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In the continuing battle against environmental degradation, it is crucial that the federal government work closely with the states to plan, then implement pollution abatement strategies. But despite the seriousness of the pollution problem, many states have balked at federally-imposed standards, proposals and deadlines. The author of this article explores the history, nature and impact of the lack of cooperation that has taken place in the case of transportation controls under the Clean Air Act. He then goes on to discuss the techniques which constitutionally may, and may not, be used to force the states to comply with these and similar federal mandates, and develops an analytical framework based on a variety of recent cases which have affected the issue of federalism.

TRANSPORTATION CONTROLS UNDER THE CLEAN AIR ACT--AN EXPERIENCE IN (UN)COOPERATIVE FEDERALISM

*Jackson B. Battle**

At the heart of the Clean Air Act¹ is a system called "cooperative federalism," which has become the structural principle for much of our most important national environ-

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1. 42 U.S.C. §§ 7401-7642 (1977).

In this article, all references to sections in the Clean Air Act will be by public law section numbers. The United States Code section numbers are not used by practitioners in the field, and on the rare occasion when they are used in a judicial opinion or article they cause only confusion. Therefore, the author confidently takes the liberty of not peppering this article with cross references to the United States Code section numbers corresponding to his multitudinous citations to sections in the Clean Air Act. The sections of the Act most often cited herein, however, do correspond recognizably with their U.S.C. counterparts: §§ 101-159 of the Act are §§ 7401-7459 of Title 42 U.S.C.; §§ 171-178 are §§ 7501-7508; §§ 301-316 are §§ 7601-7616. Other sections do not correspond so well.

mental legislation.² The basic scheme is creatively simple: federal statutes and administrative rules establish the regulatory framework; states prepare and submit to the responsible federal agency packages of state statutes and regulations ("plans") designed to implement the federal law; if a state plan is approved, the state assumes primary implementation authority (usually with the aid of substantial federal funding); if a state does not submit an approvable plan, the federal agency remains in charge of administering the act. In principle, cooperative federalism is a marvelous device to accomplish comprehensive national objectives without alienating and pre-empting the states and expanding the federal bureaucracy to new dimensions of size and unmanageability. Federal statutes and regulations establish the legal framework; but states are allowed some discretion in applying this framework to their own needs and policies, through the design particularities of their plans as well as through their day-to-day decisions in implementation and enforcement. The federal government sets the stage and monitors the states' performances to check failures and abuses,³ but it largely avoids an intrusive and costly federal presence.

The problem is that cooperative federalism does not always work smoothly. The states don't always cooperate. Why they don't depends upon what federal act and agency is involved, the circumstances concerning individual states, and with whom one talks. The federal statute may require too much too soon.⁴ The responsible federal agency may go even further.⁵ There may be insufficient incentives to entice the states to participate, as can occur when the state is left

2. *E.g.*, the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376; the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-9; the Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464; the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328; the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987.

3. For example, by federal inspection and enforcement and by revocation of approval of state programs. See §§ 308, 309(a)(1)-(2), and 402(c)(3) of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1318, 1319(a)(1)-(2), 1342(c)(3).

4. For example, the requirement in § 202(b) of the Clean Air Act Amendments of 1970 that ninety percent reductions in vehicle emissions of hydrocarbons and carbon monoxide be achieved by 1975 model year.

5. This is a widespread accusation levelled by the states at the Office of Surface Mining for the regulations which it published implementing the Surface Mining Control and Reclamation Act.

with too few discretionary choices.⁶ A state may be recalcitrant and not in agreement with national policy.⁷ Or public attitudes reflected by the state may change before the controlling federal legislation does.⁸

Whatever the cause for the breakdown in state/federal cooperation, few *legal* problems would exist if the responsible federal agency realistically were able to fall back on its statutory duty to promulgate and administer a federal implementation plan. Under present interpretations of the Constitution, the commerce clause is ample authority for the federal government to directly regulate virtually any threats to the environment anywhere within the country—at least as far as private activities are concerned.⁹ The obstacles to direct federal environmental regulation are primarily practical and political ones, but they may be insurmountable. Regulation of every source of air or water pollution in any substantial part of the country would be impossible without a quantum leap in the size of the federal bureaucracy, a corresponding increase in federal agency budgets,¹⁰ and duplication of many functions already performed by the states. It is not likely that Congress would fund or long tolerate on any sizeable scale an agency's making good the ultimate threat contained in such statutory schemes. The task of the federal government, therefore, becomes one of enticing or coercing the states to perform duties toward which they are themselves disinclined—without running afoul of constitutional restrictions or a legislative backlash.

6. This is something which may have been partially responsible for the states' initial lack of enthusiasm to obtain permitting authority under the Federal Water Pollution Control Act.

7. This can occur when rural states are subject to uniform national policies or a valuable local industry is jeopardized.

8. For example, an "energy crisis" which shifts priorities toward increased coal production might affect state willingness to submit to a stringent federal statutory scheme.

9. See *Katzenback v. McClung*, 379 U.S. 294, 298, 299-395 (1964); *Wickard v. Filburn*, 317 U.S. 111, 127-29 (1942); *United States v. Darby*, 312 U.S. 100, 115, 122 (1941); *South Terminal Corp. v. EPA*, 504 F.2d 646, 677 (1st Cir. 1974).

10. EPA's budget outlay for 1978 was over \$5 billion, and it employed over 12,000 paid employees. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 263, 280 (1978).

The history of transportation controls under the Clean Air Act provides an excellent model for consideration of the limits of various means available to obtain state implementation of federal legislation. The Environmental Protection Agency (EPA) tested its power to compel state implementation of the 1970 Amendments to the Act, but largely failed in a series of cases first to be discussed in this article. As a result, when Congress passed the 1977 Amendments to the Act it expressly created new "carrots and sticks" to entice and coerce state cooperation. Exploration of the legal and practical obstacles to the use of these persuasive devices is an ideal format for discussion of "federalism" limits to this new regulatory approach, which may yet hold more promise than any other for preserving our nation's quality of life. Whether co-operative federalism succeeds or fails depends largely upon whether the law is strong enough to keep its fabric intact. The author believes that traditional constitutional principles furnish sufficient authority to support adequate federal pressure against uncooperative states. Congress is fully capable of responding to protect the states when their integrity is disregarded; and, in a rare case in which Congress does not respond in time, recently rediscovered Tenth Amendment principles will prevent egregious federal disregard of state sovereignty. Our experience to date with transportation controls bears out the author's confidence.

I. THE EXPERIENCE UNDER THE 1970 AMENDMENTS

A. *Summary of the Relevant Statutory Provisions*

In order to understand transportation controls and the federalism problems that they have engendered, a basic knowledge of the Clean Air Act is required. What follows is an overview of the regulatory scheme existing under the 1970 Amendments. This is still the general format for the Air Act, it is the stage on which the first legal battles were fought, and present problems can be understood only in the light of this recent history.

Congressional concern with the deteriorating quality of the nation's air resulted in federal legislation in 1955,¹¹ 1960,¹² 1963,¹³ 1965,¹⁴ and 1967¹⁵ which progressively increased the federal role, but which still left the states wide latitude to set air quality standards and decide when they would be met. Because of the states' disappointing response to this gentle approach,¹⁶ Congress adopted a much more forceful strategy in the comprehensive Clean Air Act Amendments of 1970. Although the 1970 Amendments continued to recite that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments,"¹⁷ new provisions were inserted to insure that states met this responsibility and that EPA was well equipped to remedy any shortcomings. Direct federal regulatory authority was increased by requiring EPA to promulgate uniform national standards of performance for new stationary sources¹⁸ and stringent national emission standards for particularly hazardous air pollutants.¹⁹ The taproot of the 1970 Amendments, however, was (and is) the national ambient air quality standards.

The Amendments required that within 30 days of their enactment on December 31, 1970, the Administrator of EPA was to publish proposed regulations prescribing national "primary" and "secondary" ambient air quality standards for each air pollutant for which "air quality criteria" had been issued under the 1967 Act.²⁰ For these

11. 69 Stat. 322-23.

12. 74 Stat. 162.

13. The Clean Air Act of 1963, 77 Stat. 392-401.

14. The Motor Vehicle Air Pollution Control Act, 79 Stat. 992-96.

15. The Air Quality Act of 1967, 81 Stat. 485.

16. Brief histories of these early congressional efforts are contained in Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 63-64 (1975), and in Jorling, *The Federal Law of Air Pollution Control, in FEDERAL ENVIRONMENTAL LAW 1059-62* (E. Dolgin & T. Guilbert eds. 1974).

17. Clean Air Act § 101(a)(3).

18. Clean Air Act § 111.

19. Clean Air Act § 112.

States were statutorily permitted to develop and submit to EPA procedures for implementing and enforcing both new source standards and hazardous pollutant standards. EPA was required to delegate such authority to any state whose procedures were adequate, retaining concurrent enforcement authority for itself. §§ 111(c), 112(d). States played no part, however, in setting the actual standards. §§ 111(b), 112(b).

20. § 109(a)(1)(A). This initial group of five "criteria" pollutants included sulfur oxides (SO_x), particulates, carbon monoxide (CO), photochemical oxidants (O₃), and hydrocarbons (HC). To this list the Administrator

“ambient pollutants” EPA was directed to promulgate such primary and secondary standards within 90 more days.²¹ These national standards were timely promulgated on April 30, 1971.²² Primary standards were established at ambient²³ air concentration levels found “requisite to protect the public health.”²⁴ Secondary standards were set at ambient levels “requisite to protect the public welfare from any known or anticipated adverse effects.”²⁵ Within nine months of EPA’s

promptly added a sixth, nitrogen oxides (NO_x). See 36 Fed. Reg. 22385 (1971).

No further addition was made until lead (Pb) was listed on March 31, 1976, as a result of a successful citizen suit. See Natural Resources Defense Council, Inc. v. Train, 411 F. Supp. 864 (S.D. N.Y.), *aff’d* 545 F.2d 320 (2d. Cir. 1976).

21. Clean Air Act § 109(a)(1)(B).
22. 40 C.F.R. Part 50 (1971). The national ambient standards originally promulgated were:

Substance	Federal Standard	
	Primary	Secondary
SO ₂	80 microgm/m ³ [0.03 p.p.m.] annual arithmetic mean 365 microgm/m ³ [0.14 p.p.m.] maximum in 24 hours	60 microgm/m ³ [0.02 p.p.m.] annual arithmetic mean 260 microgm/m ³ [0.1 p.p.m.] maximum in 24 hours 1,300 microgm/m ³ [0.5 p.p.m.] maximum in 3 hours
Particulates	75 microgm/m ³ annual geometric mean 260 microgm/m ³ maximum in 24 hours	60 microgm/m ³ annual geometric mean 150 microgm/m ³ maximum in 24 hours
CO	10 milligm/m ³ [9 p.p.m.] maximum in 8 hours 40 milligm/m ³ [35 p.p.m.] maximum in 1 hour	10 milligm/m ³ [9 p.p.m.] maximum in 8 hours 40 milligm/m ³ [35 p.p.m.] maximum in 1 hour
Photochemical Oxidants	160 microgm/m ³ [0.08 p.p.m.] maximum in 1 hour	160 microgm/m ³ [0.08 p.p.m.] maximum in 1 hour
HC (corrected for methane)	160 microgm/m ³ [0.24 p.p.m.] maximum in 3 hours, 6 a.m.-9 a.m.	160 microgm/m ³ [0.24 p.p.m.] maximum in 3 hours, 6 a.m.-9 a.m.
NO ₂	100 microgm/m ³ [0.05 p.p.m.] annual arithmetic mean	100 microgm/m ³ [0.05 p.p.m.] annual arithmetic mean

Maximum concentrations are not to be exceeded more than once per year. P.p.m. means parts per million.

The secondary standard for SO₂ was relaxed in 1973 by withdrawal of the annual and 24-hourly measurements. 38 Fed. Reg. 25678 (1973).

On October 5, 1978, national primary and secondary standards for lead were promulgated at a single level of 1.5 micrograms/m³, maximum arithmetic mean averaged over a calendar quarter. 43 Fed. Reg. 46258 (1978).

On February 8, 1979, EPA changed the chemical designation of photochemical oxidants to simply “ozone” (O₃) and revised both the primary and secondary standards up to 0.12 p.p.m. (235 micrograms/m³), with attainment to be determined by a new complex formula. 44 Fed. Reg. 8220 (1979).

23. “Ambient air” is “that portion of the atmosphere, external to buildings, to which the general public has access.” 40 C.F.R. § 50.1(e) (1978).
24. Clean Air Act § 109(b)(1).
25. Clean Air Act § 109(b)(2).

promulgation of these standards, each state was required by Section 110(a)(1) of the Act to adopt and submit to EPA a plan which provided for implementation, maintenance, and enforcement of the standards within each air quality control region²⁶ inside the state's boundaries. Within four months after submission of each state implementation plan ("SIP"), EPA was directed to approve or disapprove the plan, in whole or in part.²⁷ Approval was required if the SIP satisfied eight general conditions, the first of which was that the plan provide for attainment of the primary standards within the state "as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan," and attainment of the secondary standards within "a reasonable time."²⁸ Another basic requirement for approval of a SIP was that it include "emission limitations, schedules, and timetables for compliance . . . , and such other measures as may be necessary to insure attainment . . . , including . . . land use and transportation controls."²⁹ If these and the other six conditions designed to assure adequate implementation were met, EPA was required to approve the state-submitted SIP. In the event of disapproval of all or a portion of the SIP, or the failure of a state to submit a plan, EPA was required to promulgate a federal "substitute" implementation plan designed to correct any state omissions or deficiencies and achieve attainment by the same means available to the states.³⁰

Once a plan was approved and/or promulgated, the state had primary responsibility to administer and enforce its provisions: for example, by requiring permits contain-

26. "Air quality control regions" are purely fictitious geographic entities whose designation was mandated by the 1967 Act, and expanded by the 1970 Amendments, for the purpose of defining atmospheric areas with common pollution problems and political factors. *See* Clean Air Act § 107. There are about 250 such designated regions at present. *See* 43 Fed. Reg. 9058-59 (1978). They are intended to be a group of communities that should be treated as a unit for purposes of setting and implementing air quality standards. Their function, however, is more structural than substantive, and their existence may cause more confusion than organization. *See* W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 211-12, 222 (1977).

27. Clean Air Act § 110(a)(2).

28. Clean Air Act § 110(a)(2)(A).

29. Clean Air Act § 110(a)(2)(B).

30. Clean Air Act § 110(c).

ing numerical emission limitations for stationary sources, and by prosecuting such sources if they operated without a permit or in violation of the terms of their permits. EPA was to stand in a backup capacity. According to Section 113(a), EPA was to take enforcement action against any person in violation of any requirement of a plan, (1) if the state failed to remedy the violation after 30-days' notice, or (2) during any period in which EPA had assumed enforcement duties because of the state's failure to enforce the plan effectively despite widespread violations. As a final device to encourage enforcement, Section 304 allowed citizens to initiate civil actions in federal court if both the affected state and EPA failed to discharge their enforcement obligations.³¹

Although states were hardpressed to meet their January 31, 1972 deadlines for SIP submittal, and EPA fell behind the statutory schedule for approving or promulgating implementation plans, the greatest problems were not with what control measures were necessary for stationary sources. Of course, stationary sources did experience some difficulties. The Supreme Court told them that economic and technological infeasibility did not require relaxation of emission limitations contained in an SIP.³² Indeed, infeasibility for the sources would not justify a state's submitting a plan not designed for attainment of the primary ambient standards within three years. Therefore, unless states were farsighted and able to obtain "extensions" for up to two additional years under Section 110(e),³³ stationary sources faced compliance deadlines in mid-1975 (typically May 31, 1975), whether feasible or not. The "technology-forcing" emission limitations and the mandatory compliance deadlines caused many stationary sources no little anguish; but, in the main, states recognized what sorts of emission limitations were necessary for them and, however reluc-

31. Clean Air Act § 304 also provided for citizen suits to compel the Administrator to perform any non-discretionary act. Clean Air Act § 304(a) (2).

32. See *Union Electric Co. v. EPA*, 427 U.S. 246 (1976).

33. By satisfying even more stringent requirements in Clean Air Act § 110(f), a state could also obtain a one-year "postponement" for an essential stationary source. See discussion of Clean Air Act §§ 110(e) and (f), in their form under the 1970 Amendments, in *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75-87 (1975).

tantly, did eventually incorporate such controls into their SIPs. State cooperation proved to be much harder to obtain for control of vehicle emissions.

Vehicle emissions are the major source of four of the six pollutants for which ambient air standards were originally issued.³⁴ Carbon Monoxide (CO), hydrocarbons (HC), and nitrogen oxides (NO_x) are the major pollutants emitted from vehicle tailpipes;³⁵ and HC and NO_x combine with atmospheric oxygen in sunlight in complex chemical reactions to form photochemical oxidants, or "brown smog."³⁶ Section 202 of the Air Act was designed to deal directly with tailpipe emissions of these "vehicle pollutants." Section 202(a) directed EPA to set emission standards for new vehicles to protect public health and welfare, but to take account of economic and technological feasibility in doing so. Pursuant to Section 202(b) these "feasibility-based" standards were to be replaced in 1975 and 1976 model years by statutorily mandated levels. Ninety percent reductions from 1970 (for CO and HC) and 1971 (for NO_x) model-year emissions were required for 1975 and 1976 models, resulting in standards of .41 grams per vehicle mile (gpm) HC and 3.4 gpm CO for 1975 models and 0.4 gpm NO_x for 1976 models. Whether or not these statutory standards might have eased significantly the attainment burden, they were not destined to take effect on schedule. A series of actions by EPA and Congress have repeatedly extended the deadlines and relaxed the standards, until now the .41 gpm HC standard is slated for the 1980 model year, the 3.4 gpm CO standard for 1981, and a 1.0 NO_x standard for 1981.³⁷

34. See EPA's general preamble to all original transportation control plans, 38 Fed. Reg. 30626 (1973). 50% to 80% urban air pollution has been attributed to vehicle emissions of CO, HC, NO_x, lead, and particulate matter. Scheiderman, Cohn, & Paulsen, *Air Pollution and Urban Freeways: Making a Record on Hazards to Health and Property*, 20 CATH. U. L. REV., 5 (1970).

35. Along with lead. See notes 20 and 22 *supra*.

36. The most readily measured photochemical oxidant is ozone, which is accepted as a reliable indicator of overall oxidant pollution. See note 22 *supra*.

37. The original 1975 model-year statutory deadline for HC and CO was extended for one year by EPA, delayed a second year by the Energy Supply and Environmental Coordination Act of 1974 (ESECA) (15 U.S.C. §§ 791-798), and extended a third year by EPA—putting the standards on line for the 1978 model year. ESECA also extended the NO_x standard until 1978 models. The 1977 Amendments to the Clean Air Act, however,

Control of tailpipe emissions was aided by EPA's authority under Section 211 to regulate fuel and fuel additives if burning the fuel would (a) produce emissions which endanger public health or welfare or (b) impair the performance of emission control equipment. Under the first authority, EPA promulgated regulations requiring the phase-down of the average lead content of gasoline.³⁸ Under the latter authority it required gasoline refiners to market at least one line of the lead-free gasoline necessary for catalytic converters.³⁹ The federal regulation both of vehicle emissions under Section 202 and of fuels under Section 211 are largely pre-emptive of such regulation by the states.⁴⁰

B. Breakdown in the Cooperative Model and EPA's Response

The situation facing many states when their SIPS were due⁴¹ was not a happy one. Most large urban areas were not in attainment for the "vehicle pollutants."⁴² Control of emissions from stationary sources would not alone be sufficient for attainment.⁴³ Except for California, states were preempted from directly regulating the tailpipe emissions from new vehicles. And the federal new-car tailpipe standards, even before they were relaxed, would not bring

again rescued Detroit, giving it at least until 1980 and 1981 model years to stringently control tailpipe emissions. See Comment, *The Clean Air Act Amendments of 1977: Expedient Revisions, Noteworthy New Provisions*, 7 ENVIR. L. REP. 10182 (1977).

38. On November 28, 1973. See 38 Fed. Reg. 33741 (1973), 40 C.F.R. § 80.20 (a) (1) (ii) (1979). These "low-lead" regulations survived attack by manufacturers of lead additives and gasoline refiners in *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976).
39. After July 1, 1974. See 38 Fed. Reg. 1254 (1973); 40 C.F.R. §§ 80.2(g), 80.24, 80.5, 80.22 (1973). These "no-lead" regulations were sustained for the most part in *Amoco Oil Co. v. EPA*, 501 F.2d 722 (1974).
40. Federal pre-emption of setting emission standards for new motor vehicles is expressed in Clean Air Act § 209. Pre-emption of control over fuels and fuel additives is stated in § 211(c) (4).
41. By statute, January 31, 1972.
42. It was later determined that during 1971 and 1972 the oxidant standard was exceeded in 54 air quality control regions; the carbon monoxide standard in 29. Taken together, in 66 regions, containing roughly 60 percent of the nation's population, one or both of these primary standards were violated. See W. Horowitz & S. Kuhotz, *Transportation Controls to Reduce Automobile Use and Improve Air Quality in Cities: The Need, the Options and Effects on Urban Activity*, EPA Report, Nov., 1974, at 1.
43. See the 1973 "general preamble" to EPA's transportation control plans, 38 Fed. Reg. at 80626.

attainment in the near future.⁴⁴ The enumeration in Section 110(a)(2) of the requirements for an approvable SIP, however, provided direction for the states. Section 110(a)(2)(B) specifically required, in addition to stationary source emission limitations, "such other measures as may be necessary . . . , including . . . land-use and transportation controls."⁴⁵ Section 110(a)(2)(G) required the SIP to provide "to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards."⁴⁶

Because of the perceived unpopularity of such efforts to come between the average American and his automobile, and the states' lack of familiarity with transportation control planning, most failed to include in their first proposed plans any significant transportation control strategies, concentrating almost exclusively — and, therefore, inadequately — on emissions from stationary sources. However, when the EPA Administrator promulgated his approvals/disapprovals of the original SIPs on May 31, 1972, he stated that the deadline for submittal of the

44. Indeed, in EPA's general preamble it stated that in a number of areas "emission controls on automobiles alone will never be adequate." *Id.* at 30628. Studies conducted in 1974 predicted that the more stringent statutory tailpipe standards would bring about attainment in nearly two-thirds of the problem regions. *See* RODGERS, *supra* note 26, at 312. By 1976, however, the new-car tailpipe standards had achieved only modest success. *See* H. R. REP. No. 94-1175, 94th Cong., 2d Sess. 189-90 (1976). In part, this limited success was due to the repeated statutory and administrative extensions of the original deadlines under Clean Air Act § 202(b). *See* note 37 *supra*.

45. EPA defines "transportation control measure" to mean: "any measure such as reducing vehicle use, changing traffic flow patterns, decreasing emissions from individual motor vehicles, or altering existing model split patterns that is directed toward reducing emissions of air pollutants from transportation sources." 40 C.F.R. § 51.1(r) (1978). More generally, transportation control include any method of reducing emissions from existing (as opposed to *new*) vehicles, discouraging automobile use, and encouraging the use of cleaner means of transportation (such as mass transit). A partial list of various transportation control measures available is contained in § 108(f)(1)(A) of the Clean Air Act.

46. Vehicle emission control inspection and maintenance programs ("VIM") are included within the general category of transportation controls. *See* note 45 *supra*. More specifically, the term is defined as "a program to reduce emissions from in-use vehicles through identifying vehicles which need emission control-related maintenance and requiring that maintenance be performed." 40 C.F.R. § 52.242(a)(1) (1978).

For some purposes, EPA treats VIM as not within its reference to "transportation control measures." *See* 44 Fed. Reg. 20372, 20377 (1979), and notes 156 and 157 and accompanying text *infra*. In this article, unless a distinction is indicated, the term "transportation control measure" (or "strategy") will include VIM.

transportation control portions of SIPs would be extended to February 15, 1973. In the same ruling, the Administrator also granted blanket two-year extensions of the attainment date, until mid-1977, to the 21 states for whom transportation controls would be necessary.⁴⁷ On January 31, 1973, however, the United States Court of Appeals for the District of Columbia Circuit held that both the extension of the submittal deadline and the blanket extension of the attainment date were not authorized by the Clean Air Act.⁴⁸ Thus, pursuant to court order, EPA promptly rescinded the extensions and notified the states that their SIPS, complete with any necessary transportation controls, had to be submitted by April 15, 1973.

The states responded with varying degrees of good faith, effort, and timeliness. By June 15, 1973, sixteen states had submitted transportation control plans. On that date EPA announced its approval/disapproval decisions, complete with detailed evaluations and specification of deficiencies. After the states were given the opportunity to cure deficiencies, EPA, acting pursuant to its Section 110(c) duty, published proposed "substitute" plans and scheduled the necessary public hearings thereon. On November 6, 1973, EPA issued the first of its substitute plans along with a "general preamble" to all plans to be promulgated.⁴⁹ By December 6, 1973, EPA had completed its task of promulgating transportation control plans for all states where they were necessary.⁵⁰ Concurrently with promulgation of the various transportation control plans, EPA granted extensions of attainment dates, on a region-by-region basis, for up to two years (e.g., until May 31, 1977) for the vehicle pollutants based upon individual showings of "necessity" meeting the requirements of Section 110(e).

In the preamble to its substitute plans EPA enumerated and discussed the transportation control measures which it

47. 37 Fed. Reg. 10842 (1972).

48. *Natural Resources Defense Council, Inc. v. EPA*, 475 F.2d 968 (D.C. Cir. 1973).

49. This general preamble, published at 38 Fed. Reg. 30626 (1973), contains the early history of EPA's promulgation of transportation controls which is summarized above.

50. These plans, in all their combinations and varieties, are collected at 40 C.F.R. Part 52 (1974).

was, in varying degrees, imposing on the states. In general, these controls were designed either to reduce vehicle miles traveled (VMT) or to reduce emissions from vehicles once they were on the roads. In the first category was included: (1) limitations on both on and off-street parking;⁵¹ (2) imposition of parking fees and other charges to finance mass transit; (3) establishment of carpool programs; (4) creation of preferential bus and/or carpool lanes; (5) purchase of buses for expanded mass transit systems; (6) creation of bikeway networks; (7) time and place restrictions on the use of heavy-duty and commercial vehicles; (8) establishment of "vehicle free zones;" and (9) limitations on the supply of gasoline. In the second category, that of measures designed to reduce tailpipe emissions from existing vehicles, EPA included vehicle inspection and maintenance programs (VIM) and requirements for "retrofitting" vehicles with added pollution control devices. Equipment required to be included in state retrofit programs ranged from "vacuum spark advance disconnect systems" and air/fuel control devices for pre-1968 vehicles to catalytic converters (costing up to \$300 per installation) for all vehicles to which they would be compatible. VIM programs were at the heart of most transportation control plans promulgated by EPA. Essentially, EPA directed states to require all vehicles in an area to be tested annually for emissions and to prohibit those vehicles which exceeded certain emission levels from operating on the state's streets and highways.

Understand that EPA was not proposing to establish and administer these retrofit and VIM programs *itself*, nor

51. Off-street parking controls included both "parking surcharges" (taxes or fees imposed on parking spaces) and regulations for the "management of parking supply" (requiring a permit or prior approval for new parking lots, the issuance and terms of which are based on air quality considerations). Neither of these strategies was destined to endure. In the Energy Supply and Environmental Coordination Act of 1974, Congress prohibited EPA from promulgating or requiring state submittal of plans contain parking surcharges and voided all such existing EPA requirements. ESECA also authorized EPA to temporarily suspend its regulations for management of parking supply—which EPA did. When Congress subsequently denied it funds to administer parking management, EPA suspended all such regulations indefinitely. See 40 Fed. Reg. 2585, 28064, 29713 (1975). The relevant portions of ESECA are incorporated as amendments to the Clean Air Act, § 110(c) (2).

was *it* proposing to create the bus lanes and bikeways, purchase the buses and manage transit systems, or establish and run other ingredients in a transportation control plan. EPA's substitute plans required the *states* to do all this — specifically including the enactment of necessary state and/or local statutes and regulations, the creation of agencies to administer these programs, the enforcement of such laws against their citizens, and the expenditure of state and local revenue (although aided by federal funding). EPA's rationale for this position was expressed in its "preamble" of November 6, 1973.⁵² From Congress' statements that the states had the primary responsibility for achieving and maintaining air quality standards,⁵³ EPA inferred the legislative intent that states could be compelled to discharge this responsibility. EPA was more convincing when it pointed out the practical necessity for this approach: this air pollution was generated by millions of individual vehicles operating on an extensive network of public roads; direct federal enforcement would involve massive and duplicative federal programs that would put "about everybody on the payroll of the United States";⁵⁴ therefore, if the states were not forced to do it, it would not be done.

Turning to specific provisions in the Act, EPA found support in Section 113(a)'s directive for the Administrator to take enforcement action whenever "any person is in violation of any requirement of an applicable implementation plan." Section 302(e) defines "person" to include a "state, municipality, and political subdivision of a State." To EPA this indicated that a state, like any other person, could be subjected to federally-promulgated requirements governing operation of both its "direct" and "indirect" sources⁵⁵ of air pollution and that, in the same vein, federal

52. See 38 Fed. Reg. at 30632-33.

53. See Clean Air Act §§ 101(a)(3), 107(a).

54. 38 Fed. Reg. at 30633.

55. In its general preamble EPA explained the term "indirect source" as follows:

Many such facilities may also be viewed as indirect sources of air pollution. An indirect source is 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. Thus, the

enforcement action could be brought against it for failure to obey any such requirements. Certainly a state-owned direct source, such as a municipal incinerator, could be subjected to federal emission limitations and to enforcement action for failing to abide by them. Therefore, EPA reasoned, a state-owned and administered indirect source, such as a highway or parking space, could likewise be subjected to federal regulation and enforcement.⁵⁶ Treating state and local transportation systems as indirect sources, EPA next proceeded to justify the two general types of requirements which it would impose upon their operation. First, it would require that they only be operated in certain ways — e.g., with bus and carpool lanes, more buses, bike lanes, fewer parking spaces, etc. Second, it would require that “the road owners and the licensing and regulating authorities” regulate the emissions of those who used them — by establishing and administering VIM and retrofit programs. Failure to meet these requirements, including the failure to regulate pursuant to the federal plan, would subject the states and their officials to the sanctions available under Section 113: administrative compliance orders, court injunctions, steep civil penalties; and, perhaps, even steeper criminal fines and imprisonment.

EPA went so far as to require, on pain of these enforcement sanctions, that states conduct studies necessary to formulate the proper statutes and administrative rules, that such proposed legislation and regulations be submitted to EPA for its approval, and that evidence of commitment of adequate state funds be produced.⁵⁷ Predictably, the states

availability of ample low-cost parking facilities and high-speed freeways influences individuals to use vehicles with as few as one person in them, rather than less-polluting modes of transit. Such facilities may legitimately be charged not only with the pollution arising directly from their premises, but also with the total pollution in the region emitted by the traffic increase which they encourage.

38 Fed. Reg. at 30632-33.

The present agency definition is at 40 C.F.R. § 52.22(b) (i) (1978).

56. In support of this contention EPA pointed out that by building highways, licensing vehicles and operators, providing a system of traffic laws, etc., government had encouraged the growth of automobile use to its existing levels. 38 Fed. Reg. at 30632.

57. See, for example, the following requirements in the plan promulgated for California: 40 C.F.R. § 52.242(c), (f) (that the state submit legally adopted regulations establishing VIM and that it identify the source and

to whom such EPA-promulgated plans applied balked, few cooperated, and several challenged the plans and their enforceability by petitioning for judicial review in the United States Circuit Court of Appeals. Basically these judicial challenges were on two grounds: first, that such plans and sanctions were not authorized by the Clean Air Act; and, second, that they were in violation of constitutional principles of federalism, embodied primarily in the Tenth Amendment.

C. *Judicial Reaction to EPA's Approach*

The only Court of Appeals of the four who heard such challenges to accept EPA's argument on both counts was the Third Circuit, the first to decide the issues. In *Pennsylvania v. EPA*⁵⁸ the court agreed with EPA's finding of statutory authority in Section 113(a)(1) and cited *Maryland v. Wirtz*⁵⁹ for the proposition 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 whether they have an impact on interstate commerce."⁶⁰ After so holding, the Third Circuit had no problem finding that state transportation systems and vehicle pollution had the requisite effects on interstate commerce.

The Ninth Circuit was not so receptive to EPA's position. In *Brown v. EPA*⁶¹ ("Brown I") it reviewed the

amount of funds necessary for the program); 40 C.F.R. § 52.244 (that the state submit legally adopted regulations establishing a retrofit program); 40 C.F.R. § 52.257 (that it do the same in the case of a computer carpool matching program).

See also 40 C.F.R. §§ 52.476(g), 52.1080(g), 52.2435(e) (requiring the District of Columbia, and the States of Maryland and Virginia to submit statements evidencing financial commitments adequate to purchase 475 new buses over a three-year period).

58. *Pennsylvania v. EPA*, 500 F.2d 246 (3d Cir. 1974).

59. *Maryland v. Wirtz*, 392 U.S. 183 (1968). In *Wirtz* the Supreme Court had upheld against a constitutional attack the application of federal wage and hour law to employees at state-operated schools and hospitals, stating:

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

392 U.S. at 196-97.

60. *Pennsylvania v. EPA*, *supra* note 58, at 261.

61. *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975), *vacated*, 431 U.S. 99 (1977), *aff'd*, 566 F.2d 665 (9th Cir. 1977).

numerous elements of EPA's extensive transportation control plan for all of California's air quality control regions⁶² and barred any imposition of sanctions against the state for its failure to comply with virtually any part of the plan. Strongly influenced by the serious constitutional issues at stake, the court was unwilling to accept the agency's interpretation of Section 113. Specifically, it rejected a construction which would authorize sanctions against the state for its failure to comply with federal regulations requiring it to control the pollution-creating activities of those other than itself: "Tersely put, the Act . . . permits sanctions against a state that pollutes the air, but not against a state that chooses not to govern polluters as the Administrator directs."⁶³ In explaining its view of the fundamental constitutional questions raised by EPA's position, the court indulged in dicta leaving little doubt of its position. It forcefully stated its opinion that the commerce power did not extend to requiring a state to govern, pursuant to federal directives, private activities affecting commerce. It saw a significant difference between a state's engaging in commerce and a state's regulation of the commerce of others. In this manner it distinguished *Wirtz* and the more recent decision of *Fry v. United States*,⁶⁴ in which the Supreme Court had upheld application of the Economic Stabilization Act of 1970 to temporarily freeze the wages of state and local employees. Indeed, the Ninth Circuit prophetically supported its constitutional analysis with a quotation from a footnote in the *Fry* opinion: "The [Tenth] 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."⁶⁵ Such a danger was found by the Court in EPA's approach to transportation controls.

With the same constitutional reservations, and employing similar reasoning, the Fourth Circuit found in-

62. Which included VIM and retrofit programs, preferential bus and carpool lanes, computer carpool matching systems, parking surcharges and management regulations, mass transit planning, limitations on gasoline supply, and quite a few other strategies. See 40 C.F.R. 52.220-52.266 (1974).

63. *Brown v. EPA*, *supra* note 61, at 832.

64. *Fry v. United States*, 421 U.S. 542 (1975).

65. *Id.* at 547 n. 7, quoted in *Brown I*, *supra* note 61, at 842.

adequate statutory support for EPA's construction of Section 113(a)(1) and thereby pulled the teeth in its transportation control plan for Baltimore.⁶⁶ The Administrator fared somewhat better, however, in the D.C. Circuit. In *District of Columbia v. Train*,⁶⁷ responding to challenges to EPA's transportation control plan for the National Capital Interstate Region, the court saw much the same distinction as did the Ninth Circuit between imposing federal sanctions for a state's creation of pollution and imposing federal sanctions for a state's failure to control pollution from private sources — the former being comprehended by Section 113(a)(1) and constitutional, the latter not being authorized by Section 113(a)(1) and unconstitutional. The difference was in the two courts' dissimilar classifications of the various elements of the plans. Like the Ninth Circuit, the D.C. Circuit held that EPA could not, under the Air Act or the Tenth Amendment, require states to adopt statutes and regulations necessary to establish VIM and retrofit programs.⁶⁸ The D.C. Circuit decided, however, that both Section 113 and the Constitution allowed EPA to treat the states as violators for failing to manage their indirect sources — i.e., their highways and other components in their transportation systems — in a manner so as to encourage less vehicle use. Thus it upheld the bus purchase and bus lane requirements as remedies for deficiencies in the states' transportation systems. Such regulations of the states' transportation systems the court found analogous to the federal regulation of state-owned railroads approved in *United States v. California*.⁶⁹ The court did not feel that such regulation of indirect sources constituted impairment of the states' "integrity or their ability to function effectively in a federal system" in contravention of the Tenth Amendment.

66. See *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975), *vacated sub nom. EPA v. Brown*, 431 U.S. 99 (1977).

67. *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), *vacated sub nom. EPA v. Brown*, 431 U.S. 99 (1977), *reinstated in part and remanded in part sub nom. District of Columbia v. Costle*, 567 F.2d 1091 (D.C. Cir. 1977).

68. The court did hold, however, that EPA could validly require a state not to register or allow to operate on its streets or highways vehicles failing to meet federal standards. *Id.* at 991-92.

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

Soon after these Circuit Court cases were decided, the Supreme Court breathed new life into the Tenth Amendment and *Fry's* footnote concerning state sovereignty. At issue in *National League of Cities v. Usury* ("NLC")⁷⁰ was the constitutionality of 1974 amendments to the Fair Labor Standards Act which extended federal wage and hour laws to cover almost all employees of state and local governments. The Court expressly overruled the eight-year-old *Wirtz* decision to hold that congressional enactments such as this, which are undoubtedly otherwise within the scope of the commerce clause, encounter a constitutional barrier erected by the Tenth Amendment when they are applied to the states and their subdivisions in a manner which will "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."⁷¹ In concluding that the application of federal wage and hour laws to the states would have such an unconstitutional effect, the Court accepted the states' argument that, by increasing costs, the law would force state and local governments to make significant compromises in structuring their delivery of governmental services, such as police and fire protection, and could cause complete abandonment of certain programs, such as training programs dependent upon paying below minimum wage. This the court held to constitute impermissible interference with integral governmental functions. The opinion, however, contained several qualifications. First, *Fry*, was distinguished through a balancing process. The Court viewed the temporary freeze on the wages of state employees as an "emergency measure" to relieve "an extremely serious problem" (inflation) for a "limited, specific period of time." The Court also said that the wage freeze in *Fry* interfered with no state choices on the structure of governmental operations and noted that it reduced the pressures upon state budgets rather than increased them.⁷² Second, the holding in *United States v. California* was treated as consistent with this decision, in that a state's operation of a railroad was not re-

70. *National League of Cities v. Usury*, 426 U.S. 833 (1976).

71. *Id.* at 852.

72. *Id.* at 852-53.

garded as an integral part of its governmental activities.⁷³ Third, the Court disavowed that the decision carried any implication as to the constitutionality of affecting such integral state operations through use of the federal spending power.⁷⁴ Also, the court held that pre-emption of state law by the furthest extension of federal authority was fully consistent with the opinion.⁷⁵ Predictability of the decision's effect on transportation control cases was further diminished by Justice Blackmun's swing vote, coming in a concurring opinion which interpreted the Court's opinion as a "balancing approach" which "does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."⁷⁶

NLC, of course, did little for EPA's confidence in the future of its approach to transportation controls. Its petitions for certiorari from the decisions of the Ninth, Fourth, and D.C. Circuits, which the Supreme Court granted, were limited to challenging only the courts' invalidation of the VIM programs. The Court also granted Virginia's petition for review of the D.C. Circuit's upholding of the bus purchase and bus lane requirements and its approval of the prohibition against registering non-conforming vehicles. Thus, *EPA v. Brown*⁷⁷ came before the Court. But at oral argument the government informed the Court that it was repealing its bus purchase regulations. The case shrank even further when the Court construed a footnote in the government's brief to mean that EPA would not require the enactment of state *legislation* and that it conceded the necessity of removing from its regulations any requirement that the states promulgate *regulations*.⁷⁸ With the case in this posture, the Supreme Court refused to pass upon EPA's regulations before they were in fact changed and, as modified, reviewed in the lower courts. It therefore, vacated the de-

73. *Id.* at 854 n. 18.

74. *Id.* at 852 n. 17.

75. *Id.* at 844-45.

76. *Id.* at 856.

77. *EPA v. Brown*, 431 U.S. 99 (1977).

78. EPA had earlier abandoned its parking surcharge regulations and regulations for the management of parking supply. See note 51 *supra*.

isions below and remanded the cases to the Courts of Appeals.

Before these cases were reconsidered in the Courts of Appeals, the Air Act underwent significant changes in the extensive amendments of August 2, 1977.⁷⁹ Therefore, although the D.C. Circuit⁸⁰ reaffirmed its original holdings on the retrofit, bike lane, and bus lane regulations, it remanded these portions of the case back to EPA for reconsideration in light of the 1977 Amendments. As to the VIM regulations, because by this time EPA had promulgated the promised modifications, the court remanded this aspect of the case back to the agency in order to permit administrative remedies to be pursued prior to its review.

In the Ninth Circuit's decision on remand,⁸¹ EPA's modified VIM regulations were reviewed, but with no change in the court's opinion. The changes which EPA had promised in order to eliminate any requirement for state promulgation of regulations or reference to state legislation seemed to be little more than cosmetic. It had simply changed a few words in its original VIM regulations so that, although the state was no longer required to submit to EPA an advance text of its implementing laws and regulations, it was still requiring to create and administer a VIM program that complied with EPA's guidelines. This the Ninth Circuit found incompatible with its serious constitutional reservations and its consequent unwillingness to interpret the Act, with no support added by the 1977 Amendments, to authorize imposition of sanctions on uncooperative states as violators.

One other transportation controls case of significance arose under the Air Act prior to the 1977 Amendments; but this case occurred in a different context and received dissimilar judicial treatment.⁸² The State of New York, with the assistance of New York City and various city agencies,

79. See discussion in text accompanying notes 95-145 *infra*.

80. *District of Columbia v. Costle*, 567 F.2d 1091 (D.C. Cir. 1977).

81. *Brown v. EPA*, 566 F.2d 665 (9th Cir. 1977).

82. *Friends of the Earth v. Carey*, 401 F. Supp. 1386 (S.D. N.Y. 1975), *rev'd*, 535 F.2d 165 (2d Cir. 1976), *modified*, 422 F. Supp. 638 (S.D. N.Y. 1976), *modification vacated and writ of mandamus granted*, 552 F.2d 25 (2d Cir. 1977), *cert. denied sub nom. Beame v. Friends of the Earth*, 434 U.S. 902 (1977).

prepared and submitted an extensive transportation control plan for the Metropolitan New York City area.⁸³ Although not all legislation and regulations necessary for implementation had been adopted, and commitments for sufficient funding were wanting, EPA approved the plan (with minor revisions) in June of 1973. Nevertheless, it very soon became apparent that the designated state and city agencies were not enforcing many of the thirty-two strategies as promised in the plan. When the city and state refused to comply and EPA failed to initiate enforcement proceedings against them, environmental groups brought a citizen suit in federal district court pursuant to Section 304, alleging that the city and state were in violation of "emission standards and limitations"⁸⁴ in their own plan and seeking an injunction to compel them to administer the plan as approved. Even though the defendants admitted violation of at least four strategies and were in various stages of compliance with the remaining twenty-eight,⁸⁵ the district court refused to order enforcement, primarily on procedural grounds.⁸⁶

83. The state plan included retrofitting requirements, VIM, training of mechanics, selective bans on taxicab cruising, reduction in number of parking spaces, expanded use of exclusive bus lanes, increased bus service, staggering of work hours and days, bridge tolls, off-hour delivery requirements, and a contingency strategy to ban all private automobiles from Manhattan's business districts. See *Friends of the Earth v. EPA*, 499 F.2d 1118, 1121-23 (1974), in which the plan was challenged but upheld in most respects.

84. Clean Air Act § 304(a) provides in relevant part:

Sec. 304. (a) . . . any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation

85. EPA had issued notices of violation with respect to twelve of thirty-two strategies. However, instead of initiating judicial enforcement proceedings, it had attempted to negotiate consensual administrative orders. Although it did obtain consent orders for eight strategies, including VIM, plaintiffs alleged that these orders were not being complied with. The state admitted violation of four additional strategies: reduction of business district parking, taxicab cruising limitations, bridge toll requirements, and off-hour delivery requirements. No EPA action had been commenced to enforce the remaining twenty strategies. See *Friends of the Earth v. Carey*, 535 F.2d at 171.

86. See *Friends of the Earth v. Wilson*, 389 F. Supp. 1394 (S.D. N.Y. 1974) (preliminary injunction denied); *Friends of the Earth v. Carey*, 401 F. Supp. 1386 (S.D. N.Y. 1975) (defendants' motion to dismiss granted, plaintiffs' motion for summary judgment denied).

This decision the Second Circuit reversed in relevant part in an opinion which praised the citizen suit provision and assumed its applicability.⁸⁷ It instructed the lower court to enter summary judgment directing enforcement of the four strategies admittedly being violated. However, after the Second Circuit's ruling on a motion for rehearing permitted the lower court on remand to consider constitutional issues, it did so—focusing on the intervening Supreme Court decision in *NLC* and finding the reasoning of the other Circuits concerning EPA-promulgated transportation control plans to be applicable. Relying on these decisions, the district court ordered enforcement of the plan against the state and city only to the extent that they were direct polluters, but not to the extent of requiring them to enforce strategies against citizen polluters.⁸⁸

The Second Circuit again reversed in a strongly worded, if not entirely convincing,⁸⁹ opinion in *Friends of the Earth v. Carey*.⁹⁰ First, the court held that since the city⁹¹ could have advanced its constitutional argument against enforcement in a petition for review of EPA's approval of the plan in 1973 and chose instead to represent that it would enforce the plan, the city waived its right to make such contentions and was precluded by Section 307(b)(2) of the Act from raising them in an enforcement proceeding under Section 304.⁹² The court reasoned that had the city taken such a

87. *Friends of the Earth v. Carey*, 535 F.2d at 172-73.

Clean Air Act § 304 apparently was deemed applicable because, as the Second Circuit explained when the case came back up, the term "emission standard or limitation" was defined in § 304(f) to include "a schedule or timetable of compliance . . . under an applicable implementation plan." See *Friends of the Earth v. Carey*, 552 F.2d at 31.

88. *Friends of the Earth v. Carey*, 422 F. Supp. 638 (S.D. N.Y. 1976).

89. See discussion in part "III. A. 4." accompanying notes 199-205 *infra*.

90. *Friends of the Earth v. Carey*, 552 F.2d 25 (2d Cir. 1977).

91. The state did not join the city in its attack on the enforceability of the plan. Indeed, at this juncture the state defended the plan and conceded that it was enforceable against it. See *Id.* at 33.

92. Clean Air Act § 307(b) provides in relevant part:

(b) (1) A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 * * * may be filed only in the United States Court of Appeals for the appropriate circuit. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

position, upon the state's submittal of the plan to EPA or in a petition for judicial review, either EPA or the court might well have concluded that the plan in fact failed to contain adequate provisions for implementation and enforcement—precipitating promulgation of a substitute plan by EPA. The Second Circuit, therefore, would not permit the city to “renege upon its commitments” at this late date. Even assuming no such waiver, as a second ground for its decision, the court held that a city's failure to implement a state-submitted plan in the preparation of which it participated was distinguishable from failure to comply with an EPA-promulgated plan and did not involve the same Tenth Amendment issues. In the court's eyes, here the state and its political subdivision had voluntarily made their own policy decisions as to how they intended to control vehicle pollution, convinced EPA of the workability of their strategies, and thereby precluded EPA promulgation. The court reasoned that holding the city to its “pact” did not interfere with its “integral governmental functions” in violation of *NLC*. Unlike subjection to an EPA-promulgated plan, the city here was simply being required to adhere to its own prior decision:

Federal imposition of policy upon the State never took place in this case, and would only have taken place under the Act if the State had refused to submit its own Plan. In the context of the enforcement of the Plan through citizen suit, the choices and procedures are the products of State choice, not of federal policy, and may legitimately be enforced by the district courts.⁹³

In October, 1977, the Supreme Court denied the city's petition for certiorari.⁹⁴

II. THE WAY OF THE 1977 AMENDMENTS

A. *Nonattainment Plans*

By the summer of 1977, the need for congressional action was undeniable. Even the most extended attainment

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

93. *Friends of the Earth v. Carey*, 552 F.2d at 39.

94. *Beame v. Friends of the Earth*, 434 U.S. 902 (1977).

deadlines were now past. Most major urban areas in the country were still in violation of the primary standards, particularly for the vehicle pollutants. And the federal courts had largely refused to accept EPA's approach to transportation controls. In August of 1977,⁹⁵ Congress responded by including in the comprehensive 1977 Amendments an entirely new Part D, devoted exclusively to non-attainment areas, as well as a patchwork of special provisions designed to help solve nonattainment problems.

Relief was afforded existing stationary sources which were unable to comply with SIP requirements by insertion of a complex new Section 113(d) allowing the issuance⁹⁶ of "delayed compliance orders," which may extend a source's final compliance date as far as July 1, 1979, or three years after the compliance date specified in the "applicable implementation plan," whichever is later.⁹⁷ Because of new compliance date extensions now available under Part D, this means that such "DCO's" may give a stationary source until the mid-1980's to comply.⁹⁸ Also, a new Section 129 expressly allowed continuation until July 1, 1979, of EPA's "offset" policy, whereby a new "major stationary source"⁹⁹ was permitted to enter a nonattainment area if, for any pollutant exceeding the primary ambient standards, its additional emissions of such pollutants were more than offset by reductions in emissions from other sources in the area.¹⁰⁰

Very significantly, the 1977 Amendments also made available new extensions of the dates for attainment of the ambient air standards upon approval of "nonattainment

95. Congress passed the legislation on August 4, and President Carter signed it on August 7, 1977. See ELR Comment, *supra* note 37, at 10182.

96. By EPA or the states. See Clean Air Act § 113(d) (1), (2).

97. See Clean Air Act § 113(d) (1) (D) and § 110(d).

98. Though not necessarily without a price. See the new Clean Air Act § 129, providing for "delayed compliance penalties."

99. Clean Air Act § 302(j) defines "major stationary source":

Except as otherwise expressly provided, the terms 'major stationary source' and 'major emitting facility' mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

100. EPA's "offset" regulations are at 44 Fed. Reg. 3274 (1979).

plans" submitted by the states. Each state in which there was a nonattainment area¹⁰¹ was directed to adopt and submit by January 1, 1979, a plan designed to achieve attainment of each ambient air standard in each such area as expeditiously as practicable, but not later than December 31, 1982, for the primary standards.¹⁰² If, in conjunction with submittal of this proposed nonattainment plan, a state demonstrated that it would not be possible to attain the primary standards for ozone or carbon monoxide in an area even by December 31, 1982, despite the use of all reasonably available control measures, it could make provision for extension of the deadlines for these two criteria pollutants for up until December 31, 1987, if no earlier deadline is practicable.¹⁰³ EPA is to approve or disapprove such plans, presumably by July 1, 1979.¹⁰⁴

The Amendments impose specific requirements for approvable plans in order to insure that they will perform the intended function. For the "1983" extension available for any criteria pollutant, a plan must (among other things):¹⁰⁵

(1) provide for the implementation of all *reasonably available control measures* as expeditiously as practicable;

(2) require *reasonable further progress* during the operation of the plan; [This term is defined in Section 171(1) to mean annual incremental reductions in emissions which are sufficient to attain the ambient standards at least by December 31, 1982 (or December 31, 1987, for ozone and/or CO if the required showing is made).]

101. EPA's extensive initial designations of non-attainment areas, as promulgated on March 3, 1978, are at 43 Fed. Reg. 8962 (1978). Subsequent modifications are reflected in 43 Fed. Reg. 40412, 40502, 45993 (1978), and in 44 Fed. Reg. 5119 (1979).

The listing was quite extensive: e.g., 105 urban areas were designated nonattainment for oxidants in the March 3 list.

102. Clean Air Act §§ 129(c), 172(a)(1).

103. Clean Air Act §§ 129(c), 172(a)(2).

According to 129(c), the further extensions is conditioned upon submittal of an additional detailed plan for control of CO and oxidants before July 1, 1982.

104. Given the penalties which flow from the absence of a revised plan on and after that date. See part "II. B." *infra*. Also, see Clean Air Act § 110(c)(1).

105. The requirements following in the text are taken from Clean Air Act § 172(b)(1)-(10).

(3) require permits for the construction and operation of new or modified major stationary sources, which may be issued only under certain strict provisions;¹⁰⁶

(4) identify and commit whatever financial and manpower resources are necessary to carry out the plan;

(5) include written evidence that the state, local governments, or a regional agency have adopted the statutes, ordinances, regulations, or other enforceable measures necessary to implement and enforce the plan.

Clearly "all reasonably available control measures" include transportation controls.¹⁰⁷ Although the 1977 Amendments removed "land-use" controls from the measures expressly available for a SIP under Section 110(a)(2)(B), transportation controls were left on this list; and the requirement in Section 110(a)(2)(G) for VIM programs ("to the extent necessary and practicable") was left intact. States which seek the "1988" extension for ozone and CO must also include (1) a program for "cost/benefit" analysis prior to issuance of permits for major emitting facilities and (2) a specific schedule for implementation of a VIM program.¹⁰⁸ The 1977 Amendments also inserted a new Section 110(a)(3)(D) which expressly¹⁰⁹ requires that a plan seeking a "1988" deadline for ozone or CO include measures (1) to establish, expand, or improve public transportation and

106. Among the requirements of Clean Air Act § 173 for issuance of a permit to a major stationary source are the following:

- (1) the source is required to comply with "lowest achievable emission rate," as defined to be the more stringent of—
 - (a) the most stringent emission limitation imposed by *any* state, or
 - (b) the most stringent emission limitation achieved in practice by any such source;
- (2) all major emitting sources owned or operated by the permit applicant are in compliance with the Act;
- (3) the emissions from the new source are more than *offset* by reductions from other sources in the area.

107. The 1977 Amendments do not expressly say so, but this is the only interpretation harmonious with other sections in the Clean Air Act: §§ 110(a)(2)(B), (a)(3)(D), (a)(5)(E), (c)(2)(A), (c)(4), 176(a).

Also, the concept of "reasonably available control measures" came from the Senate version of the bill; and the Senate report contains a list of the usual transportation control measures which were assumed to be reasonably available. S. REP. NO. 127, 95th Cong., 1st Sess. 39-40 (1977).

108. See Clean Air Act § 172(b)(11)(A), (B).

109. By reference to Clean Air Act § 110(c)(5)(B).

(2) to implement transportation control measures necessary to attain and maintain national ambient standards.¹¹⁰

In fact, only one category of transportation control strategies was excluded by the 1977 Amendments from those "reasonably available control measures" required to be included in a nonattainment plan. According to new Section 110(a)(5), EPA may not require a state plan to include any "indirect source review program" (ISR).¹¹¹ An indirect source is defined to mean "a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution."¹¹² An indirect source review program is defined to mean a facility-by-facility review" of indirect sources in order to assure that the emissions from the mobile sources which they attract do not prevent attainment and maintenance of the primary standards.¹¹³ The intent of this exclusion is clear,¹¹⁴ but its precise scope is not. Obviously it was designed to prohibit EPA from requiring states to conduct pre-construction or pre-modification review of such indirect sources as office buildings, shopping centers, residential subdivisions, apartment complexes, highways, and parking lots¹¹⁵ in order

110. Clean Air Act §§ 172(c) and 129(c) are subject to the interpretation that, to the extent that VIM or other transportation control measures are not reasonably available before July 1, 1982, they need not be implemented; and, in that case, only the revision required before July 1, 1982, need commit the state to enforcement of such strategies. See EPA's April 4, 1979, general preamble to proposed state nonattainment plans (hereinafter sometimes referred to as "the April, 1979, preamble") 44 Fed. Reg. 20372, 20377 (1979).

111. Although Clean Air Act § 110(a)(5)(A)(i) expressly allows EPA to "approve and enforce" any ISR program which the state chooses to adopt and submit. Obviously, this provision can give rise to the difficult issues at stake in *Friends of the Earth* — the likelihood of which is increased by a statement in Clean Air Act § 110(a)(5)(A)(iii) which EPA interprets to mean that it will not approve revisions to eliminate any ISR requirements unless other strategies demonstrably adequate to assure attainment are adopted to replace them. See EPA memorandum of October 25, 1977, to regional offices reproduced in 8 ENVIR. REP. CURRENT DEVELOPMENTS 1021 (1977).

112. Clean Air Act § 110(a)(5)(C).

113. Clean Air Act § 110(a)(5)(D).

114. And made even clearer by the statement in Clean Air Act § 110(a)(5)(E) that the term "transportation control measure" as used in § 110(a)(2)(B), designating types of attainment methods, does not include any ISR program.

115. The definition of "indirect source" expressly includes "parking lots, parking garages, and other facilities subject to any measure for management of parking supply . . . including regulation of existing off-street parking, but such term does not include new or existing on-street parking." Clean Air Act § 110(a)(5)(C).

to evaluate their effect on vehicle pollutants and veto any project which would contribute to the problem. EPA, however, had never attempted to force the states to do this.¹¹⁰ Instead it had used the indirect source rationale to support its imposition of VIM, retrofit, bus purchase, and bus/carpool lane regulations, etc., upon the states' "transportation systems."¹¹⁷ Clearly many of these strategies—VIM, retrofitting, gasoline rationing, bus purchases, carpool programs, bike lanes, and (by statute) regulation of onstreet parking—do not constitute ISR. Less certain is whether the term comprehends creation of bus and carpool lanes, freeway and bridge tolls, vehicle-free zones, and restrictions on the use of commercial vehicles—especially when the strategy is being considered for an existing street or highway, rather than for one prior to its construction or modification. Congress intended to bar federally mandated land-use planning, not eliminate the necessary ingredients of transportation control plans. Uncertainties of classification should not, therefore, be resolved in favor of finding ISR.

Also, according to the new statutory scheme, no plan promulgated by EPA may include any ISR program¹¹⁸—except EPA "shall have the authority to promulgate, implement, and enforce regulations under Section 110(c) respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources."¹¹⁹ Given the breadth of federal financial assistance today, to both state and private operations,¹²⁰ this exception could swallow a significant part of the rule. This would certainly be true if EPA is allowed to promulgate rules which require the *states* to implement and

116. For example, whenever EPA included measures for management of parking supply in plans which it promulgated, it provided for implementation by EPA, and only for delegation of authority to states which so desired. See, e.g., 40 C.F.R. §§ 52.251, 52.493 (1974).

117. See notes 55-56 and accompanying text *supra*.

118. Clean Air Act § 110(a)(5)(A)(ii).

Without question this prohibition was aimed at EPA's existing regulations whereby it claimed the authority to conduct preconstruction review of indirect sources such as highways, industrial facilities, office buildings, and apartments. See 40 C.F.R. § 52.22(b) (1974).

119. Clean Air Act § 110(a)(5)(B).

120. E.g., to highways, schools, and low-income housing.

enforce ISR for major federally-assisted indirect sources. The better interpretation of this provision, therefore, is that EPA *itself* may implement and enforce ISR for such sources.¹²¹

B. Carrots and Sticks

Still, the majority of transportation control measures are not ISR; and, to the extent that they are "reasonably available" and necessary for "reasonable further progress" toward attainment, they must be incorporated within non-attainment plans submitted and carried out by the states. But, well aware of EPA's previous lack of success in attempting to directly control the states, Congress designed new carrots and sticks to encourage such state submittal and implementation.

The first, and probably the primary incentive for states to submit and carry out satisfactory revised plans is contained in new statutory provisions which, read together, otherwise prohibit the construction or modification¹²² of major stationary sources in any nonattainment area. Section 110(a)(2)(I) requires that SIPs themselves require such a permitting ban after June 30, 1979, unless the plans meet the requirements of part D relating to nonattainment.¹²³ Section 172(a)(1) states that these provisions designed to insure attainment "are required by Section 110(a)

121. Also, the former interpretation would take EPA into substantial constitutional difficulties. See discussion in parts "III. A. 1.-3." in text accompanying notes 176-98 *infra*.

122. According to Clean Air Act § 171(4), for purposes of Part D and § 110(a)(2)(I) the terms "modification" and "modified" mean the same as the term "modification" as used in § 111(a)(4).

§ 111(a)(4) provides:

The term 'modification' means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

123. In fact, long before July 1, 1979, each SIP did have a provision, either approved or promulgated, which [pursuant to EPA regulations at 40 C.F.R. § 51.18 (1978)] barred construction or modification that would cause a violation after the "original" attainment date. The only permissible exception to this bar was the Offset Ruling, which—according to EPA's construction of Clean Air Act § 129(a)—ceases to apply on July 1, 1979. Therefore, even offsetting is not allowed after June 30 without an approved (or promulgated) nonattainment plan. See supplementary information to EPA's interpretative rule of July 2, 1979, at 44 Fed. Reg. 38471, 38472 (1979) (hereinafter sometimes referred to as "the July, 1979, interpretive rule").

(2) (I) as a pre-condition for the construction or modification of any major stationary source in any [nonattainment] area after July 1, 1979." This statutory restriction is automatic and mandatory until a satisfactory nonattainment plan has been approved or promulgated.¹²⁴ Even after an adequate nonattainment plan is in place, no permit for the construction or modification of a major stationary source may be issued unless the plan is being properly *carried out*. Section 173(4) expressly so provides. In addition to this mandatory provision, Section 113(a) (5) authorizes EPA to issue an order prohibiting such construction or modification if "a State is not acting in compliance with . . . Section 110 (a) (2) (I) and part D."¹²⁵ Logically construed,¹²⁶ such an EPA order is necessary only when a state attempts to issue a permit despite its failure to submit or carry out the required nonattainment plan. Also, Section 113(a) (5) seems to assume that a state can be encouraged to administer a nonattainment plan promulgated by EPA, as well as one of its own design, on pain of suffering a permitting ban if it does not. Thus, in summary, the 1977 Amendments seem to prohibit the construction or modification of major stationary sources in any nonattainment areas after June 30, 1979, if a state fails either (1) to submit an adequate plan or (2) to implement an approved or promulgated plan.¹²⁷

As if a permitting ban weren't enough, the 1977 Amendments also include several provisions under which substantial and much-needed federal funds may be denied a state which fails to submit or carry out a necessary nonattainment plan.

124. *Id.*

125. Or it may bring a civil action for injunctive relief and/or a civil penalty of up to \$25,000 per day of violation against an owner or operator who attempts construction or operation despite the permitting ban. Clean Air Act §§ 113(a) (5) & (b) (5).

126. This seems to be EPA's interpretation of these rather ambiguous provisions. See its April, 1979, preamble at 44 Fed. Reg. 20372, 20380 (1979), and the July, 1979, interpretive rule at 44 Fed. Reg. 38471, 38472 (1979).

127. As will be discussed *infra*, in notes 139-41 and accompanying text, EPA retains its duty under Clean Air Act § 110(c) to promulgate a "substitute" plan to the extent the state fails to submit an adequate one. Such failure to submit, therefore, should result in a permitting ban only until EPA promulgates a plan and the state undertakes to implement it.

Section 176(a) requires that air pollution control program grants¹²⁸ and federal highway funds¹²⁹ must be withheld from any air quality control region where transportation control measures are necessary for attainment if the EPA Administrator finds after July 1, 1979, that "the Governor has not submitted an implementation plan which considers each of the elements required by section 172¹³⁰ or that reasonable efforts toward submitting such an implementation plan are not being made." A cutoff of federal financial assistance for air pollution control seems inherently counterproductive, but withholding federal aid to highways should provide strong incentive for states to submit adequate plan revisions.¹³¹ While the language requiring EPA and the Transportation Department to disapprove projects and grants is mandatory, such action is contingent upon the required finding by EPA. Certainly a reluctant EPA could not refuse to make a finding if a state needing transportation controls to achieve attainment in a region failed to submit any non-attainment plan or make any efforts to do so.¹³² But, except in this extreme situation, the vague language used leaves the nature of EPA's obligation unclear. Section 176(a) does not expressly make future funding contingent upon a state's submitting a plan which *meets* the requirements of Section 172, but only upon submitting one which "considers" the elements of that section, or making "reasonable efforts" to do so. In a memorandum on proposed policies on transportation funding published on June 11, 1979,¹³³ EPA seems to take a rather strict position in stating that adequate consideration includes a duty to investigate and compile data on needed transportation control strategies and to incorporate that data

128. Upon which states may be quite dependent. See note 234 *infra*.

129. Other than those available for safety, mass transit, or transportation improvement projects related to air quality improvement or maintenance. Clean Air Act § 176(a).

130. See note 105 and accompanying text *supra*.

131. More than one-third of the \$18.1 billion in state highway expenditures in fiscal year 1976 came from federal grants. BUREAU OF THE CENSUS, STATE GOVERNMENT FINANCES IN 1976, 18, 33 (1977).

132. Indeed, EPA admits that a finding, one way or the other, must be made with respect to all SIP revisions whenever the primary standards for vehicle pollutants are not being attained. See EPA's proposed policies and procedures for applying transportation funding limitations, published on June 11, 1979, at 44 Fed. Reg. 33473, 33474 (1979) hereinafter sometimes referred to as "EPA's proposed policies on transportation funding").

133. *Id.* at 33474-75

into a reasoned analysis of the requirements for an approvable plan. EPA suggests, moreover, that it will require specific evidence of good-faith efforts to expeditiously submit an adequate plan.¹³⁴ Given the indefinite statutory language, this construction of its authority seems well within its discretion. As also stated in the memorandum, EPA promulgation of a plan to control vehicle pollutants will not satisfy Section 176(a) and release the funds; a state must either adopt EPA's plan or present an adequate revision of its own.

Perhaps strangely, a like cutoff of federal highway funds does not follow expressly from a state's failure to *implement* the elements of a transportation control plan, whether its own or one promulgated by EPA. Section 176(b) only directs EPA self-defeatingly to withhold grants under the Air Act from any area in which the state or responsible local governmental units are not implementing any requirements of an approved or promulgated plan. On the other hand, Section 176(c) broadly declares, "No department, agency, or instrumentality of the Federal Government shall (1) engage in, (2) support in any way or provide financial assistance for, (3) license or permit, or (4) approve, any activity which does not conform to a plan after it has been approved or promulgated under Section 110." Narrowly construed this provision would require a state to "implement" only to the extent of its control over a particular project or activity for which a federal permit, grant, etc., was sought.¹³⁵ It is arguable, however, that this language could be interpreted by a zealous federal agency to bar funding, permitting, or any federal approval whenever the activity would contribute to a nonattainment problem which is due in part to a state's failure to implement. Extensive application of such an unlikely construction would, of course, be unbearable to a non-cooperating state.¹³⁶

The final category of funds subject to being withheld — sewage treatment grants — may well be the most vital to

134. *Id.*

135. *E.g.*, to the extent that an applicable plan controls the location or construction of airports, a city which proposes to build a new airport (needing federal funds and permits) would have to comply with those aspects of the plan.

136. To date EPA has offered no interpretation of Clean Air Act § 176(c).

an area.¹³⁷ Yet Section 316, added by the 1977 Amendments, in quite convoluted terms does give EPA this enormous leverage over states and local governments who fail to submit or implement necessary nonattainment plans. Section 316(b) authorizes (using the word "may") the EPA Administrator to withhold, condition, or restrict the making of any grant for construction of sewage treatment works if he determines that any of the following conditions exist (among others not related to nonattainment):

- (1) a revised SIP for a nonattainment area has not yet been approved;
- (2) an approved SIP fails to account for the increase in emissions from stationary and mobile sources in a nonattainment area which may reasonably be anticipated to result, *directly or indirectly*, from the new sewage treatment capacity (i.e., from growth);
- (3) an approved SIP for a nonattainment area which does account for increased emissions resulting from a new facility is not being *carried out* by the state; or
- (4) the new plant may reasonably be anticipated to cause an increase in emissions in excess of that provided for in an approved SIP, or the plant would otherwise not be in conformity with the plan.

Despite some ambiguity in Section 316(b) and the discretion which the Administrator has in applying it, EPA has evidenced its apparent intent to take essentially the position outlined above. In its notice of interim policy on sewage

137. Besides the obvious natural need for new and expanded sewage treatment plants, to replace old ones and accommodate growth, the Federal Water Pollution Control Act (FWPCA) effectively mandates new plants in many instances. Under § 301(b)(1)(B) of the FWPCA, 33 U.S.C. § 1311(b)(1)(B), publicly-owned sewage treatment plants discharging into waters of the United States must adopt "secondary treatment" standards established by EPA by July 1, 1977, plus whatever extension (up to six years) is granted under § 301(i)(1), 33 U.S.C. § 1311(i)(1). The statutory penalty for failure to meet these standards is a ban on any new tie-ins, thereby stopping virtually any growth in the area. § 402(h), 33 U.S.C. § 1342(h). To enable the states to meet these standards, however, the FWPCA provides for EPA to make grants of up to 75% of the cost of construction. § 201(a)(1), 33 U.S.C. § 1282(a)(1). The expense is usually so great that the federal funding is essential. Withholding such a grant, therefore, may effectively prevent construction—which will result in a tie-in ban halting growth.

plant construction published on July 2, 1979,¹³⁸ EPA proposed to withhold grants until state-submitted nonattainment plans have been approved. Once a revised plan has been approved which accounts for the emissions associated with proposed treatment works, if EPA determines that the state is not carrying it out so as to make "reasonable further progress" toward attainment for the vehicle pollutants, it proposes to condition any grant to allow only hook-ups that are sufficient to serve the existing population. Thus EPA is given another sizable carrot — or stick, depending on one's viewpoint — to "encourage" states to create and implement transportation controls.

Although in 1977 Congress gave EPA this arsenal of new weapons, it did not take away the power which EPA asserted under the 1970 Amendments — direct enforcement action against uncooperative states. Section 110(c), the authority under which EPA promulgated substitute plans directed against the states, was left intact in all relevant respects.¹³⁹ EPA's duty under Section 110(c), therefore, clearly includes the obligation to promulgate a substitute nonattainment plan, or portion thereof, to the extent a state fails to submit an approvable one.¹⁴⁰ And EPA has indicated that it is prepared to perform this obligation.¹⁴¹ Of course, the duty to promulgate a nonattainment plan does not necessarily presume the authority to promulgate it *in terms that force a state to implement it*. This was the leap that two Circuit Courts were unwilling to make under the pre-1977 Act. Yet, despite Congress' full awareness of the artful construction¹⁴² which EPA gave to

138. 44 Fed. Reg. 38575, 38577 (1979).

139. Significantly, the choice to preserve EPA's § 110(c) obligation was made over the House version of the bill which expressly denied EPA the authority to promulgate (or even enforce) nonattainment plan provisions, leaving it only the power to implement offset requirements. See H.R. 6161, 95th Cong., 1st Sess. § 127(f), 123 Cong. Rec. 5059 (1977).

140. If this point needs any further support, it plainly exists in the requirement in Clean Air Act § 172(b)(1) that a nonattainment plan "be adopted by the State (or promulgated by the Administrator under section 110(c)) after reasonable notice and public hearing." (Emphasis added.)

Additionally, the federal assistance limitations in Clean Air Act § 176(b) and (c) are based on a state's failure to implement, or an activity's failure to conform to, a plan "approved or promulgated under section 110."

141. See EPA's June, 1979, proposed policies on transportation funding, 44 Fed. Reg. 33473, 33474 (1979).

142. See discussion in text accompanying notes 55-56 *supra*.

Sections 113(a) (1) and 302(e),¹⁴³ it changed these sections in no relevant respect. One could certainly say that, in light of judicial reluctance to accept EPA's construction, no support should be found in Congress' inaction. The legislative history of the 1977 Amendments, however, can be read to indicate that Congress intended to allow such federal enforcement against the states — at least where EPA does not order states to enact legislation and promulgate regulations.¹⁴⁴ It is difficult to argue that when Congress inserted Section 113(a) (5), giving EPA the power to impose a permitting ban if a state fails to submit or implement a nonattainment plan, it intended to make this sanction exclusive of EPA's previously-asserted authority under Section 113(a) (1). On the other hand, it is even more difficult to argue that the amendment to Section 304, expressly authorizing citizen suits against any person (including a state) who is alleged to be in violation of "any requirement under an applicable implementation plan relating to transportation control measures," allows citizens to sue to compel state implementation. Under Section 304, as under Section 113(a) (1), the problem remains whether state implementation is *itself* a proper plan "requirement." All this may compel a candid admission that there is little more persuasive authority than before the 1977 Amendments to either support or contradict EPA's interpretation. Thus, if EPA again presses the point,¹⁴⁵ a court may be as free as before to avoid the difficult constitutional questions.

C. EPA Efforts to Preserve the Spirit of the Act

As of this writing four months have passed since the July 1, 1979, "deadline," and EPA has not yet finally ap-

143. Indeed, on the eve of the 1977 Amendments, EPA asserted such enforcement authority in its revisions to its VIM regulations for California and the National Capital areas. See 42 Fed. Reg. 30504, 30505 n. 15 (1977).

144. Both the 1977 House Report and an explanatory statement by the Senate manager of the 1977 Amendments essentially adopted EPA's arguments in favor of such authority. H.R. Rep. No. 294, 95th Cong., 1st Sess., at 288, 290, 315-16; 123 Cong. Rec. § 9168 (daily ed. June 8, 1977).

These sources may also be read to support EPA enforcement to compel states to implement their own plans. See Lunenburg, *The National Quest for Clean Air 1970-1978, Intergovernmental Problems and Some Proposed Solutions*, 73 NW. U. L. REV. 397, 447 (1978).

145. Apparently EPA has not abandoned its original approach. In a footnote to its April, 1979, preamble, EPA states that, although it has left litiga-

proved any nonattainment plans containing transportation control measures¹⁴⁶ nor promulgated any substitute plans.¹⁴⁷ However, no permit thus far has been denied a major stationary source on these grounds; no federal funds have been withheld from state air programs, highways, or sewage treatment plants; and no action has been taken by EPA to resume enforcement of pre-existing transportation control plans.¹⁴⁸ This is all so because EPA reads the applicable sections of the Act in ways which reduce their scope and buy as much time as possible for it and the states to perform their statutory functions.

States were late in filing their proposed plans.¹⁴⁹ Many of those submitted are deficient in varying degrees.¹⁵⁰ EPA has not yet had time to fully evaluate them, complete negotiations regarding their deficiencies, or promulgate substitute plans.¹⁵¹ With the hope of soon arriving at SIP's which are approvable in most respects, EPA is understandably reluctant to invoke the sanctions at its disposal. Such reluctance is especially understandable in view of the perceived present disaffection in the country with environmental reg-

tion and administrative proceedings concerning its previous regulations in abeyance in order to concentrate on plan revisions, it "still believes that the Clean Air Act provides a basis for promulgating enforceable transportation control measures requiring state implementation." 44 Fed. Reg. 20372, 20374 n. 15 (1979).

146. Indeed, as of the first of November, EPA has formally acted on but five SIP's. Only Wyoming (which had but one nonattainment area—for particulates) has had its plan fully approved. Vermont's plan has received "conditional approval," as have parts of Georgia's and Colorado's plans. The plan submitted by South Dakota has been disapproved (because of unacceptable regulations for permitting major stationary sources). No final or conditional action has been taken on any other state plan. Only North Dakota and Hawaii contained no nonattainment areas and were, therefore, not required to submit revised plans. See special state-by-state report on revised SIPs in 10 ENVIR. REP. CURRENT DEVELOPMENTS 923, 924, 927, 928 (1979), and the update in 10 ENVIR. REP. CURRENT DEVELOPMENTS 1472 (1979).
147. Although Clean Air Act § 110(c), on its face, requires EPA promulgation (or approval) within six months of the January 1, 1979, submittal deadlines set by § 129(c).
148. See note 145 *supra*.
149. In the latter part of May, 1979, EPA stated that it had received revised SIPs for 30 out of 56 states and territories. 10 ENVIR. REP. CURRENT DEVELOPMENTS 119 (1979).
150. For example, as of the first of August, nine states requiring VIM legislation for approval did not have it, including five of the largest: New York, California, Ohio, Michigan, and Colorado. 10 ENVIR. REP. CURRENT DEVELOPMENTS 23 (1979).
151. EPA's most recently revised forecast is that it will have acted on about ten SIPs by the end of November, on another ten by the end of the year, and will have taken final action on a majority by mid-1980. See 10 ENVIR. REP. CURRENT DEVELOPMENTS 1472 (1979).

ulation¹⁵² and some movement afoot in Congress to extend the approval/disapproval deadline, if not to make substantive amendments to the Act.¹⁵³ Strict construction at this time might well provoke a legislative backlash far more damaging to air pollution control than interpretations sympathetic to state problems.

EPA's April, 1979, general preamble to publication of state-submitted plans contains several significant lenient interpretations of the Act.¹⁵⁴ With considerably more certainty than is supported by statutory language,¹⁵⁵ it states that "reasonably available control measures" are not required if less will suffice for "reasonable further progress" to attainment and such control measures will not result in attainment any faster.¹⁵⁶ A position even more substantially, and questionably, softening the plan requirements of Section 172(b) is EPA's further explanation that it is not now requiring state adoption of transportation control measures or VIM in legally enforceable form.¹⁵⁷ Instead, for these and certain other measures, it construes the Act to allow approval of plans containing "schedules for expeditious development,

152. After experiencing fuel shortages in the summer and hearing President Carter declare war against the energy crisis in a televised speech on July 15, 1979, 55% of the persons responding to a Gallup poll for Newsweek conducted on July 18 and 19, 1979, stated that they would favor relaxing laws and regulations designed to protect the environment in order to produce more energy. Only 30% questioned in this poll opposed such relaxation of environmental laws. See Newsweek, July 30, 1979, at 28. Congress apparently perceives such public attitudes and is responding accordingly. Upon returning from Labor Day recess, it quickly dealt multiple blows to the environment: it exempted Tellico Dam from the Endangered Species Act and any other law prohibiting its construction; the Senate approved amendments to the Surface Mining Control and Reclamation Act which extend its deadlines and exempt state programs from regulations issued by the Office of Surface Mining; and bills to give a new Energy Mobilization Board power to override state and federal substantive and procedural laws gained momentum. See 10 ENVIR. REP. CURRENT DEVELOPMENTS 1151, 1152 (1979). A bill to create the Energy Mobilization Board to speed priority energy projects passed in the Senate on October 4. A similar bill passed in the House on November 1. See 10 ENVIR. REP. CURRENT DEVELOPMENTS 1335, 1495 (1979).

153. A bill to postpone the deadline one year was introduced in the House on January 18, 1979, and by July 30 had 120 co-sponsors. A similar bill was introduced in the Senate on May 11, 1979. These bills have prompted a House subcommittee to hold oversight hearings, but as of this writing they seem to lack sufficient push to pass. See 10 ENVIR. REP. CURRENT DEVELOPMENTS 119, 923 (1979).

154. 44 Fed. Reg. 20372 (1979).

155. See Clean Air Act § 172(b) (2), (3).

156. 44 Fed. Reg. at 20375.

157. Cf. Clean Air Act § 172(b) (7), (10).

adoption, submittal, and implementation.”¹⁵⁸ The interpretive rule¹⁵⁹ published by EPA on July 2, 1979, contains additional and somewhat more justifiable modifications.¹⁶⁰ First, EPA there declared that major stationary source permits for which applications were received prior to July 1, 1979, would be “grandfathered” — meaning that they would be issued despite the absence of any approved nonattainment plan if offset requirements are satisfied. EPA stated that the statutory permitting ban applies only to permits applied for after June 30, 1979.¹⁶¹ Thus, as EPA explained,¹⁶² because a typical permit takes approximately three months to process, it postponed any potential impact at least that long. By then it hoped to have approved most plans — thereby allowing it to issue permits processed during this interim.¹⁶² The sort of approval which EPA anticipates for many areas, however, is not necessarily the final approval which the Act seems to contemplate, but “conditional approval.” In conjunction with its July, 1979, interpretive rule, EPA published a “supplement” to its April, 1979, preamble in which it stated its intention to conditionally approve plans containing “minor deficiencies” for states providing assurances that they will submit corrections on specified schedules. For such states, permitting bans will fall only if adequate corrections are not made on schedule.¹⁶³

158. 44 Fed. Reg. at 20375-76.

Further on in the preamble EPA states that for areas seeking post-1982 attainment dates for ozone or CO it is requiring by June 30, 1979, assurances of adequate legal authority to implement VIM no later than the end of 1982—unless before June 30, 1979, the Senate had no opportunity to consider necessary enabling legislation. Here it also says, however, that plans providing for such extended dates need only contain “schedules” for implementation of those “currently planned” transportation control measures which are reasonably available and for “analysis, selection, and adoption” of any additional ones needed. 44 Fed. Reg. at 20377.

159. To be added to 40 C.F.R. Part 52, Subpart A, as new § 52.24.

160. The interpretive rule, preceded by supplementary information, is at 44 Fed. Reg. 38471 (1979).

161. *Id.* at 38472-73.

162. *Id.* at 38471. See also EPA memorandum to regional directors, reproduced in 10 ENVIR. REP. CURRENT DEVELOPMENTS 250 (1979). After three months had passed, however, EPA had to revise its expectations. See note 151 *supra*. With approval still months away for most states, EPA has resorted to “monitoring” permit applications in order to be informed of any economic disruption or delays caused energy projects. See 10 ENVIR. REP. CURRENT DEVELOPMENTS 1472 (1979).

163. See 44 Fed. Reg. 38583 (1979).

If the conditional approval given Colorado’s plan [published at 44 Fed. Reg. 57401 (1979)] is any indication, EPA is willing to conditionally approve a plan containing quite substantial deficiencies based upon its ex-

Other lenient interpretations by EPA have a firmer statutory base. Completely consistent with the language of the Act,¹⁶⁴ EPA will limit the new source restriction to the particular nonattainment area for which a plan is inadequate or is not being carried out; it will not apply to attainment areas or areas in the state for which plans are approved and being implemented.¹⁶⁵ Also, EPA intends to confine the restriction on new sources to major sources of the specific pollutant for which the area was designated as nonattainment and for which an approved plan is not being carried out.¹⁶⁶ Of course, it recognizes that a ban will not apply to non-major sources under any circumstance.¹⁶⁷ EPA's proposed policies and procedures for applying the limitations placed by Section 176(a) on federal funding for Air Act and highway construction grants are similarly restrained.¹⁶⁸ It proposes to apply these funding limitations to only the geographic areas under the control of the government agency directly responsible for the failure to submit.¹⁶⁹ It assumes for itself the discretion to continue to make grants under the Air Act if they are "necessary for immediate air quality benefits or development of SIP revisions."¹⁷⁰ Under the procedures which it proposes for applying the assistance

pection that corrections will be made pursuant to the timetable which it imposes. Conditional approval is widely believed to be of questionable legality. See 10 ENVIR. REP. CURRENT DEVELOPMENTS 1342 (1979). Its continued use may well depend upon the restraint shown by states and environmental groups confident of their ability to have it struck down in court if they so desire.

164. Clean Air Act §§ 110(a)(2)(I), 172(a)(1), 173(4), 113(a)(5).

165. See the July, 1979, interpretive rule, 44 Fed. Reg. at 38473.

To supplement this interpretive rule, EPA on the same day published a proposed rule to extend its application to major stationary sources to be constructed outside the nonattainment area (but within the same state) if they would cause a violation of an ambient standard within the nonattainment area. This proposed rule would, however, exempt from the permitting ban sources, whether within or without the nonattainment area, which are distant enough from a place where a standard is violated that their contribution to the problem is minimal. 44 Fed. Reg. 38583 (1979).

166. 44 Fed. Reg. at 38473.

167. See EPA memorandum, 10 ENVIR. REP. CURRENT DEVELOPMENTS at 251.

168. 44 Fed. Reg. 33473 (1979).

169. It also states that the area affected may be less than an entire air quality control region [which does not jibe with the letter of Clean Air Act § 176(a)] and that funding may be withheld only from specific agencies. *Id.* at 33474.

170. *Id.* at 33476.

On firmer ground, it also interprets quite broadly the exclusions for safety and mass transit projects and transportation projects related to air quality. *Id.*

limitations, it may be the end of October before any funds are withheld; and even then they are not lost but placed in escrow for release upon a finding that reasonable efforts are being made toward submittal.¹⁷¹ Regarding the restrictions on sewage treatment grants under Section 316, EPA's intended policy is likewise circumscribed: limitations would only apply to specific areas in default; grant applications would be processed in anticipation of issuance upon compliance; and conditions and restrictions, rather than outright withholding, would be used in most instances.¹⁷²

In at least some respects, EPA obviously is treading a fine line between "preserving the spirit of the Act" and encountering a successful citizen suit to enforce the letter of the law.¹⁷³ Although the statutory bases may be thin for its constructions which avoid immediate and wholesale use of the sanctions by extending the opportunity to arrive at adequate state plans,¹⁷⁴ EPA's political judgment is hard to fault. Such judicious interpretations may well provide the flexibility necessary to carry the Act through its most fragile period. EPA's constructions which confine the reach of the funding and permitting sanctions,¹⁷⁵ of course, serve the same political purpose; but they have the additional advantage of standing on more solid statutory footing and may prove critical to keeping its application of these sanctions within the bounds of constitutionality. Such, at least, is the author's opinion, explained in the next section.

III. THE CONSTITUTIONAL LIMITS TO SANCTIONS FOR STATE UNCOOPERATIVENESS

At this time it seems likely that EPA will soon invoke some of the weapons statutorily placed at its disposal and, consequently, bring their constitutionality to the test. Cer-

171. *Id.* at 33475.

172. See EPA notice of interim policy on sewage plant construction, 44 Fed. Reg. 38575 (1979).

173. At this time, however, indications are that the major environmental groups may be equally sensitive to the dangers of triggering a legislative backlash and may be sympathetic to EPA's bending of the law in order to save it. See testimony of David Hawkins, EPA Assistant Administrator for Air, Noise, and Radiation, at a House subcommittee oversight hearing on July 30, 1979, as reported in 10 ENVIR. REP. CURRENT DEVELOPMENTS 923 (1979).

174. See notes 154-63 and accompanying text *supra*.

175. See notes 164-72 and accompanying text *supra*.

tainly it can be expected to employ funding and permitting sanctions long before it resurrects its earlier-tried strategy of direct enforcement against the states. If nothing else, its previous lack of success makes unlikely any quick attempt to wield this big stick again. The author, however, will first treat in this section the restrictions placed by the Constitution on such direct compulsion. He does so because the most difficult issues regarding the constitutionality of funding and permitting limitations concern their application to promote state action which is beyond the constitutional reach of direct compulsion. It is first necessary, therefore, to establish the limits to that reach. Thus, although these newly-available carrots are much nearer to application, their treatment will await analysis of the method already challenged in the courts with substantial success.

A. *Direct Enforcement Against the States*

Time will not be spent here discussing whether or not the Act authorizes EPA to enforce, through civil and criminal proceedings, a promulgated plan requirement that a state implement transportation controls. Enough has already been discussed¹⁷⁶ to support an opinion either way. Section 113(a)(1), on its face, authorizes an administrative order or a civil suit by EPA to compel compliance with any requirement in a plan. The question not answered by any language in the Act is whether EPA can properly promulgate as part of a plan a requirement that the state implement the plan. The overall scheme of the Act may indicate that it cannot;¹⁷⁷ legislative history may indicate that it can.¹⁷⁸ Consequently, room exists for a court to find either way based upon its view of the constitutional issues presented. Although a court may well conclude that such enforcement is beyond the scope of the Act, it can be expected to do so in order to "avoid" serious constitutional problems.¹⁷⁹ The seriousness of these constitutional problems

176. See notes 52-56, 139-45, and accompanying text *supra*.

177. Especially EPA's duty under Clean Air Act § 113(a)(2) to enforce if the state fails to do so.

178. See note 144 *supra*.

179. The rationale employed by the Ninth and Fourth Circuits. See notes 61-66, 81, and accompanying text *supra*.

presented by enforcement against the states of various transportation control methods, therefore, will be treated herein as the decisive factor.

Other than the recent experience under the pre-1977 Act and the Circuit Court decisions involving it, there exists no close precedent, historical or legal, to determine the constitutionality of applying federal force so directly against the states. *National League of Cities v. Usery* ("NLC"), of course, overshadows the area; but its facts are quite different from any involved in transportation controls; and, as pointed out by Justice Brennan in his dissent,¹⁸⁰ the majority opinion provides little guidance as to what are and are not "essential governmental functions."¹⁸¹ NLC's chief precedential support was in decisions finding constitutional limits to the federal taxing power when directed at state operations; but such decisions themselves use similarly broad language helpful primarily as expressions of political principle.¹⁸² Strained analogy was made by the Court to *Coyle v. Oklahoma*¹⁸³ — denying Congress the power to dictate to a state the location of its capital — but none will be attempted here. The only cases cited in NLC involving situations at all similar to any transportation control measure were those distinguished and reaffirmed by the Court: *United States v. California*¹⁸⁴ and like deci-

180. *National League of Cities v. Usery*, 426 U.S. at 872-75 (dissenting opinion).

181. Besides speaking broadly in terms of "integral operations in areas of traditional governmental functions." *Id.* at 852, the Court only stated that this category included the right "to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation." *Id.* at 851.

182. The major taxation case relied on by the Court, *New York v. United States*, 326 U.S. 572 (1946), upheld a federal tax on New York State's sales of mineral water. There the plurality opinion of Chief Justice Stone rejected any distinction between "governmental" and "proprietary" interests and instead stated that even "nondiscriminatory" taxes on state activities might be struck down if they "interfere unduly with the State's performance of its sovereign function of government." 326 U.S. at 586-87.

Two years after NLC, in *Massachusetts v. United States*, 435 U.S. 444 (1978), the Court sustained an annual federal registration tax on all civil aircraft as applied to a state-owned helicopter used exclusively for police functions, four justices reasoning that a tax approximating the cost of the federal services that were provided created no undue danger of use by the federal government "to control, unduly interfere with, or destroy a State's ability to perform essential services." 435 U.S. 466-67.

183. *Coyle v. Oklahoma*, 221 U.S. 559 (1911).

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

sions¹⁸⁵ sustaining federal regulation of state-owned railroads. This the court held not to be “an area that the States have regarded as integral parts of their governmental activities.”¹⁸⁶ In this light, it may be productive to first consider the constitutionality of a form of federal regulation of state-controlled air pollution closely analogous to regulation of railroads: application of federal emission standards to state-owned vehicles and stationary sources. With reasoning here developed as a base, perhaps it will be easier to analyze the constitutionality of the more burdensome transportation controls imposed under EPA’s “indirect source” approach.

1. State-owned direct sources

Federal emission standards are routinely applied to state and municipal vehicles, power plants, incinerators, and similar direct sources of air pollution. Does *NLC* place such regulation in jeopardy? Certainly it seems very close to the application of federal safety standards to a state-owned railroad; but the argument may be made that power generation, waste disposal, and police protection (in vehicles) are more traditional governmental functions. *NLC*, however, does not disallow any federal regulation of such functions; its prohibition is against *displacement* of “state policies regarding the manner in which they will structure [their] delivery.”¹⁸⁷ It should be hard to argue convincingly that holding the state to the same emission standards applied to like private activities would displace significant governmental policies regarding performance of these services. Surely a “policy” in the sense the term was used in *NLC* means much more than a desire to burn regular gasoline or save the cost of installation of scrubbers. The cost of such pollution controls may well be great and burdensome to a community; however, in *NLC* cost alone was not the key — but pervasive costs which displaced delivery of vital services.

If nothing else, the concurring opinion with which Justice Blackmun cast his “swing vote” in *NLC* indicates

185. *Parden v. Terminal Ry.*, 377 U.S. 184 (1964); *California v. Taylor*, 353 U.S. 553 (1957).

186. *National League of Cities v. Usery*, 426 U.S. at 855 n. 18.

187. *Id.* at 847.

that a majority on the present Court would permit such federal environmental regulation of state-owned direct sources.¹⁸⁸ His view of the decision as a “balancing approach,” however, leaves much to be desired. If Congress reasonably concludes that regulation of state facilities is necessary, the Court should be very disinclined to second-guess that decision by weighing the respective interests at stake.¹⁸⁹ A better way to distinguish such regulation from the situation in *NLC* is to emphasize the object of the Court’s concern: substantial interference with governmental decisionmaking. This distinction focuses attention on preserving the most essential feature of state and local government — the creation and implementation of policies and programs on behalf of their citizens.

Of course, governmental policies and programs are normally carried out through legislation and agency regulations; but merely effecting or necessitating state regulations, or even legislation, should not be the touchstone. If it were, most federal control would be barred. States act through legislation and regulations in providing nearly all of their services — even in running a railroad or a power plant — and virtually any federal regulation thereof will require some adjustment in such state “laws.” The constitutional line should be drawn to protect a state’s decision whether or not to use its lawmaking powers to *create and run* a program which it may or may not feel is to the benefit of its citizens. In the case of federal regulation of emissions from state-owned direct sources, the state is not being forced to establish and administer mobile police units, power plants, or incinerators; it is merely being told that if it is going to undertake such activities it must not run them in ways which the federal government has determined

188. In relevant part, Justice Blackmun stated:

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

Id. at 856.

189. So also advises Professor Richard Stewart in an article extensively analyzing federalism problems in implementation of the Air Act. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 *YALE L. J.* 1196, 1236 (1977).

to be hazardous to health. This is a far cry from requiring federally-structured programs to be created and run by the states.

The argument may be made, however, that many sorts of transportation control measures do entail just such creation and implementation of programs not desired by the states. But here the author believes that a distinction, somewhat similar to that drawn by the D.C. Circuit,¹⁹⁰ can be made between (1) transportation control measures which are directed at the state's operation of a highway system *itself* and (2) those which require the state to regulate the private users of that system.

2. Operation of state highway systems

In this category are included creation of bus and car-pool lanes, imposition of freeway and bridge tolls, and restriction of on-street parking. The management of streets and highways no doubt may be considered organically an "essential function" of state and local governments. But these regulations directed exclusively toward a few ingredients of a state's overall operation of its highways should not be equated with dictating fundamental policy choices in structuring a transportation system. The state makes such basic governmental decisions when it decides whether to build a freeway (in lieu of another means of transportation) and what traffic safety laws will be enforced on it. But every detail involving operation of highways cannot be made a sacred cow, immune from federal regulation, without drawing an unjustifiable distinction between state-owned direct and indirect sources. The author must admit to being persuaded by EPA's reasoning on this score.¹⁹¹ Entirely apart from any notion of blame for the vehicles attracted, states and local governments clearly do own and operate their streets and highways. Requiring them to regulate their physical use is indistinguishable in principle from controlling the fuels burned in state vehicles and power plants in order to minimize the pollutants they emit or

190. *District of Columbia v. Train*, 521 F.2d at 988-90. See discussion in text accompanying notes 67-69 *supra*.

191. See notes 55-56 and accompanying text *supra*.

from restricting the industrial wastes processed by municipal sewage treatment plants in order to control their pass-through of dangerous pollutants. Surely states owning fairgrounds and stadiums may be required by federal law to manage such facilities and their parking accommodations in order to reduce dust, noise, and solid waste. Is there any relevant difference between such situations and federal rules requiring states to take certain steps to limit the number of vehicles attracted by their roads?

Again, any of these measures may well require state or local legislation or regulations; but only to the extent such authority is needed before the governmental entity may act in any new endeavor — however unessential to its fundamental duties to its citizens. The expense to which bus/carpool lanes, toll collection, and on-street parking controls put the governmental bodies concerned usually will not be so disproportionate to the normal costs of maintaining a highway system that they could reasonably complain that they are forced to restrict essential services to their citizens. Certainly, to the extent such costs are offset by federal grants under existing mass transit and highway programs, complaints should not be taken seriously.

Obviously, with so little precedent and so much of one's analysis dependant upon his political philosophy, the author's views are subject to criticism. Admittedly, unless one is willing to allow either all or nothing in the way of federal regulation of state control of pollution, the analytical process becomes a matter of line drawing. The closer one gets to the line, the more tenuous becomes his reasoning. With bus/carpool lanes, tolls, and on-street parking, the author recognizes strains in his analysis; but he believes that the policy behind *NLC* keeps such regulations, at least in the majority of cases, on the constitutional side of the line. That line, however, is crossed by measures such as EPA's 1973 VIM and retrofit regulations which required states to establish and administer whole new programs to regulate their citizenry.

3. Regulation of private motorists

The Ninth,¹⁹² Fourth,¹⁹³ and D.C. Circuits¹⁹⁴ understandably expressed strong reservations about the constitutionality of EPA's VIM and retrofit regulations. States' decisions concerning the regulation of purely private activities of their citizens are of the essence of governmental functions. If the Tenth Amendment means anything, it must bar the federal government from directly controlling the states' performance of such sovereign duties. Although decisions whether or not to establish and carry out VIM and retrofit programs may not be themselves vital to states' "integrity or their ability to function effectively in a federal system," they do involve essentially governmental activity which should be protected from direct federal control. To fail to erect a constitutional barrier to such unprecedented assertion of federal power would be to risk reducing the states to "puppets of a ventriloquist Congress."¹⁹⁵

The federal wage and hour legislation struck down in *NLC* itself presented nothing like the threat to state sovereignty of requirements that states establish and implement entire administrative programs.¹⁹⁶ In fact, because *NLC* involved a different, more problematical situation resulting in a vague test, it might be wise to enunciate a separate and more specific standard to ensure that in this special context the constitutional line is bright and clear. That stated by the Ninth Circuit in *Brown I* has sufficient clarity and specificity to recommend it: although the federal commerce power encompasses commerce engaged in by a state, it does not extend to a state's regulation of the commerce of others.¹⁹⁷ Such a standard may be reconciled with

192. *Brown v. EPA*, *supra* note 61.

193. *Maryland v. EPA*, *supra* note 66.

194. *District of Columbia v. Train*, *supra* note 67.

195. As characterized by the Ninth Circuit, *Brown v. EPA*, *supra* note 61, at 839.

196. As the Ninth Circuit held in "*Brown II*," no constitutionally significant difference exists between expressly requiring a state to adopt certain laws and regulations and "simply" requiring it to establish and carry out a program, whether or not special legislation or regulations are necessary. 566 F.2d at 672. The determinative factor should not be whether statutes and regulations are required—but whether the state is being compelled to govern its citizens in a certain manner.

197. *Brown v. EPA*, *supra* note 61, at 838-40.

the Court's analysis in *NLC* by reasoning that it is the Tenth Amendment which so restrains the commerce power from intruding into this sovereign domain.¹⁹⁸

4. Enforcement of state-submitted plans

The same constitutional protection should be afforded a state when EPA, or a citizen invoking Section 304, attempts to compel it to implement a transportation control measure that is part of a plan which the state itself submitted. The reasoning of the Second Circuit to the contrary in *Friends of the Earth v. Carey*¹⁹⁹ does not withstand scrutiny. It is nothing short of absurd to hold that a state or local government involved in preparing and submitting a plan could have contested its approval by EPA (within sixty days) on grounds of the unconstitutionality of its compelled implementation, and that under Section 307(b) (2) failure to do so bars reassertion as a defense to an enforcement proceeding. The constitutional argument would not have been an objection to the adequacy of the plan submitted; it is a defense which only arises when EPA or a citizen invokes such construction of enforcement authority against the state or local government. It is only slightly more rational, but still very unconvincing, to characterize the state's submission of a plan as so "voluntary" that it bars it from "reneging" on its "pact" and asserting constitutional defenses to compelled implementation. Waiver of

198. This constitutional analysis would similarly condemn any EPA effort directly to compel states to implement gasoline rationing plans, ISR programs, parking supply management systems, programs for staggered work hours for non-state employees, and like strategies requiring establishment of new programs for state regulation of private activities.

Other strategies suggested for enforcement against the states might fall to the more general *NLC* standard. Certainly any federal attempt to mandate staggered work hours for state employees is far too close to *NLC* itself to have much chance of survival. To the extent a bicycle program required the exercise of eminent domain, it might be deemed to impinge upon a traditional sovereign function. Requiring the establishment and administration of a bus system might well be so expensive that it would foreclose other governmental activities and would run afoul of *NLC* for that reason alone. Also, forcing state and/or local government to implement a transit system might simply be viewed as substantial displacement of integral governmental decisions.

Further attempt at piecemeal analysis of various transportation control measures which might be enforced against the states will not be attempted. Enough has been discussed to provide adequate background for the more pressing issues concerning the constitutionality of funding and permitting limitations.

199. See text accompanying notes 90-94 *supra*.

constitutional defenses is not to be so lightly presumed.²⁰⁰ Certainly such an inequitable²⁰¹ conclusion should not be drawn when the "voluntary" submittal was obtained under the threat of EPA substitute promulgation and enforcement.²⁰²

To the extent the state plan approved consists of state statutes and regulations, suits may be brought under state law²⁰³ to require the appropriate state officers and agents to perform their nondiscretionary legal duties — until such statutes and regulations are repealed. If, however, no applicable state statute or regulation makes independently binding a part of an approved plan,²⁰⁴ the Air Act should not be construed to make it so. The procedures under which EPA approves state-submitted plans should not be deemed sufficient to convert promises by state executives into the equivalent of state administrative rules. For some purposes EPA approval of a state plan may be considered *federal* rule-making.²⁰⁵ If such a position was asserted, however, to justify federal enforcement to compel state implementation, the Tenth Amendment argument should be just as strong as before against use of a "federal rule" to mandate state governmental functions.

B. *Limitations on Financial Assistance*

Despite the probable constitutionality of direct federal enforcement against the states of at least some transportation control measures, the legal uncertainties and political dangers involved make much more likely that EPA will first invoke its new statutory powers to restrict financial assistance and impose permitting bans. Of these two new

200. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

201. The inequity arising from the contrast with court holdings that direct enforcement is not permitted against states who failed to submit adequate plans.

202. And now funding and permitting limitations as well.

203. The citizen-suit provision in the Clean Air Act, § 304(a)(2), only authorizes suits against "the Administrator" to compel him to perform his non-discretionary acts.

204. As apparently was the case in *Friends of the Earth v. Carey*, *supra* note 82, and as may continue to be the case under present EPA practices.

205. In *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 170 (6th Cir. 1973), it was deemed so for purposes of requiring the rulemaking procedures of § 553 of the Administrative Procedure Act to be followed.

provisions, precedent more clearly supports the federal government's power to obtain compliance from a reluctant state by conditioning certain federal expenditures on such compliance. In fact, this means was pointedly suggested by the Circuit Courts which denied EPA direct enforcement authority.²⁰⁶ Ever since *United States v. Butler*²⁰⁷ was decided in 1936, it has been established that the federal spending power is not limited to use on behalf of other enumerated powers, such as the commerce power; instead it stands on its own bottom, limited only by the requirement in Article I, Section 8, that it be exercised to provide for the "general welfare of the United States."

Although this "general welfare" standard apparently does have some boundaries,²⁰⁸ they are at least wide enough to impose no obstacle to federal spending on any activity for which the 1977 Amendments authorize withholding of funds. Indeed, quite recently in *Buckley v. Valeo*,²⁰⁹ in reply to the contention that public financing of presidential election campaigns was contrary to the general welfare, the Court stated:

Appellants' "general welfare" contention erroneously treats the General Welfare Clause as a limitation upon congressional power. It is rather a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause. * * * It is for Congress to decide which expenditures will promote the general welfare * * *. Any limitations upon the exercise of that granted power must be found elsewhere in the Constitution.²¹⁰

Attention is called, however, to the last sentence quoted above. This must mean that Congress cannot structure its spending in a manner which violates express constitutional

206. See *Brown v. EPA*, *supra* note 61, at 840; *Maryland v. EPA*, *supra* note 66 at 228; *District of Columbia v. Train*, *supra* note 67, at 993 n. 26.

207. *United States v. Butler*. 297 U.S. 1 (1936).

208. Federal expenditures must be made "for the common benefit as distinguished from some mere local purpose," *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 738 (1950); but the Court defers to rational congressional judgment as to what is for the "common benefit," *Helvering v. Davis*, 301 U.S. 619, 640 (1937). See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 249-50 (1978).

209. *Buckley v. Valeo*, 424 U.S. 1 (1976).

210. *Id.* at 90-91.

restrictions on federal power — most particularly those contained in the Bill of Rights. Certainly the Fifth Amendment would prohibit Congress' limiting financial assistance to "members of the white race," and the First Amendment would not allow it only to finance the election campaigns of Democrats. Yet in *Buckley* itself the Court allowed Congress largely to accomplish through conditional spending what the First Amendment barred its doing directly: although it held expenditure limitations on candidates for federal office to be in violation of the First Amendment,²¹¹ it sustained such limitations when imposed as a condition on the acceptance by such candidates of public financing for their campaigns.²¹²

This holding can best be explained by the close relationship between the use of these funds and the permissible governmental purpose of aiding candidates not adequately supported by private sources. Any benefit to the impermissible purpose of controlling expenditures could be considered only incidental.²¹³ Thus, the conditional spending approved in *Buckley* is unlike a situation in which such funds are conditioned on the candidate's being a Democrat — where the only purpose served is constitutionally impermissible. If this requirement of a *close relationship to a permissible purpose* is correct, it would make unconstitutional a cutoff of unrelated funds: for example, the termination of a candidate's federal research grant because of his excessive campaign expenditures. There the connection between the designated use of the funds and permissible aid to inadequately-financed campaigns would be anything but close; instead the purpose served is clear — the unconstitutional discouragement of big campaign spending. In other contexts such deprivation of unrelated funds is termed an unconstitutional "penalty" if the assistance is withheld to "punish" the exercise of a fundamental constitutional right.

211. *Id.* at 39-59.

212. *Id.* at 57, n. 65; 99; 101; 107-09.

213. The author's confidence in this difficult analysis is aided by Professor Tribe's apparent agreement. See TRIBE, *supra* note 208, at 806 n. 3.

This is the reasoning employed in such cases as *Shapiro v. Thompson*²¹⁴ and *Memorial Hospital v. Maricopa County*,²¹⁵ in which the court found durational residency requirements for the receipt of public welfare benefits to be unconstitutional because they “penalized” the exercise of the fundamental right to interstate travel. In *Maher v. Roe*²¹⁶ the Court was called upon to distinguish these cases from the one before it in which the state denied indigent women medicaid benefits for abortions while making such benefits available for the expenses of childbirth, arguably interfering with the woman’s fundamental right to decide whether to terminate her pregnancy. In a very significant footnote,²¹⁷ the Court pointed out that the instant case did not involve a denial of *general* welfare benefits unrelated to the state’s legitimate interest in encouraging childbirth,²¹⁸ which would be closely analogous to *Shapiro* and *Maricopa County*. Instead, as the Court explained, the case before it only involved the state’s refusal to pay for the abortion itself, which the Court analogized to a state’s refusal to pay for interstate travel by an indigent — something which the Court obviously would find to present no constitutional problem.

The Court’s reasoning in *Maher*, therefore, seems to be the same as that used above to explain the *Buckley* decision: while funds used in the exercise of a fundamental right may be conditioned (and cut off) to further a legitimate “general welfare” purpose, unrelated funds may not be conditioned (or cut off) for the purpose of “penalizing” the exercise of such right. Because the states, through their police power, have essentially the same broad authority to spend for the general welfare as Congress has, the constitutional analysis of the effect of their spending decisions on fundamental rights should be the same as that applied to federal spending. And such reasoning employed to define the limits to conditional spending that affects fundamental *personal* rights should also define the limits to federal

214. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

215. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

216. *Maher v. Roe*, 432 U.S. 464 (1977).

217. *Id.* at 474 n. 8.

218. Such an interest was found to be legitimate by the Court. *Id.* at 478.

spending which affects the newly-rediscovered fundamental states' rights.

A footnote in *NLC* itself expressly left open the possibility that funds could be withheld from essential state functions of which the federal government disapproves.²¹⁹ Indeed, the constitutionality of conditional spending *per se* was a well-settled issue long before *NLC* was decided.²²⁰ In *Oklahoma v. United States Civil Service Commission*,²²¹ the Supreme Court had little difficulty with the state's claim that federal highway funds could not be conditioned on compliance with a provision in the Hatch Act prohibiting political activity by state officials primarily employed in activities financed by federal funds:

* * * [W]hile the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.

* * * [T]he end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. So even though the action taken by Congress does have effect upon certain activities within the state, it has never been thought that such effect made the federal act invalid. * * * The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual.²²²

219. We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the Spending Power, Art. 1, § 8, cl. 1, or § 5 of the Fourteenth Amendment.

National League of Cities v. Usery, 426 U.S. at 852 n. 17.

220. As pointed out by Professor Stewart:

Moreover, if restrictions on expenditures of federal money *per se* were to constitute an impermissible interference with state autonomy, *all* federal conditional grants would be rendered unconstitutional. Such a startling conclusion, which would invalidate at a stroke some \$46 billion of federal spending and shatter the lynchpin of "cooperative federalism," is hardly acceptable.

Stewart, *supra* note 189, at 1255.

221. *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947).

222. *Id.* at 143-144.

Here, however, the funds to be cut off were in an amount equal to two years' compensation for the offending state highway commissioner.

That *NLC* in fact made no change in this basic principle is evident from the Court's action in *North Carolina v. Califano*.²²³ There the district court had held that Congress could condition some \$50 million in federal health aid to the state on its imposition of certain standards on health-care facilities, even though the North Carolina Supreme Court had found those conditions barred by the state constitution. The Supreme Court summarily affirmed. At this point, therefore, it seems clear that federal funds relied on by the states for performance of essential governmental services may be conditioned upon their use in a manner which Congress deems consistent with "general welfare."

This does not, of course, resolve the constitutionality of conditioning *unrelated* funds upon a state's following federal directives concerning sovereign functions. Although there exists no precedent specifically on point, the same reasoning applied to fundamental personal rights should apply here as well: a state's exercise of fundamental rights derived from the Tenth Amendment cannot be "penalized" by a cutoff of unrelated funds — that is, funds not themselves being used in a manner determined contrary to the general welfare. To create an example from the *NLC* context: the federal government need not fund a police training program paying below the minimum wage, but it may not condition funds designated for crime laboratory equipment upon paying minimum wages to the trainees.²²⁴

The limitations on federal assistance contained in Sections 176 and 316 of the 1977 Air Act Amendments are perfectly amenable to analysis according to the principles here developed. These principles, however, only bar cutting

Thus the decision does no damage to a standard barring cutoff of unrelated funds.

223. *North Carolina ex rel. Morrow v. Califano*, 435 U.S. 962 (1978), affirming 445 F. Supp. 532 (E.D. N.C. 1977).

224. Again the author takes some comfort in other commentators' apparent agreement with this analysis. See *TRIBE*, *supra* note 208, at 315-16; Stewart, *supra* note 189, at 1257-62.

That this is not a new idea without the dignity of earlier pronouncements is evidenced by Justice Stone's similar reasoning in his dissent in *United States v. Butler*, 297 U.S. at 78-88. Even without the use of this precise analysis, however, the Agricultural Adjustment Act was struck down by the *Butler* majority not because it fell outside the spending power *per se*, but because it was found to coerce the state in an area then found to be reserved for the states by the Tenth Amendment.

off unrelated funds to achieve federal control over those state governmental functions protected by the Tenth Amendment. If a state's implementation of a particular transportation control measure does not fall within the scope of the Tenth Amendment protection, the federal government should be permitted to "penalize" the states by cutting off unrelated as well as related funds. It would indeed be anomalous to disallow this if the federal government has the power to invoke the more familiar civil and criminal penalties statutorily provided.²²⁵ Since the author has already dealt with the protection afforded by the Tenth Amendment to various transportation control measures,²²⁶ the following analysis of constitutional limitations to the Act's funding provisions will bear exclusively upon use of those financial assistance limitations to coerce performance of protected functions. Also, for the sake of simplification, it will consider only use of such funding sanctions to coerce submittal and implementation of VIM programs — the strategy most emphasized by EPA and most likely to run afoul of the Tenth Amendment.

1. Federal highway funds

As discussed previously,²²⁷ Section 176(a) requires that federal highway funds be withheld from any air quality control region in which transportation controls are necessary for attainment if EPA finds that the state has not submitted, or is not making reasonable efforts to submit, an adequate revised plan. A wooden application of this provision could present constitutional problems. An air quality control region may include some areas which are in attainment and some which are not.²²⁸ Certainly funds used to construct highways in a region which facilitate vehicle travel within, or commutertype travel into, an included nonattainment area may be sufficiently related to a

225. Clean Air Act § 113(a)-(c).

226. See notes 176-205 and accompanying text *supra*.

227. See notes 128-34 and accompanying text *supra*.

228. A nonattainment area is, for any air pollutant, an area determined by EPA to exceed any national ambient air quality standard. Clean Air Act § 171(2). It may be but a portion of an air quality control region. § 107(d)(1).

vehicle pollutant problem that their cutoff would be constitutional. In other situations, however, the constitutionality could be more questionable.

If a proposed highway was to serve only a part of the region with no nonattainment problems,²²⁹ a denial of funds might not bear a reasonable relationship to nonattainment in another part of the region — in which case, under the foregoing analysis, it would be deemed an unconstitutional penalty. Perhaps recognizing this problem, EPA's proposed policies for applying Section 176(a) would allow it to apply the funding limitation to only a relevant portion of a region.²³⁰ Even within a nonattainment area, a particular new highway might not contribute to the problem; conceivably it could help by reducing congestion. A blanket ban for an area, therefore, could create constitutional problems in rare individual instances. If such a case arises, however, a court should defer to any reasonable traffic flow analysis made by EPA or the Department of Transportation and not attempt to resolve conflicting expert testimony. If a state highway department has no authority to prepare or submit a nonattainment plan, it might seem "unfair" to restrict its funding; but a relationship, nevertheless, would normally exist between its "innocent" road-building in an area and violation of vehicle pollutant standards there.²³¹ Of course, highway funding should not be jeopardized if the only violation of an ambient standard is for a non-vehicle pollutant such as SO₂; but this possibility is avoided by the statutory requirement that transportation controls be necessary for attainment before the highway funding sanction is triggered.²³²

229. Since Clean Air Act § 176 does not authorize disapproval of grants or projects outside an offending region, no danger exists of the most obviously unconstitutional situation: a cutoff of funds for a highway in an entirely separate part of the state where increased vehicle travel would have no reasonable relationship to problems in the nonattainment area.

230. See notes 168-69 and accompanying text *supra*.

231. Perhaps sympathetic to this potential problem, EPA's proposed policies would seem to allow it to withhold funds only from specific agencies responsible for the failure to submit. See note 169 *supra*.

232. Another potential problem under this constitutional analysis is avoided by that portion of Clean Air Act § 176(a) which exempts from the funding limitations safety, mass transit, and transportation improvement projects related to air quality improvement or maintenance. EPA's proposed policies on transportation funding liberally construe these terms. See 44 Fed. Reg. at 33476 (1979).

In general, the highway funding restrictions in Section 176(a) seem narrow enough, and are amenable enough to even more narrowing constructions, that, if EPA continues in the conservative spirit indicated by its proposed policies, its action should withstand constitutional attack.

2. Air Act funding

More complex problems can arise from EPA's statutory directive to withhold any grants authorized by the Air Act. The mandate of Section 176(a), discussed above, applies to Air Act funding as well as highway funding for cases in which states fail to submit nonattainment plans containing necessary transportation control measures. Section 176(b), however, only directs EPA not to make any grants under the Air Act in any area²³³ in which a designated state or local agency is not implementing any requirement of an approved or promulgated plan. Even though it might be counterproductive to cut off Air Act administration funds from even a poorly functioning state agency, those agencies may be so dependent upon their federal funding that this could be a very sizeable carrot to encourage state cooperation.²³⁴ It might also be a weapon that, if improperly applied, could run into constitutional difficulties.

The structure of Section 176(b) is more susceptible to a constitutional construction. If a state or local governmental agency in an area is not carrying out its duties under an applicable plan, then it is certainly reasonable to withhold any financial assistance until that agency performs in a manner evidencing that the funds will be properly applied. On the other hand, one agency should not be "penalized" — as the term has been used above — for the failures

233. The restriction in Clean Air Act § 176(b) is expressly confined to the relevant "area," while § 176(a) speaks of air quality control regions. However, for both highway and air funds EPA proposes to apply § 176(a) only to the relevant portion of a region when appropriate. See notes 168-69, 230, and accompanying text *supra*. Neither § 176(a) or (b) allows withholding of funds from any part of the state outside an offending region or area (as the case may be).

234. § 105(a)(1)(B) of the Clean Air Act provides for federal funding of up to three-fourths of the cost of establishing and three-fifths of the cost of maintaining state and local air pollution control agencies. § 175 provides 100% federal funding to local officials for developing nonattainment plan revisions. § 210 allows federal funding of up to two-thirds of the cost to state agencies of developing and maintaining VIM programs.

of another agency. For example: if a state-level pollution control agency has the responsibility to implement the VIM segment of an approved plan for a particular nonattainment area, EPA could constitutionally withhold funds otherwise available under Section 210 from that agency if it fails to discharge this responsibility;²³⁵ but it could not under these circumstances withhold money available to a local agency under Section 105 for performance of duties unrelated to VIM, especially if the local agency has no authority to carry out the VIM program. The limitation indicated in EPA's proposed policies for applying Section 176(a) suggests that it intends to keep its actions in this context within constitutional bounds — by limiting its withholding of funds to the specific agencies responsible for any failures to comply.²³⁶

Section 176(a) itself, however, presents greater constitutional difficulties. First, as discussed when considering highway funds, on its face it is not limited to nonattainment areas, but to entire air quality control regions. So, again, this leaves open the possibility of withholding Air Act funding in a clean air portion of a region from a local agency with no jurisdiction to establish the necessary controls for another area which is in nonattainment. The likelihood of EPA's invoking such an unconstitutional "penalty," however, seems to be lessened by its proposal to limit application of Section 176(a) to portions of an air quality control region.²³⁷ Even in a single area entirely within the boundaries of a single municipality, however, a situation could exist in which a particular local agency program otherwise eligible for a grant has no function related to the deficiency in a submitted plan. In this situation, for EPA to withhold grant funding from such a program might be unconstitutional under our "relationship" principle—even if that agency is responsible for the deficiency.

235. It is far less certain, under our analysis, that EPA could withhold funds applied by the state agency to programs in the area unrelated to VIM — for example, money authorized by Clean Air Act § 105 for stationary source regulation.

236. 44 Fed. Reg. at 33474.

237. *Id.*

Obviously the proper application of our "close relationship" standard for constitutionality will depend on the particular circumstances of each case. With so many critically different situations possible, it would not be productive to engage in more abstract or hypothetical analysis. The very fact that individual circumstances are so important, however, is good reason for EPA to have maximum flexibility in implementing Section 176. So far its intentions seem to be in the right direction.²³⁸

3. Sewage Plant Construction Grants

The limitations on grants for construction of sewage treatment plants contained in Section 316(b) present the greatest threat to the states.²³⁹ Although proper construction of the terms of the statutes allows such vital grants to be withheld only from plants proposed in a nonattainment area,²⁴⁰ situations could still exist in which a new plant would not contribute to the nonattainment problem—for example: (1) a plant which merely replaces an existing one without adding more capacity; (2) a plant not utilized by a stationary source (a "direct discharger") whose SO₂ emissions cause the only nonattainment problem in the area; or (3) a plant that will enable people to live in a part of the area which will make them less dependent on vehicles. To withhold grants in such situations as these would run afoul of the constitutional principle advocated by the author.

In the typical case, however, a new plant is for the purpose of accommodating suburban growth, with attendant increase in commuting and, therefore, vehicle pollutants. Under the "relationship" principle, it would be constitu-

238. For example, in its proposed policies on transportation funding EPA, states, "the EPA Regional Administrator has discretion to continue to award grants available under the Clean Air Act to State and local air quality control agencies if he finds such grants are necessary for immediate air quality benefits or development of SIP revisions." 44 Fed. Reg. at 33476.

239. See notes 137-38 and accompanying text *supra*.

240. Although Clean Air Act § 316 also allows grants for construction of plants in clean air areas to be withheld, properly construed the statute only allows this to occur when the state does not have in effect or is not carrying out a "PSD" plan required by Part C of the 1977 Amendments. It should not be construed to allow withholding of grants for a clean air area because of failures in a nonattainment area. To do so would be to allow an unconstitutional application under the author's "relationship" principle.

tional for EPA to restrict grants for new sewage plants which will increase treatment capacity in a nonattainment area (1) when a state has not submitted a nonattainment plan which accounts for any increase in emissions caused, directly or indirectly, by the plant and included therein whatever additional controls are necessary, or (2) when a state is not carrying out such a plan, or (3) when the increase in capacity may reasonably be anticipated to cause more emissions than accounted for in the plan. If a state has not submitted a plan which accounts for any increase in emissions to be caused by a new plan in a nonattainment area, EPA should be able to withhold a construction grant. Since the most likely result of not obtaining funds to construct a new treatment plant would be a ban on new sewage hook-ups,²⁴¹ the relationship between such prevention of growth and the control of vehicle pollution, in the usual case, would be sufficiently close to make it constitutional.

Similarly, if an approved plan is not being carried out so as to make "reasonable further progress" for vehicle pollutants, or if a new plant would cause such progress to be destroyed, EPA should be able at least to condition the grant to allow only hook-ups sufficient to serve the existing population. Again, the relationship between new residential growth and worsening of the vehicle pollution problem will usually be close enough to withstand constitutional scrutiny. Fortunately, EPA's notice of interim policy indicates that it is structuring its discretionary approval power under Section 316(b) in a manner consistent with this analysis.²⁴²

4. Federal Action Not Conforming To An Applicable Plan

As mentioned earlier,²⁴³ Section 176(c) prohibits any federal action, support, licensing, or approval furthering any activity which does not conform to a plan after it has been approved or promulgated. Under either the commerce power or the spending power (as the case may be), application of this mandate should present no constitutional problem so

241. See note 137 *supra*.

242. See EPA notice of interim policy on sewage plant construction, 44 Fed. Reg. 38575 (1979).

243. See notes 135-36 and accompanying text *supra*.

long as only conformity by the particular proposed source is required. The typical state-owned sources which require federal permits—e.g., power plants, incinerators, landfills, etc.—do not involve performance of *NLC*-type fundamental governmental functions.²⁴⁴ Even to the extent that a state activity requiring federal approval—say, creation of a flood plain restricting development—does involve integral sovereign functions, any constitutional requirement of a close relationship, whether to a legitimate spending or commerce clause purpose, would be satisfied. If, however, the language of Section 176(c) were to be stretched to require federal disapproval of any project or activity whenever it would add to a nonattainment problem not being met to EPA's satisfaction by the state, constitutional "relationship" problems might arise. To the extent anything other than federal funding is involved, analysis of this difficult issue is subsumed in essence by the discussion which follows.

C. Prohibition of New Stationary Sources

Problems separate from those raised by funding limitations, but which lead to surprisingly similar constitutional analysis, arise from the new statutory provisions prohibiting the construction or modification²⁴⁵ of major stationary sources in any nonattainment area for which a state fails to submit or implement a nonattainment plan.²⁴⁶

Most basically, the federal government possesses ample authority under the commerce clause to regulate major sources of air pollution, to the complete pre-emption of the states, anywhere in the country.²⁴⁷ If, consistent with statutory language and EPA's interpretation,²⁴⁸ permitting bans are restricted to nonattainment areas where health-based ambient standards are not being met for those pollutants emitted by the proposed major sources, the bans will fall well within the commerce power. Even though such con-

244. See notes 180-90 and accompanying text *supra*.

245. Henceforth, for simplification, reference will be made only to construction of new major stationary sources ("major sources") without mention of "modifications," on the assumption that the same principles apply in either instance — as they should.

246. See discussion in notes 122-27 and accompanying text *supra*.

247. See note 9 *supra*.

248. See notes 164-66 and accompanying text *supra*.

struction prohibitions, if imposed because of a state's failure to submit an adequate plan, might well coerce the state to submit a plan containing such fundamental governmental functions as VIM, the coercive effect should be deemed incidental to the legitimate federal purpose of controlling air pollution—until EPA has time to promulgate a substitute plan.

On the other hand, if EPA were to apply a permitting ban to major sources which would have no effect on concentration of pollutants that exceed the ambient standards,²⁴⁹ its action would merit much closer scrutiny. Indeed, to the extent such a ban were imposed only to coerce state submittal of a plan committing the state to governmental functions, it should be treated as an unconstitutional "penalty." By principles analogous to those applied to conditional spending, EPA should be required to justify its action as reasonably related to a purpose legitimate under the commerce power. A sole purpose of coercing state governmental functions would not be legitimate under *NLC*. The reasonableness of its direct²⁵⁰ relationship to pollution control is a more difficult issue. Because, however, EPA would not be imposing such bans on major sources in states which had submitted and were implementing all necessary plans, it would be hard-pressed to convincingly argue that its action was reasonably related to a pollution-control purpose. Perhaps such total deference as is accorded congressional decisions in business regulation cases²⁵¹ would carry the day for EPA. The author does not believe, however, that such judicial abdication should be used where, as here, fundamental rights are substantially affected. Minimal scrutiny in this situation would indicate that EPA's means were reasonably related only to the impermissible purpose of coercing state governmental functions.²⁵²

249. Either because the proposed sources are to be located so far away from any nonattainment area or because they emit only pollutants for which affected areas are in attainment.

250. That is, not through the impermissible route of coercing state regulation. 251. See *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

252. A question which is even more bothersome, because of the apparent answer, is whether major sources not affecting any nonattainment area might be forced to bear the brunt of EPA's efforts to persuade the state to submit or implement controls requiring only the performance of duties not treated as fundamental under the Tenth Amendment. More creative

Even in the case of major sources proposed for construction within nonattainment areas which would emit pollutants for which concentrations already exceed the ambient standards, EPA should not be able to simply maintain a permitting ban in effect until a state relents and submits a qualifying plan. Constitutional analysis similar to that used above could be employed: this means would be “reasonably”²⁵³ related only to the impermissible purpose of coercing state governmental functions. Such a holding, however, would require a court to view EPA’s unwillingness to promulgate a true substitute regulatory plan as “unreasonable.” Even a court which would be persuaded by the reasoning applied above to distant sources, however, might not be inclined to take this step. Fortunately, if the Act is obeyed, no court will be placed in this position. As pointed out earlier,²⁵⁴ Section 110(c) requires EPA to prepare a substitute plan. Once this is done, however, the Act²⁵⁵ seems to allow EPA to impose (or continue) a permitting ban if the state fails or refuses to carry it out.

Thus a familiar and difficult question is again raised: does the Constitution allow EPA to maintain a permitting ban in effect so long as a state refuses to implement a plan which requires it to perform such governmental functions as VIM. If a court is unavoidably faced with this question, its answer should be “no”. EPA would have too many other regulatory methods at its disposal—including offsets—for a permanent permitting ban seriously to be considered a reasonable means of controlling pollution. Its only reasonable relationship to pollution control would be through the indirect—and constitutionally impermissible—route of coercing state governmental action. This same difficult reasoning also should be applied to strike down any attempt by EPA to invoke a permitting ban²⁵⁶ to force a state to carry

thought than the author can muster would be required to save the sources from the traditional reasonable relationship/permissible purpose analysis. Fortunately the situation is purely hypothetical, since neither the Act nor EPA’s interpretation allows this.

253. Applying anything more than complete deference.

254. See notes 139-41 and accompanying text *supra*.

255. Clean Air Act § 113(a)(5).

256. In lieu of promulgating and implementing a substitute plan. An interim ban applied only while EPA promulgates the substitute should be upheld.

out governmental functions contained in a state-submitted plan not binding under state law.²⁵⁷

IV. CONCLUSION

The foregoing constitutional analysis leaves the federal government with ample leverage over states who are resistant to the principles of cooperative federalism. Only if it becomes completely insensitive to state sovereignty and takes up a big stick to "penalize" states—by direct enforcement or by denial of unrelated funds or permits—will it cross the constitutional line. All indications are that Congress is fully capable of responding to relieve such unjustifiable federal pressure before it builds to that point,²⁵⁸ and that federal agencies themselves may become sufficiently sensitized to the constitutional and political limits of their powers that they stop short of construing their authority in ways that intrude abusively on states' rights.²⁵⁹ Only when these political checks fail to function should a court have to give the government a lesson in federalism principles. If a court is forced to do so, however, the author hopes that it will employ a comprehensive model such as here constructed rather than reacting with no more than ringing declarations of the sort made in *National League of Cities v. Usery*.

257. See notes 199-205 and accompanying text *supra*.

258. Consider how Congress severely limited indirect source review and parking controls after they attracted strong local hostility and how in the 1977 Amendments it relaxed statutory deadlines and provided relief, such as through delayed compliance orders, from requirements resisted by state and industry officials.

259. Consider EPA's recent interpretations of its powers to invoke sanctions discussed in text accompanying notes 146-75 *supra*.