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The Federal Enforcement Provisions of the 1970 Amendments to the Clean Air Act: Statutory Scope and Constitutionality

The Environmental Protection Agency (EPA) claims the power under the commerce clause and certain provisions of the 1970 amendments to the Clean Air Act¹ to either direct a state to enact laws to control air pollution according to EPA standards, or to compel the state to administer and enforce regulations as promulgated by the EPA.²

Four states have challenged the EPA's position at the circuit court level.³ In each of the cases, the plaintiff state had submitted implementation plans to the EPA for its approval.⁴ Following disapproval of certain parts of the state's transportation control plan,⁵ the EPA issued substitute provisions⁶ and directed the state, under penalty of injunctive and penal sanctions, to comply with the plans as altered.⁷ Each state objected, arguing that the

1. 42 U.S.C. § 1857 (1970), *amending* 42 U.S.C. § 1857 (1964).

2. 38 Fed. Reg. 30,632-33 (1973).

3. *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3459 (U.S. Feb. 17, 1976) (No. 75-1055); *Maryland v. EPA*, 8 ENVIR. REP. DEC. 1105 (4th Cir. Sept. 19, 1975), *petition for cert. filed*, 44 U.S.L.W. 3417 (U.S. Jan. 7, 1976) (No. 75-960); *Brown v. EPA*, 521 F.2d 827 (9th Cir.), *petition for cert. filed*, 44 U.S.L.W. 3381 (U.S. Dec. 24, 1975) (No. 75-909); *Pennsylvania v. EPA*, 500 F.2d 246 (3d Cir. 1974).

4. 37 Fed. Reg. 10,842 (1972). On May 31, 1972, the Administrator published his initial approvals or disapprovals of state implementation plans. Noting, however, that neither the EPA nor the states had any practical experience in the development of transportation control plans, the Administrator permitted the states to defer for approximately one year beyond the statutory deadline the submittal of implementation plans. In addition, 21 states were allowed 2-year extensions of the deadline for attainment of the primary standards. *Id.*

On January 31, 1973, the U.S. Court of Appeals for the District of Columbia held in *NRDC v. EPA*, 475 F.2d 968, 970-72 (1973), that the Clean Air Act does not permit either delay in the submission of transportation control plans or the granting of blanket extensions of the primary standards attainment date. In accordance with the court order, the EPA cancelled all extensions and directed the states to submit transportation control plans by April 15, 1973 designed to attain the national air quality standards by May 31, 1975. 38 Fed. Reg. 7323-24 (1973).

Sixteen states, including three of the plaintiff states, Pennsylvania, Maryland, and the District of Columbia, submitted new plans by the April 15, 1973 deadline. California, the fourth plaintiff state, failed to submit a new plan. 38 Fed. Reg. 16,550-64 (1973).

5. 38 Fed. Reg. 16,550-69 (1973).

6. For a detailed account of all state implementation plans as modified and promulgated by the EPA see 40 C.F.R. § 52 (1974). In particular see 40 C.F.R. §§ 52.220-66 (California); §§ 52.470-96 (District of Columbia); §§ 52.1070-112 (Maryland); and §§ 52.2020-55 (Pennsylvania).

7. 39 Fed. Reg. 33,512 (1974):

EPA lacked statutory authority to compel state implementation and enforcement of EPA-promulgated transportation control plans.⁸ The states also attacked the EPA's constitutional authority, asserting that Congress cannot use the commerce power to require a state to exercise *its* legislative and executive powers to undertake assigned activities, even though *federal* regulation of the activities themselves is within the reach of the commerce power.⁹ The states contended that the Tenth Amendment and the guarantee clause limit the scope of the commerce power in this context.¹⁰

In the first opinion issued on the point, *Pennsylvania v. EPA*,¹¹ the Third Circuit sustained the EPA's position. The court held that EPA sanctions against Pennsylvania for failure to legislatively implement and enforce federally promulgated transportation control plans were both (1) within the scope of the EPA's delegated authority¹² and (2) a valid exercise of the federal commerce power.¹³ On the other hand, in *Brown v. EPA*,¹⁴ and *Maryland v. EPA*,¹⁵ the Ninth and Fourth Circuits substantially

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

8. See, e.g., *Brown v. EPA*, 521 F.2d at 831; *District of Columbia v. Train*, 521 F.2d at 982.

9. See, e.g., *Brown v. EPA*, 521 F.2d at 831; *District of Columbia v. Train*, 521 F.2d at 981.

10. See, e.g., *Brown v. EPA*, 521 F.2d 841; *Maryland v. EPA*, 8 ENVIR. REP. DEC. at 1112.

11. 500 F.2d 246 (3d Cir. 1974).

12. *Id.* at 259.

13. *Id.* at 262-63. The court did go on to say, however, that:

We recognize that there may remain a legitimate concern for possible intrusions upon the proper functioning of our federalist system as a result of future developments in the implementation of the Clean Air Act, and this court will remain ready to protect that concern in any appropriate case.

Id. at 263.

14. 521 F.2d 827 (9th Cir.), *petition for cert. filed*, 44 U.S.L.W. 3381 (U.S. Dec. 24, 1975) (No. 75-909).

15. 8 ENVIR. REP. DEC. 1105 (4th Cir. Sept. 19, 1975), *petition for cert. filed*, 44 U.S.L.W. 3417 (U.S. Jan. 7, 1976) (No. 75-960).

rejected the EPA position. Recognizing the serious constitutional questions raised by the EPA's position and motivated by a desire to avoid these questions,¹⁶ both courts ruled as a matter of statutory construction that the EPA lacked authority to require states either to establish or to enforce transportation control plans or to impose sanctions on them for failure to do so.¹⁷ In the most recent decision on the issue, *District of Columbia v. Train*,¹⁸ the District of Columbia Circuit took a middle position. Like the Ninth and Fourth Circuits, the D.C. Circuit held, as a matter of statutory construction, that the EPA exceeded its authority by ordering "the states and municipalities to enact statutes and regulations or to take other actions . . . necessary . . . to complete the regulatory scheme. Congress placed these duties on the Administrator, not the states when state-submitted plans are found to be insufficient."¹⁹ The court went beyond the holdings of the Ninth and Fourth Circuits, however, by finding that the EPA has the statutory authority to and may constitutionally compel states to administer EPA-promulgated programs directed to a "traditional state function."²⁰

The purpose of this comment is to compare and contrast the four circuit court opinions to determine if the EPA can statutorily and constitutionally compel states to act pursuant to certain provisions of the 1970 amendments. The first part of the comment will set forth those provisions of the 1970 amendments relevant to this issue.²¹ The next two parts of the comment will treat the

16. See, e.g., *Brown v. EPA*, 521 F.2d at 837.

17. *Id.* at 831; *Maryland v. EPA*, 8 ENVIR. REP. DEC. at 1114.

18. 521 F.2d 971 (D.C. Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3459 (U.S. Feb. 17, 1976) (No. 75-1055).

19. *Id.* at 986 (emphasis added).

20. *Id.* at 987-88, 992; notes 179-182 and accompanying text *infra*. Virginia subsequently petitioned the Supreme Court to review this part of the decision. *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), *petition for cert. filed sub nom.* *Virginia v. Train*, 44 U.S.L.W. 3459 (U.S. Jan. 26, 1976) (No. 75-1050).

In addition to Virginia, the Justice Department sought review of *District of Columbia v. Train*, as well as *Brown v. EPA* and *Maryland v. EPA*. In so doing the Justice Department emphasized that review is necessary because of the "widely varying and inconsistent conclusions" reached by the different appellate courts. The Justice Department pointed out that the constitutional principles involved "are fundamental to the federal system," and that "the final resolution of the conflict among the circuits may substantially determine what legislative alternatives are available to Congress in the future." The Justice Department also asserted that the EPA's authority to require states to enforce transportation control plans "is of basic importance to the effectiveness of the Clean Air Act." 6 ENVIR. REP.—CURRENT DEVELOPMENTS 1497 (1975).

21. For a detailed description of the 1970 amendments see, e.g., Jorling, *The Federal Law of Air Pollution Control*, in *FEDERAL ENVIRONMENTAL LAW* 1058 (E. Dolgin ed. 1974);

substantive issues in the same order as they were treated by the courts: first, the limits of the EPA's statutory authority, and second, the constitutionality of this particular exercise of authority.

I. THE 1970 AMENDMENTS

A. *The General Scheme*

Functionally,²² the 1970 amendments can be divided into two elements: (1) the programmatic element,²³ which encompasses such matters as federal research²⁴ and technical and financial assistance,²⁵ and (2) the regulatory element, which includes provisions for the establishment and enforcement of air quality control standards.²⁶ Although the programmatic element of the 1970 amendments is based on the longstanding doctrine that the regulation of air pollution is the primary responsibility of states and local governments,²⁷ the scope of the doctrine is substantially narrowed by the dual federal-state implementation and enforcement scheme created in the regulatory element.²⁸

Keener, *A Current Survey of Federal Air Quality Control Legislation and Regulations*, 5 NATURAL RESOURCES LAWYER 42 (1972); Kramer, *The 1970 Clean Air Amendments: Federalism in Action or Inaction?*, 6 TEXAS TECH. L. REV. 47 (1974); Luneburg, *Federal-State Interaction Under the Clean Air Amendments of 1970*, 14 B.C. IND. & COM. L. REV. 637 (1973); Comment, *1970 Clean Air Amendments: Use and Abuse of the State Implementation Plan*, 26 BAYLOR L. REV. 232 (1974); Comment, *State Implementation Plans and Air Quality Enforcement*, 4 ECOLOGY L.Q. 595 (1975).

22. Structurally, the Clean Air Act, as amended through 1970, is subdivided into three titles. Title I includes the general policy statements, authorizations of programs for financial and technical assistance, research authorizations, and the general framework for the control of ambient pollutants and emissions from stationary sources. Title II includes controls relating to emissions from moving sources, primarily automobiles, trucks, and aircraft. Title III includes general administrative and judicial authorizations.

Jorling, *supra* note 21, at 1062.

23. This comment will not describe the specific parts of the programmatic element because most of the issues in the cases arose from the regulatory element.

24. See, e.g., 42 U.S.C. § 1857b (1970).

25. See, e.g., 42 U.S.C. §§ 1857b-1, 1857i, 1858a (1970).

26. For discussion see notes 29-49 and accompanying text *infra*.

27. 42 U.S.C. § 1857(a)(3) (1970) represents the first congressional pronouncement on the primacy of the state and local role in air pollution control. It was enacted in 1955. New language was added by the 1970 amendments asserting the primary state role "for assuring air quality" and meeting the national ambient air quality standards. *Id.* § 1857c-2.

28. For an excellent discussion of the doctrine of "primary state and local responsibility" and how this doctrine came to be narrowly applied in the 1970 amendments see Kramer, *supra* note 21, at 49-67. As Kramer points out, two policies motivated the intrusion into this long standing doctrine: first, the recognition of air pollution as a serious

B. Implementation Plans

An important part of the overall scheme created by the 1970 amendments is the state formulation of implementation plans specifying how air quality standards previously established by the EPA²⁹ will be achieved, maintained, and enforced in each state.³⁰ In pertinent part, section 110(a)(1)³¹ specifies that "[e]ach State shall . . . adopt and submit to the Administrator . . . a plan which provides for implementation, maintenance, and enforcement of such primary standard"³² Section 110(a)(2)³³ and ensuing regulations³⁴ delimit the contents of state implementation plans required for EPA approval and set out the appropriate time limits³⁵ within which these plans are to be sub-

national problem, and second, the inability or failure of the states under previous regulations and acts to cope with the problem. Kramer also speculates, however, whether the sponsors of the legislation themselves realized what they had wrought in terms of federal enforcement. *Id.* at 53.

29. On April 30, 1971, pursuant to 42 U.S.C. § 1857c-4 (1970), the Administrator promulgated national primary and secondary ambient air quality standards for six pollutants. Primary standards specify the levels of concentration of those pollutants in the ambient air above which there are identifiable health effects. Secondary standards protect the public welfare from any known or anticipated adverse effects associated with such pollutants. 36 Fed. Reg. 22,384 (1971). "Ambient air" has been defined by the EPA to mean that portion of the atmosphere external to buildings to which the general public has access. *Id.*

30. 42 U.S.C. § 1857c-5 (1970).

31. *Id.* § 1857c-5(a)(1).

32. *Id.*:

Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 1857c-4 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

33. *Id.* §§ 1857c-5(a)(2)(A) to -(H).

34. 40 C.F.R. §§ 51-52 (1974).

35. 42 U.S.C. § 1857c-5(a)(1) (1970). Following state submission of implementation plans, the Administrator was given four months to approve or disapprove the plans. *Id.* § 1857c-5(a)(2).

These strict time limits have received strong judicial support. *See, e.g.,* NRDC v. EPA, 475 F.2d 968, 970 (D.C. Cir. 1973). The Act provides, however, two exceptions. First, the Administrator may extend the 3-year period in which state plans must provide for

mitted. After review of a state's plan, the EPA may accept it³⁶ and delegate to that state the authority to enforce the plan,³⁷ or the EPA may reject part or all of the plan and issue its own implementation plan for the state.³⁸ In either case, the plan becomes federal law,³⁹ enforceable by the EPA pursuant to section 113.⁴⁰

C. Enforcement of Standards and Plans

Key provisions of the 1970 amendments provide for parallel state and federal enforcement of each of the standards in the approved implementation plan.⁴¹ The state enforcement mechanism is governed by section 110(a)(1), but because no specific method of enforcement is provided in this section,⁴² the EPA has issued federal regulations to serve as guidelines.⁴³ In effect, these regulations require the states to "enforce applicable laws, regulations and standards, and seek injunctive relief."⁴⁴

The federal enforcement mechanism is defined in section 113 of the 1970 amendments, which significantly expands the scope and potential effectiveness of federal enforcement. Under this

attainment of national ambient air quality standards, 42 U.S.C. § 1857c-5(a)(2)(A)(i) (1970) for not more than an additional 2 years upon a gubernatorial request for such an extension, *id.* § 1857c-5(e)(1); and second, the Administrator may extend up to 1 year the compliance with any state implementation plan for a source or class of sources, also upon gubernatorial request, *id.* § 1857c-5(f)(1). For an extensive discussion of these exceptions see Kramer, *supra* note 21, at 71-75.

36. 42 U.S.C. §§ 1857c-5(a)(2), -(3) (1970).

37. *See, e.g.*, 42 U.S.C. § 1857c-6(c)(1) (1970) (power to implement and enforce standards of performance).

38. *Id.* § 1857c-5(c)(1):

The Administrator shall, after consideration of any state hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or,

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.

39. Approval of a plan and the regulations therein results in the adoption of the state law as federal law and is considered rulemaking subject to the requirements of the Federal Administrative Procedure Act, 5 U.S.C. §§ 500-59 (1970).

40. 42 U.S.C. § 1857c-8 (1970).

41. *See, e.g.*, 42 U.S.C. §§ 1857c-6(c), -7(d) (1970).

42. 42 U.S.C. § 1857c-5(a)(1) (1970). For the text of this section see note 32 *supra*.

43. *See, e.g.*, 38 Fed. Reg. 30,632-33 (1973); 40 C.F.R. § 51.11(a)(2) (1973).

44. 40 C.F.R. § 51.11(a)(2) (1973).

section, the EPA has authority, either on its own initiative or when a state fails to act, to enforce the plan against any "person" in violation thereof.⁴⁵ "Person" is defined in section 302(e)⁴⁶ of the Act to include any "State, municipality, and political subdivision of a State." If a violation is not corrected within a 30-day period following notification, the EPA can either issue an order requiring compliance or initiate a civil action against the violator.⁴⁷ If a compliance order is violated, criminal penalties of up to \$25,000 per day or one-year imprisonment can be imposed.⁴⁸ If civil action is initiated, a court may grant an injunction or any other relief it considers appropriate.⁴⁹

45. 42 U.S.C. § 1857c-8(a)(1), -(2) (1970):

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person—

(A) by issuing an order to comply with such requirement, or

(B) by bringing a civil action under subsection (b) of this section.

46. *Id.* § 1857h(e).

47. *Id.* § 1857c-8(a)(1), -(2). For the text of these sections see note 45 *supra*.

48. 42 U.S.C. § 1857c-8(c)(1) (1970) states in pertinent part:

Any person who knowingly—

(A) violates any requirement of an applicable implementation plan during any period of Federally assumed enforcement more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section that such person is violating such requirement, or

(B) violates or fails or refuses to comply with any order issued by the Administrator under subsection (a) of this section, . . .

shall be punished by a fine of not more than \$25,000 per day of violation, or by imprisonment for not more than one year, or by both.

49. 42 U.S.C. § 1857c-8(b) (1970) states in pertinent part:

The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person—

(1) violates or fails or refuses to comply with any order issued under subsection

II. STATUTORY AUTHORITY

A. *Statutory Construction as a Means of Avoiding Constitutional Issues*

It is well settled that federal courts do not pass on questions of constitutionality unless such adjudication is unavoidable.⁵⁰ Beginning from this premise, each circuit court first considered whether the authority delegated to the EPA by the 1970 amendments included the authority to bring federal enforcement procedures against states that fail to implement and enforce implementation plans.

Although each circuit followed traditional principles of statutory construction in determining the scope of the EPA's authority, the specific criteria used and the way in which each circuit applied the criteria varied substantially. It is not within the scope of this comment to discuss in any detail the voluminous rules and theories dealing with specific criteria of statutory construction.⁵¹ Rather, the emphasis here is on evaluating each circuit's interpretation of the 1970 amendments on the basis of five general criteria: (1) reliance on the plain meaning of the statute; (2) use of intrinsic aids of interpretation; (3) recourse to the legislative history; (4) deference to the administrative interpretation; and (5) recognition of overriding policy considerations. The purpose of this evaluation is not to suggest a single proper way of interpreting the 1970 amendments. Indeed, taken together, the four cases aptly support the proposition that "there is no table of logarithms for statutory construction."⁵² Any final and conclusive interpretation must necessarily be left to the appropriate legislative or judicial body.

B. *Plain Meaning Rule*

The task of statutory interpretation by the judiciary has traditionally been preceded by a noninterpretive examination of the

(a) of this section; or (2) violates any requirements of an applicable implementation plan during any period of Federally assumed enforcement more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section of a finding that such person is violating such requirement; . . .

50. *E.g.*, *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-69 (1947).

51. For an excellent analysis of principles of statutory construction see 2A J. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* (4th ed. 1973) [hereinafter cited as 2A SUTHERLAND].

52. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 543 (1947).

language in which the statute is framed.⁵³ "Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."⁵⁴ Although this deference to the "plain meaning" of the words has now generally yielded to broader, more "legislative intent" oriented approaches⁵⁵ to statutory interpretation, it still finds expression in numerous cases.⁵⁶

In interpreting the 1970 amendments, each of the cases restricting the EPA's authority referred to the plain meaning of the statute. Specifically, the Ninth Circuit in *Brown v. EPA*, the Fourth Circuit in *Maryland v. EPA*, and the D.C. Circuit in *District of Columbia v. Train* emphasized that if Congress had intended to give the EPA such broad enforcement powers against the states, it could have done so in plain words.⁵⁷ Each court, however, found "little in the language of the Act to indicate that the Administrator has been empowered to order that legislatures and municipal bodies in the states enact statutes and regulations or to bring federal enforcement actions against those governmental units to do so."⁵⁸

A major difference between the three circuits emerges, however. The Ninth and D.C. Circuits applied the plain meaning rule

53. See 2A SUTHERLAND, *supra* note 51, §§ 46.01-.07.

54. *Caminetti v. United States*, 242 U.S. 470, 485 (1917), *citing* *Hamilton v. Rathbone*, 175 U.S. 414, 421 (1899).

55. [W]ords are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how "clear the words may appear on 'superficial examination.'"

Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943), *citing* *United States v. American Trucking Ass'ns*, 310 U.S. 534, 544 (1940).

In theory, the "plain meaning rule" implies a preference for an interpretation according to what the statute means, or may be supposed to mean, to those affected by it. In *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396-97 (1951), Justice Jackson defended this preference in a dissenting opinion, stating:

Moreover, there are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. Laws are intended for all of our people to live by To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country.

Modern approaches to statutory construction, on the other hand, most often emphasize "legislative intent," which implies a preference for the "sending end" of the communication as determined by legislative and administrative materials. For a short discussion of these differences see 26 TEMP. L.Q. 174 (1952).

56. See, e.g., *United States v. Reid*, 517 F.2d 953, 967-68 (2d Cir. 1975) (Mansfield, J., concurring in part and dissenting in part), where Judge Mansfield asserts that the plain meaning rule is alive and viable.

57. *District of Columbia v. Train*, 521 F.2d at 984-86; *Maryland v. EPA*, 8 ENVIR. REP. DEC. at 1114; *Brown v. EPA*, 521 F.2d at 834-35.

58. *District of Columbia v. Train*, 521 F.2d at 986.

only to reinforce interpretations arrived at by other means.⁵⁹ The Fourth Circuit, on the other hand, despite avowed reliance on principles of statutory construction,⁶⁰ appears to have relied on the plain meaning rule as the primary basis for its decision.⁶¹ In its short, two-paragraph discussion of the statutory authority issue, the court concluded that "[t]he statute in plain words authorizes the Administrator to 'prepare . . . regulations . . . for a State;' it does not empower him to direct a state to enact its own statutes and regulations as prescribed by the Administrator."⁶² Plainly, there is no provision in the Act which states in unequivocal terms that a state must implement and enforce its own plan or be subject to federal enforcement procedures. However, the Fourth Circuit's failure to expressly distinguish convincing EPA arguments indicating a contrary legislative intent⁶³ seriously undermines the opinion and points out the inadequacies of the plain meaning rule when used as a starting and ending point of statutory construction.

C. *Intrinsic Aids of Interpretation*

The modern starting point of statutory construction is to read and examine the act and to draw inferences concerning meaning from its composition and structure. Inferences thus drawn are referred to as intrinsic aids of interpretation because they derive meaning from the internal structure of the text.⁶⁴ It is with this tool that the EPA most convincingly supports its interpretation of the 1970 amendments. The EPA points out that

59. See notes 69-84 and accompanying text *infra*.

60. The court stated: "We are thus of the opinion, and so hold, that the EPA was without authority under the statute as a matter of statutory construction." 8 ENVIR. REP. DEC. at 1114.

61. It may be that the Fourth Circuit relied on other principles of statutory construction, but concluded that it was unnecessary to discuss them because the language of the statute appeared to the court to be plain and specific. In this context, compare *Maryland v. EPA* with *United States v. Hunter*, 459 F.2d 205, 210-11 (4th Cir. 1972), where the Fourth Circuit cited legislative history in support of its conclusion as to the plain meaning of the statute. See also 2A SUTHERLAND, *supra* note 51, § 46.02, at 52:

[L]iteral interpretation consists of an approach which (a) concentrates attention upon and maximizes the significance of the statutory text, (b) takes into consideration less rather than more indicia of meaning other than the statutory text, instead of not considering such indicia at all as is sometimes claimed, and (c) often may take extra-textual considerations into account only subconsciously or unconsciously rather than deliberately and purposefully.

62. 8 ENVIR. REP. DEC. at 1114.

63. See notes 65-66, 90-91 and accompanying text *infra*.

64. See 2A SUTHERLAND, *supra* note 51, §§ 47.01-38.

the word "person" as used in section 113 of the statute is defined in section 302(e) to include "States."⁶⁵ Basing its argument on the presumption that the meaning of words as defined in the definition section controls,⁶⁶ the EPA argues that *states* are subject to the enforcement provisions of section 113.

The difficulty with definitions, however, is that definitions are also written in words that must be defined. Although each of the circuits acknowledged the binding effect of the definition of "person" in section 302(e),⁶⁷ they disagreed on what Congress meant by the word "States" in the definition. The Third Circuit in *Pennsylvania v. EPA* held that "Congress did contemplate" the possibility that the definition section used in connection with section 113 could be used to force states to implement transportation control plans.⁶⁸ The Ninth Circuit in *Brown v. EPA* and the D.C. Circuit in *District of Columbia v. Train*, however, distinguished a state that pollutes and a state that chooses not to control pollution caused by the general public. Only the former, concluded both circuits, was intended by Congress to be included in the meaning of "State."⁶⁹

In support of their interpretation, the Ninth and D.C. Circuits drew several inferences from the text of the statute. Both circuits held that the notice provisions in section 113(a)(1)⁷⁰ requiring the EPA to notify both the "person" in violation of the plan and the "State" in which the plan applies distinguish "person" from "state" and clearly indicate that they are two distinct entities.⁷¹ The Ninth Circuit refused to invalidate this distinction by reading into section 113 the statutory definition of "person," stating that "the Administrator had no difficulty in making clear his intention to impose sanctions on states not enforcing effectively implementation plans. Congress can be expected to have

65. *Pennsylvania v. EPA*, 500 F.2d at 256-57; 38 Fed. Reg. 30,632-33 (1973).

66. See generally *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947).

It is also asserted that a statutory definition that declares what a term "includes" rather than what a term "means" is more susceptible to an extension of meaning. 2A SUTHERLAND, *supra* note 51, § 47.07, at 82. The definition of "person" in § 302(e) declares what the term "includes" and is, therefore, even more favorable to the EPA interpretation.

67. See, e.g., *District of Columbia v. Train*, 521 F.2d at 983.

68. 500 F.2d at 257.

69. *District of Columbia v. Train*, 521 F.2d at 983; *Brown v. EPA*, 521 F.2d at 832. This distinction is consistent with modern legislative efforts to invalidate the notion of sovereign immunity by including "states" in the definition of "persons." 3 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 62.03 (4th ed. 1974).

70. 42 U.S.C. § 1857c-8(a)(1) (1970). For the text of this section see note 45 *supra*.

71. *District of Columbia v. Train*, 521 F.2d at 985; *Brown v. EPA*, 521 F.2d at 834.

no less capacity for clarity."⁷² The D.C. Circuit found that two notices would not have been required if Congress had expected the states to enact and enforce applicable transportation control plans. According to the court, "[t]he most 'efficient' enforcement from the standpoint of commitment of federal resources would be to order the state to take action against the violator and proceed against state officials under section 113(b) or (c) if they fail to act."⁷³

The D.C. Circuit went on to draw a number of additional inferences from the statutory text in support of its interpretation. First, the court distinguished the phrases "violations of an applicable implementation plan" and "a failure of the State in which the plan applies to enforce the plan effectively," both of which are found in section 113(a)(2).⁷⁴ The court stated that:

Since widespread violations "result from" a state's failure to enforce a plan, the language strongly suggests Congress did not believe that inadequate state enforcement was, by itself, a "violation." Rather, the term "violation" must logically refer to the emission of pollutants into the air contrary to the provisions of an applicable implementation plan.⁷⁵

The court also found the procedures to be followed by the EPA in commencing "the period of federally assumed enforcement" referred to in section 113(a)(2) to be inconsistent with the EPA's broad interpretation of its own powers.⁷⁶

Second, as to section 110(a)(1),⁷⁷ the D.C. Circuit characterized the language "[e]ach state *shall* . . . submit . . . a plan" as directory rather than mandatory, which negated the EPA's position that Congress intended to allow the EPA to *force* states to implement plans.⁷⁸ The court's conclusion on this point is contrary, however, to two presumptions which favor construing this section as mandatory. First, the word "shall" is ordinarily presumed to be used in the imperative rather than the directory

72. 521 F.2d at 834.

73. 521 F.2d at 985.

74. 42 U.S.C. § 1857c-8(a)(2) (1970). For the text of this section see note 45 *supra*.

75. 521 F.2d at 985-86.

76. *Id.* at 986. The court gave two reasons for this conclusion: first, the dual notice provisions of § 113 indicate a congressional intent that enforcement provisions during the "period of federally assumed enforcement" should be used against polluters only and not the states; second, the provision for terminating the federal enforcement period is voluntary and therefore not required of the states. *Id.*

77. 42 U.S.C. § 1857c-5(a)(1) (1970). For the text of this section see note 32 *supra*.

78. 521 F.2d at 986.

sense.⁷⁹ Second, a mandatory construction is generally favored unless a statute's directory character clearly appears.⁸⁰ Neither of these presumptions, however, is conclusive. One well-defined exception, described in a subsequent section of this comment, specifies that a statute should be given a directory meaning where an imperative construction might involve an unconstitutional delegation of power.⁸¹ The D.C. Circuit, however, did not expressly rely on this exception. Instead, the court found it significant that Congress did not provide in section 110 any means of directly forcing the states to comply.⁸² It appears that the court employed a "stated consequences" exception; that is, where the consequences or punishment imposed for violating a particular provision of an act are not exclusive and preemptory, the provision is generally regarded as directory.⁸³ The D.C. Circuit found that the terms of section 110 are not exclusive since the EPA is expressly required to prepare, in whole or in part, plans for states that fail to comply. This indicated to the court that Congress did not feel that state-adopted regulations were necessary to achieve the goal of the 1970 amendments. The court stated: "On the contrary, section 110(c) specifically contemplates that some states would fail to live up to their 'responsibility.'"⁸⁴

In contrast to the Ninth and D.C. Circuits' careful scrutiny of the statutory text, the Third Circuit did not draw any inference except that associated with the statutory definition of "person." One explanation for the Third Circuit's brevity in this area may be that the court did not feel obligated to go beyond the definitional presumption already in its favor.⁸⁵ Indeed, although the

79. 2A SUTHERLAND, *supra* note 51, § 57.03.

80. *Id.* § 57.01, at 413.

81. See notes 109-111 and accompanying text *infra*.

82. 521 F.2d at 986.

83. 2A SUTHERLAND, *supra* note 51, § 57.08, at 423, quoting *Tuthill v. Rendeleman*, 387 Ill. 321, 350, 56 N.E.2d 375, 390 (1944).

84. 521 F.2d at 984. The Fourth Circuit in *Maryland v. EPA* may have been influenced by a similar argument raised by the Maryland brief, even though there is no mention of the argument in the text of the opinion. Although the Third Circuit in *Pennsylvania v. EPA* had concluded that the 1970 amendments indicated an "underlying assumption" that states could be required to implement transportation control plans, Maryland argued: "On the contrary, Sections 110(c) and 113(a)(2) clearly indicate an assumption that they (the states) could *not* be required to do so . . . If it were true that the States could be required to implement a Plan, then these provisions for direct federal action would be superfluous." Brief for Petitioner at 26, *Maryland v. EPA*, 8 ENVIR. REP. DEC. 1105 (4th Cir. 1975).

85. Generally such a presumption is overcome only if the statutory definition creates obvious incongruities in the statute, or where one of the major purposes of the statute is destroyed by obedience to the statutory definition. See generally 1A J. SUTHERLAND, STAT-

Ninth Circuit relied on inferences drawn from the statutory text, its opinion suggests that these inferences by themselves would probably not have been sufficient to overcome the presumption of validity in favor of the definitional section. The court based its rejection of the presumption "primarily" on constitutional grounds, stating that "Congress would not have intended to take such a step in the light of the delicacy with which federal-state relations always have been treated"⁸⁶ The efficacy of using constitutional considerations as a basis of statutory construction is discussed in a subsequent section.⁸⁷

D. *Extrinsic Aids of Interpretation — Legislative History*

Despite historical limitations, a federal court may now consider legislative history in construing a statute even when the words, taken alone, have an unambiguous meaning.⁸⁸ Characteristic of this trend is the Third Circuit opinion in *Pennsylvania v. EPA* which supported its definitional argument with certain statements selected from the voluminous history of the 1970 amendments.⁸⁹ In particular, the court held that certain statements clearly show Congress' intention that the states would be required to cooperate in "*inspection and maintenance*" programs for all state registered automobiles.⁹⁰ Because the states were required to cooperate in these kinds of programs, the court inferred a clear legislative expectation that the states should implement other portions of their transportation control plans, and could, in fact, be required to do so.⁹¹

The specific statements relied on by the Third Circuit are important, although the Third Circuit may have overemphasized

UTES AND STATUTORY CONSTRUCTION § 20.08 (4th ed. 1972). To the Third Circuit, obedience to the statutory definition apparently caused none of these problems.

86. 521 F.2d at 834.

87. Notes 109-112 and accompanying text *infra*.

88. See, e.g., *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940); *United States v. Dickerson*, 310 U.S. 554, 561-62 (1940).

89. For an excellent discussion of the legislative history of the 1970 amendments see Kramer, *supra* note 21, at 49-67.

90. 500 F.2d at 258. "[T]he implementation plan section of the proposed bill would specifically provide that, to the extent necessary, *each region develop* motor vehicle inspection and testing programs" S. REP. No. 1196, 91st Cong., 2d Sess. 13 (1970) (emphasis added); "[T]hese standards must be put into effect by the communities and the states, and we expect them to have the men to do the actual enforcing." 116 CONG. REC. 19,204 (1970) (remarks of Representative Staggers). "[T]he legislation provides that States *must require* inspection of motor vehicles in actual use" H.R. REP. No. 1146, 91st Cong., 2d Sess. 3 (1970) (emphasis added).

91. 500 F.2d at 258.

them. Indeed, excessive reliance on a few short statements extracted from a copious legislative history, no less than the literalism of the plain meaning rule, may lead to a distorted view of the statutory purpose since less thought is spent on the future implications of a committee report or explanation on the floor than on the selection of the words of a statute.⁹² In this respect, the brief submitted to the Ninth Circuit by California identifies some of the limitations of the statements relied on by the Third Circuit. According to the state, none of the quotations cited by the Third Circuit mention the possibility of federal sanctions being imposed on states that fail to enforce applicable implementation plans. Furthermore, the quotations all appear to have been taken from discussions of what a state must do in order to have an acceptable plan rather than from discussions of what power the EPA has to force states to act.⁹³

Whatever the merits of the specific quotations, they were of enough significance to induce responses from the Ninth Circuit in *Brown v. EPA* and the D.C. Circuit in *District of Columbia v. Train*. It is not surprising, in light of the Ninth Circuit's express desire to avoid confronting serious constitutional issues, that the court, by finding the entire legislative history ambiguous and therefore of no value to any interpretation,⁹⁴ rejected the Third Circuit's quotations from the legislative history. The D.C. Circuit, on the other hand, accepted the Third Circuit's reasoning, but only to the extent of the maintenance and inspection programs expressly referred to in the quotations. As to these programs, the court found that the Act neither specifically rejects the Administrator's claim of power nor expressly supports it.⁹⁵ Finding this ambiguity in the Act, the court accepted the quotations from the legislative history and upheld the EPA's interpretation, subject to constitutional considerations.⁹⁶

92. Cf. Wasby, *Legislative Materials as an Aid to Statutory Interpretation: A Caveat*, 12 J. PUB. L. 262 (1963).

93. Reply Brief for Petitioner at 16-17, *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975).

94. 521 F.2d at 835-36. Where a court determines the applicable legislative history of an act to be ambiguous, the general rule is that the legislative history should be ignored in favor of an application of the clear and precise statutory language and purpose. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 412 (1971); *Greenwood v. United States*, 350 U.S. 366, 374 (1956). Although the Ninth Circuit looked to the language of the statute, it is clear that its interpretation was primarily motivated by deference to constitutional concerns. See notes 109-112 and accompanying text *infra*.

95. 521 F.2d at 988.

96. See notes 174-182 and accompanying text *infra*.

E. Extrinsic Aids of Interpretation — Deference to Administrator

As in the instant case, it often happens that before a federal statute is brought to the courts for interpretation, the agency charged with its administration has already promulgated interpretive regulations. The question then becomes: To what extent, if at all, should the administrative agency's determination of the meaning of the act be taken into account by the reviewing court? This question received varied treatment from the different circuits.

The general rule, as identified by the Third, Fourth, and D.C. Circuits, is that the construction of a statute by an administrative agency charged with supervision of the statute is entitled to "great deference"⁹⁷ because the specialized experience and breadth of information available to administrative officials give them greater opportunities for accurately determining the congressional intention than are afforded to the courts, especially as concerns the making of interstitial law.⁹⁸ The Third Circuit in *Pennsylvania v. EPA* gave great deference to the EPA's interpretation, for example, because "it represents the judgment of one charged with carrying out the statutory provisions 'while they are yet untried and new'"⁹⁹

Such great deference is significant in that it limits the otherwise broad scope of judicial review.¹⁰⁰ This is clear from the four opinions construing the 1970 amendments. In holding that the EPA's interpretation was entitled to great weight, the Third Circuit set up a "compelling evidence" standard; that is, the court refused to prohibit any agency action imperative to the success of the Act "in the absence of compelling evidence that such [prohibition] was Congress' intention."¹⁰¹ Since the court did not find any compelling evidence that Congress did not intend to make states subject to enforcement procedures for failure to implement plans, the court upheld the EPA interpretation. The Ninth, Fourth, and D.C. Circuits avoided the narrow confines of the compelling evidence standard. Although the Ninth and D.C.

97. *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

98. *Cf. Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944).

99. 500 F.2d at 257, *quoting* *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933).

100. *Cf.* 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 28.01-29.11 (1958).

101. 500 F.2d at 258 (citations omitted). In reaching this conclusion, the Third Circuit apparently accepted the EPA's factual determination that state action is imperative to the success of the clean air legislation. 38 Fed. Reg. 632-33 (1973).

Circuits were mute on the entire issue, the Fourth Circuit refused to give great weight to the EPA's interpretation on the broad ground that it was not in accordance with law.¹⁰²

The refusal of the Fourth, Ninth, and D.C. Circuits to give great weight to the EPA's interpretation may be explained by exceptions to the general rule. First, it is clear that the courts remain the final authorities on issues of statutory construction, and "are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."¹⁰³ Besides being subject to the general limitations of the Administrative Procedure Act,¹⁰⁴ agency decisions are often limited by a rule restricting an agency from deciding the limits of its own statutory powers.¹⁰⁵ Although not expressly stated by any of the courts, the EPA interpretation of the 1970 amendments is arguably in this category of decisionmaking.

F. Conclusion — Policy Considerations

Courts have traditionally favored statutory construction that is consistent with public policy.¹⁰⁶ The Third Circuit in *Pennsylvania v. EPA* accurately pointed out that Congress intended "sweeping changes" in the antipollution laws when it enacted the 1970 amendments.¹⁰⁷ Emphasis on these sweeping changes plus the seriousness of the pollution problem in the cities and states induced the court to liberally read the Act so as to better effectuate the manifested purpose. The Ninth, Fourth, and D.C. Circuits, on the other hand, strictly construed the 1970 amendments against the EPA's interpretation without mention of any intended sweeping changes. Although each court purported to base its decision on the various criteria of statutory construction previously discussed, it is clear that constitutional considerations were of primary importance to at least the Ninth

102. 8 ENVIR. REP. DEC. at 1114, citing 5 U.S.C. § 706 (1970).

103. *NLRB v. Brown*, 380 U.S. 278, 291 (1965).

104. 5 U.S.C. §§ 701-06 (1970).

105. See *Social Security Bd. v. Nierotko*, 327 U.S. 358, 369 (1946). As to this rule, one court stated:

[T]he fact that the rule is a good rule and has the effect claimed for it, does not validate an unlawful rule. As the board did not have the power to make the rule, the fact that it might be beneficial is immaterial.

Blatz Brewing Co. v. Collins, 88 Cal. App. 2d 438, 199 P.2d 34, 42 (1948).

106. See generally 2A SUTHERLAND, *supra* note 51, §§ 56.01-.05.

107. 500 F.2d at 257.

Circuit in *Brown v. EPA* and the Fourth Circuit in *Maryland v. EPA*. To both circuits a finding in favor of the EPA's interpretation of the statutory authority issue would have required invalidation of the 1970 amendments.¹⁰⁸

A corollary to the rule that courts should avoid constitutional questions if at all possible is the rule that if one among alternate constructions involves serious constitutional difficulties, then the construction not constitutionally infirm should be adopted.¹⁰⁹ This rule of statutory construction is illustrated by a recent group of United States Supreme Court cases dealing with federal criminal legislation.¹¹⁰ In these cases, federal prosecutors urged the Court to broadly construe certain federal statutes so as to permit federal criminal jurisdiction in areas of traditionally local governance. The Supreme Court avoided the constitutional issues arising under the commerce clause, however, by restricting the scope of the subject legislation. In one of the cases, Justice Marshall explained the rationale for narrowly construing the legislation:

[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.¹¹¹

The sovereign balance in federal-state relations is also involved in interpreting the 1970 amendments and, therefore, an equally clear congressional statement should be present before legislation is construed so as to alter this balance. It appears that the Ninth Circuit in *Brown v. EPA* was looking for such a clear statement when it stated:

Congress would not have intended to take such a step in the

108. See, e.g., *Maryland v. EPA*, 8 ENVIR. REP. DEC. at 1113.

109. *Blasecki v. City of Durham*, 456 F.2d 87, 93 (4th Cir. 1972); *United States v. Thompson*, 452 F.2d 1333, 1337 (D.C. Cir. 1971); *Application of the United States*, 427 F.2d 639, 643 (9th Cir. 1970).

110. *United States v. Enmons*, 410 U.S. 396 (1973); *United States v. Bass*, 404 U.S. 336 (1971); *Rewis v. United States*, 401 U.S. 808 (1971); *United States v. Five Gambling Devices*, 346 U.S. 441 (1953).

111. *United States v. Bass*, 404 U.S. 336, 349 (1971) (footnote omitted).

light of the delicacy with which federal-state relations always have been treated by all branches of the Federal government.¹¹²

Indeed, the interpretations of the Ninth, Fourth, and D.C. Circuits correctly embrace the Supreme Court's reasoning since neither the statute nor the legislative history contain a clear statement that the federal-state balance should be altered to allow federal control of state legislative and administrative processes.

III. CONSTITUTIONAL CONSIDERATIONS

The EPA Administrator in each of the cases claimed that the commerce clause provided authority for his actions.¹¹³ The states conceded that the commerce clause, as expansively interpreted by past Supreme Court decisions,¹¹⁴ does give the Administrator

112. 521 F.2d at 834.

113. For the Administrator's position see 38 Fed. Reg. 30,632-33 (1973). The commerce power has been the basis for a substantial amount of comprehensive federal legislation, the constitutionality of which has been upheld by the Supreme Court. *See, e.g.,* *Swift & Co. v. United States*, 196 U.S. 375 (1905) (Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (1970)); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (National Labor Relations Act, 29 U.S.C. §§ 151-66 (1970)); *United States v. Darby*, 312 U.S. 100 (1941) (Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (1970)); *Wickard v. Filburn*, 317 U.S. 111 (1942) (Agriculture Adjustment Act, 52 Stat. 31, *as amended*, 7 U.S.C. §§ 1281 *et seq.* (1970)); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (Civil Rights Act of 1964, 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a-d, 2000a to h-6 (1970)).

114. There is little doubt, as conceded by the states, that the art. I, § 8 grant to Congress of the power to regulate commerce is broad. Judicial decisions construing the commerce power most expansively have relied primarily on Chief Justice Marshall's opinion in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the first case to deal with the scope of the commerce clause. Chief Justice Marshall's oft-quoted language is: "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." *Id.* at 196. Qualified only by the statement that the commerce clause does not give Congress power over completely internal concerns of individual states, this broad view of the commerce power, plus Chief Justice Marshall's expansive interpretation of the necessary and proper clause has made the commerce power a potent tool of congressional regulation. Chief Justice Marshall made the following statement concerning the necessary and proper clause:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

The case most often cited for the liberal judicial extension of the commerce power is *Wickard v. Filburn*, 317 U.S. 111 (1942), wherein the Court held that the commerce power extended to regulate the price of a small farmer's crops which were to be used wholly for his own consumption. The case was particularly significant because of its promulgation of the "aggregate affect" concept. Simply put, the Court found that although the farmer involved in the particular case grew crops strictly for his own consumption, the "aggregate affect" of the local activities of all those similarly situated did have the requisite "substan-

broad regulatory powers.¹¹⁵ Clearly, pollution affects interstate commerce and therefore the Administrator has the right to promulgate pollution control plans and enforce them against individual polluters, including states. Nevertheless, the states argued that the Tenth Amendment implicitly prevents the Administrator from compelling the states to exercise their legislative and administrative powers to administer the federal plan.¹¹⁶ In addressing the states' contention, the circuit courts were faced with two questions: (1) Does the Tenth Amendment limit the federal government's intrusion, pursuant to the commerce power, into traditional state affairs?¹¹⁷ (2) If it does, what is the scope of the Tenth Amendment's limitations on the federal government?

A. *Nature of the Problem*

The necessity for a constitutional limitation arose after Chief Justice Marshall described the commerce power as "complete in itself" and "acknowledg[ing] no limitations, other than are prescribed in the Constitution."¹¹⁸ As the federal government began to regulate state activities pursuant to its commerce power, the states sought for the constitutional prescription spoken of by Marshall. In spite of its unfortunate wording, the Tenth Amendment was the states' best constitutional argument: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹¹⁹

tial affect" on interstate commerce. *Id.* at 128-29. See *Polish Nat'l Alliance of the United States v. NLRB*, 322 U.S. 643, 648 (1944).

The modern view of the expansive reach of the commerce power apparently was not foreseen by Madison when he said: "The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained." *THE FEDERALIST* No. 45, at 329 (B. Wright ed. 1961) (J. Madison). For a further explanation of Madison's views see notes 234-237 and accompanying text *infra*.

115. See, e.g., *Pennsylvania v. EPA*, 500 F.2d at 259.

116. See, e.g., *Brown v. EPA*, 521 F.2d at 838.

117. Professor Charles C. Black's interpretation of judicial decisions up to 1970 lead him to the following conclusion about the existence of an implied constitutional limit to federal powers:

Here is one of the most important questions conceivable with respect to the legal basis of federalism. Is there an implied limitation on the federal powers, to the effect they shall not be used to deal with some matters under state authority? The prevalent modern answer is negative.

C. BLACK, *PERSPECTIVES IN CONSTITUTIONAL LAW* 25 (1970). Cf. Strong, *Cooperative Federalism*, 23 *IOWA L. REV.* 459, 474 (1938).

118. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).

119. U.S. CONST. amend. X.

Until the Supreme Court's decision in *United States v. Darby*,¹²⁰ states argued that the Tenth Amendment *explicitly* limits congressional exercise of the commerce power.¹²¹ In *Darby*, however, the Court dismissed this argument, reasoning that "[t]he amendment states but a truism that all is retained which has not been surrendered."¹²²

In spite of the decision in *Darby*, states have argued that the Tenth Amendment is evidence of an *implicit* constitutional limit to the commerce power; that the amendment, by recognizing the essential role of the states in the federal system, implicitly prohibits federal action which unduly impairs the ability of the states to effectively function as sovereign units in that system. To date, the Supreme Court has not clearly explained whether there is such an implicit constitutional limit to the commerce power.¹²³

Even if the judiciary does recognize the existence of a Tenth Amendment limit to the commerce power, the courts still face the difficult task of defining the scope of that limit. In past cases, states have sought to define the scope by claiming immunity from congressional regulation pursuant to the commerce power for "governmental," "essential governmental," and "sovereign" functions, but each of these formulations of the limit to the commerce power has been disapproved by the Supreme Court.¹²⁴

B. Past Supreme Court Decisions

The circuit courts' analysis of the constitutional issues fo-

120. 312 U.S. 100 (1941).

121. See, e.g., *United States v. Darby*, 312 U.S. 100, 106 (1941); *Kansas v. Colorado*, 206 U.S. 46, 90-91 (1906).

122. 312 U.S. at 124. The Third Circuit apparently felt that this language in *Darby* negated any constitutional argument based on the Tenth Amendment as a limit to federal powers. See notes 144-148 and accompanying text *infra*.

123. The importance of this inquiry was recognized by the district court in *Maryland v. Wirtz*, 269 F. Supp. 826, 849 (D. Md. 1967), *aff'd*, 392 U.S. 183 (1968): "If the concept of federalism is to survive, it must stand on constitutional limitations, not on the sufferance of the federal government." But see Wechsler, *Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544 (1954):

National action has always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case. This point of view cuts even deeper than the concept of the central government as one of granted, limited authority, articulated in the Tenth Amendment.

124. The "governmental" argument was rejected in *New York v. United States*, 326 U.S. 572, 583 (1945). The "essential" state function argument was rejected in *Case v. Bowles*, 327 U.S. 92, 101 (1946). The "sovereignty" argument was rejected by *United States v. California*, 297 U.S. 175, 183-85 (1936). For a discussion of these various formulations and their ultimate disposition see 66 MICH. L. REV. 750, 770-71 (1968).

cused primarily on past Supreme Court cases which held that federal statutes regulating the activities of private parties could constitutionally be extended to similar state activities. The Administrator's interpretation of the Clean Air Act amendments would, unlike the federal regulation dealt with in these Supreme Court cases, require each state to use its resources in administering a federally promulgated regulatory scheme. A major consideration to each circuit court, then, was the significance of this factual difference.

1. Supreme Court statements appear to recognize no limits to the commerce power

The first cases dealing with the proper accommodation of states' rights in the federal system arose when the federal government began to tax various state activities. In confronting the federalism issue, the Supreme Court recognized that states do have some protection against the federal *taxing* power.¹²⁵ Early cases held that the states were immune from taxation by the federal government when acting in their governmental capacity, but not immune when engaged in proprietary activities.¹²⁶ When state governments sought this same immunity from the commerce power, however, the judiciary was not persuaded. In *United States v. California*,¹²⁷ relied upon by the Administrator, Congress sought to bring a state-owned railroad within the scope of the Safety Appliance Act passed under the aegis of the commerce clause. The states argued that operation of the railroad was a governmental function and therefore immune from federal regulation. Addressing this argument, the Court said:

[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. . . . [But] [t]he sovereign power of the states is necessarily diminished to the extent of grants of power to the federal government in the Constitution.¹²⁸

125. The source of the federal taxing power is U.S. CONST. art. I, § 8, cl. 1: "The Congress shall have Power to Lay and collect Taxes"

126. See, e.g., *Allen v. Regents*, 304 U.S. 439, 451-53 (1938); *Helvering v. Powers*, 293 U.S. 214, 227 (1934); *Ohio v. Helvering*, 292 U.S. 360, 369 (1934); *South Carolina v. United States*, 199 U.S. 437, 447 (1905).

127. 297 U.S. 175 (1936).

128. *Id.* at 183-84. One commentator believes that the result in *United States v. California*, although justifiable when decided in 1936, is no longer applicable for two reasons: (1) the Supreme Court did not perceive the dangerous destructive potential of

This language in *United States v. California* influenced the Court in *Maryland v. Wirtz*.¹²⁹ *Wirtz* arose when Congress amended the Fair Labor Standards Act to apply to the operation of state-owned hospitals and schools. Maryland argued that this action was not permissible under the commerce clause because the commerce power could not be used to interfere with governmental functions. The Court found this argument untenable, reasoning that state concerns cannot "'outweigh' the importance of an otherwise valid federal statute regulating commerce."¹³⁰ Citing *United States v. California*, the Court in *Wirtz* concluded that "[i]f a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation."¹³¹

Because of the broad language in *United States v. California* cited with approval in *Maryland v. Wirtz*, it is possible to conclude that no constitutional limit, express or implied, constrains congressional exercise of the commerce power. Only language in *Fry v. United States*,¹³² the most recent Supreme Court case dealing with the constitutional issues here involved, specifically refers to a constitutional limitation to the commerce power.¹³³ In dictum, the Court in *Fry* refers to the Tenth Amendment as declar-

the commerce power, and (2) the tax immunity doctrine "hinged on the muddled distinction between 'governmental' and 'proprietary' activities." 53 TEXAS L. REV. 380, 383-84 (1975). See also *Fry v. United States*, 421 U.S. 542, 553-56 (1975) (Rehnquist, J., dissenting).

129. 392 U.S. 183 (1968). In *Maryland v. Wirtz*, the Fair Labor Standards Act was extended to state-owned schools and hospitals. The Court, however, made it clear that the intrusion into state medical and educational functions was minimal:

Thus appellants' characterization of the question in this case as whether Congress may, under the guise of the commerce power, tell the states how to perform medical and educational functions is not factually accurate. 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.

Id. at 193-94.

130. *Id.* at 195-96.

131. *Id.* at 197.

132. 421 U.S. 542 (1975). In *Fry*, the Court upheld the application of the Economic Stabilization Act of 1970 to the state's employees.

133. The Court in *Maryland v. Wirtz* said "[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.'" 392 U.S. at 196. The Court, however, does not cite any authority for this proposition, nor state whether the Court's power is derived from the Constitution. For the circuit courts' discussion of the quoted language see notes 155-161 and accompanying text *infra*.

ing "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."¹³⁴

In summary, then, only one of the Supreme Court cases involving constitutional issues present here has mentioned a constitutional limit to the federal commerce power, the authority by which the Administrator of the EPA sought to regulate the states' activities.¹³⁵

2. *The Fourth and Ninth Circuits distinguish the cases*

In spite of the holdings in the previously discussed Supreme Court cases, the Fourth and Ninth Circuits determined that those cases are consistent with the concept of a limitation to the commerce power. Essentially, the courts reasoned that the decisions in *United States v. California* and *Maryland v. Wirtz* only apply when the state activities subject to federal regulation are similar to those carried on by private parties.¹³⁶ For example, the Ninth Circuit in *Brown* cites Justice Harlan's statement in *Wirtz* that "the Court has ample power to prevent . . . the utter destruction of the state as a sovereign political entity" as recognizing this distinction.¹³⁷

Indeed, the Court in *Wirtz* did qualify the language in *United*

134. 421 U.S. at 547 n.7. The Court prefaced the quoted language dealing with the Tenth Amendment by this statement:

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.

Id.

In addition to the dictum in *Fry v. United States*, individual justices of the Supreme Court have recognized the existence of a constitutional limit to the federal commerce power. Justice Douglas said: "But what is done here is nonetheless such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism." *Maryland v. Wirtz*, 392 U.S. 183, 201 (1968) (Douglas, J., dissenting).

Justice Rehnquist, dissenting in *Fry v. United States*, criticized the following broad language in *United States v. California*: "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. According to Justice Rehnquist, "[s]uch an answer is simply a denial of the inherent affirmative constitutional limitation on congressional power which I believe the States possess." 421 U.S. at 553.

135. In spite of the fact that the statement in *Fry* was only dictum contained in a footnote to the Court's opinion, the case appears to have had a significant impact on the circuit courts' holdings. The only decision to completely reject a state's constitutional argument, the Third Circuit's opinion in *Pennsylvania v. EPA*, was decided prior to *Fry*, while the other three cases were decided subsequently.

136. See note 233 *infra*.

137. 521 F.2d at 839.

States v. California by interpreting the case as standing for the proposition that "if a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation."¹³⁸ In addition, in *Parden v. Terminal Railway*,¹³⁹ the Court reiterated the principle announced in *United States v. California*, but limited the effect of that language by concluding that "when a state leaves the sphere that is exclusively its own, and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation."¹⁴⁰

Although the Court in *United States v. California* and *Parden v. Terminal Railway* spoke in absolute terms of sovereign powers being diminished, it is evident from the Court's conclusion in the latter case that the federal government may regulate only activities that are not exclusively a state's own. While this conclusion does not obviously follow from the broad principles announced in *United States v. California* and *Maryland v. Wirtz*, it is consistent with the holdings in those cases¹⁴¹ and does provide a logical explanation for the Court's continued references to limits on the commerce power.

C. *The Circuits' Analysis of the Constitutional Issues*

The states' main constitutional argument was that the Tenth Amendment evidences an implicit constitutional limit to the federal commerce power which the Administrator has exceeded. The response of the circuits to this argument is a major point of difference in their opinions.

1. *The Third Circuit rejects Pennsylvania's constitutional argument*

Because past Supreme Court decisions have cast substantial doubt on the existence of a constitutional limit to the commerce power,¹⁴² it is not surprising that Pennsylvania did not even argue

138. 392 U.S. at 197 (emphasis added).

139. 377 U.S. 184 (1964). In *Parden*, the Court agreed to extend the Federal Employer's Liability Act (FELA) to the states. Cf. *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973).

140. 377 U.S. at 196 (emphasis added).

141. Both the ownership and operation of the railroad in *United States v. California* and the ownership and operation of schools and hospitals in *Maryland v. Wirtz* are activities engaged in by both public and private entities. See note 167 *infra*.

142. See notes 120-122, 127-134 and accompanying text *supra*.

that the Tenth Amendment limits federal exercise of the commerce power.¹⁴³ Despite this omission, the court in *Pennsylvania v. EPA* dealt with the Tenth Amendment issue,¹⁴⁴ quoting the 1946 Supreme Court case of *Case v. Bowles*¹⁴⁵ as dismissing any constitutional argument based on the amendment: "[T]he Tenth Amendment does not operate as a limitation upon the powers, express or implied,¹⁴⁶ delegated to the national government."¹⁴⁷ The Court in *Case v. Bowles* derived this principle from *United States v. Darby*.¹⁴⁸

Nevertheless, the Supreme Court's recent reference in *Fry* to the important constitutional role of the Tenth Amendment illustrates the error in the Third Circuit's reasoning that *Darby* and *Case v. Bowles* negated the amendment's significance. In apparent reference to *Darby*, the Court in *Fry* stated that:

While the Tenth Amendment has been characterized as a "truism" . . . 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.¹⁴⁹

The Court's use of the word "expressly" is clearly not an attempt to overrule *Darby*, which rejected the argument that the Tenth Amendment expressly limits the federal commerce power. The Court in *Fry* reasoned that the amendment's significance is in

143. While it is understandable that Pennsylvania would not base its constitutional argument on the Tenth Amendment, it may have been a tactical error not to do so. Had the state conceded that the literal wording of the Tenth Amendment does not limit the commerce power, yet argued that the amendment does implicitly limit federal powers, the Third Circuit could not have dismissed the state's constitutional argument by simple reference to *Case v. Bowles*. See notes 142-150 and accompanying text *infra*.

144. 500 F.2d at 259 n.20.

145. 327 U.S. 92 (1946).

146. It is important to note that the Court's reference here to "powers express or implied" is not relevant to the issue of whether the Tenth Amendment acts as an "express or implied" limitation to the commerce power. When the Court says that the Tenth Amendment does not limit express or implied powers delegated to the federal government, it is referring to the origin of the federal power sought to be limited, in this case the federal commerce power, which is an express power delegated to the federal government.

147. 327 U.S. at 102. The Court quotes *Fernandez v. Wiener*, 326 U.S. 340, 362 (1945), which cites *United States v. Darby*, 312 U.S. at 123-24, for the proposition.

148. Confusion as to the meaning of the Tenth Amendment has arisen because of the *Darby* Court's reference to the Tenth Amendment as a "truism." 312 U.S. at 124. In that case, however, the Court merely rejected the appellee's argument that "the Tenth Amendment expressly stipulates that certain powers are reserved to the people." *Id.* at 106. Therefore, since *Darby* it has generally been considered futile to argue that the literal wording of the Tenth Amendment limits the commerce power.

149. *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975).

expressly declaring constitutional policy. This policy of protecting the states' integrity is not explicitly contained in the Constitution but is implicitly derived from the Constitution's establishment of a federal system with independent states. The Tenth Amendment "expressly" recognizes this concept of separate state existence by reference to powers reserved to the states.¹⁵⁰

Not only did the court in *Pennsylvania v. EPA* dispose of any possible argument based on the Tenth Amendment, but the court also rejected the state's argument that the Administrator's interpretation of the Act would "pose an unconstitutional threat to the sovereignty of the Commonwealth of Pennsylvania."¹⁵¹ In an apparent belief that the Tenth Amendment was not a viable argument, the state cited no provision of the Constitution to support its contention but instead relied on past Supreme Court cases dealing with limits to the federal taxing power. The circuit court in *Pennsylvania v. EPA* acknowledged that the Supreme Court has upheld a state sovereignty argument in cases dealing with the scope of the federal taxing power but rejected Pennsylvania's sovereign state function argument,¹⁵² primarily by its interpretation of *Maryland v. Wirtz*, which it claimed rejected a similar argument.¹⁵³ The Third Circuit broadly interpreted the case as standing for the "principle that the constitutionality of federal regulation of state activities is subject to the same analysis as that of private activities; *viz.* the determinative factor is simply

150. California, apparently influenced by *Fry*, conceded the point made in *Darby*, but argued that the purpose of the Tenth Amendment supports its argument: "While the Tenth Amendment did not establish a new constitutional principle, its clear purpose was to solidify the position of state governments as sovereign within their sphere." Brief for Petitioner at 14, *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975); see Strong, *Cooperative Federalism*, 23 *Iowa L. Rev.* 459, 469-70 (1938). But see CORWIN, *NATIONAL SUPREMACY* 485 (1913) for the view that the supremacy clause negatives any theory of implied limitations on congressional power arising out of the fact of a divided government.

151. Brief for Petitioner at 28, *Pennsylvania v. EPA*, 500 F.2d 246 (3d Cir. 1974) (heading in petitioner's brief).

152. Pennsylvania argued that *United States v. California* and *Maryland v. Wirtz* control only when states engage in activities which are also carried on by private entities. Relying primarily on Justice Frankfurter's opinion in *New York v. United States*, the state argued that "[s]urely there could be no activity which is more definitely a governmental activity, no activity which is more clearly an attribute of sovereignty, than enforcement of law." *Id.* at 29.

153. 500 F.2d at 259-60. The Third Circuit said that Pennsylvania derived its sovereign state functions argument from Justice Frankfurter's language in *New York v. United States*, 326 U.S. 572 (1946). The court discredits Justice Frankfurter's remarks primarily for two reasons: (1) Justice Frankfurter only delivered the opinion for a plurality of the Court; (2) the Court has held that "the standards developed to define the boundaries of state immunity from federal taxation are inapplicable to federal regulation of state activities under the Commerce Clause." 500 F.2d at 261-62.

whether they have an impact on interstate commerce.”¹⁵⁴

Based on its review of precedent, the Ninth Circuit in *Brown v. EPA* criticized the Third Circuit’s interpretation of *Wirtz* as failing to recognize the difference between a state engaging in commerce and a state regulating the commerce of others (governance of commerce).¹⁵⁵ To the Ninth Circuit, California’s “governance of the use of highways and automobiles” is outside the scope of the federal power, whereas the state’s use of the highways is not.¹⁵⁶ This crucial distinction, stated the court, was recognized by Chief Justice Hughes in his statement that “the subject of federal power is still ‘commerce,’ [and not governance] and not all commerce but commerce with foreign nations and among the several States.”¹⁵⁷ The Ninth Circuit also believed that language in Justice Harlan’s opinion in *Maryland v. Wirtz* recognized the distinction. Justice Harlan quoted Chief Justice Hughes’ statement and added that “[t]he Court has ample power to prevent ‘the utter destruction of the state as a sovereign political entity.’”¹⁵⁸

The Third Circuit in *Pennsylvania v. EPA*, however, did not review these statements as recognizing a significant limit to the commerce power. To the court, Chief Justice Hughes’ language did nothing more than reaffirm “that the power to regulate commerce is limited to activities that affect *interstate* or *foreign* commerce.”¹⁵⁹ The Third Circuit reasoned that this fact, plus the caution that “Congress may not use a relatively trivial impact on commerce as an excuse for broad, general regulation of state or private activities,” led the Supreme Court in *Maryland v. Wirtz* to its conclusion that “the Court has ample power to prevent . . . the utter destruction of the state as a sovereign political entity.”¹⁶⁰

Following the Third Circuit’s reasoning, the Court’s ample power to protect the state can only be exercised if the state activities either do not affect interstate commerce at all or have only a trivial impact on commerce. Under the Supreme Court’s present expansive interpretation of the commerce clause, it is not likely that many federal actions would be limited by the Third Circuit’s

154. *Id.* at 261.

155. 521 F.2d at 838 n.45; see notes 166-173 and accompanying text *infra*.

156. 521 F.2d at 838.

157. *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453, 466 (1938).

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

159. 500 F.2d at 260.

160. *Id.*

view of the Court's "ample power."¹⁶¹ Fortunately for the states, *Pennsylvania v. EPA* was the only one of the circuits' decisions to completely reject the states' constitutional arguments.

2. *The Fourth and Ninth Circuits favor the states' constitutional arguments*

The three circuits that recognized the existence of a constitutional limit to the commerce power were necessarily confronted with the problem of defining the scope of that limit. In the absence of any clear statement by the Supreme Court on the issue, it is not surprising that the courts reached different conclusions.

The Fourth Circuit in *Maryland v. EPA* recognized that some type of linedrawing was desirable and turned for assistance to Justice Frankfurter's discussion in *New York v. United States* concerning the limits of federal powers. Justice Frankfurter, although recognizing the constraints of the Tenth Amendment on federal powers, rejected the state's contention that its governmental functions were immune from federal taxation.¹⁶² Nevertheless, he did recognize that a narrower class of state activities were immune from federal taxation. The Fourth Circuit quoted with approval Justice Frankfurter's comment that federal powers do not extend to "State activities and State-owned property that partake of *uniqueness* from the point of view of intergovernmental relations."¹⁶³ Having determined that some unique state

161. See note 114 *supra*.

162. *New York v. United States*, 326 U.S. 572, 580 (1946).

163. *Id.* at 582. The Third Circuit, however, rejected Justice Frankfurter's language, reasoning that the limits imposed on the federal taxing power do not apply to the federal commerce power. See note 153 *supra*. The Third Circuit's assertion is correct in that the Court in *United States v. California* did reject the taxing power analogy as applied to the commerce power. For this reason, then, the decision in *New York v. United States* would have no binding precedential effect on lower courts dealing with issues involving limits to the commerce power. Nevertheless, Justice Frankfurter's statements, although dicta, were not confined to the federal taxing power. Justice Frankfurter argued that the taxing power should be interpreted as broadly as was the commerce power in *United States v. California*. This is evident by his rejection of the governmental v. proprietary distinction plus his statement that the taxing power has no less reach than the commerce power. Justice Frankfurter's point of view, then, was similar to the Court's in *United States v. California*. Both rejected the governmental v. proprietary distinction and both viewed the congressional power involved as expansive. In this context, it would seem that Justice Frankfurter's comments do apply to the commerce clause.

The Third Circuit summarized Justice Frankfurter's reasoning that certain unique state activities are immune from federal taxation as concluding that the federal taxing power is limited to "nondiscriminatory" taxes. 500 F.2d at 261 n.23. The Third Circuit claims that four members of the Court in *New York v. United States* rejected Justice Frankfurter's reasoning. *Id.* Analysis of Justice Stone's concurrence, however, shows that

activities cannot be regulated by the federal government, the court then quoted language in *In re Duncan*¹⁶⁴ proclaiming the essential nature of a state legislature's right to pass or not to pass laws.¹⁶⁵ To the Fourth Circuit, then, an implicit constitutional limit to the commerce power does exist, can be defined, and was exceeded by the EPA.

Justice Frankfurter's reference to "unique state activities," cited with approval by the Fourth Circuit in *Maryland v. EPA*, appears similar to the Ninth Circuit's position that the federal commerce power does not extend to a state's governance of commerce. The Fourth Circuit only identifies one unique governmental function, the right of the state's legislature to pass or not to pass laws. The Ninth Circuit's concept of governance, however, includes some or all of a state's police powers, although the distinction between a state's economic activities and the exercise of its police power over these activities is not clearly explained.¹⁶⁶ The court illustrates its theory by reasoning that a state's operation of a railroad is an "*economic activity* indistinguishable from that of private parties," whereas its exercise of the police power over the use of highways and automobiles is *governance*.

This example is used to contrast the facts in *United States v. California* with those of *Brown v. EPA*.¹⁶⁷ But the Third Circuit

even though these four members of the Court did not accept an analysis based on discrimination, they did accept a concept of constitutionally protected state sovereignty. Moreover, it appears that the four concurring justices' view of the scope of constitutional protection extended to sovereign state activities that were not discriminatory. These justices indicated that a nondiscriminatory tax may nonetheless be unlawful if it burdens sovereign state activities. *Id.* at 586-87; see *Fry v. United States*, 421 U.S. 542, 555-56 (1975) (Rehnquist, J., dissenting).

164. 139 U.S. 449 (1891).

165. 8 ENVIR. REP. DEC. at 1112, quoting *In re Duncan*, 139 U.S. 449, 461 (1891):

By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies.

166. The Ninth Circuit explains that a state's exercise of its police power with respect to an economic activity which affects commerce is "governance." The court then contrasts a state's governance with "an *economic activity* indistinguishable from that of private parties." The court appears to say that governance does not include economic activities which affect interstate commerce. However, many exercises of the police power (governance) are economic activities which affect interstate commerce. The Ninth Circuit's concept of governance, then, is probably limited to a narrow range of police power activities which cannot be termed economic activities. See note 172 *infra*.

167. 521 F.2d at 838. The Third Circuit in *Pennsylvania v. EPA* saw as a close analogy to the situation before it "a state-owned railway system created and maintained for use by private railway companies." 500 F.2d at 261 n.22. The court concluded that Congress

in *Pennsylvania v. EPA* argued that the only difference in the two sets of facts is historical: railroads are *operated* by public and private concerns and automotive transportation systems are operated only by state and local governments.¹⁶⁸ To the Third Circuit this difference is irrelevant.¹⁶⁹ The Ninth Circuit would probably agree that the difference in the *operation* or ownership of a given economic activity is irrelevant but argue that whether the state *governs* the activity's use through exercise of its police power is entirely relevant. Even if private enterprises operated automotive transportation systems, the state would still govern their use by enacting and enforcing traffic laws. Clearly, these activities would be characterized by the Ninth Circuit as governance of commerce and hence immune from federal intervention.

From this analysis, it is evident that both the Fourth and Ninth Circuits believe that any federal regulation which forces the states to pass laws is impermissible. The Ninth Circuit's position, however, appears to extend protection to state administrative functions encompassed by the state police power.¹⁷⁰ The scope of the Fourth Circuit's unique governmental activity test¹⁷¹

could require the "state to operate it in such a way as to deal with a problem, like safety or air pollution which affects interstate commerce." *Id.*

The Ninth Circuit's governance test would probably lead to the same conclusion. A state as an owner and operator of the railroad system would be subject to the same congressional regulation of its economic activities as would a private owner and operator of railroads. However, under the Ninth Circuit's analysis, the state's regulation of the use of its railroads and the railroads of others through enacting and enforcing laws would be governance. This conclusion is consistent with the Ninth Circuit's analysis of the state activities regulated by Congress in *Maryland v. Wirtz* and *Fry v. United States*. The Ninth Circuit says "[t]hese cases establish that the *payment of wages* by states to certain types of state employees is an economic activity that substantially affects interstate commerce and is thus subject to those regulations imposed by Congress which were then before the Court." 521 F.2d at 838 (emphasis added). The state would not exercise "its police power with respect to an economic activity which affects commerce" when it acts as an employer in the payment of wages, nor would it as the owner and operator of a railroad.

168. 500 F.2d at 261.

169. *Id.*

170. A state's power to provide for the general welfare (police power) is broad indeed. As the Third Circuit indicates, Pennsylvania's compliance with the Administrator's plan would "require the Commonwealth to exercise its *legislative* and *administrative* powers." 500 F.2d at 262 (emphasis added). The Ninth Circuit's governance test, based on the police power, apparently encompasses not only legislative functions, but certain administrative functions as well.

171. The Fourth Circuit focused on the "unique" right of a state to pass or not to pass laws. The court does not say whether other state activities would be protected from federal regulation. Nevertheless, the court derived its theory from Justice Frankfurter who, from his examples given of "unique" state activities, apparently intended the class of protected activities to be quite narrow. See *New York v. United States*, 326 U.S. 572, 582 (1946).

and the Ninth Circuit's governance test are not clearly delimited.¹⁷² Nevertheless, both tests, without reversing prior precedent, operate to make only a narrow class of state activities immune from congressional regulation pursuant to the commerce power.¹⁷³

3. *District of Columbia Circuit*

Like the Fourth and Ninth Circuits, the D.C. Circuit in *District of Columbia v. Train* recognized a limit on congressional exercise of the commerce power and attempted to define its scope. In so doing, the court appeared to take an intermediate position on the constitutional issues between the Third Circuit on one hand and the Fourth and Ninth Circuits on the other.¹⁷⁴ Primarily relying on language in *Wirtz*, the court concluded:

Once Congress has properly determined that the emission of pollutants into the air has an effect on interstate commerce, it has power to regulate activities which generate that pollution either directly or indirectly, and it is irrelevant that a particular source of pollution is operated by the state.¹⁷⁵

Based on this reasoning, the D.C. Circuit apparently went beyond the approach taken by the Fourth and Ninth Circuits by allowing Congress to regulate the state's streets, highways, and bus systems. Specifically, the court concluded that Congress can require the states to purchase buses and to construct exclusive bus lanes even at great expense.¹⁷⁶ To the D.C. Circuit, then, the

172. The scope of the Ninth Circuit's governance test is also unclear. See note 166 *supra*. Even though the court defines governance in broad terms of police power regulation, California argued that only those state activities which cannot *in principle* be performed by private parties are protected from commerce power regulation. The only example of this class of activities given by California is the enactment and enforcement of state laws. Brief for Petitioner at 22, *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975).

173. See notes 127-134 and accompanying text *supra*.

174. The D.C. Circuit in *District of Columbia v. Train* did not refer to either the Fourth or Ninth Circuit decisions. The reason for this omission is not known as both the Ninth and Fourth Circuit opinions came down prior to *District of Columbia v. Train*; the Ninth Circuit's opinion is dated August 15, 1975; the Fourth Circuit's, September 19, 1975; and the D.C. Circuit's, October 28, 1975. In contrast, the Fourth Circuit's opinion, rendered a little over a month after the Ninth Circuit's, cites *Brown v. EPA* as support for its views of the constitutional issues. 8 ENVIR. REP. DEC. at 1113.

As the D.C. Circuit cited the Third Circuit's opinion several times, 521 F.2d at 988, 991, 994, 994 n.7, it is logical to assume that the court was unaware of the Ninth and Fourth Circuit decisions when drafting its opinion.

175. 521 F.2d at 989.

176. *Id.* The court realized that the purchase of 475 buses and the construction of many miles of exclusive bus lanes may be financially burdensome, but found it permissible based on the following language from the Supreme Court's decision in *Employees of*

rationale of *United States v. California* and *Wirtz* extends to allow apparently unlimited regulation of state activities that directly or indirectly¹⁷⁷ affect interstate commerce.

The court next addressed the Administrator's inspection and maintenance regulations and his retrofit regulations.¹⁷⁸ In contrast to the bus and bus lane provisions, these regulations are ultimately aimed at the individual automobile owner, not the state. Furthermore, as the court recognized, "each federally-promulgated regulation includes provisions ordering the states to enact statutes and to establish and administer programs to force their citizens to comply with this federal directive."¹⁷⁹ In analyzing the constitutionality of these various regulations, the court determined that the proper standard of inquiry was developed by Chief Justice Marshall in *Gibbons v. Ogden* when he said that the federal commerce power was a "power to regulate; that is, to prescribe the rule by which commerce is to be governed."¹⁸⁰

the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 284 (1973): "[W]hen Congress does act [under the commerce power] it may place new or even enormous fiscal burdens on the States."

In that case, employees of Missouri sought overtime pay due them under the Fair Labor Standards Act, which was applied to the states by *Maryland v. Wirtz*, 392 U.S. 183 (1968). Missouri argued that the Eleventh Amendment barred suit against it in federal court. The Supreme Court upheld the state's argument, 411 U.S. at 286-87. The quoted statement, then, appears to be dictum. In addition, the Supreme Court neither cites authority for this statement nor explains its scope. It is not clear, then, whether the language means the cost to a state of complying with a federal program is irrelevant or whether there is a point at which the financial burdens become too enormous to be allowed.

177. The Administrator defines an indirect source as

one that encourages mobile source pollution at locations not necessarily coincident with the source itself by serving as a trip attraction for automobile drivers, or which provides a parking or driving convenience.

38 Fed. Reg. 30,632 (1973). The Administrator lists a "high-speed highway" as an example of an indirect source of pollution controlled by the state. *Id.*

178. The EPA's retrofit regulations require certain vehicles to be equipped with mechanical devices, or in other ways altered, in order to reduce the emission of air pollutants. For examples of such regulations see, e.g., the EPA's plan for the District of Columbia, 40 C.F.R. §§ 54.492, .494-96 (1974); and the EPA's retrofit regulations for Virginia, 40 C.F.R. §§ 52.2446-47 (1974).

179. 521 F.2d at 990.

180. 22 U.S. (9 Wheat.) 1, 196 (1824). The language quoted by the court precedes Marshall's famous statement that "[t]his power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Id.*

By focusing on the meaning of the word "regulate," the court takes an unusual approach to the problem of defining the limits of the congressional power to "regulate commerce." Most of the previous efforts at approaching the problem have focused on the definition of "commerce." For example, the Ninth Circuit's analysis of the problem

Applying this standard, the court reasoned that Congress has authority to force the states to *administer* federally promulgated plans if the federal plan is directed to traditional state activities like registering and licensing motor vehicles.¹⁸¹ To the court, this is valid congressional regulation of commerce. Nevertheless, the court struck down the inspection and retrofit requirements that do not involve such traditional functions but go beyond valid regulation by forcing the states to enact statutes and become involved in "administering the details of the regulatory scheme."¹⁸²

It appears that the court in *District of Columbia v. Train* used the "regulation" test to accomplish the same result it feels is not justified solely by reliance on the Tenth Amendment. Although the court cited with approval the language in *Fry* referring to the important constitutional role of the Tenth Amendment, the court correctly points out that "[t]he [Supreme] Court has not yet made clear exactly what sort of restraints the Tenth Amendment does place on federal action under the commerce clause."¹⁸³ Because of this, the court's conclusion from its analysis of *Wirtz* and *Fry* was an "additional ground" for setting aside the inspection and retrofit regulations.¹⁸⁴ The same factors that led the court to conclude that the inspection and maintenance regulations are a drastic invasion of state sovereignty prohibited by the Tenth Amendment led the court to conclude that these provisions go beyond valid regulation of commerce.¹⁸⁵ In either case, the degree of federal intrusion was the focal point of the court's analysis. By reaching the desired result through a restrictive definition of regulation, the D.C. Circuit obscured its reasoning.

distinguished between "governance" and "commerce," but did not question the meaning of the word "regulate." 521 F.2d at 838-39.

181. 521 F.2d at 991. The court was careful to point out the reasoning which led to its decision to allow the Administrator to control state licensing activities:

[T]he federal regulation is directly related to existing activities presently being carried on by the states, and it does not specify the manner in which the state is to comply. A state may comply with the prohibition on registering nonconforming vehicles merely by requiring applicants for vehicle registration to submit a certificate of compliance obtained from federal officials or from private sources not manned by state personnel.

Id. at 991-92.

182. *Id.* at 992.

183. *Id.* at 993.

184. *Id.* at 994.

185. *Id.* at 992.

4. A comparison of the three tests

The approach taken by the D.C. Circuit should be contrasted with the Ninth Circuit's governance test. As previously mentioned, the Ninth Circuit in *Brown v. EPA* illustrated its governance theory by contrasting the facts in *United States v. California* with those of the instant case.¹⁸⁶ To the court in *Brown v. EPA*, the state's operation of a railroad, an "economic activity indistinguishable from that of private parties," is very much different from a state's exercise of its police power to govern the use of highways and automobiles.¹⁸⁷ In contrast, the court in *District of Columbia v. Train* views "state-owned transportation systems as analogous to the railroad operated by the state in *United States v. California*."¹⁸⁸ This analogy is used by the court to support its decision to uphold the Administrator's regulations which require the states to purchase buses, construct bus lanes, and regulate the registration of noncomplying vehicles.

The Ninth Circuit's governance test probably would not allow these provisions. The federal plan promulgated by the Administrator for California contained several bus lane provisions¹⁸⁹ and a prohibition against registering noncomplying vehicles.¹⁹⁰ All of these provisions were struck down by the Ninth Circuit in *Brown* based on its interpretation of the Clean Air Act.¹⁹¹ The court's view of the constitutionality of these regulations appears to parallel its conclusions based on construction of the Act.¹⁹²

Clearly, the registration and licensing of vehicles is an exer-

186. See note 167 and accompanying text *supra*.

187. 521 F.2d at 838.

188. 521 F.2d at 989.

189. For example, the exclusive bus lane provisions for the San Diego Intrastate Air Quality Control Region, 40 C.F.R. § 52.258 (1974), and those for the Los Angeles Region, 40 C.F.R. § 52.263 (1974).

190. 40 C.F.R. § 52.244(d) (1974).

191. 521 F.2d at 831-32.

192. The Ninth Circuit discussed the constitutional issues at some length. From the court's favorable attitude toward the state's arguments and its rejection of the Administrator's position, 521 F.2d at 837-39, it appears the court's view of the constitutional issues would lead it to the same result as its holding based on interpretation of the statute which struck down the exclusive bus lane and vehicle registration provisions. In reference to the Third Circuit's decision, the court said:

We recognize that our views *both* with regard to the interpretation of the Clean Air Act and the constitutional issues here discussed differ from those expressed in *Pennsylvania v. Environmental Protection Agency*, 500 F.2d 246 (3d Cir. 1974).

521 F.2d at 838 n.45 (emphasis added).

cise of the state's police power and not an economic activity indistinguishable from that of private parties. It is not as clear, however, that the construction of exclusive bus lanes and the purchase of new buses¹⁹³ constitute "the governance of the use of highways and automobiles." Arguably, the construction of exclusive bus lanes is governance and not commerce since the highways involved are owned solely by the state.¹⁹⁴ Yet the actual physical activity required, construction of roads, is also to some degree "an economic activity indistinguishable from that of private parties" in the sense that private parties can and do construct roads.¹⁹⁵ In that respect, construction of roads is analogous to state ownership of a railroad treated in *United States v. California* and would fall within the rationale of that case as explained in *Wirtz*: "If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation."¹⁹⁶

In *Maryland v. EPA*, the Fourth Circuit recognized that a state's right to pass or not to pass laws was a unique state activity and therefore not subject to federal regulation. Although apparently not basing its decision on constitutional considerations, the court held that the EPA could not "require Maryland to establish the programs and furnish legal authority for the administration thereof."¹⁹⁷ The court thereby set aside the entire inspection and maintenance program and retrofit programs, including the licensing provisions.¹⁹⁸

In contrast, the D.C. Circuit allowed the licensing provisions, although setting aside the majority of the EPA's inspection, maintenance, and retrofit programs. In so doing, the court admitted that because of its approach, "the states may have to enact

193. There is no provision in the EPA's plan for California requiring that state to purchase buses. See 40 C.F.R. §§ 52.220 *et seq.* (1974).

194. The Third Circuit, based on its argument that historical circumstances resulted in state and local governments monopolizing control over local automobile transportation systems and not over railways, would seemingly reject this argument. See *Pennsylvania v. EPA*, 500 F.2d at 261 and notes 167-169 and accompanying text *supra*.

195. In *Brown v. EPA*, the state argued that state activities which cannot *in principle* be performed by private parties are protected from federal regulation. See note 172 *supra*. Based on this reasoning, the construction of exclusive bus lanes is probably not a protected activity. Even though in fact the state alone will construct the bus lanes, in principle, private parties also could construct such lanes.

196. 392 U.S. at 197.

197. 8 ENVIR. REP. DEC. at 1114-15.

198. *Id.* at 1115.

auxiliary statutes or state regulations to carry out the federal regulation"¹⁹⁹

There is no indication in *Maryland v. EPA* that the Fourth Circuit's view of the constitutional issues would countenance such an approach. The court set aside all of the EPA's regulations that required the states to legislate. The presence of this one objectionable feature was determinative to the Fourth Circuit. To the D.C. Circuit in *District of Columbia v. Train*, however, federal regulations which require the state to enact some "auxiliary statutes or state regulations" are permissible if certain other limiting factors are present.²⁰⁰

5. *The guarantee clause*²⁰¹

In two of the four circuits, the states presented a rather unique constitutional argument in addition to arguing the Tenth Amendment as evidence of an implicit constitutional limit to the commerce power.²⁰² In *Brown v. EPA*, California argued that the Administrator's interpretation of the Act would result in an abridgment of the state's constitutional guarantee to a republican form of government.²⁰³ Essentially, California's argument was that the federal government, by requiring a state to enforce federal plans, could exercise ever increasing control over state expenditures. This "severance of spending from taxing at the state level" would seriously impair the state's republican form of government as the congressional representatives from other states would "dilute the strength of the voters [of California] whose revenues would be spent as Congress directs."²⁰⁴ This argument,

199. 521 F.2d at 987.

200. See note 181 *supra* and text accompanying notes 226-227 *infra*.

201. U.S. CONST. art. IV, § 4: "The United States shall guarantee to every State in this Union a Republican Form of Government"

202. A guarantee clause argument was recognized by the courts in *District of Columbia v. Train*, 521 F.2d 971, 981 (D.C. Cir. 1975) and *Brown v. EPA*, 521 F.2d 827, 838 (9th Cir. 1975), but was addressed only by the Ninth Circuit.

203. 521 F.2d at 838.

204. *Id.* The Ninth Circuit in *Brown* cited the writings of Montesquieu and the Federalist papers in support of California's guarantee clause argument. *Id.* Madison in *The Federalist* contrasts the theories of republicanism, nationalism and federalism. In speaking of a republic Madison said:

[W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is essential to such a government that it be derived from the great body of society

THE FEDERALIST No. 39, at 280-81 (B. Wright ed. 1961) (J. Madison). Montesquieu simi-

if successful, would give the state's federalism argument a constitutional basis.

a. *General rule of nonjusticiability.* Even though by article IV, section 4 the federal government is responsible for guaranteeing to the states a republican form of government, the courts have consistently held that questions arising under the guarantee clause are nonjusticiable political questions.²⁰⁵ Most of these cases, however, involved alleged interference with a state's guarantee to a republican government by the state itself or individuals within the state.²⁰⁶ In contrast, in *Brown v. EPA* the threat to the state's republican form of government was from congressional and executive, *not* state or individual action. The federal government, the guarantor of the states' right to a republican government, was the very party accused of the violation.

larly spoke of the right of the people to elect their representatives as being the essence of a republican form of government. 1 MONTESQUIEU'S SPIRIT OF LAWS 8 (J. Pritchard rev. ed. 1902). It appears, then, that these two authorities would agree that dilution of the electorate's control over local fiscal matters would impair a state's republican form of government.

205. *Baker v. Carr*, 369 U.S. 186 (1962); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1911); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). In *Baker v. Carr*, the Court declared the guarantee clause claim to be nonjusticiable, but upheld the equal protection argument based on the same facts. 369 U.S. at 227, 237. For a further discussion of *Baker v. Carr* see note 207 *infra*.

The Ninth Circuit, while discussing the guarantee clause issue at some length did not mention the problem of nonjusticiability. Its failure to do so may be explained by the court's merely giving its "opinion" of the constitutional issues while basing its decision on statutory construction.

206. In the 1849 case of *Luther v. Borden*, the Supreme Court determined for the first time that enforcement of the guarantee clause was a nonjusticiable political question. The case arose out of the Dorr Rebellion, a unique event in American history. In 1841, a group of citizens in Rhode Island led by Dorr organized, adopted a new constitution, and claimed to be the official government of the state. The Supreme Court was called upon to decide which government would be recognized by the United States. Chief Justice Taney, in refusing to pass on the question, reasoned that Congress was the proper branch of government to decide such political questions. 48 U.S. (7 How.) 1, 43 (1849).

Even though the Court's treatment of the nonjusticiability issue in *Borden* appeared to be dictum, the reasoning of the Court has been very influential to subsequent courts dealing with guarantee clause claims. See B. SCHWARTZ, CONSTITUTIONAL LAW 55 (1972); Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485, 507 (1924).

In *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 151 (1911), the Court refused to decide a challenge to a 1902 amendment to the Oregon constitution which contained the following provision:

But the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly.

ORE. CONST. art. 4, § 1 (1902).

For a discussion of *Baker v. Carr* see note 207 *infra*.

Even so, the Supreme Court has recently determined that "challenges to *congressional* action on the ground of inconsistency with the [guarantee] clause present no justiciable question."²⁰⁷ The Court based this conclusion primarily on its decision in *Georgia v. Stanton*.²⁰⁸ In *Stanton*, Georgia sued to enjoin execution of the Reconstruction Acts, alleging that enforcement of the acts would destroy its present form of government²⁰⁹ which it claimed was republican in "every political, legal, constitutional, and juridical sense."²¹⁰ The Court determined that the issue involved was a nonjusticiable political question.²¹¹ Thus, even in this extreme case where the very existence of the state's government was jeopardized by federal action, the Court refused to hear the state's guarantee clause claim.

b. Possible exception to the rule may support states' arguments. It has been suggested that the Supreme Court case of *Coyle v. Smith*²¹² acts as a limitation upon the general rule of

207. *Baker v. Carr*, 369 U.S. 186, 224 (1962) (emphasis added). This case was a landmark decision in the area of reapportionment. The appellants, residents of Tennessee, were successful in arguing that their votes were "debased" because the state legislature was not reapportioned after a substantial growth and redistribution in the state's population. Different members of the Court in *Baker v. Carr* expressed dissatisfaction with the rule announced in *Luther v. Borden*. Justice Douglas took the strongest stance in opposition to a general application of the political question doctrine. He felt that many of the cases cited by the Court as involving political questions were wrongly decided. 369 U.S. at 241 n.1. Specifically, he said that "[t]he statements in *Luther v. Borden*, that this guarantee is enforceable only by Congress or the Chief Executive is not maintainable." Justice Douglas intimated that the doctrine arose out of a peculiar fact situation and that its general application would therefore be inappropriate. Justice Douglas felt that the doctrine was particularly inapplicable to voting rights cases where the Court has given "the full panoply of judicial protection to voting rights." *Id.* at 242 n.2.

Also, the dissent criticized the majority for their treatment of the issue. The majority found that although the guarantee clause claim was not justiciable the appellants' equal protection claim was. In response to this approach, Justice Frankfurter said in dissent: "The present case involves all the elements that have made the Guarantee Clause cases non-justiciable. It is in effect, a Guarantee Clause claim masquerading under a different label." *Id.* at 297.

Even the majority made it clear that guarantee clause claims are only nonjusticiable because they "involve those elements which define a 'political question.'" *Id.* at 218. The majority's review of precedent lists six of these elements, one of which must be present for a given case to be ruled nonjusticiable. This process, said the Court, necessitates a "discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing." *Id.* at 217.

208. 73 U.S. (6 Wall.) 50 (1867).

209. *Id.* at 50-51. The Act of March 2, 1867, entitled "An act to provide for the more efficient government of the rebel States," provided that no legal state government existed in Georgia and until a government approved by Congress could be established the state was to be part of a military district controlled by the President. *Id.*

210. *Id.* at 65.

211. *Id.* at 77.

212. 221 U.S. 559 (1911).

nonjusticiability.²¹³ In *Coyle*, the Court indicated that the guarantee clause may impose a duty on the federal government not to deprive the states of their republican form of government. In the case, Oklahoma challenged the validity of the Enabling Act of June 16, 1906,²¹⁴ which restricted the power of the state to determine the location of its capitol city, to determine when and how to change the location, and to appropriate public funds for that purpose. Noting that the powers limited by the Enabling Act "are essentially and peculiarly state powers,"²¹⁵ the Court said that the guarantee clause "may imply the duty of such new State to provide itself with such State government, and impose upon Congress the duty of seeing that such form is not changed to one anti-republican—but it obviously does not confer power to admit a new State which shall be any less a State than those which compose the Union."²¹⁶

If the decision in *Stanton* can be limited to the unique historical circumstances involved,²¹⁷ the states in their case against the EPA may fall within the rationale of the Court in *Coyle*.²¹⁸ In both instances, the states claimed that the actions of the federal government deprived them of powers that are uniquely theirs. In *Coyle*, congressional action deprived a state from locating its own center of government, from determining when and how to change the location, and from appropriating public funds for that purpose. These functions were viewed by the Court as "essentially

213. Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485, 510 (1924).

214. Ch. 3335, 34 Stat. 267. These enabling acts varied from state to state. It is interesting to note that Utah's contained a provision prohibiting plural marriage, which many of the other state enabling acts did not. *Coyle v. Smith*, 221 U.S. 559, 560 (1910).

215. 221 U.S. at 565.

216. *Id.* at 567-68.

217. The Union, having been split by Civil War, sought once again to unite under a common government. The existing government of Georgia, by refusing to grant the right to vote to Negroes, was declared unrepresentative in nature by Congress. Georgia's claim to be a republican government in all respects certainly is not compelling to a society such as ours today accustomed to universal suffrage.

218. *Coyle v. Smith* was cited by one commentator for the proposition that "[t]here are limitations on the scope of the things which can be accomplished under the guaranty [sic] clause." Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485, 509 (1924). This statement suggests that the holding in *Coyle* may be limited to cases where the federal government attempts to use the guarantee clause as authority for some affirmative action. Although it is true that in *Coyle* Congress cited the guarantee clause to justify its legislation, the absence of an affirmative use of the guarantee clause here should not distinguish the circuit cases from *Coyle*. The ultimate impact on the states in each instance is similar, for in both instances federal action interfered with the state's exercise of essential and peculiar state powers.

and peculiarly state powers."²¹⁹ In the states' dispute with the EPA, the states claimed and the Administrator conceded that the Administrator's interpretation of the Act would force their state representatives to legislate. Certainly the right of a state to enact laws is also essentially and peculiarly a state power.²²⁰

6. Summary

In summary, all of the circuits recognized that due to the decisions in *United States v. California* and *Maryland v. Wirtz*, the Administrator can control state activities that are direct sources of pollution.²²¹ The D.C. Circuit, although not going as far as did the Third Circuit in *Pennsylvania v. EPA*, did, like the Third Circuit, extend the rationale of the Supreme Court cases to allow the EPA to regulate state activities that are an indirect source of pollution. The Third Circuit interpreted *Wirtz* as allowing the federal government to regulate state activities in the same manner as private activities, the determining factor being whether the activity in question has an effect on interstate commerce.²²² The Fourth and Ninth Circuits, on the other hand, made no distinction between direct and indirect sources of pollution, but apparently saw the Supreme Court cases as applicable only to state activities that directly pollute the air.²²³

Both the Fourth and Ninth Circuits objected primarily to the EPA's inspection and maintenance programs and its retrofit programs.²²⁴ These regulations required the states to enact and administer programs in order to force their citizens to comply with the federal pollution control plan. Both courts viewed the EPA's

219. 221 U.S. at 565.

220. See note 165 *supra*.

221. This result accords with the courts' view of statutory construction, since § 113 applies to all "persons" who violate the Act, and § 302(e) of the Act includes state and local governments as "persons." 42 U.S.C. § 1857h(e) (1970). See notes 64-69 and accompanying text *supra*.

The Ninth Circuit stated: "Tersely put, the Act, as we see it, permits sanctions against a state that pollutes the air, but not against a state that chooses not to govern polluters as the Administrator directs." 521 F.2d at 832.

222. 500 F.2d at 261.

223. The D.C. Circuit allows the Administrator's regulations that require the states to construct exclusive bus lanes and purchase new buses by identifying the state's streets, highways, and bus systems as indirect sources of pollution. 521 F.2d at 989-90. On the other hand, the Ninth and Fourth Circuits set aside similar provisions of California's and Maryland's federally imposed plans, as discussed notes 189-192, 197-198 and accompanying text *supra*.

224. The Fourth Circuit viewed these provisions as "astonishing regulations." 8 ENVIR. REP. DEC. at 1111.

requirements in these areas as unconstitutional interference with sovereign state legislative or regulatory functions.²²⁵ The D.C. Circuit also emphasized the substantial invasion of state sovereignty created by these regulations, but allowed the EPA's regulation prohibiting the state from licensing nonconforming vehicles. The court viewed this exception as compelled by the result in *United States v. California*, but was careful to point out the existence of factors qualifying this exception. Simply put, it appears that the court recognized two factors that must exist in order for the federal government to constitutionally require a state to *administer* a federal regulatory scheme. The state role must (1) be limited to traditional state activities²²⁶ and (2) not involve the state in extensive use of its lawmaking or regulatory powers, including use of its personnel and resources.²²⁷ Thus, the decision in *District of*

225. The Attorney General of the United States, Edward H. Levi, found similar constitutional faults with various provisions of the proposed National No-fault Act. *Hearings on S. 354 Before the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 496 (1975). The Attorney General pointed out that the No-fault Act would, as emphasized by Mr. Robert G. Dixon, require the states to "devote their funds and personnel, and to create agencies and facilities to administer a Federal law, regardless of local feeling." *Id.* at 497.

Levi distinguishes the *United States v. California* — *Maryland v. Wirtz* line of cases as "cases where the State mechanism was regarded as similar to that of any private employer or entrepreneur." *Id.* at 498.

The Attorney General recognized that the Clean Air Act Amendments of 1970 contain many of the infirmities of the National No-fault Bill. In reference to *Pennsylvania v. EPA*, he states: "I do not know whether the existence of this third circuit case should give particular comfort to anyone concerned about principles of federalism." *Id.* at 499. Nevertheless, reasons Levi, "the reference to the 10th amendment in *Fry*, the strong dissent in *Fry* and the Supreme Court's action in setting down for reargument the *National League of Cities* case and staying the operation of the recent amendments to the statute which raise the question in that case all indicate that the issue involved here is a serious one, located at the margin of constitutionality." *Id.* at 500.

At the end of 1974, in an unpublished opinion, a three-judge district court denied a preliminary injunction and dismissed the plaintiff's complaint in *National League of Cities v. Brennan*, Civil No. 74-1812 (D.D.C., Dec. 31, 1974). The plaintiffs sought to enjoin enforcement of parts of the 1974 amendments to the Fair Labor Standards Act and related regulations promulgated by the Secretary of Labor which would have applied the Act to all nonsupervisory state and municipal employees, including police and firemen.

On appeal to Chief Justice Burger as Circuit Justice of the D.C. Circuit, the Chief Justice explained that the three-judge court viewed the case as raising "a difficult and substantial question of law" although they felt that the Supreme Court's decision in *Maryland v. Wirtz*, 392 U.S. 183 (1968) controlled the matter. Sharing the lower court's "doubts and concerns," Chief Justice Burger ordered arguments before the entire Court. *National League of Cities v. Brennan*, 419 U.S. 1321, 1323 (1974).

226. See note 181 *supra*.

227. 521 F.2d at 992. The court says the following concerning the Administrator's inspection and maintenance regulations and retrofit regulations (excluding the licensing provisions):

In essence, the Administrator is here attempting to commandeer the regulatory powers of the states, along with their personnel and resources, for use in

Columbia v. Train strikes a balance between the competing considerations—the extensive federal commerce power and the states' right to an independent existence. In striking that balance, the court articulated a limitation to congressional exercise of the commerce power while accommodating the letter of past Supreme Court decisions.

D. Future Clarification by the Supreme Court

Both the Ninth and the D.C. Circuits' recognition of the states' Tenth Amendment arguments was aided by the Supreme Court's treatment of the issue in *Fry v. United States*,²²⁸ decided after *Pennsylvania v. EPA*. Although applying the Economic Stabilization Act to state employees, the Court in *Fry* explicitly refers to the Tenth Amendment as declaring 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."²²⁹ In addition, the Court was careful to note that the federal intrusion in both *Wirtz* and *Fry* was "quite limited in application" and that the latter case dealt only with an emergency measure necessitated by severe economic conditions.²³⁰ In dissent, Justice Rehnquist noted with approval the majority's recognition of the Tenth Amendment as a limit on federal power. Realizing that linedrawing is difficult, he nevertheless argued that *Wirtz* should be overruled as crossing the line between permissible and impermissible federal intrusion in state functions.²³¹ The Court's opinion in *Fry* suggests that the Supreme Court is in a position to side with the D.C., Ninth, and Fourth Circuits. Should the Court agree to grant the EPA's petition for review of the decisions of those circuits,²³² it will have an opportunity to make it clear that, regardless of how difficult the conceptualization, a limit to federal intrusion into state affairs does exist, is of constitutional origin, and will be enforced by the courts.

If the Supreme Court accepts the states' constitutional arguments, it must deal with language in past cases that appears to

administering and enforcing a federal regulatory program against the owners of motor vehicles.

Id.

228. 421 U.S. 542 (1975).

229. *Id.* at 547 n.7. See text accompanying notes 149-150 *supra*.

230. *Id.* at 548.

231. *Id.* at 559.

232. See note 20 *supra*.

recognize no limits on congressional exercise of the commerce power. The position on the constitutional issues taken by the Fourth, Ninth, and D.C. Circuits indicates an unwillingness to extend the conclusions of those Supreme Court cases beyond their factual contexts.²³³ Language by the D.C. Circuit in *District of Columbia v. Train* perhaps expresses the attitude of all three circuits toward the liberal extension of the federal commerce power by the United States Supreme Court:

Actually, in extending the commerce power to the tremendous limits it has been pressed in recent years, the Congress and the Courts are most probably exceeding the intent of those who wrote the Constitution.²³⁴

The court substantiated this view by quoting from a letter written by James Madison that indicates his feeling that the commerce power was "intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government"²³⁵ To the court, there was "no question" that the commerce power was being used by Congress and the EPA as an affirmative tool of federal regulation.²³⁶ The court, therefore, concluded that "[w]e recognize the extent to which the Supreme Court has expanded the federal commerce power, but we are not willing to expand it beyond the limits that Congress specified or court decisions presently require."²³⁷

Perhaps the Supreme Court's recognition in *Fry* that the Tenth Amendment has substantive meaning will provide the impetus for a renewed effort by the Court to articulate the scope of an implicit constitutional limit to the federal commerce power. In this important but difficult task, the efforts of the Fourth, Ninth, and D.C. Circuits provide a useful framework for future judicial analysis.

233. The Ninth Circuit's governance test was developed to distinguish *United States v. California*, *Maryland v. Wirtz*, and *Fry v. United States*. The court said in reference to the latter two cases:

Neither of these cases holds or even suggests that a state's exercise of its police power with respect to an economic activity which affects interstate commerce is itself an economic activity or 'species of commercial intercourse' subject to regulation by Congress.

521 F.2d at 838.

The Fourth Circuit's "unique state activity" test also served to distinguish *California* and *Wirtz*. See *Maryland v. EPA*, 8 ENVIR. REP. DEC. at 1112.

234. 521 F.2d at 992.

235. *Id.*

236. *Id.*

237. *Id.*