. II, 1972); Federal No-Fault Motor Vehicle Insurance Act, S. 354, 94th Cong., 1st Sess. (1975); Surface Mining Control & Reclamation Act, S. 7, S. 652, H. 25, H. 2587, H. 3119, 94th Cong., 1st Sess. (1975). An amendment sponsored by Senator Tower would have allowed states to opt out of the latter Act; it was defeated 78 to 18. 121 CONG. REC. S3715 (daily ed. Mar. 12, 1975). The Act would explicitly require states to submit a program demonstrating a capacity to meet the purposes of the Act through "a state law . . . ." Surface Mining Control & Reclamation Act, S. 7 § 503(a), 94th Cong., 1st Sess. (1975).

comply, and that it may not have seriously considered the prospect of state refusal and the need for wide-scale enforcement against states. One is led by this latter portion of the record to the view that Congress perhaps intended contradictory things: vigorous enforcement of the Act, and preservation of state autonomy and responsibility. Congress' contradictory purposes leave the record subject to contrary interpretations.

A. *Persuasion Had Failed*

The Clean Air Act is an outgrowth of a gradual expansion of federal authority in the field of air pollution control, an expansion that largely was forced by state failure to adequately address the problem.

Generally speaking, federal action was a reaction to state inaction, and federal programs generally were designed to instigate state action, rather than to act directly against pollution. While proof is abundant that Congress intended to *induce* this result, it is less clear that Congress intended to *force* the states to act, despite the mandatory duties it imposed on them. Nonetheless, as Congress' primary focus was state action, it seems reasonable to suppose that Congress intended the penalties attached to those duties to prod states which failed to act.

The first federal anti-air pollution activity began in 1955. This was limited to furnishing moderate research, and technical and financial support to the states for joint services.[91] But in 1963, with the problem growing more acute, Congress completely revised its approach, authorizing the Secretary of Health, Education and Welfare (HEW) to initiate training and demonstration projects. In this first Clean Air Act,[92] Congress also sought to stimulate state action by funding part of the cost of state pollution control programs, "upon such terms and conditions as the Secretary may find necessary,"[93] and by providing limited expert legal and technical assistance to states prosecuting abatement actions.[94] In 1965, Congress empowered the Secretary to set performance standards for

91. Act of July 14, 1955, Pub. L. No. 84-159, ch. 360, 69 Stat. 322 (1955) (codified at 42 U.S.C. §§ 1857-1857f (1958)).

92. Act of Dec. 17, 1963, Pub. L. No. 88-206, 77 Stat. 392, *amending* 42 U.S.C. §§ 1857-1857g (Supp. IV, 1959-62).

93. *Id.*, 77 Stat. at 395.

94. *Id.*, 77 Stat. at 396-98; *see* H.R. REP. NOS. 508, 1003, 88th Cong., 1st Sess. 7-8 (1963); S. REP. NO. 638, 88th Cong., 1st Sess. (1963).

new motor vehicles and engines, and broadened his authority to regulate new motor vehicle emissions.[95] In 1966, in a further effort to induce state action, it provided grants for maintenance of state pollution control programs, and reduced the amounts states were required to contribute.[96]

Congress injected the federal government into the area of air pollution control because of the minimal state activity it found: only 17 states, despite Congress' efforts, spent more than $5,000 per year on pollution control; of total annual expenditures approximating $2,000,000, more than half was spent in California.[97] But Congress nevertheless carefully specified "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments . . . ."[98]

Unfortunately, such "action-forcing" initiatives[99] again failed to provoke adequate response from the states. Pollution, Congress now determined, was an interstate problem, which could be solved only through interstate solutions. Consequently, it enacted the Air Quality Act of 1967,[100] a thorough revision of the first Clean Air Act. This Act expanded previous programs, but more importantly, it authorized the Secretary of HEW to establish air quality criteria. These criteria were not binding on the states, but if a state failed to declare its intent to take reasonable action to establish conforming standards and to enforce compliance within its boundaries, the Secretary was empowered to promulgate and enforce *directly against polluters* the necessary air quality standards.[101]

Congress seemed to intend this authority as a spur to state action, rather than as a remedy for pollution. The House Committee on Interstate and Foreign Commerce reported:

95. Act of Oct. 20, 1965, Pub. L. No. 89-272, 79 Stat. 992, *amending* 42 U.S.C. §§ 1857-1857*l* (1964).

96. Act of Oct. 15, 1966, Pub. L. No. 89-675, 80 Stat. 954, *amending* 42 U.S.C. §§ 1857-1857*l* (Supp. I, 1965).

97. H.R. REP NO. 508, 88th Cong., 1st Sess. 7 (1963).

98. 42 U.S.C. § 1857(a)(3) (1970).

99. F. ANDERSON, NEPA IN THE COURTS v, vii (1973).

100. Act of Nov. 21, 1967, Pub. L. No. 90-148, 81 Stat. 485, *amending* 42 U.S.C. §§ 1857-1857*l* (Supp. III, 1965-67); *see* H.R. REP. NO. 728, 90th Cong., 1st Sess. (1967); S. REP. NO. 403, 90th Cong., 1st Sess. (1967).

101. Act of Nov. 21, 1967, Pub. L. No. 90-148, 81 Stat. 485, 493, *amending* 42 U.S.C. §§ 1857-1857*l* (Supp. III, 1965-67); *see* H.R. REP. NO. 728, 90th Cong., 1st Sess. (1967).

However, the Secretary could take action against *intra*state pollution only at the request of a state governor. 81 Stat. at 493.

> The Committee expects that this residual power in the Secretary of HEW will seldom, if ever, be used, since the States are expected to take the necessary steps to establish and enforce air quality standards. If, however, a State fails to take appropriate action, the Department is empowered . . . to take the necessary action . . . expected of the State . . . .[102]

But again the states failed to act. Congress reacted, in Mr. Justice Rehnquist's phrase, by "taking a stick to the States."[103] The Clean Air Amendments of 1970 imposed *mandatory* duties on the states, and greatly strengthened federal enforcement powers.

Congress acted, in its view, because persuasion and inducement had proved futile, and equally pertinent, because it believed that only the states could do the job. Coercion, it concluded, was unavoidable. Senator Muskie of Maine, the floor manager of the bill to amend the Clean Air Act in the Senate, said:

> We learned from experience . . . that States and localities need greater incentives and assistance . . . .
>
> . . . .
>
> . . . State and local governments did not respond adequately . . . . Enforcement had to be toughened. More tools were needed. The Federal presence and backup authority had to be increased.[104]

Congressman Harley Staggers, chairman of the House Committee and floor manager of the Amendments in the House, was blunter:

> Mr. Chairman, we are here to legislate for the 50 States. That is our purpose. We are trying to present a strong, national clean air bill and not to . . . let the States go their own ways . . . . Where were the States during all the years until 1965, and even after that when Federal legislation was passed in 1967, which was not strong enough. . . .
>
> [I]f we do not have strong national standards . . . [w]e would in effect be saying, "Let the States do it."
>
> You will abrogate your responsibility . . . if you say, "Let us leave it to the States to do this." . . . We ought to have a strong law.[105]

The key question, however, is not whether Congress intended to require state action, but whether it intended to back that posture

102. H.R. REP. NO. 728, 90th Cong., 1st Sess. 12 (1967).
103. Train v. Natural Resources Defense Council, 421 U.S. 60, 64 (1975).
104. 116 CONG. REC. 42381, 42382 (1970).
105. *Id.* at 19237.

with force should a state refuse. Senator Muskie put the question to Dr. Middleton, Commissioner of the National Air Pollution Control Administration established by the 1967 Act, in this form:

> *Senator Muskie*: The question is to what extent is a national standard something that the Federal Government sets and enforces and polices and uses to protect health?
>
> If the national standard is nothing more than a goal, like criteria, without any national teeth to it, should we be calling it a national standard?
>
> *Dr. Middleton*: It has teeth in it because the States are required to meet that standard. If they don't, there is an enforcement plan to be sure they do.[106]

Congressman Springer, a member of the House committee and a Manager for the House in the subsequent conference with the Senate, bared those teeth:

> The bill . . . provides that State governments will create plans for the implementation and enforcement of the air standards. In fact a State may declare more stringent standards if it feels it necessary. . . . [But i]f a State hangs back and fails to move out, the Federal Government will take over and make rules and regulations amounting to a State plan. Machinery for *forcing a plan upon a State* is spelled out including penalties of $10,000 a day for failing to act.[107]

As Senator Muskie admitted, this was "[d]rastic medicine." But in his view it was also necessary.[108]

This catalog of legislative history could be amplified many times, and other examples are described in the quartet of Clean Air cases lately decided. The portions listed there and here evidence clear intent to take strong federal action, which in turn was intended to mandate state action. The legislative history also proves an intent to impose severe penalties on persons opposing implementation of this policy. But even as Congress acted, it also continued to mouthe protestations of deference to the states, providing in the Amendments that "[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State," but only, it added, "by submitting an implementation plan for such State which will specify the manner in which national

106. Senate Clean Air Hearings, *supra* note 19, at 1506.
107. 116 CONG. REC. 19206 (1970) (emphasis added).
108. *Id.* at 32904.

primary and secondary ambient air quality standards will be achieved and maintained . . . ."[109]

Congress thus seems to have been caught between conflicting motives. It was unwilling, and sincerely believed it was unable, to shoulder the cost of the programs it saw as necessary.[110] It believed action—immediate action—was indispensable.[111] It wanted to leave intact the system of cooperative federal-state relationships theretofore established, yet it saw the states alone as having the resources for the job to be done.[112] Its solution: Congress would call the tune, but the states would pay the piper.

Congress based its claim of power to do so on the Commerce Clause. Coming on the heels of the Civil Rights Acts[113] and enforcement measures taken pursuant to those Acts,[114] some of which were based on the Commerce Clause,[115] the Clean Air Act must have seemed to Congress to be well within the scope of its power, and virtually no questions or debate was directed to the constitutional issue.[116] Congress acted to prod states which had failed to act, and the history of the process by which it was forced, step by step, to that event at the least infers a view that the Act was intended to coerce state action.[117]

109. Clean Air Act § 107(a), 42 U.S.C. § 1857c-2(a) (1970).

110. I agree with you at the very outset that Federal agencies can't do the job. I think Senator Muskie and all of us realize that this is true.

Therefore, I say you are right when you declare that there certainly must be a greater utilization of the local and the State air pollution control agencies.

Senate Clean Air Hearings, *supra* note 19, at 481 (remarks of Senator Randolph).

111. 116 CONG. REC. 32904 (1970).

112. *See* notes 12 and 110 *supra*.

113. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975-1975d, 2000a-2000h-6 (1964)); Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (1960) (codified at 18 U.S.C. §§ 837, 1074, 1509, 20 U.S.C. §§ 241, 640, 42 U.S.C. §§ 1971, 1974-1974e, 1975 (Supp. III, 1959-61)).

114. *See, e.g.*, United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840, *rehearing denied*, 389 U.S. 965 (1967); Meredith v. Fair, 313 F.2d 532 (5th Cir. 1962), *cert. denied*, 372 U.S. 916 (1963) (governor held in contempt); Faubus v. United States, 254 F.2d 797 (8th Cir. 1958) (governor enjoined); Alabama NAACP St. Conference of Branches v. Wallace, 269 F. Supp. 346 (M.D. Ala. 1967) (three-judge court) (statute declared unconstitutional). These cases, however, involved racial discrimination, and the federal power was based on the thirteenth and fourteenth amendments.

115. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (public accomodations).

116. *See* note 19 *supra*.

117. This conclusion is strengthened by the parallel development of the Federal

B. *Coercive Terms Replaced Permissive Language*

A second factor suggesting that Congress did intend to compel state action is the pattern of alterations made by the Clean Air Amendments of 1970. Congress altered the plan of the Air Quality Act of 1967, which was deferential to and protective of the states, to establish a program of mandatory requirements, phrased in peremptory language.

The pattern of these changes proves conclusively, though the evidence is unnecessary, that Congress intended to reduce state opportunities for delay, inaction and inadequate action. On the issue of whether this peremptory tone also implies a will to coerce state action, however, one is again left uncertain. But if one considers that it was always Congress' purpose to attack the problem of pollution through state machinery, and that under the 1967 Act the Secretary already possessed a limited option of acting directly against polluters to abate pollution,[118] then it seems reasonable to conclude that the new sanctions which accompany the newly-mandated state duties infer congressional intent to coerce recalcitrant *states*, as well as polluters.

To support this conclusion one must carefully compare the two legislative acts. By this process one notices, as one cannot simply by examination of the 1970 text, the significant deletions and curtailments made by the Amendments. These omissions show congressional intent as clearly as do its new additions.

In brief, the 1967 Act established national criteria from which a state could derive state standards.[119] If a state did formulate these standards and adopt an acceptable implementation plan, and enforce it, they were free of federal involvement.[120] Federal action in any event was limited to promulgation of standards (but not a plan)[121] and to court action "to secure abatement of the

Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (Supp. II, 1972). While the 1955 bill had clearly placed the primary rights and responsibilities of water pollution control on the states, *see* H.R. REP. NO. 1446, 84th Cong., 2d Sess. (1956), by 1972 the emphasis had substantially changed. While continuing to give lip service to the concept of state leadership of pollution control efforts, *see* S. REP. NO. 414, 92d Cong., 2d Sess. (1971), the terms of the Act as amended imposed requirements of conformity and action on the states. *See* 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 3.03, 3-52.9 to 3-89 (1975).

118. *See* note 101 *supra* and note 122 *infra*.

119. Air Quality Act of 1967 §§ 107-08, 42 U.S.C. §§ 1857c-2, 1857d (Supp. V, 1965-69).

120. *Id.* § 108(c)(1),(4), 42 U.S.C. § 1857d(c)(1),(4) (Supp. V, 1965-69).

121. *Id.* § 108(c)(2), 42 U.S.C. § 1857d(c)(2) (Supp. V, 1965-69).

pollution."[122] The state could appeal the Secretary's promulgations to a hearing board, whose recommendations of modifications the Secretary was obliged to follow.[123] The whole scheme was phrased in terms denoting limitation on the federal government, deference to the states, and careful preservation of state options.

In contrast, section 109 of the amended Act excised each state's first option of developing its own standards.[124] The requirement that the Secretary give reasonable notice and confer with appropriate interest groups before promulgating standards[125] was diluted to a mere delay requirement: "reasonable time for interested persons to submit written comments thereon . . . ."[126] State governors were stripped of their right to petition for a hearing,[127] and the hearing board's authority to force modifications on the Secretary[128] was replaced by a reference to the Administrator's authority to make "such modifications as he deems appropriate."[129] The language bespeaking deference and choice was removed.

But much more importantly, the *remedy* previously made available to states wishing to escape onerous requirements was eliminated, despite the new duties put on the states. If it had been contemplated by Congress that the states could simply escape compliance by mere refusal, this careful limiting of state remedies would have been pointless and counterproductive. Indeed, one might have expected Congress to create *additional* incentives or alternatives which might produce a greater range of state responses than simple compliance or noncompliance. Only if Congress did believe that the states were obliged to conform, like it or not, does the emphasis in this section on reducing state opportunity for delay and escape make sense. Without intent to coerce the states, these changes could only result in *reducing* the likelihood of acceptable state action, since otherwise an unwilling state is left with the sole remedy of flat refusal to comply. Clearly, Congress did not intend

122. *Id.* § 108(c)(4), 42 U.S.C. § 1857d(c)(4) (Supp. V, 1965-69). *See* note 101 *supra*.

123. *Id.* § 108(c)(3), 42 U.S.C. § 1857d(c)(3) (Supp. V, 1965-69).

124. Clean Air Act § 109, 42 U.S.C. § 1857c-4 (1970), *amending* 42 U.S.C § 1857d(c)(1) (Supp. V, 1965-69).

125. Air Quality Act of 1967 § 108(c)(2), 42 U.S.C. § 1857d(c)(2) (Supp. V, 1965-69).

126. Clean Air Act § 109(a)(1)(B), 42 U.S.C. § 1857c-4(a)(1)(B) (1970).

127. Clean Air Act § 109, 42 U.S.C. § 1857c-4 (1970), *amending* 42 U.S.C. § 1857d(c)(3) (Supp. V, 1965-69).

128. Air Quality Act of 1967 § 108(c)(3), 42 U.S.C. § 1857d(c)(3) (Supp. V, 1965-69).

129. Clean Air Act § 109(a)(1)(B), 42 U.S.C. § 1857c-4(a)(1)(B) (1970).

this result, and therefore an intent to coerce should be implied.

This conclusion is buttressed by the pattern of changes made by amended section 110. By its terms, state programs which were previously solicited by lures of cash and other support are made mandatory. Each state "shall" adopt and submit to the Administrator a plan providing for implementation, maintenance and enforcement of national primary and secondary ambient air quality standards.[130] Each state "shall" hold public hearings to consider its plan.[131] The Administrator "shall" review the plan, and approve, disapprove or report to the state whether it "can" be revised.[132] If the state fails to submit a plan, or submits an unsatisfactory plan, or fails to revise its plan "as required," the Administrator "shall" promulgate regulations setting forth a plan "for a State."[133] The governor of a state, under this section, can apply for certain postponements which the Administrator must grant only if the state has made a good faith effort to comply, the technology is unavailable, alternatives are available, and continued operation of the source of pollution is essential to national security or public health or welfare.[134]

It is in section 113 that the real strength of the amended Clean Air Act is made apparent.

> Whenever, on the basis of any information available to him, the Administrator finds that *any person* is in violation of any requirement of an applicable implementation plan, [or] that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, . . . the Administrator may enforce any requirement of such plan *with respect to any person*—(A) by issuing an order to comply with such requirement, or (B) by bringing a civil action under subsection (b) of this section.[135]

Subsection (b) authorizes civil action "for appppropriate relief" where a person fails to comply with an order, or violates a requirement of an implementation plan during any period of federally assumed enforcement, and for violation of certain other statutory

130. *Id.* § 110(a)(1), 42 U.S.C. § 1857c-5(a)(1) (1970).
131. *Id.*, 42 U.S.C. § 1857c-5(a)(1) (1970).
132. *Id.* § 110(a)(2), (a)(3)(B), 42 U.S.C. § 1857c-5(c)(a)(2), (a)(3)(B) (1970).
133. *Id.* § 110(c), 42 U.S.C. § 1857c-5(c) (1970).
134. *Id.* § 110(f)(1), 42 U.S.C. § 1857c-5(f)(1) (1970). *See* note 159 *infra*.
135. *Id.* § 113(a), 42 U.S.C. § 1857c-8(a) (1970) (emphasis added).

requirements.[136] Criminal penalties are authorized for knowing violations and refusals to comply with orders.[137]

The sanctions available to the Secretary under the 1967 Act were limited to abatement actions directed, presumably, at the polluter. The 1970 Amendments added a new category of miscreant: the *violator* of plans and orders. This violator is identified only as a "person," which is defined elsewhere in the Act to include a "State."[138]

The Amendments of 1970 made other changes. The conference and hearing process, described in voluminous detail in the 1967 Act,[139] was limited to situations "for which . . . a national . . . standard is [not] in effect."[140] Similarly, Congress denied the courts any power to relieve the states from the burden of federal requirements:

> No order or judgment under this section, or settlement, compromise, or agreement respecting any action under this section . . . shall relieve *any person* of any obligation to comply with any requirement of an applicable implementation plan, or with any standard prescribed . . . .[141]

Again, the peremptory pattern is clear. The states' remedies were stringently reduced while at the same time federal power was expanded by conferring authority to promulgate plans "for a State" and to impose sanctions on "persons" violating the terms of such plans. If this does not evidence congressional intent to coerce the states, then one must credit Congress with an overblown and naive conception of its influence.

It simply is not reasonable to suppose that every state would accept without balking so massive a limitation of state options and so heavy a drain on state resources. To believe otherwise simply does not reflect political reality. As politicians, the members of Congress must have known that no state politician in his right mind would placidly accept programs which bestowed on Congress all plaudits for spurring affirmative state action, while leaving state

136. *Id.* § 113(b), 42 U.S.C. § 1857c-8(b) (1970).

137. *Id.* § 113(c), 42 U.S.C. § 1857c-8(c) (1970).

138. *Id.* § 302(e), 42 U.S.C. § 1857h(e) (1970).

139. Air Quality Act of 1967 § 108(c)(3)-(j), 42 U.S.C. § 1857d(c)(3)-(j) (Supp. V, 1965-69).

140. Clean Air Act § 114(b)(4), 42 U.S.C. § 1857d(b)(4) (1970).

141. *Id.* § 114(k), 42 U.S.C. § 1857d(k) (1970) (emphasis added). *But see id.* § 307(b)-(c), 42 U.S.C. § 1857h-5(b)-(c) (1970).

officials stuck with the blame for higher taxes, bigger state budgets, and painful new regulations. While section 113 was construed by the *Brown* and *Maryland* courts as providing the Administrator with the option in such situations of proceeding directly against polluters, we know from legislative history[142] that Congress believed itself unable to assume such responsibilities on any very large scale. Even given a ground swell of public support for pollution control, and the availability of citizens-suits against polluters,[143] this mechanism seems unworkable apart from sanctions applicable to the states, and intent to coerce seems necessarily implied.[144]

C. *Congress Relied on the Statutory Definition*

The term "person" is defined by section 302(e) of the Clean Air Act of 1970 to include "an individual, corporation, . . . State, municipality, and political subdivision of a State."[145]

This definition originated in the Clean Air Act of 1963,[146] and has been retained without change in later legislation. The 1963 Act utilized the term primarily to define the scope and applicability of the limited enforcement powers the Act authorized. The Secretary could bring suit to secure abatement of pollution, and require a report from "any person whose activities result in the emission of air pollutants causing or contributing to air pollution . . . ."[147] Failure to file a required report caused forfeiture of one hundred dollars.

142. *See* notes 12 and 110 *supra*.

143. Clean Air Act § 304, 42 U.S.C. § 1857h-2 (1970). It should be noted that subsection (a) of section 304 appears to refer to "person" in terms which would also include a "State": "any person may commence a civil action on his own behalf—(1) against any person (including . . . (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) . . . ."

In such cases, the district courts have jurisdiction "to enforce such an emission standard or limitation, or such an order, . . . as the case may be." *Id.*

For some idea of the scope of this provision, *compare* Parden v. Terminal Ry. Co., 377 U.S. 184 (1964) *and* California v. Taylor, 353 U.S. 553 (1957) *with* Employees of the Dep't of Public Health & Welfare v. Dep't of Public Health & Welfare, 411 U.S. 279, 285-86 (1973) *and* Principality of Monaco v. Mississippi, 292 U.S. 313, 329 (1934) *and* Hans v. Louisiana, 134 U.S. 1 (1890).

144. *See* EPA Supplemental Brief, *supra* note 45, at 9-10.

145. Clean Air Act § 302(e), 42 U.S.C. § 1857h(e) (1970).

146. Pub. L. No. 88-206, 77 Stat. 392, *amending* 42 U.S.C. §§ 1857-1857g (Supp. IV, 1959-62).

147. Clean Air Act of 1963 § 5(i), 42 U.S.C. § 1857d(i) (Supp. V, 1959-63).

Thus, as used in the original context, Congress intended the definition to apply penalties against a state, *but only in its role as a polluter*. As later legislation expanded federal power at the expense of the states, the penalties to which a state was liable by virtue of this definition similarly expanded. However, whether Congress intended to penalize states for failure to act—rather than for polluting actions—was not explicitly discussed until the debates over the Clean Air Amendments of 1970.

The Senate Committee on Public Works reported in its section-by-section analysis of the Senate bill:

> This new section [section 116, state retention of authority] prohibits and provides for the enforcement of any violation by *any person, as that term is defined in section 302 of the Act*, of any applicable implementation plan, including any emission requirements forming a part of that plan, or any emission standard or standard of performance, or procedural requirement established under the act.[148]

Elsewhere in its report, the Senate committee stressed these punitive features.

> If the Secretary should find that a State or local pollution control agency is not acting to abate violations of implementation plans or to enforce certification requirements, he would be expected to use the full force of Federal law. Also, the Secretary should apply the penalty provisions of this section to the maximum extent necessary to underwrite the strong public demand for abatement of air pollution and to enforce compliance with the provisions of the Act.[149]

Or, as the committee wrote in another place:

> The Committee believes that . . . the threat of sanction must be real, and enforcement provisions must be swift and direct. Abatement orders, penalty provisions, and rapid access to the Federal District Court should accomplish the objective of compliance.[150]

Thus, it seems to have been the intent of the Senate committee which reported the Amendments to the floor to apply the new sanctions to the states for any violation of the mandatory requirements of the Act, using for that purpose the definition of the term

148. S. REP. NO. 1196, 91st Cong., 2d Sess. 58 (1970) (emphasis added).
149. *Id.* at 21.
150. *Id.* at 23.

"person." This intent and understanding of the term may not have been shared by other members of Congress, but it is at least strong evidence indicating congressional reliance on the definition, and congressional intent to coerce the states.

D. *But the Evidence is Contradictory*

The evidence is equally as strong that Congress was led to believe that the states were eager to comply, and that it may not have seriously considered the possibility of enforcement against the states. The record of the debates on the Amendments reflects a great deal of uncertainty in the minds of many members of Congress as to whom the enforcement provisions would apply. Several assumed that they applied only to polluters, and that the federal powers would be welcomed by the states as a backup to state efforts to control air pollution.

This expectation originated in the hearings on the proposed amendments. Sidney Saperstein, Assistant General Counsel of HEW, was explicit in his confidence:

> *Mr. Saperstein*: I think I would also like to call attention to the fact that we have proceeded on the assumption that the States are going to have to have implementation plans and we would act only if the State is not carrying out its implementation plan. Ordinarily, we would assume the State would continue to implement the standards and would proceed against the violators as expeditiously as they are supposed to.
>
> *Senator Dole*: In other words, the Federal enforcement would be second; is that right?
>
> *Mr. Saperstein*: That is right.[151]

Under questioning by a member of the Senate committee staff, Dr. Middleton, head of the National Air Pollution Control Administration, seemed even more upbeat:

> *Miss Waller*: Has there been resistance by State and local governments to being included in regions [under the 1967 Act]?
>
> *Dr. Middleton*: Through the first 40 designations, there has been no opposition. In fact, it is the reverse. There is often a contest about how many counties should be included. . . .
>
> But there is virtually no contest about whether there should be an air quality control region.
>
> *Miss Waller*: There has been no resistance?

151. Senate Clean Air Hearings, *supra* note 19, at 165-66.

> *Dr. Middleton*: The only resistance we have had to date deals with some counties wanting to be included . . . .[152]

Remarks by state officers were similarly conducive to optimism. Although he was probably referring only to federal authority to set national standards and enforce them directly against polluters, the testimony of Governor Sargent of Massachusetts is easily construed to indicate state willingness to follow federal leadership:

> Finally, I applaud the provision in S. 3466 which would provide increased Federal authority to seek court action against polluters, even in intrastate situations. No State that is doing a good job in fighting air pollution has anything to fear from this proposal. My State does not fear it. And any State that is not doing the job it should be, deserves to have this provision of law to contend with.[153]

And, elsewhere:

> I would certainly stress the need for action, the need for action now. Of course, it has to be considered action. We all, I am sure, recognize that. But I think the time has gone by when we can any longer delay and we can any longer argue as to whether the Federal Government should run the show or whether the States should. I think there has to be a partnership as we have never had it before.
>
> But I think there absolutely have to be Federal standards.[154]

With positive reinforcement like that, it is not surprising that many members of Congress, like Congressman Murphy of New York, concluded that the federal enforcement powers were designed to *reinforce* on-going state activity rather than to *coerce* a state into action. Mr. Murphy stated his views in floor debate:

> . . . I brought an amendment through the committee which provides dramatic new enforcement powers to the Federal Government. The need for this kind of power was amply demonstrated to me in my own district, where pollution from one State flows into another and neither State can adequately compel changes in the other State.
>
> This language . . . will give the States the necessary backup from the Federal Government to stop interstate pollution.

152. *Id.* at 1530.

153. *Id.* at 450.

154. *Id.* at 452. For statements of similar effect, *see id.* at 1183 (Douglas M. Head, Attorney General of Minnesota and president, National Ass'n of Attorneys General), and *id.* at 1297-98 (Jess Unruh, Assemblyman and majority leader of the California Assembly).

. . . .

As you can see, we are authorizing the Federal Government to step into critical interstate situations—such as exist in the major industrial areas of this country, and elsewhere—where the interstate mechanisms have failed to abate pollution.

This section is one which can be embraced by every State in the Union because it gives the States the added muscle they have lacked in years passed.[155]

At most, Congressman Murphy may have contemplated enforcement against someone else's state; others expected enforcement against polluters only. Congressman Monagan said,

If a State fails to adopt an acceptable air quality plan, the Attorney General is authorized to bring suit to secure abatement of *polluters* within the State who violate the Federal standards. A court may assess a penalty of $10,000 a day against *persons* failing to comply with the law.[156]

Similarly, Congressman Vanik declared,

[F]urther, if a State fails to enforce its plan, the Secretary of Health, Education, and Welfare can notify the State and persons who violate the plan. If, after such notice, the State fails to act within 30 days, the Secretary . . . may request the Attorney General of the United States to bring suit to *secure abatement and cessation of the pollution.* A court may then assess a fine of up to $10,000 a day for each day during which *the polluter* fails to take corrective action.[157]

The prospect of blunt state refusal to comply, and the absence of any plain provision for forcing the states to conform to congressional will, did not seem to occur to many members until well after the Amendments were enacted. During the Senate hearings on the implementation of the Clean Air Amendments of 1970, held in 1972, the following exchange occurred between William Ruckelshaus, Administrator of the EPA, and Senator Boggs:

Senator Boggs: Once an implementation plan is approved, who has the primary responsibility for enforcement if a compliance milestone passes without compliance?

Mr. Ruckelshaus: The State has the first crack.

. . . .

155. 116 CONG. REC. 19214 (1970).
156. *Id.* at 19220 (emphasis added).
157. *Id.* at 19218 (emphasis added).

> *Senator Boggs*: . . . [L]et us assume the [specified] device will not be operating by the [specified] date.
>
> Does the State or local air pollution agency have a right to grant a variance . . . ?
>
> . . . .
>
> *Mr. Ruckelshaus*: No; they cannot. What you are postulating is impossibility of performance. The act doesn't really cover that question. . . .
>
> *Senator Boggs*: If the State or local agency is not permitted to grant a variance, what happens when the compliance date passes without the device being in operation? What mechanism exists in the law to deal with such a problem?
>
> *Mr. Ruckelshaus*: I don't think there is any. I think that is called prosecutorial discretion.[158]

The question of "impossibility of performance" is quite distinct from the question of what sanctions Congress did or did not intend to apply to unruly states. But it is not unrelated. If states cannot grant variances from federal regulations even when they are impossible to perform, is it likely that they would be permitted to vary a *feasible* plan if it would result in a failure to comply with national standards?[159] If shutting down virtually all traffic in the city of Los Angeles and requiring a shift from private automobiles to buses which most probably could not be built within the time schedule imposed, as the EPA ordered in California,[160] is not "impossibility of performance," it is difficult to imagine what it would be. But when California objected to this manifest absurdity, the "discretion" of the EPA "prosecutor" failed to provide relief.

158. *Hearings on Implementation of the Clean Air Amendments of 1970 Before the Senate Committee on Public Works*, 92d Cong., 2d Sess., ser. 31, pt. 1, at 320 (1972).

159. *See* Train v. Natural Resources Defense Council, 421 U.S. 60 (1975); Hardy, *Train v. Natural Resources Defense Council: The Genesis of a New Era of Federal-State Relationships in Air Pollution Control*, 24 CLEV. ST. L. REV. 397 (1975). The Court held that section 110(a)(2)(H) of the Clean Air Act "in no way prevents the States from also permitting ameliorative revisions which do not compromise the basic goal." In fact, it construed the Act as requiring the EPA "to approve 'any revision' which is consistent with . . . minimum standards . . . ; no other restrictions whatsoever are placed on the Agency's duty to approve revisions." *Train v. Natural Resources Defense Council, supra* at 98.

160. Letter from A.J. Haagen-Smit, Chairman, California Air Resources Board, to Robert Fri, Acting Administrator, Environmental Protection Agency, July 9, 1973, at 4; *see* Chernow, *Implementing the Clean Air Act in Los Angeles: The Duty to Achieve the Impossible*, 4 ECOL. L.Q. 537 (1975).

Not all members of Congress may have considered the problem of sanctions, and it is not unlikely that some of those who did differed in their opinions. Many may have optimistically avoided the issue by imagining platoons of eager state laborers leaping to do their commands.

But if Congress is to be credited with common sense, then it would seem necessary to also credit Congress with an intent to coerce the states. The changes made by the Clean Air Amendments of 1970 are hardly calculated to provoke *willing* compliance. Rather, they ultimately are workable only if Congress possessed and conferred power to *force* compliance.

Logic and common sense are frequently used to guide construction of murky statutes, but surer proof of congressional policy is needed when coercion of states is at issue. The evidence seems to favor the view that Congress intended to coerce state action, but the balance is close. If the standard of proof required were merely those facts necessary to satisfy a reasonable man, it might suffice. But reasonable judges deal in larger issues, and may reasonably require more certain proof. To tip the balance plainly one way or the other requires constitutional guidance.

IV. THE COMMERCE CLAUSE: IS THERE POWER?

The Supreme Court has described the nature of the power granted to Congress in these terms:

> The precise boundary between national and state power over commerce has never yet been, and doubtless never can be, delineated by a single abstract definition. The most widely accepted general description of that part of commerce which is subject to the federal power is that given in 1824 by Chief Justice Marshall in *Gibbons v. Ogden*: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the *commercial intercourse* between nations and parts of nations, in all its branches . . . ."[161]

"[F]or more than a century," the Court wrote in *Jordan v. Tashiro*,[162] "it has been judicially recognized that in a broad sense [commerce] embraces every phase of commercial and business ac-

161. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 550-51 (1944) (emphasis added; citation omitted).

162. 278 U.S. 123, 127-28 (1928).

tivity and intercourse." Or, as the Court pointed out in *United States v. South-Eastern Underwriters Association*, "No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the commerce Clause."[163]

Thus broadly described, the power of Congress to regulate commerce will extend to all its incidents, whether or not a state may also have interests at stake.

> But while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation.[164]

This review may seem elementary. The power of Congress to regulate commerce, after all, would seem to apply only to commerce, and to nothing else. But the point needs review, if the extraordinary arguments developed by Dean and former Solicitor General Erwin N. Griswold and by the Administrator of the EPA are any guide.

A. *The Claims of the Administrator*

Counsel maintained in their brief for the Administrator in *Brown v. EPA*[165] that Congress has power over commerce

> regardless . . . whether the object sought to be accomplished by use of the commerce power might otherwise be characterized as the exercise of a state police power. To exercise its commerce power, the Congress need only demonstrate . . . that the *subject* being regulated affects commerce.[166]

163. 322 U.S. 533, 533 (1944).

164. Maryland v. Wirtz, 392 U.S. 183, 196-97 (1968); *see* Parden v. Terminal Ry., 377 U.S. 184, 190 (1964); Great Northern Ins. Co. v. Reed, 322 U.S. 47, 51 (1944); United States v. California, 297 U.S. 175, 184-85 (1936); Board of Trustees of the University of Illinois v. United States, 289 U.S. 48, 56-57 (1933). *See also* Colorado v. United States, 219 F.2d 474 (10th Cir. 1954); Griswold Opinion, *supra* note 23, at 845, 851.

165. 521 F.2d 827 (9th Cir. 1975).

166. EPA Brief, *supra* note 45, at 36-37 (citations omitted; emphasis added); *see* Maryland v. Wirtz, 392 U.S. 183, 198-99 (1968) (Court "will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States"); Wickard v. Filburn, 317 U.S. 111, 123-24 (1942).

It is unimportant, in the Administrator's view, that the thing being regulated is not commerce, but is rather the governmental functioning of the states. What is important, he maintained, is that the states have burdened commerce. This *effect* on a thing capable of regulation, commerce, rather than the *nature* of the thing to be regulated, in this instance, the state, gives Congress its power.[167]

Further, not only is state *action* capable of burdening commerce, but state *inaction* may be a sufficient detriment to commerce to trigger regulation of state functions and imposition of mandatory duties. The Administrator explained this view in a circular addressed to the states:

> Transportation is a necessary service. In our society, the form in which it is provided depends overwhelmingly on the regulatory, taxing, and investment decisions made at all levels of government. By building and maintaining roads and highways, by licensing vehicles and operators, by providing a system of traffic laws, and in many other ways, government has encouraged the growth of automobile use to its present levels. There is nothing inevitable about such a choice. Governments could equally well have chosen to discharge their basic function of maintaining a transportation system in ways that would have discouraged the use of single-passenger automobiles, and encouraged the use of mass transit. But often they have not.[168]

A state may well be proscribed from those of its activities which substantially affect and burden commerce.[169] But the Administrator's argument did not stop there. *By equating a pattern of inactivity, even if innocent and unwitting, with a policy of action, or deliberate choice, he asserted a power not merely to bar state activities, but also to require state action.* The states had neglected an opportunity; they "could equally well have chosen to discharge their basic function[s]"[170] differently. They burdened commerce by failing to make that choice. The "burden" of their inactivity can be removed by the states only by action which Congress, brooking no interference with its supreme power, can compel.

By such logic, there is no state governmental function which Congress cannot reach and control. The virtually inexhaustible re-

167. EPA Brief, *supra* note 45, at 42-43.
168. 38 Fed. Reg. 30632 (1973).
169. *See* cases cited in note 9 *supra*.
170. 38 Fed. Reg. 30632 (1973).

sources of "substantial effect" doctrine, whether or not coupled with convenient hindsight, provide ample scope. The states can be forced either to act or not to act, as Congress chooses to define the burden. They have no refuge but obedience, since if they act—or fail to act—with greater or less vigor than Congress deems useful to commerce, they transgress its power and offend the Constitution. The traditional remedy of unwilling states, abandonment of the field to direct federal control,[171] is barred. State policy—and laws, and spending, and practice—must perforce conform to congressional policy.

As the Administrator bluntly put it, "States and other governmental entities have a special obligation to carry out and enforce implementation plans simply because Congress has placed that responsibility upon them."[172]

It is a bold, brassy and beguiling argument.

B. *Commerce: The Extent of the Power*

Former Solicitor General and Dean of Harvard Law School Erwin N. Griswold analyzed the EPA thesis. Writing for his clients, State Farm Mutual Automobile Insurance Association and the American Insurance Association, he submitted an opinion to the Senate Judiciary Committee supporting the constitutionality of the proposed Federal No-Fault Insurance Act.[173] The opinion touched only peripherally on the Clean Air Act, but as the No-Fault bill relies on similar coercion of the states,[174] he drew on that precedent in his analysis.[175] The Clean Air Act, he noted, "is a far more thoroughgoing imposition of mandatory requirements on

171. *See* note 17 *supra*.

172. 38 Fed. Reg. 30632 (1973).

173. Griswold Opinion, *supra* note 23. Dean Griswold both testified before the Senate Judiciary Committee and inserted into the record his written opinion of the constitutionality of the proposed Federal No-Fault Motor Vehicle Insurance Act. Testimony before the Committee is cited as No-Fault Hearings, *see* note 6 *supra*.

174. This coercion is of two kinds. First, under Titles I and II, the state administrator is forced to administer a plan in a specific way which is subject to the regulation of a federal authority. . . . Second, if a state fails to enact a Title II bill, the federal government goes even further and compels state officials to act under and administer a federal program.

Note, *Is Federalism Dead? A Constitutional Analysis of the Federal No-Fault Automobile Insurance Bill: S. 354*, 12 HARV. J. LEGIS. 668, 675 (1975); *see* S. REP. NO. 757, 93d Cong., 2d Sess. (1974) (minority report).

175. *See* Griswold Opinion, *supra* note 23, at 823-34, 866-80.

the states that [*sic*] is S. 354."[176]

Dean Griswold cited *United States v. Wrightwood Diary Company*[177] to support his first thesis, that congressional power to regulate commerce extends to things not themselves commerce by reason of their detrimental effect on commerce. The case is explicit.

> [N]o form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.
>
> . . . .
>
> It is no answer to suggest, as does respondent, that the federal power . . . is limited to those who are engaged also in interstate commerce. The injury, and hence the power, does not depend upon the fortuitous circumstance that the particular person conducting the intrastate activities is, or is not, also engaged in interstate commerce. It is the effect upon interstate commerce or upon the exercise of the power to regulate it, not the source of the injury which is the criterion of Congressional power.[178]

Mr. Justice Black stressed the point in *United States v. South-Eastern Underwriters Association*:

> [T]ransactions [may] be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they . . . concern the flow of [no]thing more tangible than electrons and information.[179]

If that which is noncommercial can be commerce, the nature of commerce is uncertain. Perhaps the only workable test available is the operational test: commerce is that which Congress declares to be commerce.[180] In the light of Justice Black's almost mystical lan-

176. No-Fault Hearings, *supra* note 6, at 741 (letter from Erwin N. Griswold to Senator Roman L. Hruska).

177. 315 U.S. 110 (1942); Griswold Opinion, *supra* note 23, at 761.

178. 315 U.S. at 119, 121 (citations omitted). In United States v. Darby, 312 U.S. 100, 118 (1941), the Court held that the power of Congress over interstate commerce also "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end."

179. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 549-50 (1944). Similarly, " 'ideas, wishes, orders and intelligence' are 'subjects' of . . . interstate commerce." Western Union Tel. Co. v. Lenroot, 323 U.S. 490, 502 (1945).

180. Chief Justice Marshall stated the argument authoritatively in Gibbons v.

guage it is difficult to maintain that Congress' power over commerce has other limits.

But despite the sweeping posture assumed here, limits exist. Aside from those "prescribed in the Constitution,"[181] an inherent limit is the meaning given to the word "commerce." Some things are "commerce," and others are not, or else the constitutional provision can have no meaning.[182] Congressional power over commerce will reach only so far as the scope included by the term.[183]

Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824):

> The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at election, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

See also Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 255 (1964); Polish National Alliance of the United States of North America v. NLRB, 322 U.S. 643, 650 (1944); Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 527-28 (1941); Board of Trustees of the University of Illinois v. United States, 289 U.S. 48, 59 (1933).

Nonetheless, only the Supreme Court is constitutionally capable of declaring the meaning of the Constitution. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Though the Court will properly defer to Congress in matters of policy, *see, e.g.*, Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., *supra* at 527-28, it must retain the responsibility for determining what things are commerce and what are not. Congress may select among alternative measures to regulate alternative aspects of commerce, but the Supreme Court defines the field from which it selects.

181. United States v. Wrightwood Dairy Co., 315 U.S. 110, 121 (1942); *see* Fry v. United States, 421 U.S. 542, 547-48 n.7 (1975); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *cert. granted*, 44 U.S.L.W. 3685 (U.S. June 1, 1976) (No. 75-1055), *cert. granted sub nom.* State Air Pollution Control Board v. Train, 44 U.S.L.W. 3685 (U.S. June 1, 1976) (No. 75-1050); and notes 231-343 and accompanying text *infra*. *But see* cases cited in note 164 *supra*.

Dean Griswold admitted in his opinion that "there are some conceivable limits to the sweep of the Commerce power . . . ." Congress could not, for example, "abolish the legislatures of the states on the ground that their enactments constitute a burden on interstate commerce." But absent "undue" interference with an indispensable state function amounting to " ' the utter destruction of the State as a sovereign political entity,' " he would uphold congressional exercise of the commerce power. Griswold Opinion, *supra* note 23, at 858-59.

182. The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition.

United States v. Sprague, 282 U.S. 716, 731 (1931); *see, e.g.*, Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570-71 (1840); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816).

183. The subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several States. The expansion of

The Supreme Court has emphasized this rule frequently, but perhaps most surprisingly in *Wickard v. Filburn*,[184] which is otherwise noted for the breadth of power it recognized in Congress. Rejecting narrower interpretations pressed upon it, the Court said,

> [R]ecognition of the relevance of the economic effects in the application of the Commerce Clause . . . has made the mechanical application of legal formulas no longer feasible. *Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted*, questions of federal power cannot be decided simply by finding the activity in question to be "production," nor can consideration of its economic effects be foreclosed by calling them "indirect."[185]

Thus, when states engage in economic activities, they subject themselves to congressional control, as does any other economic enterprise.[186]

However, a different measure of congressional power applies when Congress reaches to control state activities which are not themselves commercial. Being sovereign, such state activities are independent of federal control except insofar as they "interfere with or obstruct" the exercise of a federal power. Then, to preserve its supremacy and to protect commerce from damage or injury, Congress can overcome state encroachments and compel the state

enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains.

Santa Cruz Fruit Packing Co. v. NLRB, 303 U.S. 453, 466 (1937); *see* Maryland v. Wirtz, 392 U.S. 183, 196 (1968).

184. 317 U.S. 111 (1942).

185. *Id.* at 123-24 (emphasis added); Maryland v. Wirtz, 392 U.S. 183, 198-99 (1968). As thus measured, congressional power to regulate commerce extends both to stimulation as well as to protection of commerce. "The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon." Wickard v. Filburn, 317 U.S. 111, 128 (1942).

186. In Maryland v. Wirtz, 392 U.S. 183 (1968), the Court reemphasized the economic measure of Congress' commerce power. It rejected as a misreading of Wickard v. Filburn, 317 U.S. 111 (1942), the dissent's suggestion that the "enterprise concept" permits Congress to declare a whole state to be an "enterprise" affecting commerce.

> [T]he term is quite cognizant of limitations on the commerce power. Neither here nor in Wickard has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. The Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.

Maryland v. Wirtz, *supra* at 196-97 n.27.

to give way. The measure of this power is the extent to which Congress must assert its supremacy. Where a state does not contest federal power, and withdraws, Congress has no power to control state activity further. Its power is remedial and negative, and not capable of imposing affirmative duties on noncommercial state functions.[187] Nor, as Judge Sneed wrote in *Brown v. EPA*, can the preemption doctrine, "if applied in a conventional manner," be used to bar state withdrawal from the field.[188]

Griswold's first thesis, therefore, is valid only within a context of state opposition to congressional will. The commerce power will not support affirmative power over things noncommercial where a state desires to give way and abandon the field to direct federal action.

C. *Supremacy: A Negative Remedy*

In Dean Griswold's view, both the Necessary and Proper Clause[189] and the Supremacy Clause furnish adequate power to impose affirmative duties as well as to proscribe burdensome activities. To support this second thesis, he made three arguments: (1) where Congress has power to act, its actions bind state officers by virtue of the Supremacy Clause;[190] (2) mandamus is the ordi-

187. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971), notes 189-219 and accompanying text *infra*, and note 17 *supra*.

188. 521 F.2d at 839-40.

189. Dean Griswold likened the Necessary and Proper Clause to the enabling clauses of the thirteenth, fourteenth, fifteenth, nineteenth and twenty-fourth amendments. As such, he maintained, it provides power to impose affirmative requirements on the states. Griswold Opinion, *supra* note 23, at 837-42.

Dean Griswold dismissed as out-of-context an objection that the Necessary and Proper Clause is no grant of power, suggesting that where power is elsewhere authorized in the Constitution, the clause supplies *all* power necessary to make actions in that field effective. Nonetheless, in the case he distinguished, the Supreme Court appeared to firmly reject such use of the Necessary and Proper Clause:

> If the exercise of the [war] power is valid it is because it is granted in Clause 14, not because of the Necessary and Proper Clause. The latter clause is not itself a grant of power, but a *caveat* that the Congress possesses all the means necessary to carry out the specifically granted "foregoing" powers of § 8 "and all other Powers vested by this Constitution . . . ." As James Madison explained, the Necessary and Proper Clause is "but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant."

Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 247 (1960) (claim under war power that civilian dependents of military personnel located overseas are subject to court-martial).

190. Griswold Opinion, *supra* note 23, at 882.

nary remedy used to compel governmental officers to perform a duty to act;[191] and (3) mandamus similarly can be used to coerce state officials to perform affirmative duties, including, where necessary, state funding and administration of federally dictated programs.[192]

1. *Supremacy*. The first argument is not debatable. *United States v. California*,[193] cited as authority, certainly stands for the proposition that state officials are subject to the supremacy of the federal government. However, the case does not establish when Congress has power to act, nor the sort of remedy available when state officers resist. The case supplies no measure of congressional power.

2. *Mandamus*. In support of the second argument, three cases are cited: *Hudson v. Parker*,[194] *ICC v. United States ex rel. Humboldt Steamship Company*,[195] and *United States ex rel. Kansas City Southern Railway Company v. ICC*.[196] Insofar as the cases are limited to the narrow use made of them by Dean Griswold, they support the point urged. They do establish that mandamus is a remedy used to compel government officers to perform their duty. But the cases give absolutely no support for the proposition that mandamus can be applied to state officials, and they suggest otherwise to some degree. The cases are wholly federal in their facts. Thus, they offer only the most limited support for the argument that the Supremacy Clause is a source of affirmative power over the states.

In *Hudson v. Parker*, for example, after compelling a federal district judge to grant bail in accordance with a prior order from a Justice of the United States Supreme Court, the Supreme Court suggested that its power of mandamus might be limited where state officers were concerned. Bail might be taken pending review of a state "decision against a right claimed under the Constitution and laws of the United States," it said, "but, because of the relation between the two governments, in the court of the State only . . . ."[197]

191. *Id.* at 883.
192. *Id.* at 885.
193. 332 U.S. 19 (1947).
194. 156 U.S. 277 (1895).
195. 224 U.S. 474 (1912).
196. 252 U.S. 178 (1920).
197. 156 U.S. 285-86. The other two cases cited by Dean Griswold offer no guidance as to whether states can be compelled to undertake affirmative duties.

To support this remark, the Court cited *Cohens v. Virginia*[198] and *Worcester v. Georgia*.[199] *Cohens* had ruled that state sovereignty must yield to the ample powers conferred on the supreme federal government, and to a "conservative power to maintain the principles established in the Constitution."[200] But the systems remain distinct, Chief Justice Marshall implied, because a writ of error "does not in any manner act upon the parties; it acts only on the record . . . . Nothing is demanded from the state."[201]

In a similar vein, Justice M'Lean wrote in *Worcester*:

> It has been said, that this court can have no power to arrest the proceedings of a state tribunal in the enforcement of the criminal laws of the state. This is undoubtedly true, so long as a state court, in the execution of its penal laws, shall not infringe upon the constitution of the United States, or some treaty or law of the Union.[202]

Where a state did not interfere with a legitimate federal action, he stressed, the state was supreme:

> The powers exclusively given to the federal government are limitations upon the state authorities. But, with the exception of these limitations, the states are supreme; and their sovereignty can no more be invaded by the action of the general government, than the action of the state governments can arrest or obstruct the course of the national power.[203]

Thus, the cases cut two ways. On the one hand, they do furnish support for the proposition that mandamus can compel federal offi-

198. 19 U.S. (6 Wheat.) 264 (1821).

199. 31 U.S. (6 Pet.) 515 (1832). The Court also cited Bryan v. Bates, 12 Allen 201 (Mass. 1866).

200. 19 U.S. (6 Wheat.) at 382.

201. *Id.* at 410. *See* Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 516 (1954):

> The judges of the state courts are not only sworn to support the Constitution, like other state officers, but are bound also to observance of federal law by the special direction of the supremacy clause. This may on occasion require them, specifically and affirmatively, to enter a particular judgment, as in complying, for example, with the injunction of the full faith and credit clause. State courts ordinarily fulfill such obligations without question. But Congress nevertheless has recognized the possbility of conflict and authorized the Supreme Court, in its discretion, to avoid it by entering judgment itself. The imbroglio of *Martin v. Hunter's Lessee* [14 U.S. (1 Wheat.) 304 (1816)] suggests the wisdom of making this alternative available.

202. 31 U.S. (6 Pet.) at 567-68.

203. *Id.* at 570.

cials to perform duties imposed on them by law pursuant to the Constitution. But except where a state infringes on the Constitution, or a treaty or law of the United States made under the Constitution, they also indicate that the states are free of federal coercion. Supremacy furnishes a remedy against state obstruction, but the scope of the remedy seems limited to the negative function of restraining such violations.

3. *Coercion.* The crucial link in the argument, however, is whether federal mandamus can compel affirmative state action. Dean Griswold relied chiefly on a third group of cases to make this point, and again, though some of these cases are explicit and far-reaching, they indicate that as a prerequisite to federal coercive power a state must impair a federal right, power or duty. They also suggest that the remedy afforded by the Supremacy Clause is limited to correcting the condition or impairment.

Virginia v. West Virginia[204] is perhaps the strongest case cited by Dean Griswold to support federal coercion of the states. Having previously held that West Virginia owed money to Virginia, the Court rejected West Virginia's claim that its "reserved powers" insulated it from an order to institute taxation and to create a fund out of which to pay Virginia. The Court held that its grant of original jurisdiction to judge controversies between the states provided power to compel "obedience of a State to the Constitution by performing the duty which the instrument exacts."[205] West Virginia was obliged to tax and to spend, not as a consequence of any free-floating federal supremacy, but because the Constitution put it under a duty of obedience when subject to the Court's jurisdiction.[206]

Similarly, the two desegregation cases cited by Dean Griswold uphold the power of a district court to enter such orders as might be necessary to remedy a state's violation of federal rights.[207] In

204. 246 U.S. 565 (1918).

205. *Id.* at 603.

206. The *Virginia* Court, however, left the question of remedy for state refusal undetermined, believing that West Virginia would comply and spare the Court the necessity of exerting compulsory power. To the same effect, though based more narrowly, is Wyoming v. Colorado, 309 U.S. 572 (1940), where the Court declared a power to hold Colorado in contempt but refrained from doing so.

207. It may be noted that the desegregation cases and the reapportionment cases proceed from quite different constitutional contexts and powers than the acts of Congress challenged in the Clean Air cases. The fourteenth amendment places clear prohibitions on state action, and Congress is given explicit power to prevent state

Faubus v. United States,[208] for example, the Court of Appeals enjoined the use of force by Governor Faubus in violation of law and rights existing under the United States Constitution. It should be observed that the court did not order Governor Faubus to *perform* any duty or action, but only restrained him from violating the constitutional rights of the black students.[209]

In *Griffin v. County School Board of Prince Edward County*,[210] citing *Ex parte Young*[211] and a violation of the Equal Protection Clause by county school board officers, the Supreme Court held that the district court could take whatever action was appropriate and necessary to prevent the County from depriving the petitioners of their equal rights to education. Such requirements could include ordering the County to raise funds and to open and operate the schools.[212] But the Court's action was remedial, and not affirmative.

In several reapportionment cases,[213] the Supreme Court vigor-

violation of the rights the amendment guarantees. The Commerce Clause, on the other hand, is a grant of power without definition of its reach vis-a-vis state power, and is not accompanied by an energizing "enabling clause" as is the fourteenth amendment.

Dean Griswold viewed the Necessary and Proper Clause as the equivalent of the enabling clauses of the Civil War Amendments, and cited United States v. Guest, 383 U.S. 745, 783-84 (1966) (Brennan, J., concurring in part) as illustrating his argument that, the Supreme Court has, in Dean Griswold's words, "construed Section 5 of the Fourteenth Amendment to confer enforcement power on Congress equal to that granted by the Necessary and Proper Clause." Griswold Opinion, *supra* note 23, at 840-41.

Be that as it may, *see* note 189 *supra*, the Commerce Clause does not define the scope of federal power with regard to state functions, whereas the fourteenth amendment is expressly directed to defining that relationship. An argument based on federal power under the fourteenth amendment, therefore, does not necessarily indicate federal power under the Commerce Clause. The subject matter of that power differs; the purposes of the power differ; and given the tenth amendment's declaration of state power, the scope of the federal power may well be different when confronting activities of the state. *See* District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975).

208. 254 F.2d 797 (8th Cir.), *cert. denied*, 358 U.S. 829 (1958).

209. *Id.* at 803, 806-07.

210. 377 U.S. 218 (1964).

211. 209 U.S. 123 (1908).

212. 377 U.S. at 233. The district court, however, enjoined county officials from paying tuition grants or giving tax exemptions as long as the county's public schools remained closed. *Id.* at 232.

213. Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Davis v. Mann, 377 U.S. 678 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964).

ously upheld the district courts' sweeping equity power to either enjoin or compel affirmative state action. When necessary to prevent state violation of the Equal Protection Clause, a federal court may enjoin state elections, reapportion state legislative districts, order appropriate state legislative action, and compel a fundamental reorganization of methods of electing state officers.

But the cases also carry the clear implication that the federal courts should infringe on state activities only to the extent necessary to protect the federal right and to prevent state denial of that right. The Court made this message clear in *Reynolds v. Sims*,[214] and reiterated its view the following year in *Burns v. Richardson*.[215] The Supreme Court said in *Burns*:

> Our decision in *Reynolds v. Sims* emphasized that "legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." Until this point is reached, a State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, . . . should not be restricted beyond the clear commands of the Equal Protection Clause.[216]

To the same effect is *Swann v. Charlotte-Mecklenburg Board of Education*:

> In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation . . . . Judicial authority enters only when local authority defaults.[217]

Lest there be mistake, the Supreme Court restated this point later in the case:

In listing these cases, however, Dean Griswold curiously did not include either Reynolds v. Sims, 377 U.S. 533 (1964), decided the same day as the cases cited and the most noted case in that group, nor the leading remedies case of Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), argued by Dean Griswold while Solicitor General. While not a reapportionment case, *Swann* is a major decision on the subject of the scope of judicial remedies.

214. 377 U.S. 533 (1964).

215. 384 U.S. 73 (1966), *remanding* Holt v. Richardson, 238 F. Supp. 468 (D. Hawaii 1965).

216. 384 U.S. at 84-85 (citation omitted).

217. 402 U.S. 1, 16 (1971).

> Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis . . . .
> No fixed or even substantially fixed guidelines can be established as to how far a court may go, but it must be recognized that there are limits. The objective is to dismantle the dual school system.[218]

Thus, to the extent that the reapportionment and other mandamus cases have any validity in a matter involving congressional action under the Commerce Clause, the Supreme Court has ruled clearly that judicial coercion must be triggered by a constitutional duty or violation of a constitutional right, and that whatever action is ordered by the courts should be restricted to the minimum necessary to uphold the Constitution. The federal government can coerce the states by judicial mandates (and presumably, by congressional mandates) where the states interfere with a federal right, refuse to perform a federal duty declared by the Constitution, or impede the effective operation of a federal power. But this ability to prevent state nullification of federal power does not support a federal nullification or control of state powers in the absence of the specified prerequisites.

Accordingly, neither the Supremacy Clause nor the powers conferred on the judicial department will support an unlimited congressional power to act under the Commerce Clause. Congress holds the commerce power, and thus may require the states to conform their activities as it wills when they enter upon that power, but Congress cannot otherwise compel state action. Similarly, absent state obstruction of federal power, the Supremacy Clause is useless to force affirmative state action. Affirmative requirements are justifiable only as a remedy for state obstruction or interference. At the point state obstruction or interference ceases, the remedial power of the federal government ceases.

Thus, Congress may compel state submission to the Clean Air Act when the states pollute the air. It may require state compliance with the Administrator's requirements if the states would share in his authority to regulate the field. It may apply severe sanctions to force the states to yield if they reject the Act's mandate while obstructing or burdening commerce. It may induce voluntary state compliance either by threat or promise of other action. But Congress cannot place affirmative duties on a state that neither

218. *Id.* at 28.

pollutes, nor participates in pollution control, nor obstructs Congress in its own exercise of control. If a state desires to withdraw, and scrupulously avoids "burdening" federal power, neither the Commerce Clause nor the Supremacy Clause can prevent it.[219]

D. *Inaction: No "Burden"*

To close off this escape, the Administrator necessarily had to argue that state inaction can be a sufficient burden on commerce to empower Congress to require and compel affirmative state action by way of remedy. In one sense, as the *Prince Edward County* case demonstrated, state inaction *is* sufficient to trigger remedial action. The Court found that Prince Edward County had violated the Equal Protection Clause by its withdrawal from the field of education, and it compelled the County to return to the task of educating the schoolchildren of the County, in accordance with express federal commands.[220]

The *Prince Edward County* case, however, is not an example of true state inaction. The state did withdraw from the field, but it provably did so for the purpose of denying to black children an education equal to that white children received. Further, the County did not genuinely withdraw from the field. Public funds found their way into the "private" white schools established after the public schools were closed. The County was ordered to cease this discriminatory practice, reform its purpose, and conform its future actions to the standards of equal education defined by the Court. Accordingly, *Prince Edward County* does not support a thesis of power to impose affimative duties derivative from genuine state inaction.[221]

Of course, "genuine state inaction" is difficult to define. As the Administrator pointed out, the past transportation policies of the states, benign and unwitting though they may have been, contributed directly to the serious air pollution problem.[222] Similarly,

219. *See* notes 326-43 and accompanying text *infra* for a discussion of how the *Brown, Maryland* and *District of Columbia* courts assessed the reach of the commerce power.

220. 377 U.S. at 232-34.

221. *Id.* at 220-24.

222. 38 Fed. Reg. 30632-33 (1973). The *District of Columbia* court, however, noted "that the federal government with its massive appropriations for highway construction bears a significantly higher portion of the blame than the Administrator's statements acknowledge." District of Columbia v. Train, 521 F.2d 971, 991 n.25 (D.C. Cir. 1975).

inaction of any kind or scale may have negative effects on commerce. Sins of omission—leaving undone that which one ought to have done—are still sins, whether public or private.

But absent *active* state transgression of its power, Congress cannot coercively control the noncommercial functioning of the states. It must rely on persuasion or threat to induce state cooperation.

The Administrator, however, argued that *the mere lack of beneficial effect otherwise available when a state conforms with federal standards* is an active fault, justifying coercion.[223] Dean Griswold

223. Administrator Russell E. Train justified federal coercion of the states on the ground that state transportation facilities, as the states have chosen to operate them, are a direct source of air pollution burdensome to commerce. *See* note 168 and accompanying text *supra*; and EPA Brief, *supra* note 45, at 33 (emphasis added):

> We are presently before this Court . . . because the State of California twice *failed to promulgate a plan* adequate to assure that the level of air pollution within its boundaries was low enough to protect the health of its residents.

The Administrator's argument, in short, seems to be that since the states *could have chosen* to function as Congress determined would have been beneficial, they in fact *chose* to burden commerce. Such a burden justifies exercise of federal power; *further failure to act* as Congress deems useful justifies coercion. Similarly, a state which desired to leave the field to Congress' exclusive power can be said *to choose* to act in a burdensome manner, since any state policy but compliance "would indeed render the statutory scheme unworkable," EPA Supplemental Brief, *supra* note 45, at 9-10, and thus block the remedial efforts of Congress. Federal coercion is therefore justified to force a state to comply with federal regulations even should it wish to withdraw. By the peculiar logic of the Administrator, failure to act becomes the very act which triggers a necessity to act. This is double-think worthy of Orwell.

The *District of Columbia* court, after quoting the Administrator's argument, ducked its implications. It noted merely that *if* responsibility is to be assigned on this basis, the federal government bears a greater share of the blame than the Administrator acknowledged. 521 F.2d at 990-91 n.25. It also characterized the Administrator's analysis as inferring an *active* state fault: "The Administrator . . . observ[ed] that [the states] have contributed to air pollution *by adopting certain transportation policies* . . . ." *Id.* at 990 (emphasis added). The court's own analysis consistently refers to state activity. *See, e.g., id.* at 993 (recourse contemplated is direct federal regulation of the offending activity); *id.* at 994 n.27 (states are protected from federal compulsion to exercise state governmental functions in an area where they choose to remain inactive).

The United States Supreme Court recently selected this point, among others, as cause for overturning an order of a federal district judge. The judge, on the basis of statistical proof of a "tendency" on the part of Philadelphia police officials to discourage citizen complaints alleging police misconduct, had ordered the City Police Commissioner "to submit . . . for its approval a comprehensive program" to remedy this situation. The Supreme Court, in *Rizzo v. Goode*, 96 S. Ct. 598, 606 (1976), wrote:

> The theory of liability underlying the District Court's opinion . . . is that . . . petitioners' *failure* to act in the face of a statistical pattern is indistinguishable from the active conduct enjoined in *Hague* and *Medrano*. Respondents posit a constitutional "duty" on the part of petitioners . . . to "eliminate" future police

was not so bold as to make this bald assertion. He stressed instead that the states would welcome uniformity and congressional leadership; that confrontation would not occur;[224] that the impact of federal coercion would be minimal;[225] that the No-Fault Act "could be administered without *extensive* federal intervention in state administrative affairs";[226] that the bill paled beside the "far more thoroughgoing imposition of mandatory requirements on the states" made by the Clean Air Act.[227]

> From a practical standpoint, the specific responsibilities imposed on states under the Clean Air Act are so extensive that they could not be carried out by the Federal Environmental Protection Agency through either of the two enforcement mechanisms provided by the Act—court actions for injunctions or administrative orders issued by the EPA . . . . The only manner in which such large scale programs could be established through the Clean Air Act's enforcement mechanisms would be for EPA to seek federal court or administrative orders against the delinquent state agencies themselves, *specifically mandating them to act.*[228]

It seems unrealistic to believe that the states would ever welcome the "extensive" mandatory programs required by the Clean Air Act, especially when they involve as they do considerable state

misconduct; a "default" of that affirmative duty being shown by the statistical pattern, the District Court is empowered to . . . take whatever preventive measures are necessary . . . . Such reasoning, however, blurs accepted usages and meanings in the English language . . . . We have never subscribed to these amorphous propositions and we decline to do so now.

224. Griswold Opinion, *supra* note 23, at 738; No-Fault Hearings, *supra* note 6, at 727 (testimony of Dean Griswold); *see* Griswold Opinion, *supra* note 23, at 801, 865-66; No-Fault Hearings, *supra* note 6, at 726 (testimony of Dean Griswold).

225. No-Fault Hearings, *supra* note 6, at 736, 739 (testimony of Dean Griswold). Dean Griswold's characterization of the bill is not entirely accurate. Several provisions, he admitted, did require affirmative state action which a state could not decline to take. *Id.* at 731. *See also* Note, *Is Federalism Dead? A Constitutional Analysis of the Federal No-Fault Automobile Insurance Bill: S. 354*, 12 HARV. J. LEGIS. 668, 675-77 (1975).

In contrast, the *District of Columbia* court described the impact of the EPA regulations as follows: "Under the regulations here, the states are to function merely as departments of the EPA, following EPA guidelines and subject to federal penalties if they refuse to comply or if their regulation of vehicles is ineffective." District of Columbia v. Train, 521 F.2d 971, 992 (D.C. Cir. 1975).

226. No-Fault Hearings, *supra* note 6, at 731 (emphasis added).

227. *Id.* at 741 (letter from Dean Griswold to Senator Hruska).

228. *Id.* (emphasis added).

expenditure of funds and energy. But, undeterred, many advocates of congressional expansionism have argued that this "cooperative" sharing of the load is better for the states than the alternative of direct federal administration of such a program.[229] Half a loaf, might run the argument, is less intrusive and damaging to federalism than the whole loaf of unilateral congressional action.

Attorney General Edward Levi had a ready answer when this argument was put forward in committee hearings by Senator Moss:

> But, Senator, assuming, as I do, the desire to do good in this area, of course, I think it is an insidious point to say that there is more federalism by compelling a State instrumentality to work for the Federal Government.
>
> That is a very enticing argument, it makes it easier for the Federal Government to encroach, it makes it easier to wipe out the sovereignty of the separate States.[230]

When all is said and done, these arguments still come down to sanctions. Some state will balk. The unlikely will occur, as current challenges prove, and all the optimistic, minimizing rhetoric then comes down to a question of power.

The commerce power has inherent and extrinsic limits. Inherently, it reaches only to control commerce and those noncommercial activities which burden its sweep. Nevertheless, the argument that there is no intrinsic limit to the commerce power save the definition current in Congress may be valid. If so, if Congress does have power under the Commerce Clause to levy the resources and personnel of the states, it becomes necessary to determine whether there are under other constitutional provisions any extrinsic limitations on that power.

V. The Tenth Amendment: Is There A Limit?

If there is a limit on Congress' power under the Commerce Clause to thus burden the states, it must be found in the Constitu-

229. *See* Pennsylvania v. EPA, 500 F.2d 246, 263 (3d Cir. 1974); *cf.* Note, *Is Federalism Dead? A Constitutional Analysis of the Federal No-Fault Automobile Insurance Bill: S. 354*, 12 HARV. J. LEGIS. 668, 692 (1975).

230. Levi testimony, *supra* note 23, at 503. Senator Moss belittled Attorney General Levi's concern, solemnly opining, "[E]ach of us here represents a sovereign State. Believe me, it is paramount in our thinking when we come here, to see that our sovereign State is given its due." *Id.* at 504.

tion. A survey of constitutional law, however, gives bleak prospect of success. Indeed, the chief of those possible limits, the tenth amendment,[231] once was characterized by the Supreme Court as but a "truism"—that "all is retained which has not been

231. California and Maryland have also claimed the Guarantee Clause as a protection against federal power. Brown v. EPA, 521 F.2d 827 (9th Cir. 1975); Maryland v. EPA, 8 E.R.C. 1105 (4th Cir. 1975); *see* U.S. CONST. art. IV, § 4. Historically, the Guarantee Clause has been seen as a grant of power to the federal government, rather than a limit on it. The clause, for example, was relied upon by Congress to justify its Reconstruction policy after the Civil War. The Supreme Court has refused to hear cases based on the clause, finding it to be so intermixed with political questions as to be nonjusticiable. *See, e.g.*, Luther v. Borden, 48 U.S. (7 How.) 1 (1849); *cf.* Baker v. Carr, 369 U.S. 186 (1962).

California and Maryland, however, urged the courts to view the clause as a *limit* on federal power: a guarantee to the states that federal actions may not take such form as would deny them a republican form of government. In their view, the Administrator's orders amount to usurpation of essential elements of a representative form of government. At the root of their objection is the concept that representatives must be accountable to their electors, and to no other sovereign power. *See* Thomas v. Reid, 142 Okla. 38, 285 P. 92 (1930); Kiernan v. Portland, 57 Ore. 454, 111 P. 379, *rehearing denied*, 112 P. 402 (1910), *dismissed for want of jurisdiction*, 223 U.S. 151 (1912) (political question); Walker v. Spokane, 62 Wash. 312, 113 P. 775 (1911).

The *Brown* and *Maryland* courts did not reach the question, but they treated it with respect. *See* Brown v. EPA, *supra* at 840 ("petitioners are not irresponsible when they strongly suggest that the Republican Form of Government of the states would be seriously impaired"); Maryland v. EPA, *supra* at 1112, *citing In re* Duncan, 139 U.S. 449, 461 (1891).

Although discussing the Guarantee Clause, Judge Sneed seemed to suggest that an equal protection argument might be available:

> The power of each voter of each state over state expenditures, to the extent not supplied by the Federal government, would be less than his power over state taxation. Voters of other states, acting through their representatives in Congress, would dilute the strength of the voters of the states whose revenues would be spent as Congress directs.

Brown v. EPA, *supra* at 840. Additionally, a federal power to dictate how the states are to spend their revenue would appear to run afoul of the constitutional requirement that "all Duties, Imposts and Excises shall be uniform throughout the United States . . . ." U.S. CONST. art. I, § 8; *see id.* § 9. The sixteenth amendment gave the federal government power to lay *taxes on income* without uniform apportionment among the states, but a federal power to direct the allocation of state funds out of its *general* revenue seems more in the nature of a *levy on states*, rather than a tax on income. Such a system was proposed in the Federal Convention by Mr. Patterson of New Jersey, but rejected in favor of direct taxation in proportion of representation. *See* V ELLIOT'S DEBATES, *Debates on the Adoption of the Federal Constitution* 302 (1896); THE FEDERALIST NO. 21, 30-36 (Cooke ed. 1961); *cf.* United States v. California, 297 U.S. 175, 183-84 (1936); New York v. United States, 326 U.S. 572, 590-98 (1946) (Douglas, J., dissenting); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427 (1819).

surrendered."[232] It has proved to be a flimsy aid in withstanding federal power; it has seldom prevailed.

It may be well, therefore, to begin by recalling the latest statement of the Supreme Court, made in the recent case of *Fry v. United States*.[233] The tenth amendment, the Court said, is not without significance as a limit on the commerce power.

> The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.[234]

But short of this ill-defined extreme, Congress seems unconstrained. The tenth amendment seems largely a limit without content. Its contours are vague; its force is uncertain; its significance perhaps more reassuring than real.

Nonetheless, the amendment reserves to the states certain powers, and it is a postulate of constitutional construction that no provision is without meaning.[235] Disagreement as to that meaning, however, and its effect on the boundaries of state and federal sovereignty, has existed almost from the beginning.

A. *The Sphere of the States*

Most commentators have agreed that national power, though supreme, was limited to enumerated objects. Most could also agree that the states were equal to the nation in the quality of their sovereignty.[236] It was of the same stuff, and clothed state officers with the same immunities and powers. Where differences arose

232. United States v. Darby, 312 U.S. 100, 124 (1941).

233. 421 U.S. 542 (1975).

234. *Id.* at 547-48 n.7.

235. *See, e.g.*, Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570-71 (1840).

236. In the opinion of the Supreme Court in 1793, the people and only the people were sovereign. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 470-71 (1793) (Jay, C.J.), *overruled as to another point by the people*, U.S. CONST. AMEND. XI.

Nonetheless, though it might be more accurate to speak of "national power" as against "state power," the powers granted to government are usually spoken of as evidence of the *government's* "sovereignty," and it will do no harm to discuss them as such here. *See* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 410 (1819): "In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign . . . ."

was over the *extent* of federal power, and the *result* when that power conflicted with state sovereignty.[237]

In Madison's view, the principle of the equality of the states[238] in the scheme of federal power did not call for much discussion:

> [T]he equal vote allowed [in the Senate] to each state, is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument for perserving that residuary sovereignty.[239]

The state constitutions, Professor Hart quotes Madison as having written,

> announce clearly . . . that whereas the powers of the federal government "consist of specific grants taken from the general mass of power [we, the state governments] possess the general mass with special exceptions only."[240]

Chief Justice Marshall spoke for the powers of the nation, though explicitly admitting that states possessed "powers of sovereignty."[241] Writing for the Court in *M'Culloch v. Maryland*, he said:

237. Madison stated his position succinctly:

> [T]he operation of the Government on the people in their individual capacities, in its ordinary and most essential proceedings, may on the whole designate it in this relation a *national* Government.
>
> But if the Government be national with regard to the *operation* of its powers, it changes its aspect again when we contemplate it in relation to the *extent* of its powers. . . . In this relation then the proposed Government cannot be deemed a *national* one; since its jurisdiction extends to certain ennumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.

THE FEDERALIST NO. 39, at 255-56 (Cooke ed. 1961).

238. According to Professor Corwin, the notion that the balance of state and federal powers express any "equality" of sovereignty between state and national governments was a post-constitutional development, now abandoned. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 13-17 (1950) [hereinafter cited as Corwin]; *see* Corwin, *National-State Cooperation—Its Present Possibilities*, 46 YALE L.J. 599 (1937).

239. THE FEDERALIST NO. 62, at 417 (Cooke ed. 1961). Although Madison looked to the national government to be the primary guardian of state sovereignty, he nonetheless affirmed, as he wrote Everett in 1830, that "State functionaries . . . [are] altogether independent of the agency or authority of the U[nited] States." Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558-59 (1954), *citing* 9 WRITINGS OF JAMES MADISON 383, 395-96 (Hunt ed. 1910).

240. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 491 (1954), *citing* 9 WRITINGS OF JAMES MADISON 199-200 (Hunt ed. 1910).

241. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 410 (1819); *see* note 236 *supra*.

> This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted.[242]

At the same time, Professor Corwin has suggested, the Chief Justice committed himself to other positions in that opinion "which in their total effect went far in the judgement of certain of his critics to render the National Government one of 'indefinite powers'."[243] Among them were his characterization of the power of "regulating commerce" as a "great, substantive and independent" power, and his famous construction of the Necessary and Proper Clause.[244]

Professor Corwin reported Madison's protest:

> Approaching the opinion from the angle of his quasi-parental concern for "the balance between the States and the National Government", Madison declared its central vice to be that it treated the powers of the latter as "sovereign powers", a view which must inevitably "convert a limited into an unlimited government" for, he continued[,] "in the great system of political economy, having for its general object the national welfare, everything is related immediately or remotely to every other thing; and, consequently, a power over any one thing, not limited by some obvious and precise affinity, may amount to a power over every other." "The very existence," he consequently urged, "of the local sovereignties" was "a control on the pleas for a constructive amplification of the national power."[245]

The Chief Justice was not averse to such an expansion, as his forceful construction of the Supremacy Clause in *Gibbons v. Ogden* indicates.[246] But he did not expect to settle the matter. As he wrote in *M'Culloch v. Maryland*, "[T]he question respecting the

242. *Id.* at 405.

243. Corwin, *supra* note 238, at 7.

244. *Id.*; M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

245. Corwin, *supra* note 238, at 7.

246. [T]he framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. . . . In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210-11 (1824).

extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist."[247] He ruled in favor of national supremacy in *M'Culloch*, but Marshall's proviso is pertinent: "[T]he government of the Union, though limited in its powers, is supreme *within its sphere of action*."[248]

B. *The Sphere of the Nation*

Whatever powers the states may hold in the aggregate, and however generally admitted may be their sovereignty, there remains great question whether these powers can limit federal exercise of the commerce power.*

"[T]he States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce."[249] Thus, in *Maryland v. Wirtz*, the Court rejected "the contention that state concerns might constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce."[250]

> There is no question that this power is superior to that of the States to provide for the welfare or necessities of their inhabitants. In matters where the States may act the action of Congress overrides what they have done.[251]

Nor does it seem to matter how heavy is the burden imposed by Congress on the states, nor how essential to state sovereignty is the function Congress restricts. The Court rejected the former conten-

247. 17 U.S. (4 Wheat.) 316, 405 (1819). Similarly, in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 204-05 (1824), he wrote, "In our complex system, . . . contests respecting power must arise."

248. 17 U.S. (4 Wheat.) at 405 (emphasis added).

249. Parden v. Terminal Ry., 377 U.S. 184, 191 (1964); *see* Employees of Dep't of Public Health & Welfare v. Dep't of Public Health & Welfare, 411 U.S. 279, 286 (1973).

> The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. . . . In each case the power of the state is subordinate to the constitutional exercise of the granted federal power.

United States v. California, 297 U.S. 175, 184 (1936); *see* Employees of Dep't of Public Health & Welfare v. Dep't of Public Health & Welfare, 411 U.S. 279, 288-89 (1973).

250. 392 U.S. at 183, 195-96.

251. Sanitary Dist. of Chicago v. United States, 266 U.S. 405, 426 (1925).

* *See* AUTHOR'S NOTE, *infra, at 367, for recent developments in this area.*

tion in *Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare*:

> Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States.[252]

Justice Douglas added a mild caveat, declining for the Court to extend this proposition to cases "where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States . . . is not clear."[253]

Similarly, in *Case v. Bowles*,[254] the Court disapproved the argument

> that the extent of that power as applied to state functions depends on whether these are "essential" to the state government. The use of the same criterion in measuring the constitutional power of Congress to tax has proved to be unworkable, and we reject it as a guide in the field here involved.

Indeed, in *Sanitary District of Chicago v. United States*,[255] the Court almost arrogantly proclaimed "the edict of a paramount power" against which state concerns cannot prevail.

C. *Sovereignty and Limitation*

The Supreme Court has not yet made clear what significance the tenth amendment can have in the face of the sweeping powers asserted under the Commerce Clause. Even as in *Fry v. United States* it reasserted in dictum the vitality of the amendment, it rejected the claims raised by the State of Ohio, "convinced that the . . . regulations constituted no . . . drastic invasion of State sovereignty."[256] In *Maryland v. Wirtz*, as the Court of Appeals for the District of Columbia noted in *District of Columbia v. Train*, the Court chose to rely "on the limits inherent in the commerce

252. 411 U.S. at 284.
253. *Id.* at 287.
254. 327 U.S. 92, 101 (1946) (footnote omitted).
255. 266 U.S. 405, 432 (1925).
256. 421 U.S. 547-48 n.7.

power"[257] to find "ample power to prevent what the appellants purport to fear, 'the utter destruction of the State as a sovereign political entity.' "[258] Such faint praise may well leave the tenth amendment no more potent than before the *Fry* pronouncement, and certainly leaves the states no more informed as to the boundary between state and national sovereignty.

At a minimum, it would seem, a state seeking to protect its inherent sovereign power from infringement by Congress under the Commerce Clause must show that its powers were not surrendered in 1787 when the Constitution was ratified, or alternatively, that they were resumed by the ratification of the tenth and eleventh amendments; that whatever powers it retains are sufficient to prevail against the very broad power of Congress under the Commerce Clause; and that the regulation imposed on it by Congress impairs state integrity or the state's ability to function effectively in our federal system.[259] The Supreme Court has furnished these minimum requirements, but it has not supplied a test for determining when they have been met.

"The problem is not one to be solved by a formula, but we may look to the structure of the Constitution as our guide to decision," wrote Chief Justice Stone in *New York v. United States*.[260] We may also look to cases dealing with other enumerated or paramount federal powers for a reflection in them of the federal structure the constitutional plan guarantees.

1. *The Tax Cases*. In this regard it may be useful to review the inconsistent course of judicial interpretation of state and federal tax powers. Admittedly, the courts, beginning at least with Chief Justice Marshall's exposition in *Gibbons v. Ogden*, have generally denied any analogy between the power to tax and the power to regulate commerce.[261] Chief Justice Stone (writing for a unanimous Court while still an Associate Justice) specifically "rejected an argument that the commerce power is circumscribed by state

257. District of Columbia v. Train, 521 F.2d 971, 993 (D.C. Cir. 1975).

258. Maryland v. Wirtz, 392 U.S. 183, 196 (1968).

259. A state may also be obliged to make a fourth albeit procedural showing: that it has neither consented to Congress' infringement of its power nor waived its standing to object by voluntarily submitting to any "condition" put on some grant from Congress of power or money. *See* Parden v. Terminal Ry., 377 U.S. 184 (1964); Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

260. 326 U.S. 572, 589 (1946) (concurring opinion) (tax power case).

261. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

sovereignty, as is the taxing power."[262] He wrote:

> The analogy of the constitutional immunity of state instrumentalities from federal taxation . . . is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power . . . which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it . . . . Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.[263]

His thesis is unconvincing. A boundary marked by "traditional" activities of the states is changeable and undependable.[264] The "nature of our federal system and the relationship within it of state and national governments" may be just as "unduly curtailed" by a commerce power as by a taxing power. If the tenth amendment has meaning as a limit on the commerce power, the "reserved powers" of the states—whether defined "traditionally" or by reference to "the nature of our federal system"—have meaning in the context of other federal powers as well. Why should not the outlines of state sovereignty discerned in those contexts also have meaning within the context of the commerce power? The Constitution on its face does not make such a distinction. In reading this passage, one suspects a Court carried away in enthusiastic repentance for its error in opposing the New Deal.

One may at least look to the tax cases for suggestion, if not precedent. The tenth amendment furnishes its own authority: one

262. Maryland v. Wirtz, 269 F. Supp. 826, 842 (D. Md. 1967) (three-judge court), *aff'd*, 392 U.S. 183 (1968).

263. United States v. California, 297 U.S. 175, 184-85 (1936).

264. For examples of "traditional" powers once securely reserved to the states, but now found within the federal sphere, *see* United States v. Butler, 297 U.S. 1, 68 (1936) (agricultural production is "a matter beyond the powers delegated to the federal government"); Bailey v. Drexel Furniture Co., 259 U.S. 20, 36 (1922) (regulation of child labor is an exclusively state function); Hammer v. Dagenhart, 247 U.S. 251 (1918) (regulation of child labor is a purely local matter), *overruled*, United States v. Darby, 312 U.S. 100 (1941).

need only find flesh to clothe its dry bones. The concern evinced in the tax cases for those things "indispensable to [the states'] existence"[265] has relevance in that search.

M'Culloch is again the fountainhead, and illustrates the balanced ideas which flow through subsequent Court discussion. While stating unequivocally that the sovereignty of the states is subordinate to the Constitution of the United States,[266] Chief Justice Marshall recognized the independence of state functions from federal control:

> We have a principle which leaves the power of taxing the people and the property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution.[267]

Elsewhere in the opinion, he wrote:

> In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.[268]

Accordingly, the state, though sovereign, could not tax a corporation of the United States. Each sovereign was to remain in control of its sphere, but the United States was supreme when those spheres seemed to overlap.

This principle was reaffirmed in the cases of *Dobbins v. Commissioners of Erie County*,[269] where the Court barred state taxation of a federal officer, and again in *Collector v. Day*,[270] where the Court barred federal taxation of a state officer. *Collector* stated the idea of equality not recognized in *M'Culloch*:

> The general government, . . . in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, "re-

265. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 199 (1824).
266. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427 (1819).
267. *Id.* at 430.
268. *Id.* at 410.
269. 41 U.S. (16 Pet.) 435 (1842).
270. 78 U.S. (11 Wall.) 113 (1870).

> served," are as independent of the general government as that government within its sphere is independent of the States.
>
> . . . .
>
> Such being the separate and independent condition of the States in our complex system, . . . it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired. . . .[271]

But since by engaging in commercial activities a state could through its tax exemption effectively reduce the base of federal revenue, the Court drew back from its position in *Collector* to find, in the case of *South Carolina v. United States*,[272] a distinction between "governmental" functions and state business of a private nature. In the latter area, the federal government could tax the states. But the Court restated its vigilant protection of genuinely governmental functions. The *South Carolina* Court quoted the case of *Texas v. White*,[273] to say,

> "Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."
>
> . . . .
>
> [Each State's] internal affairs are matters of its own discretion. [The constitutional guarantee of a republican form of government] expresses the full limit of National control over the internal affairs of a State.[274]

Pressing in later years its concept of state autonomy, the Court invalidated congressional attempts to ban use of child labor and to protect agriculture from the ravages of the Depression. In the Child Labor Cases, *Hammer v. Dagenhart*[275] and *Bailey v. Drexel*

271. *Id.* at 124-25.
272. 199 U.S. 437 (1905).
273. 74 U.S. (7 Wall.) 700, 725 (1868).
274. South Carolina v. United States, 199 U.S. 437, 453, 454 (1905).
275. 247 U.S. 251 (1918), *overruled*, United States v. Darby, 312 U.S. 100 (1941).

Furniture Company,[276] the Court rejected both the use of the tax power and the commerce power as tools to control the employment of children. The states controlled such purely local matters, the Court ruled,[277] and Congress could not reach an area reserved exclusively to the states by calling a penalty a tax. Similarly, in the *A.A.A. Case*, *United States v. Butler*,[278] the Court threw back what it saw as an unconstitutional usurpation of state power to regulate agriculture. Such a system as Congress proposed, it felt, must lead to the obliteration of the states, a result which could not have been intended by the Constitution.

But faced with raging protest from both the President and Congress, the Court reaffirmed national supremacy. Though the commerce power had previously been broadly construed in *Gibbons*, the Court had long since withdrawn to more limited views. In *United States v. California*,[279] however, the Court again gave it sweeping expression. The states were subordinate to the Congress under the Commerce Clause; their sovereignty was diminished to the extent of any power granted by the Constitution to the federal government. The Court rejected the tax cases' distinction between "governmental" and "private" activities of the state, and held that a state, by engaging in interstate commerce by rail, subjects itself to the commerce power on the same basis as a private individual.[280] And by the same token, it held in *New York ex rel. Rogers v. Graves*,[281] that a federal railway (and the salaries of its officers) was exempt from state taxation. The Court tempered its strong federal bias only by pointing out that the federal corporation was an "instrumentality" of the United States, with a primarily "governmental" purpose.[282]

The Court attempted to find a balance in a pair of cases decided the following year. It conceded in *Helvering v. Mountain Producers Corp.*[283] the power of Congress to tax the lessee of a state government, but pointed out that the corporation was no "instru-

276. 259 U.S. 20 (1922).
277. *Id.* ; Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled*, United States v. Darby, 312 U.S. 100 (1941).
278. 297 U.S. 1 (1936).
279. 297 U.S. 175 (1936).
280. *Id.* at 183-85.
281. 299 U.S. 401 (1937).
282. *Id.* at 408.
283. 303 U.S. 376 (1938).

mentality" of the state, and the federal tax did not substantially interfere with the state's interest. In *Helvering v. Gerhardt*,[284] the Court held that state immunity from taxation must be narrowly limited, but suggested it would recognize an immunity where the tax applied to "activities thought . . . to be essential to the preservation of state governments. . . ."[285] and where the state could show a burden on the state which was neither speculative nor uncertain. The Court read *Collector* as giving immunity only where

> it was deemed necessary to protect the States from destruction by the federal taxation . . . of those governmental functions which they were exercising when the Constitution was adopted and which were essential to their continued existence.[286]

The Supreme Court overruled both *Collector* and *New York ex rel. Rogers v. Graves* in *Graves v. New York ex rel. O'Keefe*,[287] insofar as they recognized an implied immunity from a nondiscriminatory income tax on salaries of officers of national or state governments or instrumentalities. The theory of immunity, it said, rested on an implied limit on the taxing power "to forestall *undue* interference, through the exercise of that power, with the governmental activities of the other."[288]

The Court summed up this confused agreement in the 1946 case of *New York v. United States*.[289] Writing for the Court in an opinion joined by only one other Justice, Mr. Justice Frankfurter belittled the fear that taxation would lead one government to cripple or obstruct the operations of the other. The reciprocal immunity developed on this fear, he said, assumed an equivalence of power and sovereignty which did not exist. Borrowing a page from commerce cases, he maintained that when a state entered the market, "it divests itself of its *quasi* sovereignty . . . ."[290] He spoke approvingly of a limited role for the courts in questions involving such fiscal and political factors, and disavowed "governmental" and "proprietary" distinctions. Limits based on such "untenable criteria" could not restrain the Congress' power where the tax was levied equally on private persons.

284. 304 U.S. 405 (1938).
285. *Id.* at 419.
286. *Id.* at 414.
287. 306 U.S. 466 (1939).
288. *Id.* at 477-78 (emphasis added).
289. 326 U.S. 572 (1946).
290. *Id.* at 579.

But six Justices spoke against any taxing power which would impair the sovereign status of a state. Concurring in the result, four Justices, led by Chief Justice Stone, noted that Congress here did not tax the state "as a State." The Chief Justice quoted from *Metcalf & Eddy v. Mitchell*:[291]

> "But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. . . . Hence the limitation upon the taxing power . . . cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it."[292]

Mr. Justice Douglas, in a dissenting opinion joined by Mr. Justice Black, in turn quoted *United States v. Railroad Co.*[293] for the proposition that states are wholly immune from federal taxation:

> "The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal government from its oganization."[294]

Further, he went on,

> [t]he notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system. . . . The Constitution was designed to keep the balance between the States and the Nation outside the field of legislative controversy. . . . If the power of the federal government to tax the States is conceded, . . . [the States] become subject to interference and control both in the functions which they exercise and the methods which they employ. They must pay the federal government for the privilege of exercising the powers of sovereignty guaranteed them by the Constitution . . . .[295]

Thus, after an erratic course, the Court seemed to settle on these principles: (1) Congress is supreme within its sphere, and its taxing power may reach state activities, whether governmental or proprietary; (2) the states are sovereign, and Congress' power of

291. 269 U.S. 514, 523-24 (1926).
292. 326 U.S. at 589.
293. 84 U.S. (17 Wall.) 322, 327 (1872).
294. New York v. United States, 326 U.S. 572, 593 (1946).
295. *Id.* at 594-95.

taxation may not reach so far as to impair the functioning of a state "as a State"; (3) the states must show by evidence which is neither speculative, uncertain, nor conjectural that the burden placed on them limits activities "essential to the preservation of state governments . . . ."[296] The parallel between this conclusion and that presented in *Wirtz*, *Employees* and *Fry* is striking.

2. *The Injunction Cases*. Similar concern for state sovereignty is shown in the line of cases dealing with court power to enjoin the activities of state officers. These cases speak in terms of "comity," rather than constitutional limitation of power, but the principles they espouse are illuminating. The courts have been willing to give relief when they needed only to order a state officer to cease the conduct complained of, but they have been most reluctant to require affirmative action by the sovereign state.

The leading case of *Ex parte Young*[297] devised the fiction that a state officer, acting in contravention of the Federal Constitution, is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."[298]

Congress itself moved to restrict the scope of this device by enacting requirements that three-judge federal courts sit to consider such suits,[299] that in certain types of cases injunctions be denied where "a plain, speedy and efficient" remedy in state courts is available,[300] that injunctions not be granted against state taxes,[301] and that pending state court proceedings not be stayed or enjoined except under special circumstances.[302]

The Supreme Court, in *Railroad Commission v. Pullman Co.*,[303] directed the district court to abstain in a case challenging a state law under both the state and Federal Constitutions, pending resolution of the state question. Mr. Justice Frankfurter commended

> a doctrine of abstention appropriate to our federal system whereby the federal courts, "exercising a wise discretion," restrain their authority because of "scrupulous regard for the rightful

296. Helvering v. Gerhardt, 304 U.S. 405, 419 (1938).
297. 209 U.S. 123 (1908).
298. *Id.* at 160.
299. 28 U.S.C. § 2281 (1970).
300. 28 U.S.C. §§ 1341, 1342 (1970).
301. 28 U.S.C. § 1341 (1970) (provided that a "plain, speedy and efficient remedy may be had in the courts of such State").
302. 28 U.S.C. § 2283 (1970).
303. 312 U.S. 496 (1941).

> independence of the state governments" and for the smooth working of the federal judiciary.[304]

This interest in harmony and efficiency was buttressed by the decision in *Larson v. Domestic & Foreign Commerce Corp.*[305] which restricted by law rather than discretion the circumstances in which a governmental officer would be considered to be acting in a private rather than official capacity.

> [T]he action of an officer of the sovereign . . . can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.[306]

Again, in *Dombrowski v. Pfister*, while not finding abstention the proper course, the Court cited "considerations of federalism" as tempering its power.[307] It granted injunctive relief because "the State's criminal prosecution will not assure adequate vindication of constitutional rights . . . . These allegations, if true, clearly show irreparable injury."[308]

The Court limited even this fairly stringent test in *Cameron v. Johnson*.[309] *Dombrowski*, it said, applied to sections of a statute "patently unconstitutional on their face"; the situation presented circumstances of bad faith harassment through invocation of state statutes.[310] Here, they said, there had not been shown the kind of irreparable injury necessary " 'to justify a disruption of orderly State proceedings.' "[311]

The Court confirmed its narrow view of *Dombrowski* in *Younger v. Harris*,[312] and cited as an "even more vital consideration" than efficiency,

> the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the

304. *Id.* at 501.
305. 337 U.S. 682 (1949).
306. *Id.* at 701-02.
307. 380 U.S. 479, 484 (1965); *see* Rizzo v. Goode, 96 S. Ct. 598, 608 (1976).
308. 380 U.S. at 485-86.
309. 390 U.S. 611 (1968).
310. *Id.* at 619.
311. *Id.* at 621, *quoting* Dombrowski v. Pfister, 380 U.S. 479, 485 (1965).
312. 401 U.S. 37 (1971).

> States and their institutions are left free to perform their separate functions in their separate ways . . . . The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.[313]

The recent case of *Edelman v. Jordan*[314] further evidences the Court's respect for state functions and its sense of the limits on national power. In it, the Court limited *Young* to prospective relief only, and refused to perpetuate the fiction of a private state officer.

> "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."[315]

The Court declined to extend *Parden v. Terminal Railway*[316] or *Employees*[317] to find waiver or consent from either the language of the federal statutes or "mere" state participation in a federally funded program. Waiver of state immunity would in the future be found only where it was expressly or overwhelmingly implied by the text of the statute.

Thus, in this area as well, the Supreme Court has compromised between its distaste for absolute sovereign immunity and its recognition that state sovereignty and immunity have protected status necessary to the legitimate activities of the states. With the exception of "certain primary duties of state judges and occasional remedial duties of other state officers," affirmative mandates are infrequent.[318] Most federal commands are negative, "recognizing the responsibility of the states for the day-to-day task of governing

313. *Id.* at 44.

314. 415 U.S. 651 (1974).

315. *Id.* at 663, *quoting* Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945).

316. Parden v. Terminal Ry., 377 U.S. 184 (1964).

317. 411 U.S. 279 (1973).

318. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 516 (1954).

but telling them to carry it out without infringement of federal standards."[319]

The Supreme Court perhaps focused the limits of this power in *Rizzo v. Goode*,[320] decided this year:

> When the frame of reference moves from a unitary court system . . . to a system of federal courts representing the Nation, subsisting side by side with 50 state judicial, legislative, and executive branches, appropriate consideration must be given to *principles of federalism* in determining the availability and scope of equitable relief.[321]

3. *The Constitutional Convention*. Further evidence elucidating the boundary between state and federal power is found in the records of the Constitutional Convention. Just such a power as is claimed by the Administrator for Congress, in another form, was proposed and emphatically rejected three times by the Convention. The Clean Air Act resurrects Randolph's idea of a congressional "negative" on the states; in fact, the Clean Air Act, as the Administrator construes it, goes further and establishes a congressional power of "affirmative" control of state activity.

Randolph's Sixth Resolution included this language:

> *Resolved*, . . . that the national legislature ought to be empowered . . . to negative all laws passed by the several states contravening, in the opinion of the national legislature, the Articles of Union, or any treaty subsisting under the authority of the Union . . . .[322]

In its support, Mr. Pinckney

> urged that such a universality of the power was indispensably necessary in order to render it effectual; that the states must be kept in due subordination to the nation; that, if the states were left to act of themselves in any case, it would be impossible to defend the national prerogatives, however extensive they might be, on paper; that the acts of Congress had been defeated by this means; nor had foreign treaties escaped repeated violations; that this universal negative was in fact the corner-stone of an efficient national government . . . .[323]

319. *Id.* at 517.

320. 96 S. Ct. 598 (1976).

321. *Id.* at 608 (emphasis added); *see* Doran v. Salem Inn, Inc., 422 U.S. 922, 928 (1975); Mitchum v. Foster, 407 U.S. 225, 243 (1972).

322. V ELLIOT'S DEBATES, *Debates on the Adoption of the Federal Constitution* 127-28 (1896).

323. *Id.* at 171.

Even Madison, concerned at that time with the weakness of the central government, vigorously supported the resolution. Seconding it, he described the negative "as absolutely necessary to a perfect system."[324]

The resolution was vehemently attacked by Mr. Bedford, Mr. Gerry, Mr. Butler and others. Their objections induced Madison to concede "that the difficulties which had been started [*sic*] were worthy of attention, and ought to be answered before the question was put."[325] Speaking to these difficulties, Mr. Gerry

> could not see the extent of such a power, and was against every power that was not necessary . . . . The national legislature, with such a power, may enslave the states. Such an idea as this will never be acceded to. It has never been suggested or conceived among the people. No speculative projector—and there are enough of that character among us, in politics as well as in other things—has, in any pamphlet or newspaper, thrown out the idea.[326]

The power proposed by Randolph was defeated, 7 to 3, Delaware divided. Only Massachusetts, Pennsylvania and Virginia voted yes. In later debates, it was twice again rejected.

It is noteworthy that the Supremacy Clause (or more exactly, a resolution embodying the clause) was adopted without recorded debate immediately after the Convention's second rejection of the negative.[327] The Framers thus evidenced the clear distinction in their minds between the supremacy of the nation, which they approved, and the power of the nation to control the functioning of the states, which they rejected.

D. *The Clean Air Cases: The Boundaries of National Power*

From the foregoing one may deduce certain constant political values, values which underlie and shape the whole structure of our federal system, and which may serve as benchmarks or landmarks to assist a survey of the line dividing state from federal sovereignty. Foremost of these, of course, are the twin poles of federalism: sufficient national supremacy to preserve unity, and adequate state autonomy to prevent centralization. From these standards, other

324. *Id.*
325. *Id.* at 173.
326. *Id.* at 171-72.
327. *Id.* at 321-22.

constitutional guideposts follow: an inviolable sovereignty of the states serving to check national aggrandizement; supreme plenary enumerated powers dominating local concerns to serve the general interest; the insulation of "indispensable" state functions from "drastic invasions" by federal power; a national supremacy overcoming state activities burdening by their effect national areas of power.

Other variants of the same precepts can be discovered, but all bespeak a concern with the nature of the federal system and the relationship of the states and nation. They all point to a *balance of power*, a balance adjusted pragmatically to serve both liberty and efficiency. The political structure created by the Constitution serves those values, and any interpretation of that structure must accord with those values, or it is false.

The demarcation line between states and nation is uncertain, particularly in the field of commerce. After two hundred years of independence, it remains one of the unresolved questions of our history.

The celebration of federalism in the trio of cases lately decided—*Brown*, *Maryland* and *District of Columbia*—reduces the quandary. Though all three Courts of Appeals held on statutory grounds that the Clean Air Act does not authorize the Administrator to require states to enact statutes or regulations, or to enforce federal regulations against others,[328] each of the courts also discussed the basic political and constitutional principles that guided its decision.

The *Brown* court focused on the distinction between commerce and governance:

> The *power of states over commerce* has no more been recognized as *commerce* than has the *power of Congress which is derived from the Commerce Clause*. Each find their source in the Constitution. Both are of the same family and genus, although not of the same species. The power of the states must yield to Federal power in order to effectuate Federal supremacy, not because the power of the states is commerce . . . .

328. District of Columbia v. Train, 521 F.2d 971, 986 (D.C. Cir. 1975), *cert. granted*, 44 U.S.L.W. 3685 (U.S. June 1, 1976) (No. 75-1055), *cert. granted sub nom.* State Air Pollution Control Board v. Train, 44 U.S.L.W. 3685 (U.S. June 1, 1976) (No. 75-1050); Maryland v. EPA, 8 E.R.C. 1105, 1114-15 (4th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3685 (U.S. June 1, 1976) (No. 75-960); Brown v. EPA, 521 F.2d 827, 831 (9th Cir.), *cert. granted*, 44 U.S.L.W. 3685 (U.S. June 1, 1976) (No. 75-909).

> To treat the governance of commerce by the states as within the plenary reach of the Commerce Power would in our opinion represent such an abrupt departure from previous constitutional practice as to make us reluctant to adopt [such an] interpretation of the Clean Air Act . . . . To make *governance* indistinguishable from *commerce* for the purposes of the Commerce Power cannot be equated to the "unintrusive" regulation of economic activities of the states upheld by the Supreme Court in *Maryland v. Wirtz* and *Fry v. United States*. A Commerce Power so expanded would reduce the states to puppets of a ventriloquist Congress.[329]

The *Maryland* court focused on the incidents of sovereignty:

> [W]hile it may be true that some, or even many of the attributes of state sovereignty have been diminished by the exercise by Congress of the broad rights accorded the nation under the commerce clause, it is equally true that if there is any attribute of sovereignty left to the states it is the right of their legislatures to pass, or not to pass, laws. As the Court stated in *In re: Duncan*, "By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies . . . ."
>
> . . . If the national legislature may not revise, negative or annul a law of a state legislature, how an Act of Congress may be construed to permit an agency of the United States to direct a state legislature to legislate is difficult to understand.[330]

The Court of Appeals for the District of Columbia went further. It held, on tenth amendment grounds, that

> [a] federal regulation which compels the states to enforce federal regulatory programs clearly "impairs the States' integrity" and "their ability to function in a federal system."[331]

The court disagreed with the Third Circuit's conclusion in *Pennsylvania v. EPA*[332] that direct federal enforcement would not be less intrusive of state sovereignty.

> The principle at work here is not that the states have an interest in keeping the federal government from regulating vehicles

329. Brown v. EPA, 521 F.2d 827, 839 (9th Cir. 1975).

330. Maryland v. EPA, 8 E.R.C. 1105, 1112 (4th Cir. 1975) (citations omitted), *quoting In re* Duncan, 139 U.S. 449, 461 (1891).

331. District of Columbia v. Train, 521 F.2d 971, 994 (D.C. Cir. 1975).

332. 500 F.2d 246 (3d Cir. 1974).

> owned by their citizens but rather that they are to be protected from federal compulsion to exercise state governmental functions in an area where they choose to remain inactive.[333]

Further, the court felt, the tenth amendment spoke to

> the extent of federal intrusion into state sovereignty . . . even where the federal regulations are an exercise of the commerce power . . . . In other words, the Tenth Amendment may prevent Congress from selecting methods of regulating which are "drastic" invasions of state sovereignty where less intrusive approaches are available.[334]

The *District of Columbia* court recognized that the Commerce Clause clearly gives the federal government power to direct owners of motor vehicles to install and maintain emission controls.[335] "Since the federal government acts under its commerce power when it enforces its own regulations against vehicle owners, direct federal regulation by definition involves no intrusion on state sovereignty whatsoever."[336]

Also, once Congress has properly determined that the emission of pollutants affects interstate commerce, it has power under the Commerce Clause to regulate those activities which cause pollution either directly or indirectly, whether or not a particular source is operated by a state.[337] Thus, a state can be compelled "to operate [its] transportation systems in accordance with federal regulations . . . requiring them to purchase buses and construct exclusive bus lanes."[338]

The court recognized the supremacy of the federal government by carefully specifying that "to the extent that the state is subject to federal regulation under the commerce power, it will also be subject to the penalties provided for violation of those regulations."[339] Outside of the area of commerce, it would follow, a state is free of federal sanctions based on the Commerce Clause.

Similarly, the federal government, pursuant to its "power to *regulate*[,] that is, to prescibe the rule by which commerce is to be

333. District of Columbia v. Train, 521 F.2d 971, 994 n.27 (D.C. Cir. 1975).
334. *Id.* at 994.
335. *Id.* at 988.
336. *Id.* at 994 n.27.
337. *Id.* at 989.
338. *Id.* at 990.
339. *Id.* at 990 n.24.

governed,"[340] could require that commerce on state streets and highways be governed as it directs, as long as it "does not specify the manner in which the state is to comply."[341] This holding seems difficult to justify, since what is regulated is not commerce, but the state government's regulation of the commerce of others. The *Brown* court's objection seems well-taken.[342]

The ruling becomes palatable only by adopting the District of Columbia Court of Appeals' underlying assumption: the state is an operator of its highway system in a manner

> analogous to the railroad operated by the state in *United States v. California*. This situation is similar to federal statutes passed in the 1890's requiring the railroads to operate safe trains. Acting under its commerce power, the federal government thus can order the states to operate their transportation systems in accordance with federal regulations . . . .[343]

Beyond the limits of that assumption, the court's rule would seem of doubtful constitutionality, but beyond that point the court did not go. It drew the line, holding

> that the Administrator, in the exercise of federal power based solely on the commerce clause, cannot against a state's wishes

340. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824) (emphasis added).

341. District of Columbia v. Train, 521 F.2d 971, 991 (D.C. Cir. 1975).

342. In many respects, the difficulty with the *District of Columbia* decision is not that its analysis of the nature of the commerce power is too loose, but that it is too finely drawn. The numerous distinctions it found may be indistinguishable in practice. For example, how does one differentiate between a valid "rule of governance" and an invalid "detail of administration"? *See* note 342 and accompanying text *infra*. What substantive difference is there? *See* District of Columbia v. Train, 521 F.2d 971, 991-92 (D.C. Cir. 1975).

The *District of Columbia* court seemed to emphasize the *manner* in which the federal government exercises its power: "drastic" invasions of state sovereignty are barred, *id.* at 994, but regulations which leave to the state's discretion the method of compliance are valid. *Id.* at 991. If all the careful distinctions come down to a simple matter of degree, rather than power, the *District of Columbia* decision may prove to be a fragile protection for the states. Here, as with the statutory analyses made by each circuit court, the attempt to limit federal depredations without crippling its vital capacity to govern, seems to mark a judiciousness more finely tempered than so robust an issue may require.

343. *Id.* at 989-90 (citations omitted). The *Brown* court rejected this analogy:

> [W]e [do not] believe that it is proper to equate the operation by a state of a railroad, an *economic activity* indistinguishable from that of private parties, with its *governance* of the use of highways and automobiles, an exercise of its police power with respect to commerce.

Brown v. EPA, 521 F.2d 827, 838 (emphasis in original; footnote omitted).

> compel it to become involved in administering the details of the regulatory scheme promulgated by the Administrator.[344]

Congress, it noted, has means of obtaining state cooperation. But where cooperation is not forthcoming, "the recourse contemplated by the commerce clause is direct federal regulation of the offending activity and not coerced state policing" of a federal plan under threat of federal enforcement proceedings.[345]

In summary, the three courts seemed guided by certain principles of federalism common to the constitutional plan of powers. These principles define the line separating the powers of the states and of the nation.

First, the tenth amendment guarantees every state the option of withdrawal from the field, and thus the *power* to exempt its functions from federal control. Second, the tenth amendment recognizes a distinction between inaction and action, and thus refutes the claim that inaction is a sufficient burden to trigger the commerce power. Third, the tenth amendment prevents the federal government from making drastic intrusions upon state sovereignty where less intrusive measures are available, thus preserving the vitality of the federalist balance. Fourth, the Commerce Clause permits direct or indirect federal regulation of activities affecting commerce, whether state or private. Fifth, the Supremacy Clause and the Commerce Clause empower the federal government to penalize state resistance to valid exercises of federal power, thus maintaining the unity of the nation. Sixth, the Commerce Clause makes state regulation of and engagement in commerce subject to the rules Congress prescribes, provided only that Congress leaves to the discretion of the state the manner in which it chooses to comply. Seventh, where a state's activities do not affect commerce, and where it chooses to decline Congress' blandishments or reject its threats, neither the Commerce Clause, the Supremacy Clause, nor the tenth amendment permit Congress to coerce the activities of the state.

VI. THE FEDERALIST PRINCIPLE

The text of the Constitution has left the courts hung on the horns of a constant dilemma. Where one clause grants, another

344. District of Columbia v. Train, 521 F.2d 971, 992 (D.C. Cir. 1975).
345. *Id.* at 993.

limits. The frame of the federal structure is left uncertain in many areas.

The constitutional clauses, "To regulate Commerce," and "To make all Laws which shall be necessary and proper" to the execution of the commerce power, are like all written words. When turned loose into the world, they have independent vigor of their own, becoming whatever their finder would regard them as representing. Words can no more be locked into the meaning intended by their progenitor than can a fluid be forced to hold invariant form. Thus, the meaning given to the Commerce Clause by the Framers of the Constitution, while marking certain values and an idea of the federal structure, cannot begin to express the commercial structure of that day, and even less the commercial realities of today.

On some constitutional questions, however, the issues turn not on the simple meaning of words but on the abiding political concepts represented in the Constitution. If "meaning" were the only test, an interpretation allowing unlimited congressional power might be found, for the words are vague and supple. But if the political values expressed in the Constitution are the test, the plan of powers holds firm.

The Commerce Clause, as noted at the beginning of this Perspective, has proved to be a volatile measure of federal power, quickly adaptable to the practical needs of changing times. But the practical needs of commerce must be considered together with the practical requirements of government.

The Constitution expresses a popular preference for a federal form of government, a choice reflecting a fundamentally practical policy. As Attorney General Levi recently testified, "[T]he issue of constitutional federalism [is not] a frivolous one. It is close to the protection of diversity, creativity and freedom within our system."[346]

Alexis de Tocqueville had come to the same conclusion:

> . . . I cannot conceive that a nation can live and prosper without a powerful centralization of government. But I am of the opinion that a centralized administration is fit only to enervate the nations in which it exists, by incessantly diminishing their local spirit. Although such an administration can bring together at a

346. Levi testimony, *supra* note 23, at 500.

> given moment, on a given point, all the disposable resources of a people, it injures the renewal of those resources. It may insure a victory in the hour of strife, but it gradually relaxes the sinews of strength. It may help admirably the transient greatness of a man, but not the durable prosperity of a nation.[347]

Narrowly addressed, the issue essentially is resolved by considering the balance of powers. The Constitution expresses that balance not only in the listing and allocation of powers, but also in its ordering of the federal structure. There must exist between the individual and his society, between a state and the nation, a dynamic tension. Each must possess such power as it needs to function; their relationship must be such as to limit the other's excesses. Both must be active, powerful, yet limited.

This concept of dynamic tension is not neglected in the constitutional proportioning of political powers. The Constitution carried forward an idea of checks and balances, but without the disabling notion of weakness as a virtue of governments. The balance it made was a balance of power, and not of weakness. The political agencies were given power to act to fulfillment, always subject to controlling limitation. The Framers of the Constitution concentrated powers, removed barriers to action, always in concert with balancing grants of power. They committed us to a certain structure as our guarantee of both efficiency and liberty.

The power affirmed in the Clean Air Act, if extended to the furthest reach of "substantial effect" doctrine, would subject the vast proportion of state functions to federal dominance. If the power is allowed, state sovereignty is vastly diminished. Since that sovereignty is protected by the Constitution, the power should be disallowed.

Mr. Madison concluded the *39th Federalist* as follows:

> The proposed Constitution therefore is in strictness neither a national nor a federal constitution; but a composition of both . . . . [I]n the operation of these powers, it is national, not federal: In the extent of them again, it is federal, not national . . . .[348]

The courts have been called upon to arbitrate the final clash of powers. Some such tribunal is clearly essential to prevent appeal to

347. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 64 (Heffner ed. 1956).
348. THE FEDERALIST NO. 39, at 257 (Cooke ed. 1961).

the sword, and a dissolution of the compact, and as long as the powers of both state and nation remain vital, its need is certain. By checking unreasoned expansion of the commerce power, and by reasserting the power of the states, I urge, the courts should reaffirm the federalist principle.

AUTHOR'S NOTE

In National League of Cities v. Usery, *44 U.S.L.W. 4974 (U.S. June 24, 1976) (Nos. 74-878 and 74-879), the Supreme Court held unconstitutional under the tenth amendment federal actions under the commerce power to the extent they "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions . . . ."* Id. *at 4979. The Court stressed that "there are attributes of sovereignty attaching to every state government" and state " 'functions essential to separate and independent existence' " which Congress may not abrogate if to do so "would impair the States' 'ability to function effectively within a federal system . . . .' "* Id. *at 4977, 4979. The Court overruled* Maryland v. Wirtz, *392 U.S. 183 (1968), and disapproved the sweeping "dicta" of* United States v. California, *297 U.S. 175 (1936).*

This 5-4 decision appears to largely validate the argument of this Perspective and would appear dispositive of the Clean Air Cases *but for Mr. Justice Blackmun's concurring* caveat:

> *I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential.*

Id. *at 4980.*

The "area" approach to Commerce Clause construction proved unworkable, whether defined in terms of local commerce or state sovereignty. Similarly, Mr. Justice Blackmun's "balancing approach" conjures up nightmares of a "substantive Commerce Clause" doctrine or a "two-tier" commerce power analysis. A better device might be the "principles of federalism" described here, which are compatible with both analytical tools yet sufficiently flexible and judicious to be reliable.

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