# Enforcement Controversy Under the Clean Air Act: State Sovereignty and the Commerce Clause

On June 1, 1976, the United States Supreme Court granted certiorari on five cases[1] which may well produce a decisional milestone in shaping our system of federalism. At issue is the power of the Administrator of the Environmental Protection Agency [hereinafter "the Administrator" and "the EPA"] granted to him by the Clean Air Act[2] [hereinafter "the Act"]. The Administrator interpreted the Act to empower him to promulgate regulations requiring the states to pass laws, institute programs, and use their police power to enforce antipollution measures in order to meet air quality standards created under the Act by the Administrator. The states which petitioned for review of the above regulations claimed that the Clean Air Act did not support the Administrator's actions and, to the extent that it did, it would be unconstitutional. The five cases mentioned *supra*, plus *Pennsylvania v. EPA*,[3] which involved the same issues but is not up for review before the Supreme Court, will be referred hereinafter as the Clean Air Act cases.

Section 110(a)(1) of the Clean Air Act[4] provides: "[E]ach State shall . . . adopt and submit to the Administrator . . . a plan which provides for implementation, maintenance, and enforcement of [primary and secondary air quality standards promulgated by the Administrator]."[5] Upon receiving the plan of a state, the Administrator must approve or disapprove it on the basis of eight listed criteria.[6] The Administrator has the

1. Brown v. EPA, 521 F.2d 827 (9th Cir. 1975); Arizona v. EPA, 521 F.2d 825 (9th Cir. 1975); Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975); Virginia *ex rel.* State Air Pollution Control Bd. v. Train, 521 F.2d 971 (D.C. Cir. 1975); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975).

2. 42 U.S.C. § 1857 (1970).

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

4. Clear Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1680 (codified at 42 U.S.C. § 1857c -5(a)(1) (1970).

5. 42 U.S.C. § 1857c-2 gives the Administrator authority to designate air quality control regions, § 1857c-3 requires the Administrator to publish a list of air pollutants, and § 1857c-4 orders him to prescribe national primary and secondary air quality standards for those pollutants. 42 U.S.C. § 1857c-4(b)(1) and (2) define primary standards as representing a level of pollution reduction necessary to protect the public health, and secondary standards as representing a level of reduction necessary to protect the public welfare.

6. 42 U.S.C. § 1857c-5(a)(2) (1970).

nondiscretionary duty to disapprove a plan which does not conform to the criteria set forth in the statute,[7] but the Act also allows a state to revise its plan in order to satisfy the requirements.[8]

If the Administrator disapproves the state's proposed plan, he is required to promulgate whatever regulations are necessary to create a satisfactory plan.[9] The final plan, whether an approved state plan or a plan consisting in whole or in part of regulations promulgated by the Administrator, is called "an applicable implementation plan" for achieving national primary and secondary air quality standards[10] and can be enforced by both the state and federal governments.[11]

The Administrator has partially disapproved many proposed state plans for their failure to provide for the necessary legal authority and funds to implement them. He then promulgated regulations which were designed to control the use of the governmental powers of the affected state. The purpose of this was to avoid inefficiency; rather than undertaking to police its antipollution measures directly against private parties at the cost of duplicating previously existing state policing machinery, the EPA sought to command the states to use their police powers to achieve the national air quality standards. The result of this tactic was to make states vulnerable to the enforcement and penalty provisions of section 113 of the Clean Air Act[12] not only for operating a pollution source, but also for failing to use their governmental powers as directed by the Administrator's regulations to control the pollution activities of parties subject to their jurisdiction.

The controversy which developed between the EPA and the states in this regard centered on state- and area-wide transportation control plans. Although the Clean Air Act specifically required an implementation plan to provide, "to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards,"[13] transportation controls were required only if necessary "to insure attainment and maintenance of . . . primary or secondary standard[s]".[14] Since several air pollutants for which the Administrator had promulgated air quality standards were produced in large part by motor vehicles, extensive transportation controls were clearly necessary to meet the national standards.

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7. Natural Resources Defense Council v. EPA, 478 F.2d 875, 888 (1st Cir. 1973).
8. 42 U.S.C. § 1857c-5(a)(3) and (c)(3) (1970).
9. 42 U.S.C. § 1857c-5(c)(2) (1970).
10. 42 U.S.C. § 1857c-5(d) (1970).
11. Natural Resources Defense Council v. EPA, 478 F.2d 875, 888 (1st Cir. 1973).
12. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1686 (codified at 42 U.S.C. § 1857c-8) (1970).
13. 42 U.S.C. § 1857c-5(a)(2)(G) (1970).
14. 42 U.S.C. § 1857c-5(a)(2)(B) (1970).

## I. PENNSYLVANIA V. EPA

The Third Circuit's decision in *Pennsylvania v. EPA*[15] initially addressed the question of the Administrator's power under the Clean Air Act to regulate the state in its capacity as a government. The transportation control plan at issue was typical of those at issue in the other Clean Air Act cases. The Pennsylvania plan required the Commonwealth to establish an air bleed retrofit program, establish an inspection system for certain motor vehicles, set up bikeways, establish a computer carpool matching system, create exclusive bus and carpool lanes, limit public parking, and monitor carbon monoxide and hydrocarbon emissions to determine the effectiveness of the EPA measures.[16] In its petition for review, Pennsylvania challenged the regulation requiring a retrofit program and the Administrator's action making the Commonwealth subject to enforcement penalties for violation of the implementation plan if it failed to enforce and administer the regulations.[17]

Before deciding the question of the constitutionality of the Administrator's claimed power, the court proceeded to determine the extent of power authorized by the Act itself. Section 113 of the Clean Air Act provides for enforcement against "any person," which is defined to include "any State, municipality, and political subdivision of a State."[18] Further, federal enforcement actions may be taken under section 113 "when there has been a violation of 'any requirement' of an applicable implementation plan."[19]

The court gave "great deference" to the Administrator's determination of appropriate means to achieve the statute's purposes, "particularly since it represents the judgment of one charged with carrying out the statutory provisions 'while they are yet untried and new.' "[20]

Unlike the decisions in the other Clean Air Act cases, which found the legislative history to be ambiguous in this area, in the *Pennsylvania* decision the legislative history was held to show that "Congress clearly contemplated that states could be required to implement a transportation control plan . . . ."[21] In summary, the decision on the question of statutory intent was based mostly on the "great deference" given to the determination of the Administrator, with some reliance placed also on the presumed intent of Congress as seen through the legislative history.

In regard to the constitutional question, the court observed that, since

15. 500 F.2d 246 (3d Cir. 1974).
16. *Id.* at 249.
17. *Id.* at 248.
18. *Id.* at 257 (citing 42 U.S.C. § 1857c-8 and 42 U.S.C. § 1857h(e) (1970)).
19. Pennsylvania v. EPA, 500 F.2d 246, 257 (3d Cir. 1974).
20. *Id.* (citing Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933)).
21. *Id.* at 259.

it is well settled that air pollution is a form of interstate commerce and also affects interstate commerce,[22] Congress necessarily has the authority to regulate it.[23] This left only the question of whether the means used were unconstitutional.

At the beginning of its analysis of this question the court indicated its opinion on the doubtful relevance of the tenth amendment, quoting the following language from *Case v. Bowles*:

> Since the decision in *McCulloch v. Maryland*, 4 Wheat. 316, 420, 4 L.Ed. 579, it has seldom if ever been doubted that Congress has power in order to attain a legitimate end—that is, to accomplish the full purpose of a granted authority—to use the all appropriate means plainly adapted to that end, unless inconsistent with other parts of the Constitution. And we have said that the Tenth Amendment "does not operate as a limitation upon the powers, express or implied, delegated to the national government (footnote omitted)."[24]

According to the *Pennsylvania* decision, the point the precedents really established was "only that the resolution of this constitutional issue should *not* depend on whether the party to be regulated is a private person or state."[25] The only limitation on Congress was the reach of the commerce power itself, and the sole limiting factor in that connection was whether the activity to be regulated significantly affected interstate commerce.[26]

The regulations at issue in the *Pennsylvania* case easily met the test of constitutionality formulated by the court. The Commonwealth's roads, licensing procedures, and system of traffic laws were activities which affected air pollution, and therefore, interstate commerce.[27] The court found an apt analogy to its decision in *United States v. California*,[28] where the Supreme Court upheld federal safety laws as applied to a state-owned and -operated railroad. The Third Circuit likened Pennsylvania's transportation system, including the legal and policy structure behind it, to the state-owned railroad in *California*, and reasoned that the same necessity of state compliance with federal regulations existed here.[29]

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22. *Id.* (citing United States v. Bishop Processing Co., 287 F.Supp. 624, 630-632 (D. Md. 1968), *aff'd*, 423 F.2d 469 (4th Cir.), *cert. denied*, 398 U.S. 904 (1970)).

23. *Id.*

24. *Id.* n. 20 (citing Case v. Bowles, 327 U.S. 92, 102 (1976)).

25. *Id.* at 260.

26. *Id.* The Third Circuit relied heavily on Maryland v. Wirtz, 392 U.S. 183 (1968) on this point, and also on United States v. California, 297 U.S. 175 (1936). The Supreme Court cited *California* in the *Wirtz* case as authority for rejecting any special status for a state's "sovereign" activities as opposed to its "private" activities. Maryland v. Wirtz, *supra*, at 196-197, (quoting United States v. California, *supra*, at 183-185).

27. Pennsylvania v. EPA, 500 F.2d 246, 261 (3d Cir. 1974).

28. 297 U.S. 175 (1936).

29. Pennsylvania v. EPA, 500 F.2d 246, 261 n.22 (3d Cir. 1974).

The court rejected Pennsylvania's claim that *New York v. United States*[30] should provide the basis for review of the Administrator's action. It declared that there had been a long-recognized distinction between the taxing and commerce powers of the federal government, and the modern trend toward diminishing this distinction increased the reach of the former without shortening the reach of the latter.[31]

The Court of Appeals did not appear uneasy over the practical effects of its decision, which it predicted would be beneficial:

> It is also true that compliance with the plan will require the Commonwealth to exercise its legislative and administrative powers, for that is the means by which a state regulates its transportation system . . . . In enacting the Clean Air Amendments of 1970, Congress created an interlocking governmental structure in which the Federal Government and the states would cooperate to reach the primary goal of the Act—the attainment of national ambient air quality standards . . . . We believe that this approach represents a valid adaptation of federalist principles to the need for increased federal involvement.[32]

## II. BROWN V. EPA

The decision in *Brown v. EPA*[33] was in complete opposition to that in *Pennsylvania*, as the Ninth Circuit Court of Appeals discovered grave constitutional difficulties with the Administrator's position and decided that the Clean Air Act had not clearly given such an extensive power. Examining the Act, the court saw two indications in section 113 (the enforcement section) that enforcement actions could not be brought against a state for failing to regulate private parties. First, this section makes a distinction between "person" and "state" in the notice proce-

30. 326 U.S. 572 (1946). In this case a badly divided Court held in a 5-4 decision that Congress could tax the sale of mineral waters even if they were sold by a state. Only one Member of the Court joined in the Court's opinion, written by Justice Frankfurter. Justice Rutledge wrote a concurring opinion, and dissented insisting that full protection of the states from federal taxation was required by the tenth amendment.

31. Pennsylvania v. EPA, 500 F.2d 246, 262 (3d Cir. 1974).

32. *Id.*

33. 521 F.2d 827 (9th Cir. 1975). California was the petitioning state in this case. The disputed regulations required, among other things, a reduction of the amount of gasoline sold in certain regions, the administration of an inspection and maintenance program by California, the imposition by California of limitations on the use of motorcycles, the creation by California of an oxidizing catalyst retrofit program, the establishment by the State of a computer-aided carpool matching system, and the creation of preferential bus and carpool lanes. Failure to submit a compliance schedule in regard to these requirements or to create the required regulatory programs would put the State in violation of the implementation plan and subject it to federal enforcement actions. *Id.* at 830.

Arizona v. EPA, 521 F.2d 825 (9th Cir. 1975), was decided on the same day as *Brown*. Although it was a separate case, it raised the same issues, so the court disposed of them in its opinion in *Brown*. *Id.* at 826.

dures. Before the Administrator can issue an order or bring a civil action against a "person in violation of a plan," he must give notice both to that "person" and to the "State in which the plan being violated applies."[34]

Secondly, subsection 113(a)(2) contains a provision for direct federal enforcement of an implementation plan against "any person" until the state satisfies the Administrator that it will enforce the plan. This section applies to situations where violations of the plan are so widespread that the state appears to be delinquent in its enforcement efforts.[35] This portion of the Act treats the "person in violation" and the "State failing to enforce" as two different entities, which seems to refute the view that the state's very failure to enforce the regulations would cause it to become the "person in violation."[36] Congress had left a gap between the concept of the state as a governing power and the state as an operator of a pollution source, and the court declined to supply a connection through statutory interpretation.[37]

The court found further support for its statutory analysis in the broad legislative design of the Clean Air Act. Congress had created a complicated structure of regulation, using such techniques as total and partial preemption, delegation of federal authority to states, and offering opportunities to states to participate in the task of controlling air pollution.[38] This complex structure was described as "incompatible with the view that buried within section 113 is the Congressional intent to make the states departments of the Environmental Protection Agency no less obligated to obey its Administrator's command than are its subordinate officials."[39]

The court found the legislative history too ambiguous to be of significant help, but it concluded that the more natural reading of the legislative history was that "the Administrator [has] ample power to enforce an implementation plan when a state has failed to do so."[40]

Turning to the constitutional question, the *Brown* decision held that a state's governing functions had a unique constitutional status, and were protected by the tenth amendment. The court insisted upon maintaining a strong distinction between ordinary activities affecting interstate commerce and a state's regulation of the activities of other parties which affect interstate commerce.[41]

Since two Supreme Court cases occupied a central position in the

34. Brown v. EPA, 521 F.2d 827, 834 (9th Cir. 1975).
35. 42 U.S.C. § 1857c-8(a)(2) (1970).
36. Brown v. EPA, 521 F.2d 827, 834 (9th Cir. 1975).
37. *Id.*
38. *Id.* at 835.
39. *Id.*
40. *Id.* at 836.
41. *Id.* at 838-839.

constitutional analysis of the Administrator's action, it is worthwhile to describe them more fully. *Maryland v. Wirtz*[42] involved an action by Maryland and other states attacking amendments to the Fair Labor Standards Act which extended federal minimum wage and maximum hour laws to cover state schools and hospitals.[43] The Supreme Court upheld the amendments to the Fair Labor Standards Act, and in doing so held that the commerce power includes the authority of Congress to regulate employment conditions of state employees engaged in activities which affect interstate commerce.

One of the difficulties in determining the meaning of this case lay in the Court's observation that the Fair Labor Standards Act as amended expressly avoided application to school employees in executive, administrative, or professional positions, and the Court assumed that medical personnel in analogous positions were also exempted. The only effect of the law was on the wage-hour structure, and it did not otherwise affect the way school and hospital duties were performed.[44]

Thus, on the one hand the Court appeared to emphasize the minimal nature of the federal intrusion into state affairs involved in this case. On this point the Court stated, "Congress has 'interfered with' these state functions only to the extent of providing that when a State employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals."[45]

On the other hand, the case contained language denying any limitation on a granted federal power based on states' quasi-sovereignty:

> [I]t is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as "governmental" or "proprietary" in character. As long ago as *Sanitary District v. United States*, 266 U.S. 405, the Court put to rest the contention that state concerns might constitutionally "outweigh" the importance of an otherwise valid federal statute regulating commerce.[46]

*Fry v. United States*,[47] involved a challenge to the attempt of the United States to apply the Stabilization Act[48] wage-price controls to prevent payment of part of a wage increase to Ohio state employees deemed by the United States to be excessive. The Supreme Court

42. 392 U.S. 183 (1968).
43. 29 U.S.C. §§ 206(a), 207, 203(s) (1970).
44. Maryland v. Wirtz, 392 U.S. 183, 193 (1968).
45. *Id.* at 193-194.
46. *Id.* at 195-196.
47. 421 U.S. 542 (1975).
48. Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799 (expired April 30, 1974, after being extended five times).

affirmed the Court of Appeals ruling that the Stabilization Act as applied to state employees was constitutional.

The petitioners in this case were two Ohio employees who had sought and obtained a writ of mandamus from the Ohio Supreme Court ordering payment of the full wages agreed upon. They admitted that the payment of the state wages had an effect on interstate commerce but contended that there were limitations placed on the exercise of the federal commerce power by state sovereignty and the tenth amendment. The Court bluntly rejected this contention, declaring:

> *Wirtz* reiterated the principle that States are not immune from all federal regulations under the Commerce Clause merely because of their sovereign status. 392 U.S., at 196-197. We noted, moreover, that the statute at issue in *Wirtz* was quite limited in application. The federal regulation in this case is even less intrusive.[49]

Thus, in one paragraph the Court asserted that the states' sovereign status could not make them immune from federal regulation under the commerce power and yet emphasized the unintrusiveness of the statute at issue. If this latter fact was important to the decision, one could reasonably argue that a statute which interferes extensively with state sovereignty is unconstitutional. This argument is strengthened by a footnote in which the Court stated:

> While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," *United States v. Darby*, 312 U.S. 100, 124 (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.[50]

The *Wirtz* and *Fry* cases did not set a clear direction in federal-state relations. They continued a long-standing tradition of expanding federal power under the Commerce Clause and yet contained language acknowledging the constitutional importance of state sovereignty as attested by the tenth amendment. It is not surprising that these cases could be read to support contradictory holdings. Thus the Third Circuit in *Pennsylvania* relied heavily on *Wirtz* (*Fry* had not been decided yet), and concluded that the commerce power was in no way limited by state sovereignty and the tenth amendment, while the other courts in the Clean Air Act cases cited dicta in *Wirtz* and *Fry* as indicating that state sovereignty does impose *some* limitations on federal power.

In *Brown v. EPA*, the Ninth Circuit held that a state's governmental powers are not subject to the commerce power, except where state laws must yield to federal regulation to give affect to the Supremacy Clause.[51]

49. Fry v. United States, 421 U.S. 542, 548 (1975).
50. *Id.* at 547 n. 7.
51. Brown v. EPA, 521 F.2d 827, 839 (9th Cir. 1975).

The court decided that the holdings in *Maryland v. Wirtz* and *Fry v. United States* were inapposite, and that the court in *Pennsylvania v. EPA* had erred by failing to recognize the special character of a state's regulation of the economic activity of those subject to its jurisdiction.[52] On this, the *Brown* court said:

> To make *governance* indistinguishable from *commerce* for the purposes of the Commerce Power cannot be equated to the "unintrusive" regulation of economic activities of the states upheld by the Supreme Court in *Maryland v. Wirtz* and *Fry v. United States*. A Commerce Power so expanded would reduce the states to puppets of a ventriloquist Congress.[53]

The court foresaw consequences so severe as to constitute a possible violation of the constitutional guarantee to the states of a republican form of government.[54] If Congress had the power to compel the use of a state's governmental machinery for its own constitutional purposes, it could control an ever increasing portion of the states' budgets.[55] This would create a gap between the taxing and spending powers as far as state funds were concerned: control over a state's functions and moneys would be determined, to a large extent, by national representatives and their constituents, while the obligation to tax would remain local, focused on the taxpayers of each state.[56] The taxpayers of each state would be encouraged to demand increased federal aid to their states, while attempting to earmark their own state's funds for activities still subject to state control.[57] These effects are not consistent with either a "healthy federalism or sound public finance."[58]

Separation of the power to tax from the power to spend would divest the states of a sovereign function so important that they would no longer possess a republican form of government as that term was understood by Montesquieu and the authors of the *Federalist Papers*.[59] This conclusion would not be altered even if both the powers of spending and taxation were exercised by the federal government.[60] Although the court did not base its rejection of the Administrator's position squarely on the Guarantee Clause, it did view that Clause being relevant to its decision.[61]

The heart of this decision was the necessity, as the court perceived it, of protecting the essentials of state sovereignty as a part of the constitu-

52. *Id.* at 838 & n. 45.
53. *Id.* at 839.
54. *Id.* at 840.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

tional structure of federalism. The court quoted *Fry v. United States* as authority on relevance of the tenth amendment in establishing and protecting this structure.[62] It also quoted a statement from *Maryland v. Wirtz* that "[t]he Court has ample power to prevent what the appellants purport to fear, 'the utter destruction of the State as a sovereign political entity.' "[63] These statements gave support to the concept of a reserved state sovereignty which was threatened by the Administrator's regulations.

## III. MARYLAND V. EPA

The decision in *Brown* was followed by the Fourth Circuit in *Maryland v. EPA*,[64] especially in regard to the constitutional analysis. The *Maryland* case, like *Brown*, was decided by a statutory interpretation which was strongly influenced by the alternative of striking down part of the Act on constitutional grounds. Two rules of construction mandated this approach. The first requires that courts should, when possible, construe the statute as valid, and the second requires a court to decide a case through statutory construction or general law rather than on constitutional grounds if either method is available.[65]

Although the statute specifically authorized the Administrator to promulgate necessary regulations when a state had not done so, the *Maryland* decision held that this provision was very different from one which would authorize the Administrator to direct a state to enact statutes and regulations. The court could find nothing in the terms of the Act which clearly gave the Administrator the power to do the latter.[66] "In our opinion," the court held, "the preparation of regulations for a state means regulations to be applied within the boundaries of a state if it does not act in a manner approved by the EPA."[67]

The Court of Appeals began its examination of the constitutional question by quoting from *Maryland v. Wirtz*,[68] *New York v. United States*,[69] and *Gibbons v. Ogden*[70] to show that the commerce power is limited and

62. *Id.* at 842 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)).

63. *Id.* (quoting Maryland v. Wirtz, 392 U.S. 183, 196 (1968)).

64. 530 F.2d 215 (4th Cir. 1975). Maryland challenged the right of the EPA to require that it enact programs calling for retrofit of pollution control devices on certain classes of vehicles and the establishment of bikeways. *Id.* at 218. The EPA also promulgated regulations providing that the "State of Maryland shall" establish automobile inspection and maintenance programs. *Id.* at 219.

65. *Id.* at 226-227.

66. *Id.*

67. *Id.*

68. 392 U.S. 183, 196 (1968).

69. 326 U.S. 572, 580 (1946).

70. 22 U.S. (9 Wheat.) 1, 198-199 (1824). Chief Justice Marshall's opinion in this case is usually cited for authority on the broad sweep of the commerce power, but in *Maryland* the Fourth Circuit quoted the following statement in support of a reserved state sovereignty:

that state sovereignty is an essential part of our constitutional system.[71] The court then stated:

> [W]hile it may be true that some, or even many, of the attributes of state sovereignty have been diminished by the exercise by Congress of the broad rights accorded the nation under the commerce clause [sic], it is equally true that if there is any attribute of sovereignty left to the states it is the right of their legislatures to pass, or not to pass, laws. As the Court stated in *In re Duncan* . . .: "By the constitution [sic], a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies . . . ."[72]

The court pointed out that the First Circuit had been troubled by the direction the Clean Air Act requirements were taking when it reviewed different issues in *Natural Resources Defense Counsel v. EPA*.[73] In that case the petitioner, the Natural Resources Defense Counsel, wanted assurances from the governor or legislature of Rhode Island that the implementation plan's regulations would be followed. The court replied that it was

> difficult to imagine what sort of guarantee the current Rhode Island executive or legislature could give the E.P.A. to insure that adequate resources would be devoted to the Plan . . . . Such assurances might have a symbolic effect; however, they would have little more, since a governor or even a present session of the legislature cannot make binding commitments on behalf of their successors, nor would such representations seem to be enforceable.[74]

The Fourth Circuit concluded that the serious constitutional questions raised by the Administrator's interpretation of the Clean Air Act required an alternative interpretation.

## IV. VIRGINIA AND DISTRICT OF COLUMBIA

In *Virginia ex rel. State Air Pollution Control Board v. Train* and *District of Columbia v. Train*[75] (hereinafter *District of Columbia*), the D.C. Circuit held that the Clean Air Act did not support the Administrator's regulations

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Although many of the powers formerly exercised by the States, are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system. *Id., quoted in* Maryland v. EPA, 530 F.2d 215, 225 (4th Cir. 1975).

71. Maryland v. EPA, 530 F.2d 215, 225 (4th Cir. 1975).

72. *Id.* (quoting *In re* Duncan, 139 U.S. 449, 461 (1891) (citation omitted)).

73. 478 F.2d 875 (1st Cir. 1973).

74. *Id.* at 883-884, *quoted in* Maryland v. EPA, 530 F.2d 215, 226 (4th Cir. 1975).

75. 521 F.2d 971 (D.C. Cir. 1975). The District of Columbia and the State Air Pollution Control Board (of Virginia) were joint petitioners before the court, which decided the issues in one proceeding. The claims of the two parties were considered as separate cases only in the Supreme Court memorandum granting certiorari. 96 S.Ct. 2224 (1976).

insofar as they required the state and local governments to enact statutes, but it declared that the question of requiring the states to enforce existing EPA regulations was a different matter. The court proceeded to examine the constitutionality of the regulations requiring state enforcement, and held that the tenth amendment prevented such an exercise of federal power.

There were two points in the statutory design which supported its decision.[76] The first point concerned the distinction subsection 113(a)(1) makes between a "person in violation of the plan" and the "State in which the plan applies" in its notice requirements.[77] This point was discussed in the *Brown* case, *supra*.

The second point arose from a comparison of subsection 113(a)(1) with subsection 113(a)(2). The former authorizes the Administrator to take enforcement action directly against a person in violation of the implementation plan if, after notice to both the violator and the responsible state and a thirty-day waiting period, the state has not taken action. The latter gives the Administrator general enforcement responsibility for the plan as a whole if there are such widespread violations that he finds a lack of proper enforcement effort by the state. After making that finding, he must notify the defaulting state of his finding, wait thirty days for the state to improve its enforcement efforts, and then, if the state's efforts are still unsatisfactory, give public notice of the assumption of direct federal enforcement. Direct federal enforcement continues until the state satisfies the Administrator that it will enforce the plan properly.[78] The court reasoned that, if the Administrator were correct in his determination that he could penalize a state under subsection 113(a)(1) for violating regulations directing it to enact statutes and enforce the plan, subsection 113(a)(2) would be nearly superfluous.[79]

The *District of Columbia* case also noted that subsection 113(a)(2) treats "violations of an applicable implementation plan" and "a failure of the State in which the plan applies to enforce the plan effectively" as separate concepts, thus distinguishing between nonenforcement by the state and violation of the plan.[79a] Finally, the notice requirements to be given both to the state failing to enforce the plan effectively and to the general public thirty days later emphasized the difference between the failure of a state to enforce the plan and the violation of the plan by polluting activities of any "person." If a state's failure to enforce were itself a violation of the plan, only one notice, to the state, would be required. The second notice must have been aimed at polluters who were thereby warned that the federal government was assuming responsibility for

76. District of Columbia v. Train, 521 F.2d 971, 985-86 (1975).
77. 42 U.S.C. § 1857c-8(a)(1) (1970).
78. 42 U.S.C. § 1857c-8(a)(2) (1970).
79. District of Columbia v. Train, 521 F.2d 971, 985-986 (D.C. Cir. 1975).
79a. *Id.*

enforcement.[80] The court held that this provision treated state enforcement as voluntary and not as coerced by the threat of federal penalties.[81] All the above considerations caused the court to conclude that the language in section 110(a)(1), that states "shall" submit implementation plans, was directory and not mandatory.[82] It also concluded that the Administrator could not use his power to promulgate regulations to throw the responsibility back on the states if they failed to accept it voluntarily.[83]

It is surprising that after making this analysis of the statute the court decided that the Administrator's action requiring the states to legislate should be treated differently from that requiring the states to enforce the implementation plan. Nevertheless, the *District of Columbia* case stated that such a distinction could be argued to exist, and the latter power, though not supported by the Clean Air Act any more than the former, was not expressly denied.[84] Furthermore, the legislative history, combined with section 110(a)(2)(G),[85] appeared to evidence the congressional intent to require state inspection and testing of motor vehicles.[86]

The court turned to the constitutional question regarding the Administrator's power to require state enforcement. It had been established that air pollution affects interstate commerce.[87] The federal government, therefore, had the power under the Commerce Clause to regulate all sources of air pollution, including state-owned sources, whether those sources stem from activities described as "proprietary" or "governmental."[88] This power also extended to sources such as highways which cause air pollution indirectly by promoting polluting activities of others.[89]

On this basis the court upheld portions of the implementation plan at issue which required the District of Columbia and the petitioning states to create exclusive bus lanes and purchase additional buses.[90] Both buses and highways could be used to decrease the generation of pollution by others, so the court labeled them indirect pollution sources.[91] The court referred to the states' buses and highways as a "state-owned transportation system," and stated that federal control over it could be justified on the

80. *Id.* at 985.
81. *Id.*
82. *Id.* (construing 42 U.S.C. § 1857c-5(a)(1) (1970)).
83. *Id.*
84. *Id.* at 988.
85. 42 U.S.C. § 1857c-5(a)(2)(G) (1970).
86. District of Columbia v. Train, 521 F.2d 971, 987 (D.C. Cir. 1975).
87. *Id.* at 988.
88. *Id.* (citing Maryland v. Wirtz, 392 U.S. 183 (1968)).
89. District of Columbia v. Train, 521 F.2d 971, 989 (D.C. Cir. 1975).
90. *Id.*
91. *Id.*

basis of *United States v. California*, which required a state-owned railroad to conform to federal safety regulations.[92]

However, the logic of labeling buses as sources of indirect pollution and thus giving the bus-purchase requirement equal justification with the requirement for creating exclusive bus lanes does not hold up under examination. Since a state-owned highway causes other parties to drive motor vehicles and pollute the air, it can easily be defined as a source of indirect pollution, justifying the federal requirement that the state conform to EPA regulations in controlling its use.

This analysis cannot apply to the bus-purchase requirement. A bus, unlike the highway it runs on, does not cause pollution by others; its effect is to produce pollution directly. By classifying buses with highways as indirect pollution sources, the court allowed the EPA to require state legislatures to appropriate money. This part of the decision is inconsistent with the rest of the decision, which held that either the Clean Air Act or the Constitution prevented federal control over state legislative activites.

The regulations requiring the states to establish and administer programs for motor vehicle inspection and maintenance and for retrofit of certain classes of vehicles with antipollution devices were struck down. The court held that, while the exclusive bus lane and bus-purchase requirements were regulations of state activites, the retrofit and inspection regulations were aimed at controlling individuals who operated motor vehicles.[93] The effect of the inspection and retrofit regulations was to use the commerce power to force the states to regulate interstate commerce.[94]

This was an "impermissible encroachment on state sovereignty and went beyond 'regulation' by the Congress."[95] The court quoted *Fry v. United States* as support for the proposition that the tenth amendment "does have some substantive meaning." Federally compelled state enforcement of the retrofit and inspection programs would run afoul of the principle in this footnote that "Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."[96]

The court distinguished the holdings of *Fry v. United States* and *Maryland v. Wirtz* from the instant case on the ground that a lesser degree of federal interference in state functions was involved in the former two cases. The Supreme Court had observed in *Wirtz* that the disputed statute

92. *Id.* (analogizing from United States v. California, 297 U.S. 175 (1936)). The term "state" will also be used to refer to the District of Columbia, since it was treated the same as the states.

93. *Id.* at 990.

94. *Id.* at 992.

95. *Id.*

96. *Id.* at 993 (quoting Fry v. United States, 421 U.S. 542, 547 n. 7 (1975)).

was not significantly intrusive,[97] and in *Fry* the Court had declared that the statute at issue in that case was even less intrusive.[98] The *District of Columbia* decision concluded that "[h]owever the Supreme Court ultimately determines to reconcile the formulation of the Tenth Amendment in *Fry* with the federal commerce power, we have no doubt that the inspection and retrofit regulations involve 'drastic' intrusions on state sovereignty."[99]

The court's position on the meaning of the tenth amendment was that it restricted the fashion in which the federal government could exercise the commerce power, possibly preventing the use of a method involving a drastic invasion of state sovereignty where a less intrusive one was available, even though less efficient.[100] Although the Administrator had chosen an efficient method of regulating pollution sources, this nation's constitutional system requires that state participation be voluntary.[101]

If necessary, Congress could devise a system of rewards and forfeitures in federal aid programs to induce the states to cooperate.[102] Also, negative controls, such as the requirement that a state refrain from registering vehicles that do not conform to federal regulations and refuse to allow them on its roads, are constitutionally valid.[103] Beyond the permissible techniques listed here the EPA would be forced to assume direct responsibility for enforcing regulations if the states did not want to participate.[104] Both the *Brown* and *Maryland* cases also noted that the federal government could still choose from numerous options to solve an interstate problem which involved difficult federal-state relations.

The present attitude of the Supreme Court toward questions on federalism has been revealed most recently in *National League of Cities v. Usery*.[105] That case involved the attempt of Congress to press its luck to the limit in extending the application of the Fair Labor Standards Act to state employees. Amendments to this Act in 1974 applied its minimum wage and maximum hour standards to almost all employees of states and their political subdivisions.[106] This application was struck down on constitutional grounds in a 5-4 decision.

The majority opinion in this case continued a line of argument found in

97. 392 U.S. at 193-194.
98. 421 U.S. at 548 n. 7.
99. District of Columbia v. Train, 521 F.2d 971, 994 (D.C. Cir. 1975).
100. *Id.*
101. *Id.*
102. *Id.* at 993 n. 26.
103. *Id.* at 991-992.
104. *Id.* at 994-995.
105. 96 S.Ct. 2465 (1976).
106. 29 U.S.C. §§ 203(d), 203(s)(5), 203(x) (Supp. IV 1974). *Cf.* 29 U.S.C. § 213(a)(1) (Supp. IV 1974) *and* 29 U.S.C. § 203(e)(2)(C) (Supp. IV 1974) (exemptions from Act's coverage).

the dissents of *Maryland v. Wirtz* and *Fry v. United States*. In *Maryland*, Justice Douglas dissented in an opinion joined by Justice Stewart. Justice Douglas asserted that the decision should have turned on the threat of the federal law to overwhelm state fiscal policy by imposing federal controls on wage structures.[107] He rejected the previous commerce power cases as precedents for *Wirtz* on the ground that they did not pose the same threat to the states' fiscal policy and autonomy in regulating health and education.[108]

Justice Douglas noted the wide reach of the commerce power based on such cases as *Wickard v. Filburn*[109] and *Katzenbach v. McClung*,[110] and then issued a warning:

> Yet state government itself is an "enterprise" with a very substantial effect on interstate commerce . . . . If constitutional principles of federalism raise no limits to the commerce power where regulation of state activities are concerned, could Congress compel the States to build super highways criss-crossing their territory in order to accommodate interstate vehicles . . .? Could the Congress virtually draw up each State's budget to avoid "disruptive effect[s] . . . on commercial intercourse?"[111]

Justice Douglas advocated using *New York v. United States*,[112] as a guide to decision.[113] He quoted the opinion of Chief Justice Stone in that case that "the National Government may not 'interfere unduly with the State's performance of its sovereign functions of government,' " and Justice Frankfurter's statement that a constitutional line should be drawn between the state as a government and the state as trader.[114]

Justice Rehnquist, dissenting in *Fry v. United States*, continued and expanded the arguments of Justice Douglas in *Wirtz*. Although his was a lone dissent in that case, a year later he wrote much the same opinion for the majority in *National League of Cities v. Usery*.[115]

In *National League of Cities*, the Supreme Court held that the plenary power of Congress to regulate activities affecting interstate commerce cannot be exercised "in a fashion that impairs the States' integrity or their ability to function effectively in a federal system . . . . "[116] This is so

107. Maryland v. Wirtz, 392 U.S. 183, 201-203 (1968).
108. *Id.* at 203-204.
109. 317 U.S. 111 (1942).
110. 379 U.S. 294, 299-300 (1964).
111. Maryland v. Wirtz, 392 U.S. 183, 204-205 (1968).
112. 326 U.S. 572 (1946).
113. Maryland v. Wirtz, 392 U.S. 183, 205 (1968) (dissenting opinion).
114. *Id.*
115. 96 S.Ct. 2465 (1976).
116. National League of Cities v. Usery, 96 S.Ct. 2465, 2470 (1976) (quoting Fry v. United States, 421 U.S. 542, 548 n. 7 (1975)).

because state governments have aspects of sovereignty reserved to them which Congress may not impair even when it acts from an affirmative grant of authority.[117] Whether any given state choices are thus protected from congressional infringement depends upon their status as "functions essential to separate and independent existence."[118]

In the instant case, the Court concluded that the federal law had thrust itself unconstitutionally into sovereign state decisions. The statute would likely impose additional costs on states which then might have to cut back on important programs.[119] Furthermore, a state might want to hire part-time or summer employees without the normal training requirement at wages below the federal minimum.[120] Although the precise effects of the Fair Labor Standards Amendments formed a matter of controversy, "particularized assessments of actual impact" were not necessary to the decision. It was enough that employer-employee relationships in activities traditionally pursued by state governments would be altered significantly by the federal law.[121]

The Court overruled *Maryland v. Wirtz*.[122] *United States v. Fry* was not overruled but was viewed separately from *Wirtz* primarily on the ground that an economic emergency existed at the time that the law in controversy was passed and national action was required to deal with it.[123] The Court also favored the general wage freeze in *Fry* over the minimum wage and maximum hour law in *Wirtz*. The former, the Court held, "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."[124]

The Court refused to overrule a number of other cases that had supported an extensive reach for the commerce power, and it even reaffirmed its adherence to the holding of *United States v. California*.[125] However, the Court described as "simply wrong" a phrase in the California opinion that "[t]he state can no more deny [the plenary power to regulate commerce] if its exercise has been authorized by Congress than can an individual."[126]

117. *Id.* at 2471.
118. *Id.*
119. *Id.* at 2471-72.
120. *Id.* at 2472.
121. *Id.* at 2474.
122. *Id.* at 2475.
123. *Id.* at 2474.
124. *Id.* at 2474-2475.
125. *Id.* at 2475 n. 18 (discussing United States v. California, 297 U.S. 175 (1936)).
126. *Id.* at 2475 (quoting United States v. California, 297 U.S. 175, 183-185 (1936)).

Justice Blackmun cast the swing vote in this 5-4 decision. In his short concurring opinion, he stated,

> 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 such areas as environmental protection, where the federal interest is demonstrably greater and where *state facility compliance with imposed federal standards* would be essential. . . . With this understanding on my part of the Court's opinion, I join it.[127] (Emphasis added.)

The dissenters in this case made crystal clear their opinion that there could be no state interest asserted to limit the exercise of the commerce power,[128] so Justice Blackmun's position on this question will probably be decisive. Although he mentions environmental protection as a specific example of an area of dominant federal interest, the italicized phrase may be an important clue to his intent as to the permissible use of federal power here. It is logical to read Justice Blackmun's comment to mean that, unlike the situation in the *Usery* case, where Congress's attempt to regulate state activities affecting interstate commerce was struck down on the ground that state sovereignty overbalanced the federal interest, in the environmental protection area the federal government would have sufficient interest to regulate pollution even where state facilities were involved.

The question remains whether Justice Blackman would weight the federal interest in environmental protection so heavily as to include state legislative and administrative machinery among the "state facilities" whose compliance with federal regulations could be enforced. It is the conclusion of this paper that he would vote to strike down the regulations of the EPA which were at issue in the Clean Air Act cases. Such a decision would not prevent the EPA from exercising the full power needed to regulate all sources of pollution; it would simply preclude sacrificing essential aspects of state sovereignty to efficiency in controlling polluters.

If a majority of the Court is now prepared to require an exercise of federal power under the Commerce Clause to yield to certain essential aspects of state sovereignty, it seems likely that the Supreme Court will either affirm the statutory constructions of the Fourth and Ninth Circuits, or establish a new constitutional landmark in state-federal relations.

Arlan Gerald Wine

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127. *Id.* at 2476 (emphasis added).

128. National League of Cities v. Usery, 96 S.Ct. 2465, 2477 (1976) (dissenting opinion by Justices Brennan, joined by Justice White and Marshall. Justice Stevens dissented, at 2488.).