NOTE

Coercive Enforcement of the Clean Air Act: A Clash of Constitutional Principles

EDITOR'S NOTE

Can the federal government, acting under its Commerce Clause power, force the states to enforce regulations required by federal law, or is such action forbidden by the tenth amendment? The issue, which goes to the foundation of our federal system of government, was presented when the Administrator of the Environmental Protection Agency promulgated Regulation 52.23, acting under what he believed to be the authority of the Clean Air Act. The regulation treated a failure by a state to implement or enforce a transportation control plan, in whole or in part, as a violation of that plan, thereby subjecting the state to disciplinary action by the federal government under section 113 of the Act.

Several lawsuits have focused on this controversy between the states and the federal government among which the central cases are:

> District of Columbia v. Train, *521 F.2d 971 (D.C. Cir. 1975)*, cert. granted, *426 U.S. 904 (1976) (oral argument heard Jan. 12, 1977, 45 U.S.L.W. 3448).*
> Maryland v. EPA, *8 E.R.C. 1105 (4th Cir. 1975)*, cert. granted, *426 U.S. 904 (1976) (oral argument heard Jan. 12, 1977, 45 U.S.L.W. 3448).*
> Brown v. EPA, *521 F.2d 827 (9th Cir. 1975)*, cert. granted, *426 U.S. 904 (1976) (oral argument heard Jan. 12, 1977, 45 U.S.L.W. 3448).*
> Pennsylvania v. EPA, *500 F.2d 246 (3d Cir. 1974). Certiorari was not requested for this case, but the issues are essentially the same, and it has generally been linked with the other three Circuit Court decisions.*

The Third Circuit held that the Act authorized the Administrator to threaten the imposition of civil and/or criminal penalities against a state which fails to legislate and enforce transportation control

regulations promoted by the Administrator. The Fourth and Ninth Circuits held that the Act did not confer such authority, and as a result did not have to face the question of whether such authority would be constitutional if granted. The District of Columbia Circuit came out between these two extremes, holding that in some cases the control was authorized, while in others it was not.

The states argue that the statutory language of section 113 does not support the Administrator's interpretation, and that it allows only federal enforcement *where the states fail to enforce or implement the plans. Further, they contend that such authority if granted would be unconstitutional under the tenth amendment as an undue incursion upon state sovereignty.*

The states' argument that the Commerce Clause does not allow unlimited federal interference with state governmental functions was supported when the Supreme Court, in National League of Cities v. Usery, *426 U.S. 833 (1976), struck down the extension of the Fair Labor Standards Act's requirements to state and municipal employees as impermissible incursions on state sovereignty in violation of the tenth amendment.*

The controversy over the Clean Air Act was extensively treated in Salmon, The Federalist Principle: The Interaction of the Commerce Clause and the Tenth Amendment in the Clean Air Act, *in Volume 2, Number 2 of the* Columbia Journal of Environmental Law. *The author included therein an exhaustive study of the statutory language and the legislative intent. With respect to the constitutional issues, the author argued that the tenth amendment requires that state sovereignty prevail over the Administrator in these cases. Although the decision in* Usery *came down too late for full treatment by Mr. Salmon, in an* Author's Note *at the end of his piece, he stated that he felt the decision supported his position and "would appear dispositive" of the cases in issue if not for a* caveat *in Justice Blackmun's concurring opinion.*

This Note *is being published so that the* Journal *may present both sides of this controversial issue. The author of this* Note, *assesses the impact of* Usery, *including the* caveat *of Justice Blackmun, and argues in favor of the constitutionality of the Administrator's actions.*

As of this writing, the cases in issue have already been argued before the Supreme Court. Regardless of the outcome, the constitutional issue will remain. The federalist controversy, the question of the proper relationship between the states and the federal govern-

ment, is crucial not only to the vitality of the Clean Air Act, but to other federal environmental legislation and indeed all federal legislation and controls. Although both authors discuss the specific controversy over the Clean Air Act, the arguments presented in these articles have validity beyond the cases here.

I. INTRODUCTION

As more complex problems confront and beset the nation, its governmental structure faces strains due to factors that were never contemplated by the Founding Fathers. The way in which the questions facing us in the 1970's are answered will have much to do with the form that the institutions of government will take in the 1980's and beyond.

One problem that poses a seemingly intractable dilemma for a federal form of government is the control of air pollution. The Clean Air Amendments of 1970[1] were a landmark attempt to usher in a new step in the evolutionary development of cooperative federalism, in order to help solve the air quality crisis which the nation faced.[2]

The instant line of cases is extremely important for two separate but interlocking reasons. First, there is the question of the continued vitality of the Clean Air Act, particularly of those sections which impose upon the states the burden of implementing plans by which they hope to comply with the national primary and secondary air quality standards imposed by the Act.[3] The second reason

1. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, *amending* 42 U.S.C. §§ 1857-1857*l* (1970). For two early views of these Amendments, *see* Greco, *The Clean Air Act Amendments of 1970 Better Automotive Ideas from Congress*, 1 ENVT'L AFF. 384 (1971); Note, *Clean Air Act Amendments of 1970: A Congressional Cosmetic*, 61 GEO. L.J. 153 (1972). For a later review of its genesis, *see* Strelow, *Reviewing the Clean Air Act*, 4 ECOLOGY L.Q. 583 (1975).

2. The problem had existed to a lesser or greater degree, depending on what area of the country was examined, since the 1930's. Several attempts were made to enact effective air pollution control legislation prior to 1970, but they were mere band-aids, and major surgery was necessary. During the 1960's the problem grew steadily worse, and by 1970 both the Congress and the general populace were prepared to call it a crisis. The surgery was performed, and now, six years later, the patient is still awaiting word of the outcome. For a review of the air pollution problem generally, and the efforts to improve upon the situation, *see* J. Holmes, J. Horowitz, R. Reid & P. Stolpman, The Clean Air Act and Transportation Controls: An EPA White Paper (U.S. Environmental Protection Agency, Office of Air and Water Programs, Aug. 1973).

3. The Clean Air Act requires that the federal government promulgate national

for their importance relates to the constitutional questions presented therein. At some point, a conflict may arise between the desire to preserve the environment in as efficient a manner as possible, and the need to protect the integrity of the states as co-equal partners of the federal government.[4] In the cases in question, there is evidence that such a conflict exists, and must eventually be resolved.

The litigation has provoked much analysis by various commentators.[5] To date, most of the authors speaking to the subject have been critical of the Environmental Protection Agency's (EPA's) claimed powers,[6] and dubious of the constitutionality of its claims. The most exhaustive analysis to date was entitled *The Federalist Principle: The Interaction of the Commerce Clause and the Tenth Amendment in the Clean Air Act.*[7] In the words of the author of that article, the main issue is

> Whether the Congress, acting through an Administrator of its creation, has power under the Commerce Clause and through the Clean Air Act, to direct the executive and legislative functioning of a state and to penalize its noncompliance.[8]

primary and secondary air quality standards for known pollutants. § 109, 42 U.S.C. § 1857c-4 (1970). The primary standards are established at a level sufficient "to protect the public health." *Id.* § 109(b)(1), 42 U.S.C. § 1857c-4(b)(1) (1970). The secondary standards are more stringent and their achievement can be delayed beyond that of the primary standards. Their purpose is to "protect the public welfare," *id.* § 109(b)(2), 42 U.S.C. § 1857c-4(b)(2) (1970), which includes protection against economic harms such as degradation of paint and increased corrosion rates for metals created by air pollutants for which standards are published.

4. The claims of the states are essentially the same in this regard, relying mainly on the tenth amendment and the Guarantee Clause of the U.S. Constitution. U.S. CONST. amend. X; U.S. CONST. art. IV, § 4.

5. *See, e.g.*, Salmon, *The Federalist Principle: The Interaction of the Commerce Clause and the Tenth Amendment in the Clean Air Act*, 2 COLUM. J. ENVT'L. L. 290 (1976) [hereinafter cited as Salmon]; Richards, *The EPA, the City and the Constitution*, 175 N.Y.L.J. No. 46 at 1, col. 2 (March 9, 1976); Note, *Pennsylvania v. EPA*, 53 TEX. L. REV. 380 (1975); Note, *District of Columbia v. Train*, 29 VAND. L. REV. 276 (1976); Currie, *Federal Air-Quality Standards and Their Implementation*, 1976 AM. B. FOUNDATION RESEARCH J. 365, 390-94 (1976); Comment, *The Clean Air Amendments of 1970: Can Congress Compel State Cooperation in Achieving National Environmental Standards?* 11 HARV. C.R.-C.L. L REV. 701 (1976).

6. Of the commentaries listed, *supra* note 5, only the last advocated that the EPA's powers be validated. In addition, there was some discussion favorable to the Administrator in Comment, *The National Standards for No-Fault Insurance Act: Good Intentions and Bad Federalism*, 25 BUFFALO L. REV. 575 (1976).

7. Salmon, *supra* note 5.

8. *Id.* at 290.

Most commentators have concluded that it did not. The thesis herein is that those commentators have misappraised Congress' and the EPA Administrator's powers, and that their conclusions are therefore incorrect.

The central theme of this Note is that (1) the Clean Air Act did empower the Administrator to promulgate regulations that called on various states to provide implementing legislation, and (2) the grant of that power meets the tests of constitutionality imposed by the juxtaposition of the Commerce Clause and the tenth amendment. In this regard, there are fundamental differences between the Clean Air Act and the Fair Labor Standards Act,[9] which was at issue in *National League of Cities v. Usery*,[10] and consequently the clean air cases must not be judged in a manner that makes *Usery* "dispositive" in any sense. Given the delicate balance inherent in a federal system, the interests that argue for environmental control must in this instance speak louder than those that argue for the inviolability of state interests.[11]

9. 29 U.S.C. §§ 201-219 (1940), *as amended* (Supp. V 1975).

10. 426 U.S. 833 (1976). The dispute in *Usery* was whether the extension of the Fair Labor Standards Act, Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 58 (1974), to include most state employees violated the sovereignty of the states to such a degree as to make them impermissible intrusions upon the tenth amendment powers granted the states. The Court concluded that such an intrusion did in fact take place, and invalidated the extensions.

11. A concept of cooperative federalism, wherein the states are able to legislate within a framework of overriding federal standards, is not new. *See, e.g.*, Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 319 (1851):

> Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

Cf. 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). For an informative review of this quest for "cooperative federalism," and the problems it engendered, *see* Luneburg, *Federal-State Interaction Under the Clean Air Act Amendments of 1970*, 14 B. C. INDUS. & COM. L. REV. 637 (1973). For a somewhat different viewpoint on the federal role, this time relating to water pollution control under a very similar statute, *see* Kline, *Intergovernmental Relations in the Control of Water Pollution*, 4 NAT. RESOURCES LAW. 505 (1971). *See also*, Hassett, *Enforcement Problems in the Air Quality Field: Some Intergovernmental Structural Aspects*, 19 WAYNE L. REV. 1079 (1973).

II. NATIONAL LEAGUE OF CITIES V. USERY

The dispute in *Usery* involved the 1974 Amendments to the Fair Labor Standards Act (FLSA),[12] which extended federal minimum wage coverage to virtually all employees of state and local governments. In a 5-4 decision, the Supreme Court ruled that the Amendments were invalid because they represented an unconstitutional intrusion into the affairs of sovereign states. In the process, the Court saw fit to overrule *Maryland v. Wirtz*,[13] the EPA's major arguing point in the clean air cases, and called into question the rationale and holdings of several other Commerce Clause decisions of long standing.[14]

The plaintiffs[15] admitted that the Act as amended covered employees who would properly be the subject of such legislation if they worked in similar occupations but were employed in the private sector rather than by a public agency. However, they contended, the Act intruded upon established inter-governmental immunities when it was thus extended to cover workers who were employed by agencies whose task it was to render services that were in the peculiar domain of governments, rather than those which competed with services provided by the private sector as well.[16] In effect, it was argued that the 1974 Amendments extended the Act to include workers for whom there were no equivalent jobs in the private sector.

12. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1940).

13. 392 U.S. 183 (1968).

14. Justice Rehnquist wrote for the Court in an opinion in which the Chief Justice and Justices Stewart, Blackmun and Powell concurred. Justice Blackmun filed a separate concurring opinion. Justices White and Marshall joined in a dissent filed by Justice Brennan, and Justice Stevens dissented separately.

Although only Maryland v. Wirtz, 392 U.S. 183 (1968), was explicitly overruled, the dissenters accused the majority of overruling other cases by implication.

15. The decision consolidated two separate cases. In the first, No. 74-878, the plaintiffs were The National League of Cities, the National Governors' Conference, the States of Arizona, Indiana, Iowa, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Washington, the Metropolitan Government of Nashville and Davidson County, Tennessee, and the cities of Cape Girardeau, Mo., Lompoc, Cal. and Salt Lake City, Utah. The second case was State of California v. Usery, No. 74-879, in which California was the sole plaintiff.

16. 426 U.S. at 837. The plaintiffs pointed out that the amendments at issue in Maryland v. Wirtz, 392 U.S. 183 (1968), only extended the Fair Labor Standards Act to employees in state-operated hospitals, schools, etc.—which were activities that were also engaged in by private enterprise. Here, however, it was not competitive or proprietary activities, but police functions, that were made subject to the Act. *Id.* at 855.

Having ruled (1) that there are activities that may normally be subject to federal regulation, and (2) that that regulation may not reach those activities if in so doing the federal government threatened to take from the states control over essential governmental functions, the Court examined the question, whether the specific activities involved were of a character that could be considered "essential." It stated:

> One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime. The question we must resolve here then, is whether these determinations are 'functions essential to separate and independent existence,' so that Congress may not abrogate the States' otherwise plenary authority to make them.[17]

Citing the extraordinary measures the states would be forced to take in order to abide by these regulations, the Court concluded that the functions interfered with were indeed essential to effective state government, and that the Act as so applied was therefore invalid.[18]

In a separate concurring opinion, Justice Blackmun pointed out that, in his opinion, the majority had applied a balancing test in analyzing the Act's validity, even though that fact was never stated explicitly in the opinion of the Court.[19]

Justice Brennan expressed his dissent in a strong defense of the

17. *Id.* at 845-46 (citation omitted).

18. *Id.* at 846-51.

19. 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 856.

Justice Blackmun's comments concerning federal power under environmental legislation can be interpreted in either of two ways. His comment about the federal interest being greater in the environmental area is cryptic. The clause following that in like manner gives little indication of what Blackmun was thinking about. For example, did he mean that *all* state facilities must meet federal standards, or was he referring only to state facilities that act as stationary pollution sources. If the former, he might be willing to uphold Regulation 52.23, 40 C.F.R. § 52.23, *as amended*, 39 Fed. Reg. 33512 (1974); if the latter, he might be willing to go no further than the states have already been willing to concede. His comments, in any event, will loom quite large in the analysis below.

past 150 years of Commerce Clause decision-making by the Supreme Court. In addition to finding fault with the majority's interpretation of various cases used as support for the tenth amendment limits on federal power,[20] he also questioned the use of a "balancing" test as espoused by Justice Blackmun:

> Such an approach, however, is a thinly veiled rationalization for judicial supervision of a policy judgment that our system of government reserves to Congress.[21]

The dissenters thus found support in the "political question" doctrine, which was first espoused in *Gibbons v. Ogden*.[22] The majority was accused of undermining this long-standing principle, and at the same time of underestimating the relative power of the federal government vis-à-vis that of the states.[23]

III. THE QUESTION OF CONSTITUTIONALITY

A. *Impact of the Usery Decision*

After *Usery*, the slate appeared to be wiped virtually clean with respect to precedent in Commerce Clause cases. The "dictum" from *United States v. California*[24] was placed in serious doubt, and

20. *E.g.*, Texas v. White, 74 U.S. (7 Wall.) 700 (1869), and Lane County v. Oregon, 74 U.S. (7 Wall.) 71 (1869). 426 U.S. at 867 n.8. The distinctions drawn between Maryland v. Wirtz, 392 U.S. 183 (1968), and Fry v. United States, 421 U.S. 542 (1975), were also criticized: "It is absurd to suggest that there is a constitutionally significant distinction between curbs against increasing wages and curbs against paying wages lower than the federal minimum." 426 U.S. at 872. *See* notes 126-33 and accompanying text *infra*.

21. 426 U.S. at 876.

22. 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 elections, are . . . 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.

23. 426 U.S. at 876-79. And, in like manner:

> [T]he Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress.
>
> Federal intervention as against the states is thus primarily a matter for congressional determination in our system as it stands.

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, 559 (1954).

24. 297 U.S. 175 (1936). The majority in *Usery* stated that in Maryland v. Wirtz,

Maryland v. Wirtz[25] was explicitly overruled. *New York v. United States*[26] and *Fry v. United States*[27] were distinguished and limited, due to, respectively, differences in the federal power involved and the importance and permanency of the act in question.[28] Cases

392 U.S. 183, 198 (1968), the language quoted from United States v. California was dictum, and that the real holding there was simply that California was subject to control because its railroad was not an "integral" state function. That may have been the case, but the Court in United States v. California did not limit its language in that manner. In comparing limits on the taxing and commerce powers, it stated:

> [W]e 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.

297 U.S. at 185.

What that earlier Court said was that there are no limits on the plenary commerce power, not even in those instances where the state was engaged in traditional state functions. Put another way, the tenth amendment protects against the taxing power but not the commerce power. The *Usery* Court, in fact, was relying on dictum rather than the holding from New York v. United States, 326 U.S. 572 (1946), in attempting to demonstrate its point regarding limits on the federal taxing power. In that case, a tax on mineral water was held to apply to the State of New York, and Chief Justice Stone, concurring, stated in passing that there may indeed be integral state functions that would be immune from federal taxation.

25. 392 U.S. 183 (1968).

26. 326 U.S. 572 (1946).

27. 421 U.S. 542 (1975).

28. We think our holding today quite consistent with *Fry*. The enactment at issue there was occasioned by an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall. The means selected were carefully drafted so as not to interfere with the States' freedom beyond a very limited, specific period of time. The effect of the across-the-board freeze authorized by that Act, moreover, displaced no state choices as to how governmental operations should be structured, nor did it force the States to remake such choices themselves. Instead, it merely required that the wage scales and employment relationships which the States themselves had chosen be maintained during the period of the emergency. Finally, the Economic Stabilization Act [Title II of Pub. L. No. 91-379, 84 Stat. 799, *as amended*, note following 12 U.S.C. § 1904 (Supp. I 1970)] operated to reduce the pressures upon state budgets rather than increase them. These factors distinguish the statute in *Fry* from the provisions at issue here. The limits imposed upon the commerce power when Congress seeks to apply it to the States are not so inflexible as to preclude temporary enactments tailored to combat a national emergency. "[A]lthough an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." Wilson v. New, 243 U.S. 332, 348 (1917).

426 U.S. at 853.

New York v. United States, 326 U.S. 572 (1946), involved the federal power of taxation. *See* note 24 *supra*.

such as *Parden v. Terminal R. Co.*, *California v. Taylor* and *Case v. Bowles* were similarly limited.[29]

Thus, despite the majority's attempt to portray its decision as following closely the logic of previous cases involving federal-state relationships, there is a possibility that the decision may have drastically altered those relationships.

There is a quite different manner in which *Usery* may be interpreted, however, that is more logical, given the circumstances surrounding that case: the Court may have written a carefully conceived opinion that enunciated an enduring test for judging the validity of federal legislation that affects the states. When legislating in areas wherein the states have exercised traditional power and influence, the Congress must now take the Court's opinion in *Usery* into account, but such legislation was not necessarily prejudged invalid by that decision. Instead, the majority opinion implicitly, and Justice Blackmun explicitly in his concurrence, stated that the harm-benefit balancing which has been a part of such litigation since earliest times would remain so today.[30]

Examined in that light, *Usery* is not a radical departure from prior case law. Rather, the Court decided that in that particular instance the benefits conferred by the federal incursion into areas traditionally the province of the states did not outweigh the harmful effects of that intrusion—expressed in terms of reducing the autonomy of state choice and shifting the delicate federal-state balance too far toward national control.[31]

29. Parden v. Terminal Ry., 377 U.S. 184 (1964); California v. Taylor, 353 U.S. 553 (1957); Case v. Bowles, 327 U.S. 92 (1946). The majority merely asserted that the first two were left intact by its new holding, but it pointed out that Case v. Bowles involved the scope of the war power, not the Commerce Clause power. 426 U.S. at 845 n.18. In so stating, the majority seems to have made a value judgment that the war power is more complete than the commerce power, an argument that was contested vehemently by the dissenters. *Id.* at 864 n.6.

30. Indeed, Mr. Salmon himself speaks continually of the "balance" that must be struck between the powers of the federal government and those of the states. *See generally*, Salmon, *supra* note 5. For a specific analysis of the balance of power necessary to our system of government, *see id.* at 359-67.

31. *See* the majority opinion in National League of Cities v. Usery, 426 U.S. 833 (1976).

An excellent appraisal of the use by the Supreme Court of a balance test is found in ENGDAHL, CONSTITUTIONAL POWER: FEDERAL AND STATE (1974). For a review of Engdahl's analysis in the context of use of the federal commerce power to overturn a city law restricting the sale of phosphate detergents, *see* Note, *Use of the Commerce Clause to Invalidate Anti-Phosphate Legislation: Will it Wash?* 45 U. COLO. L. REV. 487 (1974).

The major impact of the decision appears to be psychological —for literally the first time, the Supreme Court recognized both the existence and effect of tenth amendment constraints on the federal commerce power.[32] The shock of this decision on the legal conscience of a nation that had been conditioned for the past forty years to believe that *any* degree of federal intrusion into state sovereignty is legitimate, if the aim is valid, might lead commentators to believe that somehow the pendulum would swing instantaneously the other way.[33]

Now that the existence of a "federalist principle" has been acknowledged, however, the proper reaction is not simply to abandon all efforts to guide the paths of the states in federal matters. Rather, a more logical approach is to look at the harms and benefits of each particular attempt at such legislation, and judge each in accordance with this balance, as the Supreme Court did in *Usery*. This fact is brought home convincingly by the Court's varying treatment of *Maryland v. Wirtz*[34] and *Fry v. United States*.[35] Far from being "dipositive" of the matter at hand in the clean air cases, then, the presence of *Usery* is merely helpful to the analysis. At last there is a standard available to guide the hand of the legislature.[36]

32. In Fry v. United States, 421 U.S. 542, 547 n.7 (1975), the Supreme Court stated: "While the Tenth Amendment has been characterized as a 'truism', stating merely that 'all is retained which has not been surrendered,' . . . it is not without significance." Of course, that statement was merely dictum therein, since the Court upheld the exercise of federal power in that instance. *See also*, New York v. United States, 326 U.S. 572 (1946), wherein the Court questioned whether the federal taxing power could be employed limitlessly, while upholding its use in the particular instance at hand. In other cases, the Supreme Court has declared that federal power has limits, but has refused to apply them at that time, or even adequately to define them. *See, e.g.*, Coyle v. Smith, 221 U.S. 559 (1911). While the Court used the Commerce Clause and tenth amendment to invalidate legislation during the New Deal, it soon abandoned this restrictive notion in favor of the sweeping congressional power favored by later Courts, until the *Usery* opinion. *See* 426 U.S. at 865-68 (Brennan, J., dissenting opinion).

33. That shock value may be one salutory effect of *Usery*. For too long the Court has seemed to countenance overreaching federal intrusion into areas that should legitimately be the concern of the states. Stretching the Fair Labor Standards Act to cover state employees was an example of this overreaching.

34. 392 U.S. 183 (1968) (overruled in *Usery*).

35. 421 U.S. 542 (1975) (reaffirmed in *Usery*).

36. If there is no guiding principle to decisions involving principles of federalism, there is no way for the Congress to know what bounds it may not pass in enacting legislation. A standard that merely says that the federal government may not intrude upon "necessary" state functions is no standard at all, given the multitude of

Because the balance between federal and state power is subject to evolutionary processes,[37] some constant thread is necessary in order to establish a logical method of dealing with each issue as it arises. That constant is the "balance" test argued by Justice Blackmun and criticized by the dissenters.[38] This principle provides a measure by which to test the importance of the goal against the dangers of seeking it in a particular way.[39] If we accept the argument that a balancing formula is used to determine the validity of Commerce Clause statutes, we must realize that there is the opportunity for the use of policy-preference reasoning by a court.[40]

entirely new problems that must be dealt with at all levels of government. A standard that presupposes that a balance exists between state and federal governments, and that the importance of legislation affects how that balance must be maintained in given circumstances, does provide guidance for the Congress.

37. Certainly the environmental movement and resulting legislative pronouncements and litigation are an outstanding example of this phenomenon. There are others, however, including the civil rights movement of the 1960's. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964).

38. Justice Brennan's criticism of this principle seems misplaced when compared with the test he proposed recently in the opinion of the Court, striking down Oklahoma's gender-based minimum drinking-age laws (the minimum age for women was 18 years, while that for men was 21). There, Justice Brennan said: "Classification by gender must serve *important* governmental objectives and must be *substantially* related to achievement of those objectives." Craig v. Boren, 97 S. Ct. 451 (1976) (emphasis added). There was no absolute standard employed by the Court in that case, and the majority apparently felt that there was room to legislate in the area of discriminatory gender differentials, as long as the gains clearly outweighed the detriments of such action. Justice Rehnquist, dissenting, disputed the wisdom of such a balancing test. *Id.* at 469.

39. It is relatively simple to judge the validity of a federal action at one end or the other of the 'spectrum' of Commerce Clause power versus tenth amendment limitations. For example, it is evident that the Court would adjudge valid federal control over an aspect of commerce that is necessary to further a war effort, and that intrudes either minimally or not at all into areas of state sovereignty. *Cf.*, Case v. Bowles, 327 U.S. 92 (1946). In the same manner, it would be relatively simple to declare invalid an action that truly threatens the existence of the states as separate political entities, as for example the all-encompassing federal "negative" of state enactments as proposed in the Constitutional Convention. *See* Salmon, *supra* note 5, at 358-59. For the majority of potential federal programs that fall somewhere between these extremes, however, the problem is more difficult, particularly if a court is not allowed to employ a reasonable standard upon which to balance the relative harms and benefits of such legislation.

40. A choice of valid versus invalid federal legislation is likely to reflect the observer's personal viewpoint concerning the value and necessity of the specific legislation at hand: in this case, the relative merits of environmental versus minimum wage legislation. That was the point expressed in Justice Stevens' separate dissent in *Usery*, that the Court ought not allow its views on the substantive merits of legislation to interfere with a decision concerning the constitutionality of that

In search of a balance, courts must weigh the legislation enacted by Congress in accordance with its necessity, a value judgment in itself. Given this inherent "weakness" in judicial oversight of the commerce power of Congress, we must trust the courts to look carefully at the political processes behind the legislation being analyzed, in order to determine the degree of necessity and support for it.[41] The demarcation line between the political and judicial processes is blurred, and the only device available to the courts is that provided by the balancing test.[42]

This is particularly true when totally new and previously unforeseen factors enter the calculus. One such is the struggle to eliminate the adverse health and economic effects of air pollution, a struggle to which no delegate to the Constitutional Convention gave a passing thought. It clearly is a national problem that requires national standards to correct. How far, though, can the federal government intrude into the affairs of the states to enforce effectively its task of reducing this menace? Similarly, how far could the federal government go in forcing the states to pay certain minimum wages to their employees, given a perception that the national economic well-being required that a certain wage be paid to workers throughout the country? Blackmun's balance test, one followed either implicitly or explicitly in virtually every such case, offers a meaningful way to approach such questions.[43]

Using that test, the Court concluded that the Fair Labor Standards Act did not promise a sufficient "benefit" to the national

legislation. 426 U.S. at 881. Such a trend, if unchecked, would undermine a fundamental precept of Supreme Court jurisprudence.

41. There is ample evidence within the political spectrum that legislators of many persuasions favor the adoption of strong environmental legislation. Former Senator James Buckley of New York, certainly no friend of "big government" during his term of office, stated that environmental protection is the only area in which he felt a need for a greater federal presence. Wall St. J., Oct. 15, 1976, at 23, col. 2.

In the case of the Clean Air Act, this political commitment was strongly expressed initially, and in general has been maintained since that time. There have of course been problems with some aspects of the Act, particularly where it is felt to interfere too severely with the economic conditions in a given area. The overall commitment has remained, however.

42. *See* notes 120-36 and accompanying text *infra*.

43. *See* note 31 *supra*. It is difficult to ascertain how Mr. Salmon's device of the "principles of federalism" is any more useful in this regard. Salmon, *supra* note 5, at 367. Given the Supreme Court's varying treatment of *Fry* and *Wirtz*, these "principles" may boil down to nothing more than Justice Blackmun's balancing formula. *See* notes 118-36 *infra*.

economy to validate its acknowledged "harms," measured in terms of a diminution of the freedom of choice of the states.

The Clean Air Act must meet the test laid down by the *Usery* Court in order to be adjudged a valid exercise of congressional authority. First, it must strike a cost-benefit balance that is in some manner more "favorable"[44] than was evident in the FLSA. Second, in addition to striking a more favorable balance than the FLSA, the Clean Air Act must also be shown to fit within the context of prior constitutional practice with respect to the historical context of federalism. That is, regardless of whether the Clean Air Act is "better than" the FLSA, is it impermissible nonetheless because it treads too heavily on state immunities?[45]

B. *Distinguishing Factors in the Clean Air Act*

Applying the first part of this test to the regulations promulgated by the Administrator will give a clearer picture of the manner in which *Usery* affects the clean air cases. In *Usery*, the Court recognized that the legislation was within the scope of valid congressional power under the Commerce Clause, but concluded that the legislation was nonetheless unconstitutional as applied because it impaired state "functions essential to separate and independent existence."[46]

The clean air cases, however, present a different set of standards for the Court, which must analyze the Clean Air Act on the basis of its own peculiar attributes. In judging the validity of the Clean Air Act compared with that of the FLSA, the Court should review the ways in which it differs from the latter. There are three major differences. The first involves the degree to which the national interest is affected by the problems reflected in the legislation. The second relates to the degree of intrusion involved in the exercise of federal power against the states. The third reflects the role of past state policies and activities and their effect on the problem being remedied.

44. That is, the benefits must be "greater" or more valuable than—or, perhaps, at least equal to—the harm in order for the legislation to be valid.

45. *See* note 31 *supra*. This second part of the test presupposes that there is some point beyond which the federal government may not intrude upon state sovereignty, regardless of the urgency of the problem confronted or the means necessary to solve it. That is, a point presumably exists beyond which legislation would be deemed to have intruded to an impermissible extent upon the affairs of the states, regardless of the amount of benefit derived therefrom.

46. 426 U.S. at 845.

1. *The National Interest Is Demonstrably Greater in the Field of Environmental Protection.* The Fair Labor Standards Act attempted to control economic conditions by mandating that states and municipalities pay their employees in accordance with a uniform federal scheme for overtime and minimum wages. While it is patently obvious that employment of workers constitutes a factor in the control and facilitation of interstate commerce, it is less than assured that its effect is due in any degree to the *methods* chosen by governmental units to pay those workers. There are simply too many variables involved—cost-of-living factors, the preferences of workers in different areas of the country regarding pay and fringe benefits, the ability of governments to provide pecuniary versus in-kind benefits—to pin an effect on any single one of them. It becomes difficult if not impossible to establish one nationwide set of standards for pay, and then argue that the standard will somehow "facilitate" the flow of interstate commerce.[47]

It is true, as the majority stated, that the establishment of pay and privileges is one of the attributes of sovereignty with which local governments are endowed, and interference with those attributes must be looked at carefully.[48] It is also true that this practice is one in which there is little rationale for intervention by the national government. That is a factor which is implicit in the reasoning of the majority, as well as in the separate dissenting opinion of Justice Stevens.[49]

47. Even at the low minimum level mandated by the FLSA that is the case. The Court's opinion mentioned several examples of work-study and internship programs that faced serious jeopardy due to rising costs associated with the 1974 extensions of the Act. *Id.* at 847. It is particularly in the area of programs such as these, where advanced training is provided to a large number of people at low wages, temporarily, that local governments must have the option to judge what would be the best blend of benefits to use. Rigid national formulae cannot apply across-the-board, regardless of the degree to which wages influence interstate commerce.

48. *Id.* at 845.

49. Justice Brennan accused the majority of striking down the legislation because it disagreed with the economics of the Act. *Id.* at 867. Given the "ideological" split of the Court, that accusation may contain an element of truth. However, if the Court was in fact relying on a balancing test, as Justice Blackmun opined, then its striking down of the legislation seems proper. Such a test presupposes that a substantive determination be made concerning the benefits of the legislation involved as opposed to its detriments. The degree of harm and good in any statute depends to some degree on the point of view of the evaluator. Right or wrong, if the balance test is adopted, such value judgments are inevitable. The alternative, in fact, is the grant of a truly plenary power to Congress in the area of Commerce-Clause law-making, a result that would make the result reached in *Usery* impossible.

The only instance in which such power would prove insufficient to validate legis-

The situation is markedly different with the fight against air pollution, however. In that realm there is no question that the problem, and the solution, are national in scope.[50] The problem involves international consequences as well, due to the large number of urban areas in close proximity to Canada and Mexico.[51] Due to this overriding fact concerning pollution and its movement across political boundaries,[52] the exercise of power by the federal government is much more necessary than is the regulation of pay and benefit policies for govermental employees. Viewed in this way, federal governmental control in the field of anti-pollution legislation is more akin to the war power or foreign commerce and foreign policy powers.[53]

The history of the Clean Air Act,[54] as well as that of other major

lation would be where a constitutional protection intervenes directly. Such was the case in Leary v. United States, 395 U.S. 6 (1969) (Due Process Clause of the fifth amendment) and United States v. Jackson, 390 U.S. 570 (1968) (right to trial by jury in the sixth amendment), but would likely not be the case when the constitutional protection asserted is as imprecise and debatable as is the tenth amendment.

50. Air pollution knows no political bounds, a fact attested to by the large number of interstate air quality control regions. For example, Pennsylvania v. EPA, 500 F.2d 246 (3d Cir. 1974), involved, in part, regulations for the Southwest Pennsylvania Interstate Air Quality Control Region, and District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *cert. granted*, 426 U.S. 904 (1976) (oral argument heard Jan. 12, 1977, 45 U.S.L.W. 3448), involved the National Capital Interstate Air Quality Control Region. Out of 247 total air quality control regions throughtout the United States, 53 involve interstate regions. 40 C.F.R. Part 52 (1976). *See Hearing Before the Subcomm. on Air & Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 1st Sess. 15 (1969) (Statement of Rep. William L. Hungate); Stevens, *Air Pollution and the Federal System: Responses to Felt Necessities*, 22 HASTINGS L.J. 661 (1971).

51. The international consequences of air pollution originating in the United States were acknowledged in the original Act. Clean Air Act § 115(c), 42 U.S.C. § 1857d (1970).

52. For example, much of Connecticut's air pollution originates from without the state. *See* State of Connecticut, Dep't of Environmental Protection, The Connecticut Transportation Control Plan (Proposed). The prevailing southwesterly winds along the Atlantic Seaboard funnel pollutants into the New England area and beyond.

53. *See, e.g.*, Sanitary Dist. of Chicago v. United States, 266 U.S. 405 (1925); Case v. Bowles, 327 U.S. 92 (1946).

54. The current version of the Clean Air Act represents an evolutionary process in congressional awareness of the nature and severity of the problem. The first Clean Air Act was enacted in 1963, Pub. L. No. 88-206, 77 Stat. 392, revising legislation establishing a federal program of assistance to states in formulating air quality control policies. Air Pollution Control Research & Technical Assistance Act, Pub. L. No. 84-159, 69 Stat. 322 (1955); Pub. L. No. 90-148, 81 Stat. 485 (1967). The Act had also been renumbered and had undergone some revision in 1965. Pub. L. No. 89-272, Title I, § 101(2), 79 Stat. 992 (1965). The 1970 Amendments in essence rewrote the statute. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970).

environmental legislation, points out the frustration caused by allowing state and local governments unfettered discretion in devising and implementing control strategies.[55] The legislative history of the Clean Air Act, if it shows anything, demonstrates the concern felt by Congress that the nation was failing to effect a cure for a problem that was engaging the interest—and outrage—of an increasingly large percentage of the nation's population.[56] Time was running out in the fight against air pollution, and strong national legislation was the only viable answer.[57]

As a result of these factors, the federal role in the Clean Air Act follows more in the line of cases *Wickard v. Filburn*, *Case v. Bowles* and *Fry v. United States*[58] than it does the cases *Maryland v. Wirtz* and *Usery*.[59] In the former cases, a decision was made in

55. Allowing states to implement regulations without coordination at a higher level is an invitation to inter-regional competition to attract industry through uneven enforcement. Industry would then save environmental cleanup costs, and those jurisdictions downwind would be left to clean up both their own pollution and that of their neighbor. *See* Stevens, *Air Pollution and the Federal System: Responses to Felt Necessities*, 22 HASTINGS L.J. 661 (1971); Walker, *The Place of Local Government in Air Pollution Control*, 5 NAT. RESOURCES LAW. 172 (1972) (expressing the view that the pollution-fighting role tends to move toward more centralized authority, but should be returned to local and state control); Kline, *Intergovernmental Relations in the Control of Water Pollution*, 4 NAT. RESOURCES LAW. 505 (1971) (developing regional water pollution control authorities). *See also, Hearing Before Subcomm. on Air & Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 1st Sess. 92 (1969) (Statement of A.J. Cervantes, Mayor of St. Louis, Mo.) (air pollution control is a national problem, and the federal government must step in if the state fails to act). For a view of environmental control in Canada, *see* Emond, *The Case for a Greater Federal Role in the Environmental Protection Field: An Examination of the Pollution Problem and the Constitution*, 10 OSGOODE HALL L.J. 647 (1972).

56. *See generally*, S. REP. NO. 1196, 91st Cong., 2d Sess. (1970); H.R. REP. NO. 1146, 91st Cong., 2d Sess. (1970).

57. Congress has in many cases forced the states to enact legislation in support of national policies. Examples are: (1) the Federal Election Campaign Act of 1971, 2 U.S.C. § 439 (Supp. V 1975) (requires the Secretary(ies) of State(s) to maintain financial reports filed by candidates for federal office); and (2) Title 32 of the United States Code, governing the National Guard, which provides that state Adjutants General "make such returns and reports as the Secretary of the Army or the Secretary of the Air Force may prescribe . . . ." 32 U.S.C. § 314 (1970). These responsibilities do not, of course, amount to nearly the same requirement, in terms of time, effort or money expanded, as do the requirements levied by the EPA.

58. Fry v. United States, 421 U.S. 542 (1975); Case v. Bowles, 327 U.S. 92 (1946); Wickard v. Filburn, 317 U.S. 111 (1942). In those cases, federal legislation was ruled valid because of the strong federal interests involved. In *Usery*, the Court reaffirmed the cases, recognizing the importance of those interests.

59. National League of Cities v. Usery, 426 U.S. 833 (1976); Maryland v. Wirtz, 392 U.S. 183 (1968). The FLSA was, of course, invalidated in *Usery*, insofar as it was

favor of the legislation involved, *not because there was no intrusion at all*, but because the national interest demanded in those particular circumstances a strong federal hand. In *Usery* the balance fell the other way, and the legislation fell as well.

The argument for strong national laws was also made in *Sanitary District of Chicago v. United States*,[60] in which the overriding need for the federal government to prevent a serious impediment to interstate and foreign commerce prevented the City of Chicago from lowering the levels of the Great Lakes as part of an otherwise laudable effort to rid itself of sewage and its attendant problems.[61] In yet another area of concern, that of energy conservation, the federal government imposed on all the states a national 55-mph speed limit,[62] to be enforced at the local level and backed up by a threat to withhold federal matching funds for highway construction from those states which refused to enforce the limit.[63]

In all these cases, the needs of the nation, and the requirement that the federal government become more involved in order to protect the interests of its citizens, are much more apparent than they are in the case of the Fair Labor Standards Act, which merely attempts to establish some economic parity among industries in various regions of the country.

Another aspect of this need for increased federal involvement in the problem of environmental degradation is the fact that the search for a solution involves a more technologically-oriented approach than is the case in economic-control actions.[64] In order to

extended in 1974 to cover state employees, and in the process the Court overruled the extensions previously validated in *Wirtz*.

60. 266 U.S. 405 (1925).

61. The Secretary of War had limited the Sanitary District's diversion rights, in order to prevent deterioration of the navigability of the Great Lakes. Several states bordering the Lakes sued in the Supreme Court to enjoin the diversions, citing navigation problems. Wisconsin v. Illinois, 281 U.S. 179 (1930); New York v. Illinois, 274 U.S. 488 (1927). Other suits were brought by Minnesota, Ohio, Pennsylvania and Michigan. In addition, the State of Missouri attempted to enjoin the use of the diversion ditch, due to pollution of the Mississippi River by the effluent from Chicago's sewers (untreated, of course). Missouri v. Illinois, 180 U.S. 208 (1901); 200 U.S. 496 (1906).

62. The Emergency Highway Energy Conservation Act, Pub. L. No. 93-239, 87 Stat. 1046 (1974).

63. *Id.* § 2, 87 Stat. 1046. This Act also contained a carrot of sorts, by making available grants totalling 90% of funds required to establish urban carpool demonstration plans, for those states willing to fund the other 10%. *Id.* § 3, 87 Stat. 1047.

64. *See* B. ACKERMAN, S. ACKERMAN, J. SAWYER, D. HENDERSON, THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY (1974). Although this work concerns

achieve a goal by means of a technical solution, it is imperative that all parties work together under the coordination of that group deemed most competent to judge the needs and solutions required—in the case in point the EPA. In the case of the Fair Labor Standards Act, on the other hand, such a solution is neither necessary nor practical. There should be more latitude given the states and municipalities to pay their workers in the manner they wish, in order to arrive at a workable solution to their own, diverse, local problems in accordance with local resources and needs. In enforcing the Clean Air Act, however, it is imperative that each locality enforce the Act as much as the next,[65] for each area's pollution is evidenced in the air of its neighbors. Furthermore, each state might well have insufficient resources to design or determine the best solution; a nationwide effort is clearly more efficient in that respect. The amount of pay given a state employee, and whether that employee is given overtime pay or compensatory time off, is not a particularly complex problem, and does not affect that state's neighbors to anywhere near the same degree.[66]

The EPA, as the technical agency charged under the Clean Air Act with the responsibility of establishing air quality standards and

water pollution, the lessons are equally applicable to technological problems of air pollution control. *See also*, Bogen, *Hunting of the Shark: An Inquiry into the Limits of Congressional Power Under the Commerce Clause*, 8 WAKE FOREST L. REV. 187, 193-94 (1972). For an analysis of the EPA's practice in search of a technological solution to the air pollution problem *see* Bonine, *The Evolution of "Technology-Forcing" in the Clean Air Act*, 6 ENVIR. REP. (BNA) 1 (1975).

An example of this continuing struggle with technology was presented in the preface to a study by the National Research Council, the National Academy of Sciences and the National Academy of Engineering concerning the automobile and air pollution, in which it was stated: "The automobile emissions regulation problem is an example of the complexity of acquiring and using technical information in decision making . . . ." *Hearings on Implementation of the Clean Air Act, 1975, Before the Subcomm. on Environmental Pollution of the Senate Comm. on Public Works*, 94th Cong., 1st Sess. 1463-64 (1975) (Report of the Conference on Air Quality and Automobile Emissions, May 5, 1975, to the Committee on Environmental Decision Making).

65. Though each area must achieve the same air quality levels, the way in which they proceed should recognize differences based on local conditions. In general, that is the approach of the various implementation plans.

66. That is probably not the case in the application of the Fair Labor Standards Act to private industry. Variations in labor costs in different areas of the country have a dramatic impact on industrial migration away from the older regions of the Northeast and Midwest. The possible effect of governmental labor costs on such migration, minimal at best, does not overcome the intrusion into the affairs of those governments.

helping with the planning for meeting those standards, has decided that the most efficient means of arriving at the goal is for the states to implement the enforcement systems in question.[67] Given the national scope of the effort involved, the federal role must be assumed to take precedence over the role of the states. On the balancing scale, the need for federal enforcement outweighs the governmental intrusion to a significantly greater degree than in *Usery*.

2. *The Means Chosen in the Clean Air Act are Not Overly Intrusive*. It may not be necessary for the Supreme Court to consider whether the Clean Air Act is valid, even though requiring greater intrusion into state interests than the expanded FLSA, because the Clean Air Act is actually *less* intrusive in many ways than was the FLSA as applied in *Usery*. Not only is it less intrusive than the external standard offered by the FLSA, but the choices offered the states by the EPA, and the sanctioning power claimed by that body, may actually be less intrusive than would alternatives suggested for enforcement of the Act, either complete federal preemption of the states' roles,[68] or the carrot-stick approach of conditioning federal grants on compliance by the states with federal policies.[69]

The Court found in *Usery* that extension of the FLSA to include most state employees "displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require."[70] Thus, the extension of the Act was impermissible because it threatened the sovereign existence of the states. Two reasons were given why the state policies displaced were crucial to their existence. The first was that the substantial costs placed upon them would require the restructuring, and often the abandonment of, worthwhile programs and

67. The lesson of the earlier clean air legislation was that, without strong federal coordination, each jurisdiction was prepared only to argue that its neighbors should "bite the bullet." Therefore, it was decided to amend the law to provide for a set of standards that would force every governmental unit to contribute to the overall effort.

68. *See, e.g.*, Pennsylvania v. EPA, 500 F.2d 246, 263 (3d Cir. 1974); Campbell v. Hussey, 368 U.S. 297 (1961); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947). This is true despite an apparent desire on the part of the states involved in the instant litigation for federal preemption of the field.

69. *See, e.g.*, Vermont v. Brinegar, 379 F. Supp. 606 (D. Vt. 1974) (involving the Highway Beautification Act, 23 U.S.C. § 131 (1976)).

70. 426 U.S. at 847.

functions.[71] The second was that the FLSA offered the affected states no discretion whatever:

> The only "discretion" left to them under the Act is either to attempt to increase their revenue to meet the additional financial burden imposed upon them by paying congressionally prescribed wages to their existing complement of employees, or to reduce that complement to a number which can be paid the federal minimum wage without increasing revenue.[72]

Compared to these two major shortcomings, the Clean Air Act requirements are not overly burdensome. First, although there will be costs to the states due to the regulations,[73] these costs will not necessarily be great, nor will they necessitate the abandonment of other state functions.[74] There are also statutory provisions that provide for federal funding of much of the implementation costs imposed by the Act.[75] In fact, as was pointed out in the Brief submitted by the federal government to the Supreme Court, if the savings in health-related and other welfare costs (borne largely by state governments) anticipated from achieving the national primary ambient air quality standards are "internalized," there may actually be a net *saving* to the states by enforcing their compliance.[76]

There is every indication also that the Clean Air Act allows a greater degree of choice to the states than did the FLSA. First, of

71. *Id.* at 846-47.

72. *Id.* at 848. In addition, there was an improper degree of intrusion evident in the overtime provisions of the FLSA, which may "substantially restructure traditional ways in which the local governments have arranged their affairs." *Id.* at 849.

73. The mere imposition of costs on a state is perfectly valid in itself. *See* Sanitary Dist. of Chicago v. United States, 266 U.S. 405 (1925).

74. Brief for the Federal Parties at 49-51. For example, vehicle inspections can be conducted as a part of the on-going programs in many states, or contracted out to private concerns. Neither method need be expensive for the states, and in fact it was pointed out that states that charge a fee for inspections generally realize a net profit from the programs. *Id.* at 50.

75. For example, federal aid can be obtained for the construction of preferential bus lanes. 23 U.S.C. § 142(a)(1) (Supp. V 1975); Buses themselves can be funded 80% by federal monies. The Urban Mass Transportation Act of 1964, *as amended*, 49 U.S.C. §§ 1601-1612 (1970) at § 1603(a) (Supp. V 1975). Brief for the Federal Parties at 51.

76. Brief for the Federal Parties at 51, citing a National Academy of Sciences Report to that effect. SENATE COMM. ON PUBLIC WORKS, 93D CONG., 2D SESS., AIR QUALITY AND AUTOMOBILE EMISSION CONTROL, REPORT BY THE COORDINATING COMMITTEE ON THE AIR QUALITY STUDIES, NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING 11-13 (Comm. Print, Serial No. 93-24, 1974). This argument is of course weakened by the fact that any such savings would occur in the long-range future, while the costs of compliance would be more immediate.

course, a state has the ability to circumvent the entire problem by enacting an acceptable transportation control plan.[77] If it cannot or will not do so, it then has the option of accepting and implementing the EPA's alternative plan.[78] If it disagrees with the Administrator's choice of strategy, or with the methodology used to arrive at the alternative plan, a state may challenge it and propose and adopt an alternative of its own.[79]

Therefore, if a state becomes subject to the EPA's claimed coercive powers, it is not for want of alternatives.[80] In fact, every aspect of each plan for each state involved in this litigation had been proposed originally by the respective states.[81] They had thereby acknowledged their duty to impose transportation controls.[82] By

77. Even this is necessary only if such a plan is required. Clean Air Act § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B) (1970).

78. Clean Air Act § 110(c)(1), 42 U.S.C. § 1857c-5(c)(1) (Supp. V 1975).

79. *See* Texas v. EPA, 499 F.2d 289 (5th Cir. 1974). In that case, the State of Texas challenged the EPA's methodology in arriving at a transportation control strategy, and was successful. For a review of some of the factors that affect the choice of a transportation control plan, *see* J. Holmes, J. Horowitz, R. Reid & P. Stolpman, The Clean Air Act and Transportation Controls: An EPA White Paper (U.S. Environmental Protection Agency, Office of Air and Water Programs, Aug. 1973); HOROWITZ & KUHRTZ, TRANSPORTATION CONTROLS TO REDUCE AUTOMOBILE USE AND IMPROVE AIR QUALITY IN CITIES: THE NEED, THE OPTIONS, AND EFFECTS ON URBAN ACTIVITY (U.S. Environmental Protection Agency 1974); R.O. ZERBE & K. CROKE, URBAN TRANSPORTATION FOR THE ENVIRONMENT (1975).

80. This is in marked contrast to the requirements of the FLSA, which were visited upon a state without variance, upon the mere act of hiring, and paying salaries to, workers.

81. "Each of the State-submitted plans proposed a wide range of strategies to reduce air pollution caused by motor vehicle emissions, including mandatory annual emission inspection and maintenance programs for various classes of vehicles." Brief for the States at 8. "Thus, the significant modification made by the Administrator to the State-submitted plans in each instance was the imposition of a requirement that the States enact and enforce laws and regulations necessary to carry out the various programs." *Id.* at 10.

Reasons for the disapproval of other state plans included the failure to appropriate adequate funds, NRDC v. EPA, 478 F.2d 875 (1st Cir. 1973) (Rhode Island and Massachusetts Plans I); including improper provisions for variances, NRDC v. EPA, 489 F.2d 390 (5th Cir. 1974) (Georgia Plan); and provisions allowing industries to treat air pollution data as "trade secret" information, NRDC v. EPA, 494 F.2d 519 (2d Cir. 1974) (New York Plan). *See also*, Friends of the Earth v. Carey, Nos. 75-7497, 76-3054 (2d Cir. Jan. 18, 1977), where the Second Circuit upheld the right of the EPA to force a plan on New York City. In the process, the court attempted, apparently erroneously in light of the states' admissions above, to distinguish these cases on the basis that here the EPA was attempting to coerce the states to accept totally EPA-promulgated ideas. *Id.*, slip op. at 1477-78.

82. The Clean Air Act requires that valid implementation plans include transportation control strategies, if required. § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B)

failing to provide any means of *implementing* those controls, however, the states in effect accomplished nothing. In essence, they admitted the obligation, then dared the EPA to enforce it.[83]

If the Administrator's coercive powers are upheld, the states will be forced to implement the plans that they themselves felt most necessary to reduce air pollution in their most polluted air quality control regions. This is in marked contrast to the requirement in the FLSA that states implement standardized minimum wage and overtime rates regardless of whatever peculiar local conditions might argue for alternate rates or rules.[84]

It is not enough that the Clean Air Act be less intrusive than the Fair Labor Standards Act, however. It must be shown that the Act as interpreted is less intrusive than would be alternative means of

(1970). It is also necessary that such plans provide "necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan . . . ." § 110(a)(2)(F)(i), 42 U.S.C. § 1857c-5(a)(2)(F)(i) (1970).

Because of this requirement, a state that failed to provide for proper enforcement of an implementation plan in effect failed to submit an approvable plan. In promulgating alternative plans for the states, the Administrator included demands that those necessary enforcement mechanisms be provided by the states themselves. In Regulation 52.23, therefore, he stated that failure on the part of the states to provide the enforcement mechanism that the EPA demanded they provide in order to fulfill the congressional desire for such plans would subject a state to federal enforcement under the Act, including forcing the state to enforce the plan. 40 C.F.R. § 52.23, *as amended*, 39 Fed. Reg. 33512 (1974).

83. The states included in their argument a statement that can only be viewed as puzzling, given the provisions of the Act described above:

> Ironically, the reason that the Administrator gave for disapproving several of the States' proposals, including the inspection and maintenance programs, the exclusive bus lane provisions, and the purchase of additional buses by WMATA, was the failure of the states to demonstrate that they had the requisite legal authority to implement and fund those transportation control strategies.

Brief for the States at 8-9.

84. Even when compared with the Economic Stabilization Act of 1970, Title II of Pub. L. No. 91-379, 84 Stat. 799, *as amended*, note following 12 U.S.C. § 1904 (Supp. I 1970), upheld in Fry v. United States, 421 U.S. 542 (1975), and used as a benchmark in *Usery* to compare with the undue harms of the FLSA, the Clean Air Act does not suffer greatly. Although it is contemplated that the Clean Air Act will not be "temporary," as the Economic Stabilization Act was meant to be, the simple reason for that fact is that the air pollution problem is not of a temporary nature. In the Clean Air Act, the means were carefully selected to take into account local needs, and the Act foreclosed no state choice other than the one the states eventually made—to promulgate a plan without the legal wherewithal to put it in motion. Finally, though it will increase rather than decrease state budgetary pressures (but query by how much), the Clean Air Act might still retain its validity under the *Wirtz-Fry-Usery* test by its attempt to solve an even thornier problem than that created by "severe" inflation.

arriving at the same end.[85] Federal preemption would involve the use of federal marshals to monitor the establishment and enforcement of preferential carpool and bus lanes on state highways (including, one would presume, setting up the necessary signs and roadway painting).[86] There would need to be established widespread federal programs for retrofitting airbleed devices on automobiles, either in addition to regular state car inspection programs, or, more likely, in competition with them.[87] It would involve federal takeover of state- or locally-run programs such as parking supply management,[88] inspection systems for emissions control devices already placed on automobiles,[89] emissions monitoring stations,[90] limitations on the use of certain types of vehicles during high-pollution periods,[91] and decisions concerning mass transit

85. *See* Salmon, *supra* note 5, at 364.

86. 40 C.F.R. §§ 52.257, .258, .259, .261 and .263 (1974) were invalidated in Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *cert. granted*, 426 U.S. 904 (1976) (oral argument heard Jan. 12, 1977, 45 U.S.L.W. 3448). 40 C.F.R. §§ 52.476(h), .1080(h) and .2435(f) (1974) were declared valid in District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *cert. granted*, 426 U.S. 904 (1976) (oral argument heard Jan. 12, 1977, 45 U.S.L.W. 3448), however. Preemption would entail federal programs being instituted to take the place of these programs, designed to be run with state personnel using state funds. All such programs envisioned as part of state-wide implementation plans are considered necessary if the national primary air quality standards are to be achieved. Refusal to acknowledge the power to force the states to adopt these programs would mean that the federal government would have to run them.

In earlier cases that invoked the preemption power of the federal government, such action did not result in greater intrusion into the affairs of the state or local governments. For example, in Campbell v. Hussey, 368 U.S. 297 (1961), the federal government, stressing a need for uniformity in tobacco inspection standards, preempted those of the states. In Hines v. Davidowitz, 312 U.S. 52 (1941), a Pennsylvania alien registration law was held to frustrate the will of Congress as expressed in a national act, and the state law was preempted. Colorado v. United States, 219 F.2d 474 (10th Cir. 1954), involved state stockyard inspections preempted by federal statutes.

87. 40 C.F.R. § 52.2039 (1976) (Pennsylvania air bleed retrofit); 40 C.F.R. § 52.244 (1976) (California retrofit); 40 C.F.R. §§ 52.1096-.1100 (1976) (Maryland retrofit); 40 C.F.R. §§ 52.492, .1091-.1094, .2444-.2448 (1976) (District of Columbia retrofit).

88. In 1974 the EPA withdrew these regulations, largely due to political pressure. The regulations had been planned for all areas involved in the suits here considered, and in other states as well. In District of Columbia v. Train, it was noted that Congress has since prohibited their use. 521 F.2d 971, 980 (D.C. Cir. 1975), *cert. granted*, 426 U.S. 904 (1976) (oral argument heard Jan. 12, 1977, 45 U.S.L.W. 3448).

89. 40 C.F.R. § 52.242 (1976) (California); 40 C.F.R. § 52.1095 (1976) (Maryland); 40 C.F.R. §§ 52.490, .1089, .2441 (1976) (District of Columbia).

90. 40 C.F.R. § 52.2029 (1976) (Pennslyvania).

91. 40 C.F.R. § 52.243 (1976) (motorcycle use in California restricted during the summer months).

facilities.[92] The federal government would have to establish bikeways in urban areas, presumably on city streets, through parks, and other areas, and wherever else needed to facilitate the use of this pollution-free transportation device to support state implementation plans.[93]

The alternative is to allow the federal government to force the states to legislate such regulations into existence, and monitor and enforce them, on their own, after the states have already expressed a desire to implement those plans. On balance, it appears that the lesser of the two "evils," in terms of intrusion into sovereign state choice, might be the use of section 113[94] and Regulation 52.23.[95]

Federal use of section 113 is no more coercive than other means of prodding the states to action, either. The alternative most often suggested is for the federal government to condition the grant of funds on state compliance,[96] much as was done in the case of the national 55-mph speed limit legislation.[97]

Although that specific tool has been "blessed" with unchallenged constitutionality,[98] it is difficult to see from this vantage point how that approach is any less "intrusive" than the one taken by the Administrator.[99] It is the end result that is, or should be, significant, and in both cases it is the same—forcing the states to legislate to suit the needs and desires of the national government. Conditioning grants, particularly in a period of increasing state

92. 40 C.F.R. §§ 52.258, .264, .265, .266 (1976) (California); 40 C.F.R. § 52.1105 (1976) (Maryland).

93. 40 C.F.R. § 52.2041 (1976) (Pennsylvania); 40 C.F.R. § 52.1106 (1976) (Maryland); 40 C.F.R. §§ 52.491, .1090, .2442 (1976) (District of Columbia).

94. Clean Air Act § 113, 42 U.S.C. § 1857c-8 (Supp. IV 1974).

95. 40 C.F.R. § 52.23, *as amended*, 39 Fed. Reg. 33512 (1974).

96. *See* Comment, *The Clean Air Amendments of 1970: Can Congress Compel State Cooperation in Achieving National Environmental Standards?* 11 HARV. C.R.-C.L. L. REV. 701, 729 n.177 (1976). There it was noted that the Ninth Circuit in Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *cert. granted*, 426 U.S. 904 (1976) (oral argument heard Jan. 12, 1977, 45 U.S.L.W. 3448), the Fourth Circuit in Maryland v. EPA, 8 E.R.C. 1105 (4th Cir. 1975), *cert. granted*, 426 U.S. 904 (1976) (oral argument heard Jan. 12, 1977, 45 U.S.L.W. 3448), and the D.C. Circuit in Brown v. EPA, 521 F.2d 971 (D.C. Cir. 1975), *cert. granted*, 426 U.S. 904 (1976) (oral argument heard Jan. 12, 1977, 45 U.S.L.W. 3448), all recommended such a course. *See also* H.R. REP. No. 1742, 94th Cong., 2d Sess. 104 (1976) (Conference Report to accompany S. 3219, the 1976 Clean Air Act Amendments) (Conference Committee notes on a proposal in the Senate version of the bill, later deleted, that would have provided for withholding funds for failure by the states to implement requirements of approved plans).

97. *See* notes 62-63 and accompanying text *supra*.

98. *See* note 69 *supra*.

99. *See* note 96 *supra*.

budgetary pressures, is as subversive of free choice in the typical state legislature as is forcing the states to legislate on pain of civil court penalties.[100]

3. *The State as Polluter.* The third, and possibly most important, consideration that makes the administration of the Clean Air Act different from that of the Fair Labor Standards Act is that here, the states themselves are arguably acting as polluters and are thus subject to the plain wording of the enforcement provisions of the Act.

The argument may be summarized as follows. The states, by making conscious decisions regarding the construction of highways and appurtenances thereto, have contributed to the urban sprawl that has exascerbated the problem of air pollution in the nation's urban areas.[101] If, instead of making the decisions that were in fact made years ago concerning highway location and construction, the states had moved in other directions—mass transit, more careful planning of arterials and beltways, and the like—the air pollution problem would be much less severe today.[102] If that were the case, there might not be a need for area-wide transportation control plans as part of the state implementation plans to achieve the mandated federal air quality control standards. Stationary source controls, combined with the emissions standards required of new automobiles, might have been sufficient.

100. These recent uses of conditional grants to achieve environmental and energy conservation goals in the context of highway programs indicate that Congress may take advantage of state dependence on essential funding to compel cooperation in achieving general federal objectives. While these measures do not entail as great a degree of state action as do the EPA regulations, they involve the same principle of coerced state participation. If the spending power can be exercised when the conditions attached have no clear relation to the goal of the legislation, then there is no valid constitutional argument against allowing the use, under the commerce power, of the no more coercive mechanism of directly requiring state action.
Comment, 11 HARV. C.R.-C.L. L. REV. 701, 729 (1976).

101. An example of such a decision was that which occurred in Los Angeles. Prior to the automobile boom of the 1920's the largest commuter rail system in the nation was operated in that area. The rise of the automobile, spurred on by unparalleled and seemingly unlimited freeway construction, spelled doom for that early attempt at urban mass transit. The Los Angeles Basin has tried without success to imitate this system ever since. N.Y. Times, Oct. 20, 1976, at 26, col. 3.

102. Pennsylvania v. EPA, 500 F.2d 246, 261 (3d Cir. 1974). For example, approximately 80% of the air pollution problem in the Denver area results from private passenger cars, and 96% from all vehicular sources. 3 DENVER LIVING 54 (1976). The percentages in other urban areas, although probably not as high as in Denver, are significant.

The counter-argument to this proposition is that it is the private citizen driving his privately-owned automobile who is the polluter, not the state which owns and maintains the highways upon which he travels.[103] Therefore, when the Clean Air Act gives the federal government the power to proceed against "any person" found in violation of a requirement of a plan, that power does not extend to forcing the states to abate pollution by redesigning their transportation systems. The District of Columbia Circuit adopted this view in part when it stated that the federal government could proceed against private drivers by requiring that they become federally-certified before they could register their automobiles, but that the states could not themselves be forced to adopt the inspection systems because they were not themselves the cause of the pollution.[104]

The states' arguments, and the logic followed by the courts are however, wrong. They presuppose that it is the growth in the number of automobiles, and in the number, density and distance from the central city of the suburbs, that creates the need for more highways, and not the other way around. Although it is possible to argue the egg-chicken question indefinitely, it appears that the more modern view, adopted by an increasing number of urban planners and commentators, is that to a large extent the planning and construction of highways predated, and to some extent caused, or at least made easier, the recent explosive growth of the suburbs,

103. Pennsylvania v. EPA, 500 F.2d at 261-62. District of Columbia v. Train, 521 F.2d 971, 990 (D.C. Cir. 1975), *cert. granted*, 426 U.S. 904 (1976) (oral argument heard Jan. 12, 1977, 45 U.S.L.W. 3448).

104. District of Columbia v. Train, 521 F.2d at 990-91. The different approach taken does not, however, seem logical. First, this proposal is grossly inefficient, given the resulting multiplicity of inspection and licensing programs. Second, the objective of the regulations is to limit the total emissions of any given highway system to below a target amount, that amount depending on the decrease necessary in an ambient air quality region to enable it to conform with ambient air quality standards. Separating the steps in this process in terms of validity or non-validity does not comport with the intention of Congress when it drafted the Act:

> Those [ambient air quality] standards realistically applied, will require that urban areas do something about their transportation systems, the movement of used cars, the development of public transit systems, and the modification and change of housing patterns, employment patterns, and transportation patterns generally. All of that is implicit in the concept of implementation plans for national ambient air quality standards . . . .

116 CONG. REC. 42387 (1970) (Sen. Muskie). *See* Bolbach, *Land Use Controls Under the Clean Air Act*, 6 SETON HALL L. REV. 413 (1975).

and as a direct result led to the increased use of the automobile.[105] The regulations being challenged are attempting to reverse these trends, and the EPA should be allowed to proceed against the governments themselves as primary culprits.

The Clean Air Act calls for states to require that construction programs consider the 'secondary' effects of shopping centers, large office buildings and the like on nearby traffic flow and air pollution.[106] What these requirements signify is that the states can no longer plan willy-nilly, without considering the effects outside their immediate consequences on neighborhood zoning, economics and other local factors.

In other words, the states themselves are a part of the pollution-causing problem; it is not only the automobile driver who is at fault.[107] Once this conceptual hurdle is surmounted, the word-

105. *See generally* Schneiderman, Cohn & Paulson, *The Impact of the Highway on the Urban Environment*, 20 CATH. U. L. REV. 1 (1970); J. JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 338-72 (1961). Evidence of this growing awareness is found in many places. The literature in the field of urban-suburban relationships and the role of highways is virtually inexhaustible, for instance. The variety of viewpoints on the merits of this social structure is equally varied, although a consensus appears to be building toward a realization that all is not utopia, and that the automobile creates at least as many problems as it corrects. In his 1970 State of the Union Message, President Nixon stated: "In the future, decisions as to where to build highways . . . should be made with a clear objective of aiding a balanced growth." [1970] U.S. CODE CONG. & AD. NEWS 7. *See also*, A. DOWNS, URBAN PROBLEMS AND PROSPECTS (1970); THE RELATIONSHIP OF LAND USE AND TRANSPORTATION PLANNING TO AIR QUALITY MANAGEMENT (G. Hagevik ed. 1972); R. HEBERT, HIGHWAYS TO NOWHERE (1972).

Perhaps nowhere is this awareness more evident than in the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4347 (1970). Environmental Impact Statements are required only for major federal actions, but the use of federal funding for most modern highway projects mandates that their planning abide by the requirements of NEPA and that Environmental Impact Statements be filed prior to construction. *Id.* § 102(2)(C), 42 U.S.C. § 4332(2) (1970). These statements have as their specific purpose the consideration of the impact of the proposals on the "human environment," *id.*, and they require input as to such effects, including the expected increase in automobile use that will result from the highway project. *See* U.S. Department of Transportation, Policy and Procedure Memorandum 20-8, January 14, 1969, 23 C.F.R. § 1 App. A (1972), modified by Instructional Memorandum 20-4-72, August 30, 1972, 23 C.F.R. § 1 App. A (1974); Policy and Procedure Memorandum 90-1, Environmental Impact and Related Statements, September 7, 1972, 23 C.F.R. § 1 App. A (1974) (codified in 23 C.F.R. Part 795 (1975)).

106. Air Programs; Approval and Promulgation of Implementation Plans; Review of Indirect Sources, 39 Fed. Reg. 7270 (1974) (accompanying regulations codified at 40 C.F.R. § 52.22(b) (1976)); 39 Fed. Reg. 25292 (1974).

107. *See* notes 104-05 *supra*. Highways are merely another form of polluting agent, much as is a sewer or a state office building. In all these cases, the political

ing of sections 110 and 113 of the Clean Air Act becomes clearer. It also lends a slightly different interpretation to the words of Justice Blackmun, who in his concurring opinion in *Usery* stated that "state facility compliance with imposed federal standards would be essential."[108] The term 'state facility' can be construed to mean not only sewage disposal systems, state office buildings and the like, but also highways and other transportation systems, built, owned and policed by the states.[109]

body owns and operates a facility that produces various pollutants as by-products. In a factory operation, the owner is held responsible for eliminating the harmful emanations before they foul the air and water. The owner cannot lay the blame onto his employees, even though it is their action in operating machinery that actually creates the pollutant discharges. A state-owned office building must also limit its discharges, and it is the state, not the office employees or the janitor who lights the furnace in the basement, that must bear the burden. Similarly, the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (Supp. II 1972), requires local governments, rather than the citizens who use the sewage disposal systems, to meet the federal goals of zero discharge of pollutants into U.S. waters by 1985 through the installation of primary and secondary sewage treatment systems. In 1975, the EPA issued 350 administrative orders to "polluting" municipalities, ordering them to install abatement facilities. The courts have power to enforce such orders, and seem to be demonstrating a willingness to do so. Wall St. J., Oct. 13, 1976, at 1, col. 6.

Logic dictates that if cities can be considered polluters for building systems to carry away their citizens' wastes—essentially a non-discretionary duty employing the only feasible means available—they can be adjudged polluters for conducting a road-building program in a manner that proves more harmful to the environment than alternative systems would have been. *See* 38 Fed. Reg. 30632 (1973).

108. 426 U.S. at 856.

109. Although Justice Blackmun did not indicate whether he meant the former or the latter interpretation, the latter seems the more logical and fitting, considering the role of the highway construction process in the air pollution problem.

The EPA Administrator stated, in promulgating Regulation 52.23, 40 C.F.R. § 52.23 (1973):

> The specific requirements imposed herein upon States and localities are based largely on two conclusions in addition to the factors discussed above: (1) that the governmental units must abide by valid implementation plan requirements just as much as any other source owners, and (2) that they are the owners and operators of pollution sources through their ownership and operation of highway transportation facilities.
>
> . . . .
>
> The question remains, what kinds of requirements must a State or other governmental entity comply with? The most obvious situation is one in which a State is operating a direct stationary pollution source such as a municipal incinerator. It is no less clear, however, that the Act allows the control of many kinds of direct and indirect sources relating to mobile pollution. Parking and road facilities constitute such sources and the control of them is a valid exercise of the authority in section 110(a)(2)(B) and 110(c) to promulgate such regulations as may be necessary to attain the national ambient air quality standards.

38 Fed. Reg. 30632 (1973).

The question becomes slightly more complicated when, as in the examples of the sewer and the highway, state police and regulatory powers are involved in addition to ownership. In the case of a sewer, the state discharges its obligation to protect the health and welfare of its citizenry by collecting human waste products and treating them. It must, however, dispose of those products in conformance with federal water pollution regulations. The citizens, who originate the refuse, are not (directly) charged with this burden.

In the case of highways, the state not only owns them, but makes rules for their safe and efficient operation (again, the police power role). However, there is a pollution by-product, and by analogy with the activities described above, the state must comply with federal law in reducing the harmful effects therefrom. There is no conceptual principle that can distinguish the peculiar form of ownership and control of state highways from the operation of other "facilities." It is simply a case of the governing agency being responsible for cleaning up the effects of its ownership. When its ownership has been manifested in the past by a series of decisions that have exascerbated the pollution by-product problem, there is even more reason to require that steps be taken to correct those past actions.

One criticism of this line of reasoning is that the federal government has helped fund and plan the highway systems built by the states, and in some cases has mandated the placement of those highways by the location of the components of the interstate highway network.[110] Now that the federal government has decided that such planning contributes to pollution, it proposes to intrude upon the sovereignty of the states by forcing them to implement regulations aimed at changing the transporation mix in urban areas. Since the federal government helped fund these original highway programs, it is argued, it should also provide the funds for implementing pollution-control programs.[111]

110. If responsibility for correcting air pollution problems arising from the operation of a regional system of streets and highways is to be assigned on the basis of the extent to which each jurisdiction has encouraged the use of automobiles, we would note 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 at 990 n.25.

111. In Sanitary Dist. of Chicago v. United States, 266 U.S. 405 (1925), the prop-

The simple answer to this objection is that the federal and state governments have both made mistakes in highway and other transportation systems planning, and now must work together to solve the problems created by those mistakes. The federal government, through the Clean Air Act, spends certain monies for research and enforcement, and helps to fund many state pollution abatement programs.[112] The role of the states is, however, and always has been, paramount in the field of air pollution control.[113] Because of previous recalcitrance on the part of the states, the federal government has been granted a 'bigger stick' to use against them. To the federal government falls much of the task of coordinating the research and development effort, as well as the establishment of standards and the best procedures to be employed in meeting them. The states' role is to regulate in accordance with local interests as much as possible, but always with the necessity of meeting the federal guidelines.

Because of this use of 'cooperative federalism,' both levels of government pay for past mistakes. Most of the planning choices were local ones, hence most of the burden of righting the mistakes falls on the states. The fact that they must now fund programs to correct past errors is little different from the situation in *Sanitary District of Chicago v. United States*,[114] wherein Chicago was forced to pay for alternative sewage disposal facilities after it had, with federal approval and help, built a canal to the Mississippi River Basin to carry off its sewage.[115] There, the Court stated that the economic interests of the states could not be allowed to intrude upon the overriding power of the federal government over commerce.[116] Here, the states should not be excused from correcting

osition was asserted that since the United States acceded to construction of the sewage ditch, it was estopped from later enjoining its expanded use. That contention was disposed of by the Court, which found that since a state cannot estop itself from the exercise of its police power, neither could the United States estop itself from the exercise of its commerce power. *Id.* at 427.

112. Authorization for such spending is evident throughout the Clean Air Act. *See, e.g.*, §§ 103(b), 104(a)(2), 105(a), 210, 42 U.S.C. §§ 1857b(b), 1857b-1(a)(2), 1857c(a), 1857f-6b (1970).

113. Clean Air Act § 101(a)(3), 42 U.S.C. § 1857(a)(3) (1970).

114. 266 U.S. 405 (1925).

115. The United States granted land to Illinois, and had hopes at one time of using the ditch for a commercial connection between the Great Lakes and the Mississippi River Valley. *Id. See* note 111 *supra*.

116. 266 U.S. at 426.

past mistakes just because the federal government participated in making them.

C. *The Clean Air Act and the "Usery Doctrine"*

The Clean Air Act thus meets the first test imposed, in that its requirements are not as onerous to state sovereignty as those invalidated in *Usery*. When plugged into the calculus of the cost-benefit analysis,[117] there are fewer "costs"[118] chargeable to the EPA regulations, and greater "benefits" accruing therefrom.[119]

The second step, closely related to the first, confronts more directly the conflict between the reach of the federal government under the Commerce Clause and the domain reserved to the states by the tenth amendment. Assuming that the EPA's discretionary use of its Clean Air Act mandate is constitutionally less abhorrent than was the extension of the FLSA to cover state employees, is it still too intrusive in and of itself to be deemed valid?

In answering this ultimate question, we refer again to the test laid down by the Court in *Usery*. There, some of the attributes of the Economic Stabilization Act of 1970 were enumerated and were cited as factors that contributed to its constitutional validity.[120] First, that act attempted to solve a serious problem of great national concern. Second, it was drafted carefully so as to be as unobtrusive and inoffensive as possible, given the circumstances. Third, it did not displace state choice with respect to the offering of services. Fourth, it created no state budgetary pressures. Overall, "the degree of intrusion upon the protected area of state sovereignty was in that case even less than that worked by the amendments to the FLSA which were before the Court in Wirtz."[121]

It is quite certain that the problem of air pollution poses dangers for this society that are every bit as severe as those created by the inflation of 1970.[122] The pollution problem would only grow more

117. *See* notes 44-45 and accompanying text *supra*.

118. *I.e.*, intrusions on state sovereignty.

119. *I.e.*, benefits accruing to interstate commerce through the elimination or amelioration of air pollution.

120. The Court did not indicate that the factors listed were all that were relevant or necessary in such an analysis. Rather, they were relevant and important for the consideration at hand.

121. 426 U.S. at 852-53.

122. In an effort to avoid a descent into the morass of economic analysis, it will

severe with continued neglect, and the costs—both direct and indirect—to the society would increase as a result.

The means chosen to combat this threat were the least intrusive possible, given the necessity for federal-state cooperation and the severity of the problem. As was evidenced above,[123] the Act's requirements should not be burdensome financially on the states. In addition, they leave to the discretion of the states the major decisions regarding what control measures to take, subject only to a requirement that federally-mandated air quality standards be met. The only course that a state may *not* take is to abandon the air pollution effort.[124] To do so would be to place a burden in the way of interstate commerce, a result the federal government has the power to prevent.[125]

The final test of constitutionality, given the necessity for the legislation and a degree of care in its implementation, is whether the resulting intrusion threatens the "separate and independent existence"[126] of the states. On this point, the *Usery* Court's attempts to distinguish *Fry* and *Wirtz* become a bit more obscure. It was suggested that the Economic Stabilization Act did not "displace" state choices, whereas the FLSA did. Unless the Court means here to compare budgetary pressures created by the two acts,[127] it is difficult to ascertain its meaning in this regard. In both the FLSA and the Economic Stabilization Act of 1970, and, for that matter, in the Clean Air Act, the end result of the coercion brought to bear by the federal government is that state legislatures are unable to pass the laws they might otherwise wish to pass, and they are required to pass others that they might not desire.[128]

be stated simply that there are cyclical tendencies that would in the long run (albeit at the risk of potentially severe social costs) tend to reduce such inflationary pressures. There are no such countercyclical tendencies in the realm of air pollution, however.

123. *See*, notes 74-76 and accompanying text *supra*.

124. Mr. Salmon takes the position that abandonment of the air pollution effort involving state-owned highways is akin to complete state inaction, and that states cannot be forced to take action where there has been none before. Salmon, *supra* note 5, at 293-95. However, when a facility creates pollution, the owner cannot be permitted merely to abandon all efforts to halt that pollution. *See* notes 143-49 and accompanying text *infra*.

125. Sanitary Dist. of Chicago v. United States, 266 U.S. 405 (1925); *cf.* Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964).

126. 426 U.S. at 851, *citing* Coyle v. Smith, 221 U.S. 559 (1911).

127. A comparison the Court in fact made. 426 U.S. at 853.

128. This was one of the court's main arguments in Brown v. EPA, 521 F.2d at 837-42.

The states have argued that to so restrict state choice reduces their inherent sovereign functions, and renders them impotent in the face of federal power. The Ninth Circuit, agreeing with this contention, perhaps expressed this viewpoint most succinctly: "A Commerce Power so expanded would reduce the states to puppets of a ventriloquist Congress."[129] Regardless of whether it is evidenced in an inability to enact pay increases for state employees, the subject of the challenge in *Fry*, or to limit those increases if the states do not desire to pay them, as was debated in *Usery*, or to refuse to implement federally-promulgated transportation control plans, the real problem evidenced in federal intervention is the restriction on that freedom of choice.

The crux of the argument, despite various attempts by the Supreme Court to portray it in terms of "traditional"[130] or "essential"[131] state functions, appears to be whether the tenth amendment reserves to the states the ability to function completely independently by means of the votes of their elected legislatures, and under what conditions the federal government might constitutionally intrude on that prerogative.

In other words, the question in this case is not whether the fact of ownership and control of highways constitutes an aspect of state sovereignty that is essential to its existence as a state.[132] The question is, may the state refuse to knuckle under to Congressional pressure and continue to spend state monies in whatever ways it pleases—even to the point of encouraging pollution—while leaving pollution control to the federal government. This is the only form of the issue that makes sense as an enduring principle of federalism, given the evolution of constitutional doctrines that in-

129. Brown v. EPA, 521 F.2d at 839.

130. *See* Salmon, *supra* note 5, at 348-55 and cases cited therein.

131. As delineated in *Fry*, *Wirtz* and *Usery*. *See, e.g.*, *Usery*, 426 U.S. at 845.

132. If such were the case, the holding of the Supreme Court in Helvering v. Powers, 293 U.S. 214, (1935) would be instructive. In that case compensation paid to the officials charged with running a public transportation system was held subject to federal taxation. The Court stated:

> We see no reason for putting the operation of a street railway in a different category from the sale of liquors. In each case, the State, with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State.

Id. at 227.

trude upon areas that had been the traditional domain of either the states or individuals.[133]

If it were to be concluded that it is the specific state function undertaken (rather than the states' ability to make laws regarding those functions) that controls on the question of "essentiality," then the varying treatment afforded *Wirtz* and *Fry* in *Usery* makes no sense. In each case the restrictions applied pertained to the pay of state employees, which is certainly a traditional state activity. How then could one such exercise of federal power be upheld and the other overruled?

If it is the exercise of the states' independent legislative power that is at stake, however, the *Usery* doctrine becomes apparent. It is that the legislative power of the states is *not* inviolate, but rather may be overridden, if the means-end rationale balances in favor of the intrusion, as it did in *Fry*. If that balance falls the other way, as it did in *Wirtz* and *Usery*, then the federal power cannot constitutionally extend to curtail state sovereignty.[134]

In the factual setting of the clean air cases, the only refuge the states may claim is that their legislatures may elect to say no to the federal regulations *only if* the harm in so doing[135] is less than the harm engendered by the federal government's use of force against

133. That is, given evolving ethical notions of governmental and private activity and the norms it must comport with, new activities that had formerly been the exclusive province of private concerns are undertaken every day by governments. The states themselves have expanded their roles greatly, largely at the expense of local governments and private enterprise. There are probably very few activities that would have been considered essential or traditional state functions one hundred years ago; yet, there is no question that at the present time state governments undertake them and their presence might be considered "essential" by many for continued existence of the type of state operations we have grown accustomed to expect.

134. It may be argued that this standard allows any degree of intrusion, so long as the potential benefits from the move are great enough. In theory, that may be true, but we are left with the somewhat overused, but nonetheless useful, principle that the political process itself will intervene to prevent what the courts apparently have feared—the utter destruction of the states. *See Usery*, 426 U.S. at 876-78 (Brennan, J., dissenting opinion). The effect of state loyalties on the part of members of Congress cannot be ignored, a fact which is evidenced by deliberations over and passage of amendatory language in the Clean Air Act itself, since the passage of the Amendments in 1970. The courts must act in partnership with the Congress. In those instances where the latter fails utterly to take into account the needs and interests of the states, the former can step in, as the Supreme Court did in *Usery*.

135. "Harm" in this sense must include harms created in other states, and to their citizens, by the actions of the state in question. In the case of Clean Air Act regulations, these harms would include pollutants transported across state lines and causing health- and economics-oriented damage in neighboring states. *See* notes 50-56 and accompanying text *supra*.

the legislatures. If the balance shifts the other way, the states must yield to the "plenary" power of Congress to control interstate commerce.[136] As is evident from the above analysis, this author believes that the balance dictates that the states must yield in this instance.

IV. THE COMMERCE CLAUSE—TENTH AMENDMENT CONFLICT

At the conclusion of his analysis, Mr. Salmon enumerated seven principles that indicate his perception of the "federalist principles" guiding the Court's inquiry in cases such as this.[137] In light of the fact that his conclusions differ so substantially from those reached herein, it would appear worthwhile to examine briefly his reasoning.

With propositions three through seven there is no quarrel.[138] In fact, four through seven merely restate longstanding principles of constitutional law with which there can be little serious quarrel by anyone.[139] Proposition three, reflecting a view that the less intrusive means of arriving at a goal is the preferable means, has been dealt with at length above[140] and will not be discussed further. It too is seemingly not open to serious question.

136. United States v. California, 297 U.S. 175, 184 (1936), *cited in Usery*, 426 U.S. at 866 (Brennan, J., dissenting opinion).

137. Salmon, *supra* note 5, at 364.

138. 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.

Id.

139. Mr. Salmon apparently interpreted his sixth and seventh principles as foreclosing federal coercion of the states in this case. It is not with the principles themselves that this author disagrees; rather, in the case of number six, it is argued here that the states have the right to comply in any way they deem fit, as long as they comply. *See* notes 77-83 and accompanying text *supra*. As to principle number seven, the states' activities in this regard do affect commerce, therefore they may be coerced into complying.

140. *See* notes 85-100 and accompanying text *supra*.

The first two of Mr. Salmon's principles deserve some comment, however, since they apparently form the basis for his attack on the claimed federal power.[141] For reasons of convenience, the two will be combined into one overriding principle, that can be paraphrased as follows: the tenth amendment recognizes a difference between a burden on commerce created by state action and a burden that is felt in the absence of state action, and therefore allows the state the right to withdraw from all action and thereby be immune to federal control.

The basis for this approach is that Mr. Salmon does not believe that state officials can be ordered to take affirmative actions in aid of commerce. He perceives a distinction between the historical scheme whereby the national government will brook no affirmative interference with the flow of commerce, and one wherein that government will place on the states an affirmative role in support of that flow.

He also draws a distinction between a state engaging in commerce, for example by operating a railroad,[142] and one that engages in a function that merely affects commerce as engaged in by private persons, for instance by policing and formulating rules for the operation of private vehicles on a highway. The former may be validly forced to conform its commercial enterprise to federal standards, whereas the latter can refuse to regulate activities on its highways that themselves might constitute a burden on commerce.

Regarding the activity/inactivity dichotomy, Mr. Salmon's arguments can be countered in two ways. First, he mistakes past state transportation policies for *non*-policies.[143] Thus, describing the EPA's rationale for its issuance of Regulation 52.23, he states:

> A state may well be proscribed from those of its activities which substantially affect and burden commerce. 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

141. 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.
Salmon, *supra* note 5, at 364.

142. United States v. California, 297 U.S. 175 (1936).

143. Salmon, *supra* note 5, at 293-95. *See* notes 101-07 and accompanying text *supra*.

> neglected an opportunity; they "could equally well have chosen to discharge their basic function(s)" 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.[144]

What he has failed to recognize in the EPA's argument is that it was state decisions, and not the absence of decisions, that helped create the air pollution problem. The states actually built highways in the wrong places, at the wrong times. If they had failed to act, we might be better off today in terms of air pollution. However, that was not the case. In order to make up for their *affirmative* mistakes of the past, the states must now participate in the federal-state programs.[145]

The second stumbling point arises with the assertion that state officials cannot be commanded to perform tasks by federal officials, simply because there are no instances wherein such power has been granted.[146] Despite the fact that there is no explicit grant of such power, there is a history of federal use of state officials,[147] and in some limited instances that use has been compulsory.[148] We are left only with the contention that, absent *active* state transgression of its power, Congress cannot coercively control the noncommer-

144. Salmon, *supra* note 5, at 326.

145. There is a real difference between a truly hands-off policy on the part of a state and one in which state ownership and control of an activity is used in a way that exascerbates a problem that demonstrably causes great socio-economic harm both within and without the state. *Cf.* Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964).

146. Salmon, *supra* note 5, at 334-38. Mr. Salmon failed there to analyze Testa v. Katt, 330 U.S. 386 (1947), where a state court was forced to try a case involving federal law.

147. *See* note 57 *supra*.

148. *See* note 57 *supra*.

> The States recognize that the Thirteenth, Fourteenth, and Fifteenth Amendments grant Congress the power to intrude "into judicial, executive, and legislative spheres of autonomy previously reserved to the States." Fitzpatrick v. Bitzner, 96 S. Ct. 2666 (1976). This Court, however, has made it clear that the powers of the federal government over the states under the Civil War Amendments are considerably greater than the power of Congress under the Commerce Clause and other provisions of the Constitution. *Id.* at 2670-71.

Brief for the States at 77-78. In *Fitzpatrick*, there was no express statement that the Commerce Clause is more restricted than the Civil War Amendments. That belief may have been implied by the majority, however. *See also* the instances cited in Salmon, *supra* note 5, at 334-38.

cial functioning of the states. It must rely on persuasion or threat to induce state cooperation.[149]

Mr. Salmon's point concerning the commercial/noncommercial distinction is also open to dispute. By building and maintaining roads, the states are, quite simply, engaged in commerce. If highways were still owned and operated by private concerns, as they were in the early years of our nation, there would seem to be no argument about whether or not that ownership constituted "commerce."[150] Now, however, the states own and operate the roads, and police them as well. Perhaps the police powers exercised are not in themselves "commerce," but the ownership and operation certainly are. And, as observed in *United States v. California*:

> [W]e think it unimportant to say whether the state conducts its railroad in its "sovereign" or in its "private" capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution.[151]

It appears that the operation of highways places the states more squarely in the position of California than either they or Mr. Salmon will admit.[152] In any event, it does place them in the position of engaging in commerce, which allows the federal government to prevent inadequacies in state programming that place a burden on other states, the federal government and interstate commerce.

149. Salmon, *supra* note 5, at 339. It thus appears that on the one hand Mr. Salmon would have the courts make a distinction between state action and inaction regarding highways, while on the other imply that the failure of the courts to have established any contrary precedent in this field of federal coercive power is akin to a formal renunciation of such power.

150. One of the early definitions of commerce as implying "intercourse" certainly includes that conducted as a result of owning and operating the means of commerce. *See* United States v. California, 297 U.S. 175 (1936).

151. *Id.* at 183-84 (citations omitted).

152. In United States v. California, 297 U.S. 175 (1936), although the state owned and operated the railroad itself, rolling stock of private railroad companies made use of the track system. Therefore, the road was in essence a government-operated commerce-aiding device as much as it was a commercial enterprise; the purpose of the railroad was not simply to generate income for the state. That did not prevent the Supreme Court from ruling that it constituted commerce and as such was subject to congressional control.

V. CONCLUSION

The Clean Air Amendments of 1970 have spawned apparently unforeseen difficulties in intergovernmental relations that go to the very heart of our federal system. In an era of renewed awareness of the boundaries separating the powers allotted to the federal and state governments, the EPA Administrator has claimed coercive powers that will limit the freedom of choice of the states in the important field of transportation planning and regulation. These powers must be scrutinized carefully, to determine whether their use comports with our notions of what constitutes permissible intrusion by the federal government into the affairs of the states.

The first question that must be asked is whether Congress authorized the use of coercion against the states in the Clean Air Act. Given the quantum leap in regulatory powers granted the EPA in the 1970 Amendments compared to those present in earlier editions of the Act, it is probably the case that the Administrator was acting within his statutory authority. Therefore, the Administrator's authority must be scrutinized to determine whether the grant of such extraordinary powers to a federal regulatory agency meets constitutional standards imposed upon federal Commerce Clause authority by the tenth amendment. Recent case law, culminating in *National League of Cities v. Usery*, provides a set of principles upon which to base a decision. That case imposes upon the federal government an obligation to ensure that intrusions into sovereign state affairs are limited to the minimum necessary to accomplish restricted national objectives.

Given the extraordinary crisis visited upon the nation by an increasing incidence of air pollution, strong federal legislation is both proper and necessary to effect a cure. The Commerce Clause clearly gives to Congress the authority to legislate in this manner. Given the specific safeguards built into the Clean Air Act, and the fact that every solicitude has been shown the states by the federal government in its efforts to assure effective compliance with the mandate of the Act, the tenth amendment should not be held to bar the exercise of that authority.

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