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## THE PRACTICE OF FEDERALISM UNDER THE CLEAN AIR ACT

JOHN P. DWYER\*

Federalism is boring. Or so my environmental law students have told me. What they mean, I think, is that federalism is an abstraction with no concrete connection to cutting edge environmental issues. These students believe that states are mostly peripheral players on the environmental policy stage.

My students' opinions on the subject say as much about them as it does federalism. Surely part of their feelings is attributable to law school curricula, which emphasize federal law after the first year. Federal statutes—for example, the Clean Air Act and the Administrative Procedure Act—and federal cases are the legal texts that teachers teach and students study.<sup>1</sup> Taking these spoken and unspoken cues to heart, students reflexively believe that the locus of political power and the challenging policy issues are found in federal fora.

But I think that a larger source of disaffection with the principles of federalism is that most law students were born after 1964, which marked the beginning of the Great Society. They grew up as political power over pressing social issues was centralized in the national government.<sup>2</sup> Beginning in 1964 and throughout the rest of the decade,

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1. Professor Kramer has noted that "[t]he law that most affects most people in their daily lives is still overwhelmingly state law—except perhaps law professors, for whom it is easier to study one federal system than many state systems, and who may, therefore, have a somewhat warped perspective." Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1504 (1994).

2. Professor Scheiber has identified five distinct periods of federal-state relations. Harry Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619, 628-36 (1978) [hereinafter *Federalism and the Diffusion of Power*]; Harry Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC'Y REV. 663, 679-81 (1980) [hereinafter *Federalism and Legal Process*]. The first period, a time of dual federalism, was before the Civil War, when the states were the predominant source of political and regulatory power. Scheiber, *Federalism and the Diffusion of Power*, *supra*, at 628-36.

Thereafter, centralization of political power expanded in four periods. After the Civil War, national power over civil rights expanded as a result of the Civil War Amendments, civil rights legislation, and statutes expanding federal court jurisdiction. Scheiber calls this period "transitional federalism." *Id.* at 636-40.

From 1890 to the New Deal, the federal government steadily expanded its powers at the expense of the states. The expansion of federal power during this period was not as

Congress enacted welfare programs, anti-discrimination laws, and voting rights statutes that many states stubbornly had refused to enact. During this time, the federal courts enforced these statutory rights and gave new meaning to constitutional rights protecting individuals against government power and against institutional abuses. State officials and institutions were subject to federal judicial remedial orders.<sup>3</sup>

In the last thirty years, we also have witnessed a spectacular growth of the federal regulatory state. Since 1965, Congress has enacted a vast range of social legislation establishing new responsibilities, rights, and remedies to protect the environment, public health, and occupational safety. From the Motor Vehicle Pollution Control Act of 1965<sup>4</sup> and the Air Quality Act of 1967,<sup>5</sup> through the Clean Air Act Amendments in 1990,<sup>6</sup> Congress has enacted legislation centralizing policy-making authority over the environment and creating new federal agencies, such as the Environmental Protection Agency, to carry out the congressional mandate.<sup>7</sup> In most environmental statutes, Congress has reserved a substantial role for states, particularly in the implementation and enforcement of federal standards,<sup>8</sup> but Congress has kept most of the fundamental policy-making authority for

dramatic as in other periods. *Id.* at 640-43; see also SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY* (1959) (describing the growth of the federal government as a result of the Conservation movement between 1890-1920).

During the New Deal, Congress centralized economic policy-making in the federal government with the Supreme Court's eventual acquiescence in broad congressional authority under the Commerce Clause. Scheiber, *Federalism and the Diffusion of Power*, *supra*, at 644-48. Scheiber identifies the New Deal as the beginning of "cooperative federalism," as opposed to the previous arrangement of "dual federalism." *Id.* at 644.

The last period of centralization (which Scheiber characterizes as an acceleration of the trend begun in the New Deal) began after World War II, but especially with the Great Society programs in 1964, and has continued to the present. In this period, Congress has enacted a vast array of social programs regulating civil rights, housing, the environment, and occupational safety and health. *Id.* at 648-75.

3. See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (championing institutional litigation as an appropriate means to cure social ills); Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979) (analyzing the limitations of court reform of public institutions); Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978) (challenging judges' routine attempt to cure social ills via judicial power).

4. Motor Vehicle Air Pollution Control Act of 1965, Pub. L. No. 89-272, 79 Stat. 992.

5. Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485.

6. Clean Air Act Amendments of 1990, Pub. L. 101-549, 104 Stat. 2399 (codified as amended at 42 U.S.C. §§ 7401-7671q (Supp. V 1993)).

7. President Nixon created the Environmental Protection Agency by Executive Order in 1970. Reorganization Plan No. 3 of 1970, 3 C.F.R. 1072 (1970). Other new agencies included the Office of Surface Mining, the Office of Coastal Zone Management, the Occupational Safety and Health Administration, the Council on Environmental Quality, and the Natural Resources Division of the Justice Department.

8. See *infra* notes 38-53 and accompanying text.

itself or the federal agencies. With the proliferation of federal statutes, federal expenditures for regulatory programs also have grown substantially, and many states have come to rely on federal funding to help run their environmental programs.

To some extent, then, my students are right. Thirty years of relentless growth in federal legislative and bureaucratic hegemony has produced a strong, pervasive national authority and a relatively weak state authority in these areas of public policy. So much political power has been reallocated to the federal government that, at times, the states could be mistaken for vassals of the federal government. With the steady growth of national regulatory power, generally at the expense of state power, federalism does not look like a burning issue that should concern young environmental lawyers. Moreover, because of the normative power of the actual, students regard the centralization of political power as ideal.

Despite the growth of federal power, federalism is central to many current controversial environmental issues. The unfunded mandates legislation<sup>9</sup> and the continuing fights between EPA and the states over implementation of federal environmental laws, for example, attest to the continued vigor of federalism in environmental law. The practice of federalism, in legislatures and bureaucracies, remains an essential component in the evolution of environmental policy.

As taught in law schools and discussed in scholarly journals, federalism is justified or attacked as it relates to Supreme Court decisions and certain political values.<sup>10</sup> But in practice—and this is not inconsistent with those academic arguments—federalism contracts or expands in response to pragmatic concerns of political actors in legislatures and bureaucracies. Federal officials worry about practical

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9. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (to be codified in scattered sections of 2 U.S.C.).

10. Scheiber lists three clusters of values offered by proponents of federalism: Federalism keeps the government "close to the people," thereby promoting participatory democracy and helping to protect individual liberties; federalism promotes a more efficient and effective government; federalism promotes social experimentation among the many states. Scheiber, *Federalism and Legal Process*, *supra* note 2, at 689-92.

Professor Merritt has identified four somewhat different values: autonomous state governments can check the federal government; state governments are better than the federal government in diversifying the actors in the political process; states offer choices in living conditions in contrast to federal homogeneity; and states are laboratories for experimentation. Deborah J. Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1573-75 (1994). *But see* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994) (contending that most of the arguments for federalism are really arguments for decentralized management and that the remaining arguments for judicially enforced states' rights are insubstantial).

administrative burdens that only state bureaucracies can surmount, and thus reserve a substantial role for state bureaucracies. Interest groups and politicians opportunistically exploit the fragmentation of the federalist system to achieve their short-term goals.<sup>11</sup> The pattern is by no means neat or predictable. But, as I explore below in the context of the Clean Air Act, there are characteristics of pollution and environmental regulation that help to ensure that federalism will remain one of the central features of American regulation of pollution.

## I. THE CONSTITUTIONAL PROTECTION OF FEDERALISM

Much of the academic debate about federalism centers on the proper role for judicial review of federal statutes that trench upon state sovereignty. The Supreme Court has delicately conceded that federalism doctrine has "travelled an unsteady path."<sup>12</sup> More accurately, the Court's decisions have careened from one theory to another, not in response to changing social conditions, but as the result of open ideological struggle on the Court.<sup>13</sup> After reviewing Tenth Amendment cases, Professor Merritt identified three distinct models

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11. Political actors unhesitatingly change their views about the importance of state autonomy depending on their own narrow, immediate political needs. A recent example is a proposal by Republicans in the House of Representatives—the same Republicans who have championed the elimination of unfunded mandates and who want to "return power to the states"—to enact federal legislation that would preempt state law on punitive damages and products liability (including liability for drug and medical companies). See Stephen Labaton, *G.O.P. Preparing Bill to Overhaul Negligence Law*, N.Y. TIMES, Feb. 19, 1995, at A1 (noting that Republican attempts to federalize tort law run contrary to the party's traditional states' rights platform). Another example is a claim by auto manufacturers—the people who successfully sought national motor vehicle emission standards preempting state standards—that § 184 of the Clean Air Act, which creates the Ozone Transport Commission comprising several Northeastern states, unconstitutionally forces states to form a regional agency without their consent. *Constitutionality of OTC Actions Upheld in Memo from Justice Department Attorney*, 25 Env't Rep. (BNA) 1687 (Jan. 6, 1995).

12. *New York v. United States*, 112 S. Ct. 2408, 2420 (1992).

13. The ideological polarization on the Court has produced wildly varying results. For example, the majority in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which attempted to use the Tenth Amendment to impose judicially reviewable limits on congressional power, later became the dissenters in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), which imposed virtually no limits under the Tenth Amendment. In his dissent in *Garcia*, Justice Rehnquist declared that the dissenting position "will . . . in time again command the support of a majority in this Court." *Id.* at 580 (Rehnquist, J., dissenting). In 1995, the *Garcia* dissenters formed the core of the majority in *United States v. Lopez*, 115 S. Ct. 1624 (1995), which emphasized federalism principles to establish some limits on congressional power under the Commerce Clause.

of judicial review in recent years: the "territorial" model,<sup>14</sup> the "federal process" model,<sup>15</sup> and most recently the "autonomy" model.<sup>16</sup>

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14. Merritt, *supra* note 10, at 1564. The territorial model relies on the Tenth Amendment to establish certain areas of "traditional governmental functions" reserved to the states. *Id.*; see *National League of Cities*, 426 U.S. at 852 (holding that Congress could not regulate the wages and hours of state and local employees working in areas of "traditional governmental functions"), *overruled by Garcia*, 469 U.S. at 528; *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 286-93 (1981) (holding that the Surface Mining Control and Reclamation Act of 1977 did not exceed constitutional limits on congressional power to interfere with states' "traditional governmental functions"); see also *United States v. Lopez*, 115 S. Ct. 1624, 1630-32 (1995) (identifying education as an area of traditional state control, whose regulation by the federal government under the Commerce Clause may be subject to greater judicial scrutiny). One serious difficulty with the territorial model, as the Court later acknowledged in *Garcia*, is that *National League of Cities* and subsequent cases did not provide a workable test to decide which areas qualified as "traditional governmental functions." *Garcia*, 469 U.S. at 530-31.

15. The federal process model assumes that the states are able to protect themselves in the federal legislative arena, and thus concludes that there should be little or no judicial review. See *Garcia*, 469 U.S. at 550-55 (noting that the federal system gives states political power allowing them to thwart congressional abuse).

*Garcia* drew explicitly upon earlier work by academics who argued that the federal political process is structured to take adequate account of state interests, and that judicial review under the Tenth Amendment should be nonexistent or highly deferential to Congress. See JESSIE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 175-95 (1980) (arguing that federalism claims should be nonjusticiable); D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779 (1982) (arguing that courts should be highly deferential to Congress when reviewing federalism claims); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (arguing that the national political process is structured to retard federal intrusions on state sovereignty).

The federal process model has come under attack as having an unrealistic view of the federal legislative process. See Kramer, *supra* note 1, at 1503-14 (arguing that the arguments for the political process safeguards of federalism are "thin"); Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 15 (1988) (contending that *Garcia's* premise that the structure of federal politics protects state autonomy is "wishful thinking").

16. Under the autonomy model, the Tenth Amendment bars federal legislation only if it "dictates the structure of state governments, commandeers the energy of state administrators, or forces state enactment of particular laws—all without offering state governments the option of nonparticipation." Merritt, *supra* note 10, at 1571; see *New York v. United States*, 112 S. Ct. at 2419-23 (holding unconstitutional a federal statute that required states to take title to low-level radioactive wastes if they did not otherwise provide for disposal of the wastes); see also Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commandeer State Officers to Implement Federal Law*, 95 COLUM. L. REV. 1001 (1995) (arguing that the autonomy model is inconsistent with other constitutional principles, does not achieve the normative goals associated with federalism, and fails to consider important national interests).

In *New York v. United States*, the Court acknowledged that the unconstitutional provision at issue in that case "appears to be unique." 112 S. Ct. at 2429; see also Kramer, *supra* note 1, at 1486-87 ("But the power of Congress to single out state governments for special treatment isn't all that important anyway, because the vast bulk of what the federal govern-

Irrespective of the model of judicial review, as a practical matter, there is virtually no judicially enforced federalism doctrine limiting the reach of federal statutes.<sup>17</sup> Since the end of the Civil War, but especially since 1937, the Court has allowed the breadth and depth of the national government's political power to expand hugely at the expense of state autonomy.<sup>18</sup> Court decisions involving challenges to statutes enacted under the Civil War Amendments establish that Congress has broad power to enforce the amendments and override principles of federalism.<sup>19</sup> Court decisions under the Commerce Clause<sup>20</sup> have upheld congressional statutes regulating private activity, including legislation centralizing economic policy in the federal government, creating new federal civil rights, punishing local criminal activity, and regulating local land use.<sup>21</sup> Under the Spending

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ment does involve private activity."). Thus, the autonomy model may offer little protection for state sovereignty.

17. The model with the most potential for vigorous judicial review—the territorial model—has resulted in almost no victories for the states. *La Pierre*, *supra* note 15, at 956 (noting that after *National League of Cities*, courts found only one statute to be an unconstitutional transgression on state authority).

18. See generally Scheiber, *Federalism and the Diffusion of Power*, *supra* note 2, at 636-75 (tracing the expansion of the federal government since the Civil War).

19. See, e.g., *City of Rome v. United States*, 446 U.S. 156, 179 (1980) (upholding provisions in the Voting Rights Act of 1965 adopted under the Fourteenth Amendment) ("[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.'"); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (upholding provisions in the Voting Rights Act of 1965 enacted under the Fifteenth Amendment) ("As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."); *Ex parte Virginia*, 100 U.S. 339, 346 (1879) (upholding the Act of March 1, 1875, enacted under the Fourteenth Amendment, making criminal any effort to exclude persons from jury service on account of race) ("Nor does it make any difference that such legislation is restrictive of what the State might have done before the constitutional amendment was adopted. The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power").

20. U.S. CONST. art. I, § 8, cl. 3.

21. Since 1937, the Supreme Court has repeatedly and expansively held that Congress has authority under the Commerce Clause to regulate a vast range of private activities, even though the activities are intrastate in character. Although the Court has stated that Commerce Clause authority extends only to intrastate activities that have a "close and substantial relation" to interstate commerce, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (upholding federal regulation of labor relations under the National Labor Relations Act of 1935), the Court's cases make clear that the relation to interstate commerce may be quite tenuous and will be subject only to rational basis judicial review. See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 275-305 (1981) (upholding provisions in the Surface Mining and Reclamation Control Act regulating intrastate mining operations); *Perez v. United States*, 402 U.S. 146, 154-55 (1971) (upholding federal criminal loan sharking provisions in the Consumer Credit Protection Act because local extortionate credit transactions, in aggregate, could affect interstate commerce); *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964) (upholding application of

Clause,<sup>22</sup> the Court has broadly upheld statutes that impose substantive conditions on state activities funded by federal grants.<sup>23</sup>

Taken together, these decisions signal a nearly unconditional abdication of the courts' potential role of promoting federalism by protecting the states from an intrusive Congress.<sup>24</sup> The Supreme Court

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the Civil Rights Act to a local restaurant); *Wickard v. Filburn*, 317 U.S. 111, 118-29 (1942) (upholding regulation of the production of wheat intended for consumption on the farm under the Agricultural Adjustment Act of 1938).

The recent case of *United States v. Lopez*, 115 S. Ct. 1624 (1995), does not alter this basic conclusion. In *Lopez*, a bare majority of the Court struck down a provision in the Gun-Free School Zones Act of 1990, which made criminal the possession of a gun in a school zone. *Id.* at 1634; see 18 U.S.C. § 922(q)(1)(A) (Supp. V 1993). The Court held that this provision exceeded congressional power under the Commerce Clause because it did not have a substantial impact on interstate commerce. *Lopez*, 115 S. Ct. at 1630-33. No doubt, the majority opinion indicated that five members of the Court are less willing to defer to congressional assertions of Commerce Clause power especially when, as in *Lopez*, the regulated activity was not commercial and the federal law impinged on areas of traditional state control (*i.e.*, education). *Id.* at 1630-32. But the case may have little long-term impact. It did not reject any previous cases, and it reiterated that the proper standard of review is rational basis. *Id.* at 1628-29. With regard to environmental statutes, which are almost always tied to interstate commerce, the impact of the decision, if any, will be at the margins. See John P. Dwyer, *The Commerce Clause and the Limits of Congressional Authority to Regulate the Environment*, 25 *Env'tl. L. Rptr.* (Env'tl. L. Inst.) 10,421 (Aug. 1995) (discussing the impact of *Lopez* on federal environmental legislation).

22. U.S. CONST. art. I, § 8, cl. 1 (giving Congress the authority to spend "to provide for the . . . general Welfare of the United States").

23. See *South Dakota v. Dole*, 483 U.S. 203, 206-12 (1987) (upholding a provision in the Surface Transportation Act directing the Secretary of Transportation to withhold up to 10% of federal highway funds from states that did not adopt a minimum drinking age of 21 years); *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 142-44 (1947) (upholding a provision in the Hatch Act restricting political activity by employees of state agencies supported in part by federal funds).

*South Dakota v. Dole* makes clear that the Spending Clause is an independent grant of federal authority, potentially broader than the Commerce Clause or other provisions in Article I, § 8. 483 U.S. at 207 ("In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress."). Although the Court also required that the grant conditions be related to the underlying project, the relation can be exceedingly tenuous. See *id.* at 215 (O'Connor, J., dissenting) (arguing that the relationship between a minimum drinking age and highway construction was so weak that "Congress could effectively regulate almost any area of a State's social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced."); see also Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 117-25 (arguing that there are no meaningful doctrinal constraints to federal power under *South Dakota v. Dole*). See generally Merritt, *supra* note 15, at 46-50 (arguing that courts should vigorously enforce doctrinal limits established under the Spending Clause); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987) (concluding that there are few constitutional limits on conditions imposed on federal grants to states, even though states have no realistic alternative of rejecting federal grants when they do not like the conditions).

24. These cases focus on the limits of congressional authority. Other cases have limited federal court jurisdiction and judicial remedies over state institutions and officials. See



might reenter the fray, especially with Spending Clause cases, but given the well established breadth of Commerce Clause doctrine and given that most federal environmental regulation addresses private commercial activity directly, the Court's impact on environmental law will be at the far margins of federalism.

## II. THE POLITICAL PROTECTIONS OF FEDERALISM IN ENVIRONMENTAL REGULATION

Although the federal courts do not give much shelter to state autonomy, it does not necessarily follow that state autonomy and authority over environmental matters have been exterminated. Congress may have constitutional power to regulate the environment exclusive of state concerns and preferences, but it need not exercise that power to its fullest extent. The actual allocation of regulatory authority between federal and state governments depends on legislative and bureaucratic politics.

A review of federal air pollution legislation, as written by Congress and implemented by EPA, strongly suggests both that the states are not puppets of Congress or EPA—states continue to wield considerable regulatory authority—and that their ability to make wholly autonomous choices regarding air pollution control has been greatly scaled back.<sup>25</sup> Although the states are by no means equal partners in regulating the environment, they paradoxically remain indispensable partners. The fundamental reason for the states' continuing importance is that the federal government needs state bureaucracies (with their technical and administrative resources) and state politicians (with their political and budgetary support) to achieve its environmental goals.

### A. *Formal Federalism: State Autonomy Imbedded in the Clean Air Act*

The great watershed in federal-state relations in air pollution control was the Clean Air Act of 1970.<sup>26</sup> Before 1970, the federal regulatory role was quite small. In the late 1950s and early 1960s, federal air

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Scheiber, *Federalism and Legal Process*, *supra* note 2, at 685-86 (noting that Supreme Court decisions limit federal court oversight of state judicial procedure and restrict federal court reform of state institutions). Thus, the Court seems somewhat more willing to promote federalism by limiting the reach of federal judicial authority, while giving relatively free reign to congressional authority.

25. See *infra* notes 38-76 and accompanying text.

26. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7671q (1988 & Supp. V 1993)) (commonly referred to as the Clean Air Act).

pollution legislation consisted primarily of directives for greater federal research<sup>27</sup> and unworkable procedures to referee and abate interstate pollution problems.<sup>28</sup> States were expected to design and administer any air pollution control programs that might be required.<sup>29</sup> In 1965 and 1967, the federal role expanded slightly as Congress enacted legislation creating federal authority to establish federal motor vehicle standards.<sup>30</sup> The 1967 legislation also required a federal agency to establish air quality regions and adopt air quality criteria, and it created weak federal authority to abate air pollution, but it still left states with the responsibility to adopt air quality standards and air pollution control plans.<sup>31</sup>

Regulatory power flowed swiftly to the central government through the 1970 amendments to the Clean Air Act. The legislators who championed the 1970 Act contemplated that the federal regulatory role would increase substantially at the expense of the states,<sup>32</sup>

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27. The Act of July 14, 1955, ch. 360, 69 Stat. 322, created a federal program to promote research and to provide technical assistance to states. The Act of June 8, 1960, Pub. L. No. 86-493, 74 Stat. 162, authorized research into the effects and control of air pollution from motor vehicles. The Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392, extended federal research and technical assistance programs, and gave HEW authority to set advisory air quality criteria.

28. The Clean Air Act of 1963 established cumbersome procedures to abate interstate pollution. See generally Sidney Edelman, *Air Pollution Abatement Procedures Under the Clean Air Act*, 10 ARIZ. L. REV. 30 (1968).

29. The 1963 Act explicitly stated that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments." § 1(a)(3), 77 Stat. 392, 393 (codified at 42 U.S.C. § 7401(a)(3) (1988)).

30. In the Motor Vehicle Air Pollution Control Act, Pub. L. No. 89-272, 79 Stat. 992 (1965), Congress established federal authority to adopt emission standards for new motor vehicles, but did not explicitly preempt state emission standards. In the Air Quality Act of 1967, Pub. L. No. 90-148, sec. 2, § 208, 81 Stat. 485, 501, Congress made clear that, except in California, state motor vehicle emission standards were preempted.

31. Air Quality Act of 1967, sec. 2, § 108, 81 Stat. at 490-97; see Robert Martin & Lloyd Symington, *A Guide to the Air Quality Act of 1967*, 33 LAW & CONTEMP. PROBS. 239, 255-58 (1968) (describing the role of the states in adopting air quality standards and pollution control plans); John E. O'Fallon, *Deficiencies in the Air Quality Act of 1967*, 33 LAW & CONTEMP. PROBS. 275, 286-92 (1968) (analyzing the central role of state and local agencies in complying with the Act).

32. See, e.g., 116 CONG. REC. 32,901 (1970) (comments of Sen. Muskie) ("However, State and local governments have not responded adequately to this challenge. It is clear that enforcement must be toughened if we are to meet the national deadlines. More tools are needed, and the Federal presence and backup authority must be increased."); *id.* ("[W]e have learned from experience with implementation of the [1967 Air Quality Act] that States and localities need greater incentives and assistance to protect the health and welfare of all people."); *id.* at 19,206 (comments of Rep. Springer) ("If a State hangs back and fails to move out, the Federal Government will take over and make rules and regulations amounting to a State plan."); H.R. REP. NO. 1196, 91st Cong., 2d Sess., 4 (1970) ("Within a short period, the pressures for additional staff and funds will also be felt by States. Should the States fail to respond to that pressure, the deadlines established by the

but they also ensured that the states would have a substantial role in implementing and enforcing the federal program. Sponsors of the bill forcefully argued that the legislation required state participation to be successful. Congressman Staggers, the floor manager of the House bill, explained that state participation was indispensable:

If we left it all to the Federal Government, we would have about everybody on the payroll of the United States. We know this is not practical. Therefore, the Federal Government sets the standards, we tell the States what they must do and what standards they must meet. These standards must be put into effect by the communities and the States, and we expect them to have the men to do the actual enforcing.<sup>33</sup>

The chief Senate sponsor, Senator Muskie, also contemplated that effective implementation of the Act required state and local cooperation:

In title I of this act we have written a national deadline for the purpose of implementing applicable ambient air quality standards. That is going to require every State Governor and the mayor of every city in this country to impose strict controls on the use of automobiles before the new car is a clean one.<sup>34</sup>

These members of Congress were concerned with the practical difficulties that would arise from implementing, enforcing, and funding the vast and complicated Clean Air Act. Conceivably, by delegating implementation and enforcement to the states, Congress was also shifting politically sensitive issues to state officials.<sup>35</sup> Few members of Congress, however, expressed any sentiments for the abstract values of state autonomy, once lovingly described as "Our Federalism."<sup>36</sup> On the contrary, federal legislators viewed state autonomy with suspicion

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Act would require broader Federal involvement in regional and State programs."); *see also infra* note 60 (citing interstate competition for business as the reason states had weak air pollution control laws).

33. 116 CONG. REC., *supra* note 32, at 19,204 (comments of Rep. Staggers).

34. 116 CONG. REC., *supra* note 32, at 32,903 (comments of Sen. Muskie).

35. *See* Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 274-90 (1990) (arguing, based on a simple public choice model, that Congress will delegate regulatory authority to the states when doing so will shift some of the blame for controversial laws to the states).

36. Justice Black used this phrase in *Younger v. Harris*, 401 U.S. 37, 44 (1971) (holding that principles of federalism prevent federal courts from enjoining pending state judicial proceedings).

because the states had failed to impose adequate air pollution controls.<sup>37</sup>

As a result of these pragmatic administrative and political concerns, Congress weaved a complicated role for the states in the 1970 Act, a role that became more complicated in the 1977 and 1990 amendments to the Act. Congress sought both to enlist the states' assistance and to bend them to the federal will. To do so, Congress reserved an important role for the states in implementing and enforcing the federal program, excluded the states from certain policy decisions and programs where it suspected that the states would undermine federal goals, and created mechanisms to compel the states to adhere to federal policy.

1. *Delegation: State Implementation of the Federal Program.*—Even a cursory review of the Clean Air Act shows that the states are important actors in the implementation and enforcement of air pollution policy. Section 110 offers states the opportunity to adopt and enforce state implementation plans (SIPs) that allocate air emissions among stationary sources so long as the aggregate emissions do not violate federal air quality standards.<sup>38</sup> The SIPs are subject to EPA approval,<sup>39</sup> and states that decline or are unable to submit adequate SIPs become subject to a federal implementation plan (FIP) that EPA must design and enforce.<sup>40</sup> In other words—and this is critical for federalism jurisprudence—the language in section 110(a)(1) of the Act providing that states “shall” adopt an SIP is directory, not mandatory. Formally, at least, the states always have an exit option.<sup>41</sup>

Section 110 is enormously detailed in its specifications, and EPA's regulations are even more detailed.<sup>42</sup> Statutory and regulatory provisions require states to allow public participation when formulating an

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37. See *supra* note 32 (arguing that federal intervention was necessary because states had failed to act); see also *infra* note 60 (suggesting that states could not be trusted to adopt adequate environmental controls because they would compete with each other for business).

38. Clean Air Act, 42 U.S.C. § 7410(a)(2) (1988 & Supp. V 1993).

39. *Id.* § 7410(a)(1), (a)(3), (k).

40. *Id.* § 7410(c).

41. Similarly, if states fail to administer or enforce the permit program required by Subchapter V, EPA must “promulgate, administer and enforce” a federal permit program.

42 U.S.C. § 7661a(i)(4).

The constitutional importance of the states' exit option became clear when the Supreme Court wrote, in the context of a Tenth Amendment case about another environmental statute, that “[t]he Federal Government may not compel the states to enact or administer a federal regulatory program.” *New York v. United States*, 112 S. Ct. 2408, 2435 (1992).

42. See 40 C.F.R. pts. 51-52 (1995).

SIP,<sup>43</sup> to employ quantified emission limitations and timetables for compliance,<sup>44</sup> to adopt monitoring and enforcement programs,<sup>45</sup> to adopt provisions limiting interstate pollution,<sup>46</sup> to have adequate personnel, funding, and legal authority to implement the plan,<sup>47</sup> to have contingency plans,<sup>48</sup> to revise the SIP periodically,<sup>49</sup> and to ensure compliance with the nonattainment and PSD programs.<sup>50</sup> The nonattainment provisions, which Congress first adopted in 1977, and then greatly expanded in the 1990 amendments, establish detailed requirements and timetables designed to bring polluted areas into compliance with national air quality standards.<sup>51</sup> Finally, the 1990 amendments adds subchapter V,<sup>52</sup> which requires states to establish a comprehensive, and potentially burdensome, permit program for stationary sources.<sup>53</sup> In short, the states' role, if they accept it, is subject to a great deal of federal specification, oversight, and approval.

2. *Preemption: Excluding States from Basic Policy Decisions.*—States are excluded from or have a limited formal role in many basic policy decisions. For example, under section 109, EPA must set nationally uniform ambient air quality standards for criteria pollutants.<sup>54</sup> Section 111 requires EPA to adopt nationally uniform "new source performance standards" (NSPS) for certain new or modified stationary sources,<sup>55</sup> and section 112 requires EPA to adopt nationally uniform emission standards for sources of hazardous air pollutants.<sup>56</sup> The Act also establishes nationally uniform emission standards for new motor

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43. 42 U.S.C. § 7410(a)(1).

44. *Id.* § 7410(a)(2)(A).

45. *Id.* § 7410(a)(2)(B), (C).

46. *Id.* § 7410(a)(2)(D).

47. *Id.* § 7410(a)(2)(E).

48. *Id.* § 7410(a)(2)(G).

49. *Id.* § 7410(a)(2)(H).

50. *Id.* § 7410(a)(2)(I), (J).

51. *Id.* §§ 7501-7515.

52. *Id.* §§ 7661-7661f.

53. See generally Michael R. Barr, *How States Can Successfully Implement the New Operating Permit Title*, 7 NAT. RESOURCES & ENV'T 7 (Fall 1992) (suggesting ways in which states may comply with EPA permit regulations); David P. Novello, *EPA's Title V Operating Permit Rules: The Blueprint for State Permitting Programs*, 7 NAT. RESOURCES & ENV'T 3 (Fall 1992) (outlining EPA regulations for implementing permit programs); Timothy L. Williamson, *Fitting Title V into the Clean Air Act: Implementing the New Operating Permit Program*, 21 ENVTL. L. 2085 (1991) (exploring problems Title V will pose for state implementation programs). States are free to establish additional permit requirements. 42 U.S.C. § 7661e.

54. 42 U.S.C. § 7409.

55. *Id.* § 7411.

56. *Id.* § 7412. States, however, are required to include these sources in the new subchapter V permit program. *Id.* § 7661a(a).

vehicles,<sup>57</sup> and preempts most state emission standards for motor vehicles.<sup>58</sup> Sections 160-169 (first adopted in 1977) impose a federal "prevention of significant deterioration" (PSD) program as part of every SIP or FIP for an attainment area.<sup>59</sup>

Congress's widely repeated justification for preempting less stringent state ambient air quality standards and certain stationary source emission standards, and for creating the mandatory PSD program, was the states' natural tendency to compete in a "race-to-the-bottom" for business. Because of their willingness to relax environmental standards to attract or keep economic development, states could not be trusted to adopt adequate standards.<sup>60</sup> A different problem prompted Congress to require nationally uniform new car standards—fears that auto manufacturers might have to meet up to fifty different motor vehicle emission standards.<sup>61</sup>

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57. *Id.* §§ 7521-7554.

58. *Id.* § 7543(a).

59. *Id.* §§ 7470-7479.

60. See 116 CONG. REC., *supra* note 32, at 33,115 (comments of Sen. Prouty) ("To be sure, minimum Federal standards are a must, as they free the 50 States from the necessity of competing for business by lowering their standards."); *id.* at 33,116 (remarks of Sen. Cooper) (claiming that nationally uniform new source performance standards will "eliminate a large element of 'forum shopping' that is possible if new facilities are not required to meet the level of pollution control"); *id.* at 19,209 (comments of Rep. Jarman) ("The promulgation of Federal emission standards for new sources in the aforementioned categories will preclude efforts on the part of States to compete with each other in trying to attract new plants and facilities without assuring adequate control of extrahazardous or large-scale emissions therefrom."); *id.* at 19,213 (comments of Rep. Preyer) ("But if we do not have national standards, we find what has happened is that States begin to bid against each other to attract polluting industries."). Finally, Representative Vanik stated:

To date, the States have been left to establish their own air quality standards. In all too many areas, there has been delay and foot dragging—and ridiculously low standards set to accommodate local industries and interests. The establishment of national standards will ensure action throughout the Nation on a rapid basis. . . . National standards of pollution control would prevent another State from attracting any industries because of a greater pollution tolerance. Such competition is unfair and against the public interest.

*Id.* at 19,218.

These views were repeated in committee reports. See H.R. REP. NO. 1146, 91st Cong., 2d Sess. 3 (1970) ("The promulgation of Federal emission standards for new sources in the aforementioned categories will preclude efforts on the part of States to compete with each other in trying to attract new plants and facilities without assuring adequate control of extra-hazardous or large-scale emissions therefrom."); H.R. REP. NO. 294, 95th Cong., 1st Sess. 133-35 (1977) (citing competition among states as the reason for a nationally mandated PSD program in the 1977 amendments).

61. Congress repeatedly expressed concern about the inefficiency of multiple new motor vehicle emission standards. The Senate Report on the Motor Vehicle Air Pollution Control Act of 1965, which did not include an express preemption provision, stated that "it would be more desirable to have national standards rather than for each State to have a variation in standards and requirements which could result in chaos insofar as manufactur-

Despite its concerns that the states' parochialism worked against the public interest,<sup>62</sup> Congress did not wholly eliminate state authority and autonomy in these parts of the federal air pollution control program. States are free under section 116 of the Act to adopt more stringent air quality standards and stationary source emission standards.<sup>63</sup> The PSD program explicitly permits economic development that will degrade air quality to some extent, and there are provisions (admittedly they are procedurally burdensome) that permit each state to adopt either a relatively pro-development or more environmentally protective PSD program.<sup>64</sup> Even the provisions for national motor vehicle emission standards permit states some flexibility. Subject to EPA approval, California may adopt its own new car emission standards,<sup>65</sup> and other states with nonattainment areas also may adopt the California standards.<sup>66</sup>

3. *Coercion: Requirements and Sanctions to Compel State Cooperation.*—Finally, Congress has adopted certain mechanisms to compel states to stick with and promote the federal program. In its current form, the Act requires state and local transportation planning agencies to adhere to the transportation control provisions in the SIP. No metropolitan planning organization (MPO) responsible for transpor-

ers, dealers, and users are concerned." S. REP. NO. 192, 89th Cong., 1st Sess. 6 (1965). The Senate Report on the Air Quality Act of 1967, which included a preemption provision, stated that the Act included a "single national standard in order to eliminate undue economic strain on the industry." S. REP. NO. 403, 90th Cong., 1st Sess. 81 (1967). During consideration of the proposed Clean Air Act of 1970, the House rejected an amendment to the House bill to permit each state to adopt its own new motor vehicle emission standards, largely on the ground that multiple standards would be inefficient. See 116 CONG. REC., *supra* note 32, at 19,231-37.

62. Some scholars have argued that these concerns may be baseless. See Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (arguing that the need for federal standards based on interstate competition for business has not been demonstrated); David P. Currie, *Motor Vehicle Air Pollution: State Authority and Federal Pre-emption*, 68 MICH. L. REV. 1083 (1970) (arguing that federal preemption of state motor vehicle emission standards is unnecessary).

63. 42 U.S.C. § 7416.

64. *Id.* § 7474.

65. *Id.* § 7543(b), (e); S. REP. NO. 1196, 91st Cong., 2d Sess. 32 (1970) (stating that the provision for waiver of federal preemption was intended for California).

Congress first adopted the special provision for California in the Air Quality Act of 1967 as a result of intense state lobbying. JAMES E. KRIER & EDMUND URSIN, *POLLUTION AND POLICY* 181-83 (1977). California had adopted motor vehicle emission standards long before the federal government adopted such standards, and thus the state led the way for federal standards. See *generally id.* at 135-95.

66. 42 U.S.C. § 7507. In addition, the Act authorizes California to establish a clean-fuel vehicle program, which other states may join. *Id.* § 7589(a), (f).

tation planning may approve a transportation project or plan unless it conforms to an approved SIP,<sup>67</sup> and the MPO's transportation plan<sup>68</sup> must implement the transportation control provisions in the SIP.<sup>69</sup> Moreover, no federal agency may approve or fund any transportation project or transportation plan unless it conforms to the SIP.<sup>70</sup>

Congress also gave EPA coercive powers to compel states to submit and administer adequate SIPs. Under the current Act, if EPA finds that a state is not implementing its SIP in a nonattainment area, no permits may be issued to construct or modify major stationary sources.<sup>71</sup> In addition, if a state has not submitted or is not implementing a SIP in a nonattainment area, EPA must either prohibit the Secretary of Transportation from approving any projects or awarding grants,<sup>72</sup> or impose restrictions on new construction,<sup>73</sup> or both.<sup>74</sup> EPA also may withhold federal grants for air pollution planning and control programs and sewage treatment programs.<sup>75</sup> These sanctions are also available if a state does not administer or enforce the new subchapter V permit program.<sup>76</sup>

4. *Cooperative Federalism: Filling in the Details of the Federal Program.*—Three points can be drawn from this tedious (though incomplete) excursion through the Clean Air Act. First, Congress made the major policy decisions or assigned them to EPA.<sup>77</sup> The statute itself

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67. *Id.* § 7506(c)(1).

68. *See* 49 U.S.C.A. §§ 5301, 5303-5306 (West Supp. 1995) (formerly codified at 49 U.S.C. app. § 1607 (Supp. V 1993)) (requiring MPOs to develop transportation plans and programs).

69. 42 U.S.C. § 7506(c)(2).

70. *Id.* § 7503(c)(1), (c)(2).

71. *Id.* § 7503(a)(4). Although this sanction is directed against polluters, and not against states, it will produce political pressure on states to conform to the Clean Air Act's requirements.

72. *Id.* § 7509(b)(1)(A). Certain projects and grants, such as those related to safety or public transit, are exempt from this sanction. *Id.* § 7509(b)(1)(B).

73. *Id.* § 7509(b)(2). This provision increases the offset ratio to 2, which means that new or modified sources must reduce twice as much air pollution at other sources as they will add.

74. EPA must impose both sanctions if EPA "finds a lack of good faith" or if, six months after EPA has applied one sanction, the state has failed to correct the deficiency. *Id.* § 7509(a); *see also id.* § 7410(m) (establishing additional authority for EPA to impose sanctions).

75. *Id.* §§ 7509(a), 7616(b).

76. *Id.* § 7661a(i).

77. Congress dictated the minimum elements for SIPs, mandated special programs (*e.g.*, nonattainment, PSD) and established substantive and procedural criteria, including specific compliance deadlines. Congress decided to require emission standards for a variety of sources (NSPS, hazardous air pollutants, motor vehicles) and established the standards or the criteria for the standards.



contains a wealth of regulatory detail, thereby substantially limiting states' policy flexibility.<sup>78</sup> Yet, Congress also has left states considerable room to build upon policy decisions from which they are nominally excluded. States are free, for example, to set stricter air quality and emission standards, including a variant of the nominally uniform new car standards, and to modify the federal PSD program.

Second, Congress delegated substantial implementation and enforcement responsibilities to the states if they want them and are willing to conform their regulatory programs to minimal federal criteria. Clearly, much of what is left to the states is filling in the details. But these details are enormously important on the state and local level. The authority to allocate emissions to industry gives states an opportunity to play a significant political role in controlling air pollution and making related decisions about land use and economic development—an opportunity that the vast majority of states have taken. States may believe that they will do a more effective job than EPA in protecting the environment. Or, because air pollution regulation has a substantial impact on local economic development, states may believe they can achieve the federal goals more efficiently and with less disruption of local economies than bureaucrats who answer to headquarters in Washington, D.C. It may also be that with the availability of federal grants, state budgets are not unduly strained by assumption of the federal program.<sup>79</sup>

Third, Congress adopted mechanisms to coerce state cooperation without directly taking over state legislative and administrative bodies. Although states retain an exit option, a state's failure to submit or implement an adequate SIP may result in a cutoff of substantial federal funds that are important to state and local economies. Moreover, federal and metropolitan transportation planning agencies must conform to the SIP or FIP. And, of course, a state's continued failure to submit or enforce an acceptable SIP would result in EPA assuming those responsibilities. Exercising an exit option would come at the

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78. Congress not only mandated federal standards, it decided that they had to be nationally uniform standards, and it specified the criteria to be used in setting those standards (e.g., protection of public health and the irrelevance of compliance costs for air quality standards). Some scholars have argued that nationally uniform federal standards are unwise. See James E. Krier, *The Irrational National Air Quality Standards: Macro- and Micro-Mistakes*, 22 UCLA L. REV. 323, 324-35 (1974) (arguing that nationally uniform standards are inefficient and unfair).

79. See 42 U.S.C. § 7405 (grants for air pollution planning and air pollution control programs); *id.* § 7406 (grants for interstate pollution plans); *id.* § 7544 (grants for "developing and maintaining effective vehicle emissions devices and systems inspection and emission testing and control programs").

cost of state control of the air pollution control program and related land use and economic decisions.

*B. Informal Federalism: State Autonomy in the Implementation of Federal Air Pollution Policy*

The dynamics of legislative enactment and regulatory enforcement under the Clean Air Act also illustrate, from another angle, that Congress and EPA have been responsive to state and local concerns. The federal government's attitude toward state autonomy has not been constant over time; it ebbs and flows in response to administrative and political needs and goals. By no means have the states been triumphant in fending off federal intrusion. At the same time, however, they have not collapsed as independent political units. The federal authorities' responsiveness, moreover, is not due to federal sympathy for the ideals of federalism, but rather to their need for state cooperation and political support. Two sets of events—the struggle over mandatory land use and transportation controls, and EPA's enforcement against recalcitrant states regarding state inspection and maintenance (I & M) programs for motor vehicles—reveal the ongoing political vitality of the states in environmental policy.

*1. Land Use and Transportation Controls: Federal Assumption of Traditional State Authority and Control of State Agencies.*—The story of land use and transportation controls, which is not yet over, has spanned the entire life of the Clean Air Act. It reveals both the expansive reach of federal authority, and the readiness of Congress and EPA to relinquish some of that authority in the face of determined state resistance.

Neither of the major air pollution bills moving through Congress in 1970 contained provisions for land use and transportation controls. Indeed, given the tradition of local land use regulation in this country, such a provision would have been startling to many legislators. Nevertheless, after the House and Senate bills passed their respective chambers in the summer of 1970, the Conference Committee negotiators added a brief phrase mandating provisions for "land use and transportation controls" in SIPs if necessary to achieve federal air quality standards.<sup>80</sup> Given the absurdly short deadlines<sup>81</sup> that Con-

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80. H.R. REP. NO. 1783, 91st Cong., 2d Sess. 45 (1970).

81. The Act effectively required achievement of these standards by 1975. 42 U.S.C. § 1857c-5(a)(1), (a)(2)(A) (1970) (requiring states to submit SIPs within nine months of EPA's adoption of ambient air quality standards, requiring EPA to approve or disapprove SIPs within four months of submission, and requiring states to achieve primary standards

gress set to achieve the strict national standards,<sup>82</sup> and given that the new car emission standards would not have an impact on air quality until well after the deadlines,<sup>83</sup> land use and transportation controls were legally required in most urban areas. In short, the Conference Committee quietly had included a provision that would be both controversial and unavoidable.

The Conference Committee Report did not discuss the meaning of the new language. It simply stated, in less than a sentence, that a state implementation plan "would also have to provide for necessary land use and transportation controls."<sup>84</sup> Not one House member mentioned land use and transportation controls in the House debate over the Conference Committee Report, and the sole comment in the Senate was by Senator Muskie, who said that "transportation controls" were intended to reorient local land use practices.<sup>85</sup> Thus, this tiny addition (in terms of the number of words) to a sprawling and im-

no later than three years after EPA approval of SIPs). Because EPA adopted the air quality standards on April 30, 1971, 36 Fed. Reg. 8186 (1971), the Act required the federal standards to be achieved by May 31, 1975. The Act provided that EPA could extend the attainment date by up to two years. 42 U.S.C. § 7410(e) (1988) (repealed 1990).

82. The Act requires EPA to set ambient air quality standards that would protect public health without regard to implementation costs. See *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1148-51 (D.C. Cir.) (discussing language and legislative history of the Act), *cert. denied*, 449 U.S. 1042 (1980).

83. New car standards were not scheduled to begin until 1975 for carbon monoxide and hydrocarbon emissions and in 1976 for nitrogen oxide emissions. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 6(a), 84 Stat. 1676, 1690. Because most cars are likely to stay on the road for 10 years, the new car standards could not begin to have a serious impact on air quality until the late 1970s or early 1980s.

84. H.R. REP. NO. 1783, 91st Cong., 2d Sess. 45 (1970).

85. Senator Muskie noted:

For example, construction of urban highways and freeways may be required to take second place to rapid transit and other public transportation systems. The use of motor vehicles may have to be restricted . . . . [W]hat is involved in these greater urban areas, from the standpoint of air pollution, is the whole complex of residential patterns, employment patterns, and transportation patterns—the way in which people move about, go to their work, and live—and all of this ought to be subject to modification, and must be modified if the objective of clean air is to be achieved.

116 CONG. REC., *supra* note 32, at 42,393 (comments of Sen. Muskie). Muskie also appended to his comments a brief written summary of the Conference Committee agreements, which included a reference to land use and transportation controls. He stated that:

[I]mplementation of standards will require changes in public policy: land use policies must be developed to prevent location of facilities which are not compatible with implementation of national standards. . . . Transportation policies must be developed or improved to assure that the impact of pollution from existing moving sources is reduced to the minimum compatible with the needs of each region. Construction of urban highways and freeways may be required to take second place to rapid and mass transit and other public transportation systems. Central city use of motor vehicles may have to be restricted.

mensely popular statute passed almost without comment or notice.<sup>86</sup> Senator Muskie seemed to understand the significance of the addition, but no one else really paid attention.

This astonishingly open-ended provision not only gave EPA enormous authority to intrude directly into a policy-making area that states had historically controlled, it also effectively required EPA to do so. Given the absence of serious congressional consideration of this sensitive issue, EPA lacked the political legitimacy to regulate land use. It also lacked the administrative resources, expertise, and necessary technical information (*e.g.*, emissions data, air quality data, and the relationship among emissions, controls, and air quality) to adopt specific criteria for land use and transportation controls.<sup>87</sup> EPA's incompetence was sure to magnify the political turmoil that would result from such controls.

EPA sensed both its own political and technical limitations and the mammoth technical task that the states faced.<sup>88</sup> EPA's first regulations governing preparation of SIPs barely mentioned land use and transportation controls.<sup>89</sup> Although each state submitted a proposed

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*Id.* at 42,384 (Summary of the Provisions of Conference Agreement on the Clean Air Act Amendments of 1970). This language was originally quoted in the Senate Report of the original Senate bill. S. REP. NO. 1196, 91st Cong., 2d Sess. 2 (1970); *see also id.* at 13 (stating that some areas may require "traffic control regulations and restrictions that could impose severe hardship on municipalities and States.").

86. That the Act passed without significant comment regarding the "land use and transportation controls" provision is hardly surprising. The bill was roaring through Congress on its way to unanimous enactment, and the report was printed only the day before the Senate and House debate. With the public clamor for environmental protection (Earth Day was the previous spring) and the competition among presidential contenders from both parties, it is doubtful that many members of Congress read the seemingly minor statutory details of this 37-page act carefully or critically. *See* John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGY L.Q.* 233, 242-44 (1990).

Even under less hectic circumstances, few members of Congress look carefully at congressional reports attached to the bills. Former Congressman Abner Mikva has written that members of Congress do not write or read congressional reports when deciding whether to vote for or against a bill. *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1088 (D.C. Cir. 1981) (Mikva, J., concurring) (observing that legislative "committee reports are often authored entirely by staff members, and that in the rush and flurry of events active congressmen may never have an opportunity to read these reports at all").

87. R. SHEP MELNICK, *REGULATION AND THE COURTS* 305-08 (1983).

88. *See* 37 Fed. Reg. 10,842, 10,844 (1972) (approval and promulgation of state implementation plans) (acknowledging that the states had "practically no experience with transportation control measures as a means of dealing with air quality problems and that available data were not sufficient to permit states to develop meaningful transportation control schemes and predict their impact on air quality"). Of course, EPA had no experience or data either.

89. EPA's regulations stated only that if a SIP relied on such controls it must set forth a timetable for obtaining legal authority to implement them. 36 Fed. Reg. 15,486, 15,489 (1971).

SIP for approval, the state plans contained either no measures or only minor measures for land use and transportation controls.<sup>90</sup> After reviewing the state plans, EPA automatically granted all states a two-year extension to meet the federal air quality standards.<sup>91</sup> The agency also approved many of the SIPs, even those without land use or transportation control measures, and in other cases disapproved the plans but granted the states an extension until February 15, 1973, to submit plans with the controls.<sup>92</sup> EPA was in no rush to take control of the state programs. Instead, it wanted time to gather the necessary data, and to give itself and the states an opportunity to create effective programs.

There was, however, no statutory authority for either of these extensions. On January 31, 1973, the Court of Appeals for the District of Columbia Circuit ordered EPA to rescind both extensions, to require states to submit complete SIPs by April 15, 1973, and to prepare an FIP for each state that did not submit an adequate SIP with land use and transportation controls if needed to meet air quality standards.<sup>93</sup> EPA eventually would be compelled to federalize land use and transportation controls in many states.

Following the court's order, EPA notified twenty-two states that they must submit new transportation control plans.<sup>94</sup> The agency also disapproved all SIPs because they did not include adequate provisions for land use controls,<sup>95</sup> and required the states to submit "indirect

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90. Daniel R. Mandelker & Susan B. Rothschild, *The Role of Land-Use Controls in Combating Air Pollution Under the Clean Air Act of 1970*, 3 *ECOLOGY L.Q.* 235, 254 & n.75 (1973).

91. 37 Fed. Reg. 10,842, 10,845 (1972).

92. For states granted extensions, see *id.* at 10,850 (Arizona); *id.* at 10,855 (California); *id.* at 10,856 (Colorado); *id.* at 10,858 (District of Columbia); *id.* at 10,863 (Illinois); *id.* at 10,871 (Maryland); *id.* at 10,873 (Massachusetts); *id.* at 10,875 (Minnesota); *id.* at 10,884 (New York); *id.* at 10,887 (Ohio); *id.* at 10,889 (Oregon); *id.* at 10,891 (Pennsylvania); *id.* at 10,898 (Texas); *id.* (Utah); *id.* at 10,901 (Washington).

93. *NRDC v. EPA*, 475 F.2d 968, 970-71 (D.C. Cir. 1973). Meanwhile, after EPA had disapproved portions of the proposed SIP for the Los Angeles basin, another court ordered EPA to prepare a FIP within two months. *City of Riverside v. Ruckelshaus*, 4 Env't Rep. Cas. (BNA) 1728, 1731 (C.D. Cal. 1972). EPA knew the exercise was meaningless, but to comply with the court order it proposed a plan to require, among other things, rationing of gasoline that would reduce gasoline consumption by 80%. 38 Fed. Reg. 2194, 2195-96 (1973). See generally *KRIEGER & URSIN*, *supra* note 65, at 218-34. Although the case was later vacated as moot, the Ninth Circuit first upheld the gas rationing plan. See *City of Santa Rosa v. EPA*, 534 F.2d 150 (9th Cir. 1976) (holding that EPA had statutory authority to implement a gas rationing plan and that Congress had authority under the Commerce Clause to require such a plan, even though the plan would require 100% reduction in gasoline consumption to meet federal air quality standards), *cert. dismissed*, 429 U.S. 952, *cert. granted and vacated*, 429 U.S. 990 (1976).

94. 38 Fed. Reg. 7323, 7324 (1973).

95. 38 Fed. Reg. 6279, 6279 (1973).

source review" programs for EPA approval<sup>96</sup> as part of their land use controls. These controls were designed to reduce pollution from motor vehicles by imposing restrictions on parking and on the construction of new parking facilities in polluted areas.

Several states balked at these requirements and deadlines. State officials saw that EPA's order would strip them and local officials of a traditional source of political power, and that their participation would leave them vulnerable to the political consequences of what would surely be unpopular measures.<sup>97</sup> Professor Melnick states that state officials "preferred to let EPA write and enforce its own plans."<sup>98</sup> Few states submitted adequate land use and transportation controls by the court's deadline,<sup>99</sup> thereby forcing EPA to issue FIPs for several states.

Driven to implement the Act hurriedly, and realizing that it had neither the administrative resources nor the technical expertise to design and implement detailed land use and transportation controls, EPA tried to force the problem onto the unwilling states.<sup>100</sup> EPA maintained that since the roads, which belonged to the states, were

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96. *Id.*; see also 38 Fed. Reg. 12,920 (1973) (miscellaneous amendments to previous publications). "Indirect sources" are construction projects that do not themselves emit air pollutants, but which generate additional driving and thus additional air pollution. EPA listed several examples of indirect sources, including "major highways and airports, large regional shopping centers, major municipal sports complexes or stadiums, major parking facilities, and large amusement and recreational facilities." 38 Fed. Reg. 15,834, 15,837 (1973) (app. O). For EPA's indirect source review regulations, see *id.* at 15,834; 39 Fed. Reg. 7270 (1974).

97. As Melnick states:

EPA's efforts to enter this territory were considered an affront to elected officials and an assault on the American political tradition of local control. Each step the EPA took to issue orders to local officials strengthened resistance to federal dictation. In some areas, candidates for state and local office saw the political advantage of running against a federal agency.

MELNICK, *supra* note 87, at 309; see also KRIER & URSIN, *supra* note 65, at 213 (describing the unwillingness of the State of California and local air pollution control officials to adopt transportation controls).

98. MELNICK, *supra* note 87, at 313; see KRIER & URSIN, *supra* note 65, at 219 (explaining that California officials thought transportation controls were foolhardy and left their development to federal officials).

99. See 38 Fed. Reg. 16,650, 16,654 (1973) (noting that seven states had submitted transportation control plans for 16 metropolitan areas two months after the court deadline); 38 Fed. Reg. 29,893 (1973) (only five states had submitted indirect source review plans by the end of October 1973); MELNICK, *supra* note 87, at 315 (stating that only a handful of states submitted indirect source review programs).

On June 22, 1973, EPA approved only five state plans and disapproved 18 state plans either because they were inadequate or the states had not submitted transportation control plans. 38 Fed. Reg. 16,550, 16,554 (1973).

100. In subsequent litigation, EPA maintained that because it would be "inefficient and impractical" for EPA to implement its own FIP, state implementation was "clearly neces-

effectively sources of pollution, the states had to abide by the FIP transportation provisions like any other polluter.<sup>101</sup>

EPA's semantic argument could not hide the fact that it wanted to use state agencies, personnel, legislation, regulations, and money to implement the federal requirements. In the FIPs, EPA ordered states to establish bus and carpool lanes, to adopt regulations for retrofit programs and vehicle inspection and maintenance programs, to implement these programs, and to identify state funding for these programs.<sup>102</sup> Some provisions ordered states and municipal governments to impose and collect parking fees.<sup>103</sup> More importantly, EPA asserted the right to enjoin and punish states and state officials who did not enact the required statutes and regulations. EPA believed it could seek court orders for injunctive relief against state officials, put state functions into receivership, hold state officials in contempt of court subject to substantial daily fines, and require states to reallocate funds from one portion of their budget to another.<sup>104</sup> Using the explicit threat of judicial enforcement and penalties, EPA sought to subject state officials, state agencies, and state legislatures to EPA control.

Several jurisdictions sued EPA, claiming that the agency's orders violated the principles of federalism in the Tenth Amendment. A spate of decisions ruled in the states' favor on statutory grounds<sup>105</sup> and one court ruled in EPA's favor.<sup>106</sup> After expressing grave doubts about the constitutionality of the challenged FIP provisions, the Ninth, Fourth, and District of Columbia Circuits construed the Act to avoid the constitutional question. According to these courts, EPA did

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sary." *Maryland v. EPA*, 530 F.2d 215, 225 (4th Cir. 1975) (quoting 38 Fed. Reg. 30,626, 30,633 (1973)), *vacated*, 431 U.S. 99 (1977).

101. 38 Fed. Reg. 30,626, 30,632-33 (1973).

102. *See, e.g., id.* at 30,633, 30,646-50 (Texas); *id.* at 30,818, 30,820-21, 30,824 (Colorado); *id.* at 30,827, 30,830-32, 30,960, 30,964-69 (Massachusetts); *id.* at 30,971, 30,974 (Ohio); *id.* at 31,232, 31,245-47, 31,252-54 (California); *id.* at 31,388, 31,393-96 (New Jersey).

103. *See, e.g., id.* at 30,966 (Massachusetts); *id.* at 31,247 (California).

104. *Brown v. EPA*, 521 F.2d 827, 831 (9th Cir. 1975), *vacated*, 431 U.S. 99 (1977); *see also* *District of Columbia v. Train*, 521 F.2d 971, 982 n.19 (D.C. Cir. 1975) (stating that EPA's lawyers told the court that it had authority to seek civil penalties against state governments and officials), *vacated sub nom. EPA v. Brown*, 431 U.S. 99 (1977); 38 Fed. Reg. 30,626, 30,633 (1973) (asserting the agency's right to "bring civil actions or seek penalties" against states that failed to implement EPA's FIP).

105. *Brown v. EPA*, 521 F.2d at 827; *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975), *vacated sub nom. EPA v. Brown*, 431 U.S. 99 (1977); *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975).

106. *Pennsylvania v. EPA*, 500 F.2d 246, 256-63 (3d Cir. 1974).

not have statutory authority to adopt such provisions.<sup>107</sup> The Third Circuit, on the other hand, held that the challenged regulations were within EPA's statutory authority and did not violate the Tenth Amendment.<sup>108</sup>

Although the federal government sought and received Supreme Court review of the decisions striking down EPA's regulations,<sup>109</sup> it had begun to recognize the potential legal difficulty with its position. To limit the impact of the Court's decision, EPA sought Supreme Court review only of the lower courts' invalidation of the inspection and maintenance program requirements. Then, at oral argument, EPA conceded that it had no statutory authority to require states to adopt regulations for an I & M program. The Court held the cases moot.<sup>110</sup>

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107. The Ninth Circuit expressed strong doubts about the constitutionality of EPA's FIP. In the court's words, the FIP "would reduce the states to puppets of a ventriloquist Congress." *Brown v. EPA*, 521 F.2d at 839. However, the court construed the Clean Air Act to avoid the constitutional issue. "We will not attribute to Congress any such intent unless it is expressed unequivocally. As we have already pointed out, that was not done in the Clean Air Act." *Id.*

The Fourth Circuit concluded that the constitutionality of the FIP provisions requiring state enactments were "very doubtful at the very best." *Maryland v. EPA*, 530 F.2d at 226. The court stated: "[I]f there is any attribute of sovereignty left to the states it is the right of their legislatures to pass, or not to pass, laws." *Id.* at 225. The court, however, also chose to avoid the constitutional question by holding that EPA had no statutory authority to require states to enact particular statutes and regulations. *Id.* at 226-27.

The D.C. Circuit also held that the Clean Air Act did not give EPA the authority it claimed. *District of Columbia v. Train*, 521 F.2d at 986 ("In summary, we can find little in the language of the Act to indicate that the Administrator has been empowered to order that legislatures and municipal bodies in the states enact statutes and regulations or to bring federal enforcement actions against those governmental units to do so."). The court also struck down the FIP requirement that the states adopt an inspection and maintenance program and a retrofit program as an unconstitutional attempt to "commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program against the owners of motor vehicles." *Id.* at 992.

108. Deferring to EPA's interpretation of the Clean Air Act, the court held that the Act authorized EPA to require the states to implement the FIP. *Pennsylvania v. EPA*, 500 F.2d at 256-59. The court also held that Congress's broad powers under the Commerce Clause overrode any Tenth Amendment objection to EPA's provisions requiring state implementation of the FIP. *Id.* at 259-63.

109. *EPA v. Brown*, 426 U.S. 904 (1976).

110. *EPA v. Brown*, 431 U.S. 99 (1977). It is extremely doubtful whether these regulations would survive a constitutional challenge after *New York v. United States*, 112 S. Ct. 2408, 2435 (1992) (holding that Congress has substantial power under the Constitution to encourage states to provide for disposal of radioactive waste, but that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program"). Of course, after *South Dakota v. Dole*, 483 U.S. 203 (1987), which appears to permit almost any conditions on federal grants to states, EPA has available a constitutional route to the same destination.



EPA also realized that there was little political support for its efforts to impose land use and transportation controls, at least in the form and to the extent that EPA had in mind. Not only were federal land use and transportation controls noxious to many local officials, but EPA's effort to take over state agencies and legislatures was both noxious and threatening. Moreover, political support in Congress for land use controls was evaporating as members of Congress heard from their constituents. In 1974, Congress suspended the indirect source review program for FIPs,<sup>111</sup> and in 1977 Congress made the suspension permanent and repealed the "land-use" portion of "land-use and transportation controls."<sup>112</sup> In the 1990 amendments, Congress declared that the Clean Air Act does not infringe "on the existing authority of counties and cities to plan or control land use, and nothing in this chapter provides or transfers authority over such land use."<sup>113</sup> Although this last provision does not have much legal bite, it reflects Congress's knowledge, based on two decades' experience, that federal land use controls were unpopular and that there was little state and local support to implement them.<sup>114</sup>

Congress has not entirely abandoned transportation controls, but its new approach is more modest. Although the 1977 amendments continued to require SIPs to include transportation controls "as may

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In subsequent litigation based on the 1977 Clean Air Act amendments, states challenged EPA's efforts to enjoin state officials from registering cars that did not meet emission standards. The courts of appeals split on the issue. *Compare* *Brown v. EPA*, 566 F.2d 665, 668-72 (9th Cir. 1977) (finding that the Clean Air Act did not give EPA this authority and observing that such authority would pose "serious [constitutional] questions") *with* *United States v. Ohio Dep't of Highway Safety*, 635 F.2d 1195, 1201-05 (6th Cir. 1980) (finding that the Clean Air Act gave EPA this authority under § 113 and rejecting constitutional arguments), *cert. denied*, 451 U.S. 949 (1981).

111. Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, § 4(b), 88 Stat. 246, 257.

112. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 108(a)(2), (e), 91 Stat. 685, 693, 695-96; *see* 42 U.S.C. § 7410(a)(5)(A) (1988) (EPA may not require indirect source review as a condition to approve a SIP and may not include indirect source review in a FIP, except for federally assisted highways, airports or other federally assisted, owned, or operated indirect sources); *id.* § 7410(c)(2)(B) (EPA may not require parking surcharges as part of a SIP or a FIP).

113. 42 U.S.C. § 7431.

114. *See also* H.R. REP. NO. 294, 95th Cong., 1st Sess. 222 (1977), which states:

But the Committee is especially cognizant of the potentially sweeping consequences and potentially socially and economically disruptive impacts which may result from efforts to reduce automobile pollution through mandated reductions in parking supplies and restrictions on new parking facilities. This risk of such adverse effects can be minimized only if the program is designed, implemented and enforced by State and local governments.

*Id.*

be necessary,"<sup>115</sup> they also required EPA to study the feasibility and effectiveness of transportation controls.<sup>116</sup> The 1977 legislation made no explicit requirement for transportation controls in the new nonattainment provisions. Congress was signalling EPA to "go slow" with transportation controls. In the 1990 amendments, more than a decade after the land use and transportation controls fiasco, Congress cautiously imposed new transportation control requirements (without land use controls) in nonattainment areas having the most serious problems that could not be addressed by other means.<sup>117</sup> Moreover, Congress gave states additional lead time to develop their own controls.<sup>118</sup> EPA, as well, seems reluctant to push too hard on the states. According to one report, EPA will not sanction states for failing to implement and enforce employer trip reduction programs, which are an important element in transportation controls.<sup>119</sup>

Congress's foray into land use and transportation controls faced many difficulties, the central one being that Congress had not evaluated the problem politically or technically. Not only did these controls intrude on long-standing state and local political authority (in contrast to air emission standards, where states had done quite little), but they did so in a ham-handed way. By giving the states inadequate time to address the difficult political and technical problems, and then by forcing an ill-prepared EPA to shoulder the administrative burdens through FIPs (which EPA tried to foist on state agencies), Congress alienated the states. Finding little local support for the federal controls, Congress and EPA eventually retreated to a more modest position that required fewer controls, in more limited circumstances, and with additional time for states to gather informa-

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115. 42 U.S.C. § 7410(a)(2)(B) (Supp. II 1978).

116. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 107, 91 Stat. 685, 689 (codified as amended at 42 U.S.C. § 7408(f) (Supp. II 1978)).

117. The Act potentially requires transportation controls for serious, severe, and extreme ozone nonattainment areas. 42 U.S.C. § 7511a(c)(5), (d)(1), (e) (Supp. V 1993); see also *id.* § 7512a(a)(3), (b)(2) (transportation controls for carbon monoxide nonattainment areas). Employer trip reduction programs are required only for areas classified as severe or extreme ozone nonattainment areas. *Id.* § 7511a(d)(1)(B), (e). Reportedly, only 13 urban areas are subject to this latter requirement. *States Must Enforce Trip-Reduction Plans, But EPA Says It Will Not Impose Sanctions*, 25 *Env't Rep.* (BNA) 1862 (Feb. 3, 1995).

118. States with severe and extreme ozone nonattainment areas had two years to adopt transportation control plans. 42 U.S.C. § 7511a(d)(1)(A). States with serious ozone nonattainment areas had six years to determine whether transportation controls were necessary, and another 18 months to adopt necessary controls. *Id.* § 7511a(c)(5).

119. *States Must Enforce Trip-Reduction Plans, But EPA Says It Will Not Impose Sanctions*, *supra* note 117. EPA's letter to state officials also eschewed any significant federal oversight role. *Id.* ("While EPA has an oversight role, it is not EPA's intent . . . to look over the shoulder of the states as they implement the program.")

tion and design the controls. EPA's reported enforcement posture similarly suggests a readiness to work with the states to develop adequate transportation controls, rather than federalize their administration and enforcement.

2. *Inspection and Maintenance Programs: EPA Sanctions to Compel State Cooperation.*—Inspection and maintenance programs, which are one type of transportation control, have long been a controversial part of the Clean Air Act, principally because they impose the costs and inconvenience of pollution controls directly on consumers. State officials, who are more sensitive to the local political pulse than EPA officials, often have been slow to implement effective programs.<sup>120</sup> Because studies have repeatedly emphasized the importance and cost-effectiveness of I & M programs in reducing pollution,<sup>121</sup> since 1977 Congress has required inspection and maintenance programs for SIPs governing nonattainment areas.<sup>122</sup>

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120. For good overviews of the I & M program, see Jerome Ostrov, *Inspection and Maintenance of Automotive Pollution Controls: A Decade-Long Struggle Among Congress, EPA, and the States*, 8 HARV. ENVTL. L. REV. 139 (1984); Arnold W. Reitze, Jr. & Barry Needleman, *Control of Air Pollution from Mobile Sources Through Inspection and Maintenance Programs*, 30 HARV. J. ON LEGIS. 409 (1993); see also U.S. GENERAL ACCOUNTING OFFICE, GAO/RCED-85-22, VEHICLE EMISSIONS INSPECTION AND MAINTENANCE PROGRAM IS BEHIND SCHEDULE 9-10 (1985) [hereinafter GAO].

121. H.R. REP. NO. 294, 95th Cong., 1st Sess. 283-86 (1977) (arguing the environmental benefits of I & M programs are substantial and that their costs are relatively minor); S. REP. NO. 127, 95th Cong., 1st Sess. 40 (1977) (stating that I & M programs are reasonable measures to control air pollution); NATIONAL COMM'N ON AIR QUALITY, TO BREATHE CLEAN AIR 209-13 (1981) (describing the importance and cost-effectiveness of I & M programs); Rick Henderson, *Dirty Driving: Donald Steadman and the EPA Sins of Emissions*, 60 POL'Y REV. 56-58 (Spring 1992) (arguing that I & M programs are more cost-effective than other pollution control strategies); 57 Fed. Reg. 52,950, 52,951-52 (1992) (concluding that a properly designed I & M program is one of the "most effective" air pollution control programs, as well as cost-effective).

122. The 1970 Act required SIPs to contain provisions "to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards." Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1681 (codified as amended at 42 U.S.C. § 7410(a)(2)(G) (1970)). Thus, the Act neither specified that I & M programs were mandatory nor that states must meet specific deadlines to submit them. By the mid-1970s, only a half-dozen states had I & M programs, and then only in certain areas. NATIONAL ACADEMY OF SCIENCES, REPORT BY THE COMMITTEE ON MOTOR VEHICLE EMISSIONS 132 (1974).

In the 1977 amendments, Congress adopted a provision requiring states with carbon monoxide and ozone nonattainment areas (roughly 30 states) to establish a schedule for adopting "a vehicle emission control inspection and maintenance program." Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 129(b), 91 Stat. 685, 748 (codified as amended at 42 U.S.C. § 7502(b)(11)(B) (Supp. II 1978)).

In the 1990 amendments, Congress continued to require the "basic" I & M program for the newly designated "marginal" and "moderate" nonattainment areas, but required an

The 1977 amendments to the Clean Air Act established new deadlines for states to submit revised SIPs. States seeking an extension of time to meet the air quality standards were required, among other things, to submit by July 1, 1982, a revised SIP that included an I & M program.<sup>123</sup> States not meeting this deadline were subject to an automatic construction ban.<sup>124</sup> In addition, EPA was required to withhold certain federal transportation and air pollution control funds,<sup>125</sup> and it had discretion to withhold grants for construction of sewage treatment works.<sup>126</sup>

Numerous states missed the deadline to submit the required I & M program with the revised SIPs.<sup>127</sup> According to a General Accounting Office report, many state legislatures and governors resisted the "forced federal requirements" and found ways to delay adoption and implementation of the I & M programs.<sup>128</sup>

The California and Kentucky legislatures, for example, simply failed to enact legislation that would have adopted such programs.<sup>129</sup> EPA, however, did not immediately impose fiscal sanctions as it was

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"enhanced" program for "serious," "severe," and "extreme" nonattainment areas. See 42 U.S.C. § 7511a(a)(1)(B), (b)(4), (c)(3), (d), (e).

123. Pub. L. No. 95-95, § 129(b), 91 Stat. 685, 748 (1977) (codified at 42 U.S.C. § 7502(b)(11)(B), (c) (Supp. II 1978)); see also 46 Fed. Reg. 7182 (1981) (requiring states to submit enforceable SIPs, including an I & M program, that demonstrate attainment by the December 31, 1987 deadline).

124. Pub. L. No. 95-95, § 108(b), 91 Stat. 685, 694 (codified at 42 U.S.C. § 7410(a)(2)(I) (Supp. II 1978)); Safe Drinking Water Act Amendments of 1977, Pub. L. No. 95-190, § 14(a)(58), 91 Stat. 1393, 1403 (codified at 42 U.S.C. § 7503(4) (Supp. II 1978)); see also 44 Fed. Reg. 38,471 (1979) (EPA interpretive regulation for construction ban).

125. Pub. L. No. 95-95, § 129(b), 91 Stat. 685, 749-50 (codified at 42 U.S.C. § 7506 (Supp. II 1978)); see also 45 Fed. Reg. 24,692 (1980) (notice of EPA and Department of Transportation final policy on transportation funding restrictions).

126. Pub. L. No. 95-95, § 306, 91 Stat. 685, 777 (codified as amended at 42 U.S.C. § 7616(b)(2) (Supp. II 1978)); see also 45 Fed. Reg. 53,382 (1980) (notice of EPA policy on sewage construction funding restrictions).

127. See GAO, *supra* note 120, at 9-10 (reporting that, of the 30 states that needed to submit I & M programs, 11 submitted them on time, and another six submitted them by the end of 1983; the rest had not submitted a program); 48 Fed. Reg. 35,312 (1983) (notice of proposed rule-making stating that EPA proposed to find that 10 states had not met their obligations to adopt and implement I & M programs).

128. GAO, *supra* note 120, at 12-16. States resisted EPA's requirements for a variety of reasons. GAO reports that some state officials resented the federal intrusion and thought that the federal program was neither effective nor cost-effective. *Id.* at 11. In addition, some states may have delayed because of the prospect that the proposed Clean Air Act Amendments, which were not enacted until 1990, might relax the I & M program requirements. *Id.* at 18-20.

129. 45 Fed. Reg. 81,746, 81,747 (1980) (final agency action) (giving details of California legislature's failure to enact necessary legislation in 1978-1980); 45 Fed. Reg. 81,752, 81,754 (1980) (final agency action) (describing failure of Kentucky legislature to enact necessary legislation).

authorized and perhaps required to do. Rather, for a year after the deadline, EPA met with state officials to try to address their concerns while meeting the requirements of the Clean Air Act. Finally, after more than a year past the deadline, EPA threatened to withhold federal funding and enforce a construction ban in nonattainment areas.<sup>130</sup> When the court of appeals upheld EPA's authority to take these actions,<sup>131</sup> EPA cut off \$850 million in federal highway and sewage treatment funds in California<sup>132</sup> and \$35 million in federal funds in Kentucky.<sup>133</sup>

California did not respond immediately—politics takes time—but by mid-1982, it had adopted a satisfactory I & M program,<sup>134</sup> and EPA restored the funds.<sup>135</sup> Kentucky took even longer, but when it adopted an I & M program in 1986, EPA restored the state's funding.<sup>136</sup> This pattern was repeated in other states that, for various reasons, also failed to adopt or keep their I & M programs. EPA at first moved slowly to impose sanctions, demonstrating a preference to work with state officials to design a satisfactory program, but eventually imposed sanctions if the states continued to delay.<sup>137</sup>

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130. 45 Fed. Reg. 59,180 (1980) (notice of proposed rule-making to limit federal assistance to California); 45 Fed. Reg. 62,506 (1980) (notice of proposed rule-making to limit federal assistance to Kentucky).

131. *Pacific Legal Found. v. Costle*, 627 F.2d 917 (9th Cir. 1980), *cert. denied*, 450 U.S. 914 (1981).

132. 45 Fed. Reg. at 81,746 (final agency action regarding California federal assistance limitations). In California, the withheld funds included \$457 million in transportation projects, \$389 million in sewage treatment works, and \$5.2 million in air quality grants. 45 Fed. Reg. 59,180, 59,182 (1980).

133. 45 Fed. Reg. 81,752, 81,756 (1980). In Kentucky, the withheld funds were \$34.5 million in highway funds, \$300,000 in air quality grants, and \$1.5 million in sewage facility construction funds. *Id.*

134. Act of Sept. 10, 1982, ch. 892, 1982 Cal. Stat. 3303.

135. 47 Fed. Reg. 46,374 (1982) (notice of removal of California federal assistance limitations).

136. 51 Fed. Reg. 39,375 (1986) (final rule approving Kentucky SIP).

137. For example, in 1984, New Mexico's I & M program was halted when the state supreme court ruled that municipalities did not have state statutory authority to charge an inspection fee to fund implementation of the program. *Chapman v. Luna*, 678 P.2d 687 (N.M. 1984), *cert. denied*, 474 U.S. 947 (1985). Following the termination of the program, EPA held public and private meetings and negotiated with state officials for a year before it imposed sanctions withholding air quality grants and federal highway funds. 50 Fed. Reg. 8616, 8617 (1985); *New Mexico Env'tl. Improvement Div. v. Thomas*, 789 F.2d 825, 828 (10th Cir. 1986) (upholding the imposition of sanctions). When the state legislature reauthorized the program, EPA restored the funds. 53 Fed. Reg. 38,722 (1988) (final rule approving New Mexico's air quality implementation plan).

The conflict played out differently when, in 1981, the Pennsylvania legislature prohibited the expenditure of state funds for the I & M program. Because the state had previously entered a 1978 consent decree requiring an I & M program, a district court held that defunding the program violated the consent decree. *Delaware Valley Citizens' Council for*

Throughout its implementation of the 1977 Clean Air Act Amendments, EPA's approach with the states was tempered. First, EPA gave the states wide latitude in the design of their I & M plans. Although this hands-off approach resulted in some state programs with "serious problems,"<sup>138</sup> it also encouraged states to participate in the development of the programs.

Second, EPA did not impose sanctions as soon as the states missed a deadline.<sup>139</sup> Instead, EPA tried to encourage states to deal with the difficult problem of designing an appropriate program, rather than to see the situation as "EPA versus State Officials." EPA sent the states signals that it would not proceed with sanctions if the states were making "reasonable progress" in developing the I & M programs,<sup>140</sup> and it imposed sanctions only after months of meetings and negotiations had failed to produce an I & M program.

Congress's reaffirmation and expansion of the I & M program requirements in the 1990 Clean Air Act Amendments began a fresh round of SIP submissions. Under the Act, many states had to adopt new I & M programs by November 15, 1993.<sup>141</sup> Concerned that existing I & M programs were inadequate, EPA adopted new I & M regulations for the states to follow.<sup>142</sup> One of EPA's principal concerns was that a "decentralized" program—one that permitted small service stations to test and repair pollution control devices—encouraged fraud

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Clean Air v. Pennsylvania, 533 F. Supp. 869, 881 (E.D. Pa.), *aff'd*, 678 F.2d 470 (3d Cir.), *cert. denied*, 459 U.S. 969 (1982). The court held state administrative officials in contempt of court and froze federal highway funds on the ground that they failed to implement the consent decree's mandate for an I & M program. *Id.* at 883-84. In the district court, EPA did not support the contempt finding. Rather, it urged the court to withhold judgment to allow the agency to pursue the administrative remedies (*i.e.*, construction ban and withholding federal funds). *Id.* at 876-77. EPA apparently wanted to deal with the state on its own terms and without outside interference. After the Third Circuit upheld the district court, *Delaware Valley Citizens' Council for Clean Air*, 678 F.2d at 470, the legislature eventually adopted a new I & M program, and the court released the federal funds. GAO, *supra* note 120, at 13.

138. GAO, *supra* note 120, at 21-26, 32.

139. *Id.* at 16.

140. 48 Fed. Reg. 35,312, 35,314 (1983) (proposing to defer sanctions against a state that missed its deadline to submit an I & M program if the state "has taken concrete steps toward starting its I/M program in an expeditious manner"); 48 Fed. Reg. 50,686, 50,691-92 (1983) ("EPA wants to give States an opportunity . . . to remedy [SIPs'] deficiencies before construction and funding restrictions apply. . . . If a State commits to remedy its deficiency by a specific date and, at the same time, shows that it cannot possibly move any more quickly, EPA may defer final action until that date."); *id.* at 50,695 ("If EPA proposes restrictions, it may defer action for up to one year if an area commits to an expeditious schedule for the submittal of new revisions."); *see also* GAO, *supra* note 120, at 16-18 (reporting that EPA was slow to impose sanctions).

141. *See supra* note 122.

142. 57 Fed. Reg. 52,950 (1992).

and generally permitted inaccurate testing.<sup>143</sup> EPA wanted to separate “test” and “repair” stations and to require expensive testing procedures. The resulting regulations virtually required centralized testing facilities.<sup>144</sup>

State officials, responding to different concerns and constituencies, strongly objected to EPA’s regulations. State officials believed that EPA’s new requirements would impose added costs and inconvenience on car owners (*e.g.*, fewer test stations, longer waits, and the need to go elsewhere for repairs and return for retesting), and would economically damage private service stations that had invested in test equipment and handled much of the test and repair work.<sup>145</sup>

Although most states submitted I & M programs for EPA review,<sup>146</sup> at least three state legislatures—including California—had adjourned without taking any action.<sup>147</sup> EPA initially announced that it was considering sanctions against the three states,<sup>148</sup> but in a few days announced that it would not pursue sanctions because it felt that the states were working to adopt an adequate program.<sup>149</sup> Then, only a month later, in January 1994, EPA again announced that it was considering withholding federal highway funds and imposing greater offset requirements for California, thereby making it more difficult to build new or modify existing stationary sources.<sup>150</sup> EPA’s position was particularly aggressive, because it was not seeking sanctions under section

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143. *Id.* at 52,967-70. EPA concluded that the inexpensive testing equipment used at most service stations did not produce accurate results. *Id.*

144. *Id.* at 52,951-52, 52,958-59 (final rule regarding I & M program requirements). EPA’s regulations permit decentralized testing facilities only if a state can demonstrate that such facilities are as effective as centralized facilities. *Id.* at 52,953. EPA’s regulations, moreover, explicitly assume that the emissions reductions from “test and repair” facilities are 50% lower than if the “test” and “repair” facilities were separated. 40 C.F.R. § 51.353(b) (1995). Thus, although the regulations do not mandate centralized, test-only facilities in all cases (which would involve relatively few facilities, as opposed to testing at far more numerous certified gas stations), as a practical matter centralized testing will be unavoidable under the regulations, as EPA recognized.

145. 57 Fed. Reg. at 52,959-65.

146. Reportedly, 22 states submitted timely and complete I & M programs to EPA, 15 states submitted timely but incomplete programs, and others were expected to submit programs shortly after the deadline. *States That Failed to Authorize I/M Programs Considered for Sanctions, Air Office Chief Says*, 24 Env’t Rep. (BNA) 1333 (Nov. 19, 1993).

147. *Id.*

148. *Id.*

149. *Sanctions Against California Put on Hold*, 24 Env’t Rep. (BNA) 1481 (Dec. 3, 1993).

150. *Sanctions Again Considered by Agency Against Three States for I/M Programs*, 24 Env’t Rep. (BNA) 1600 (Jan. 7, 1994); *see also Failure to Adopt Proper I/M Programs Brings Proposed Sanctions in Three States*, 24 Env’t Rep. (BNA) 1623 (Jan. 14, 1994) (reporting that EPA’s sanctions will result in withholding \$800 million in federal highway funds from California, \$700 million from Illinois, and \$280 million from Indiana). EPA claimed discretionary authority under 42 U.S.C. § 7410(m) to impose the sanctions immediately, rather than

179,<sup>151</sup> which permits sanctions only after giving the offending state eighteen months to correct deficiencies in the implementation plan, but under section 110(m),<sup>152</sup> which purportedly gives EPA discretionary authority to impose sanctions as soon as it finds the state plan deficient.

California refused to follow EPA's direction and instead adopted a statute that EPA had declared, in advance of its passage, would not meet federal requirements.<sup>153</sup> Then, days later, the Northridge earthquake hit southern California, and EPA almost immediately announced that it would not pursue the discretionary sanctions; the agency declared that it wanted to minimize hardship to the state's economy.<sup>154</sup> Some people were skeptical of the stated reason for EPA's announcement;<sup>155</sup> a more candid reason may have been that EPA's hard-line position was leading directly to a nasty, public political confrontation between EPA and the state. In any event, EPA's announcement effectively gave the parties a new opportunity to work out their differences.

EPA's decision, however, still left California vulnerable to the mandatory sanctions that would apply eighteen months after missing the original deadline for submitting an I & M program.<sup>156</sup> In March 1994, state and EPA officials announced an agreement for California to adopt a "hybrid" I & M program.<sup>157</sup> Contrary to EPA's I & M regulations, California's program continues to have test and repair stations for most vehicles, and requires only a small percentage of vehicles to go to test-only stations.<sup>158</sup>

EPA's compromise with California reignited state opposition to EPA's I & M program. Even though EPA discouraged the states from doing so, several states immediately expressed interest in adopting a hybrid program, particularly one that did not require centralized test-

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wait the 18-month period to impose mandatory sanctions under § 7509(a). 59 Fed. Reg. 1476 (1994) (final rule establishing criteria to exercise discretionary sanctions).

151. 42 U.S.C. § 7509(a) (Supp. V 1993).

152. *Id.* § 7410(m).

153. *Legislature Plans Decentralized I/M Law Despite EPA Pressure, Proposed Sanctions*, 24 Env't Rep. (BNA) 1657 (Jan. 21, 1994).

154. *Citing Hardship from Los Angeles Quake, EPA Scuttles Plan for California Sanctions*, 24 Env't Rep. (BNA) 1697 (Jan. 28, 1994).

155. *Id.*

156. *See* 42 U.S.C. § 7509(a).

157. *California: State, Federal Officials Set Agreement on I/M Plan to Bring About CAA Compliance*, 24 Env't Rep. (BNA) 1982 (Mar. 18, 1994).

158. *Id.*



ing facilities.<sup>159</sup> Virginia, for example, enacted a law barring the separation of test and repair facilities unless the governor certified that the separation was warranted by federal requirements.<sup>160</sup> Many other states that had committed to submitting revised SIPs delayed doing so.<sup>161</sup> In July 1994, EPA announced that nine states had not submitted adequate SIPs and would be subject to sanctions.<sup>162</sup>

Then came a second earthquake—the November 1994 mid-term elections. A month after the elections, EPA Administrator Carol Browner met with the governors of seven states and announced that states would be allowed to develop hybrid vehicle inspection programs.<sup>163</sup> Soon thereafter, the National Governors' Association and the Environmental Council of the States asked EPA for a two-year

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159. *States Urged to Avoid California Example in Pursuing Alternative Vehicle I/M Programs*, 24 Env't Rep. (BNA) 1960 (Mar. 18, 1994); *Delaware: Governor Says State Will Not Implement I/M 240 Test in Vehicle Emission Testing*, 25 Env't Rep. (BNA) 1191 (Oct. 14, 1994).

160. *Virginia: Virginia Law on I/M Programs Leads EPA to Revoke 'Protective Finding' for State*, 25 Env't Rep. (BNA) 287 (June 10, 1994). Subsequently, EPA rejected Virginia's proposed hybrid plan. *Virginia: Agency to Reject Virginia I/M Plan to Allow Test Company to Operate at Maintenance Shops*, 25 Env't Rep. (BNA) 638 (Aug. 5, 1994).

EPA refrained from imposing sanctions on Virginia. One reason may have been that Virginia's congressional delegation went on the warpath, accusing EPA of being insensitive to the inconvenience that its centralization requirement would impose on consumers and of being unfair to Virginia, since it had approved hybrid I & M plans for California, Georgia, and New Jersey. *Virginia: Transportation Projects in State in Limbo as Agency Moves to Lift Sanctions Exemption*, 25 Env't Rep. (BNA) 718 (Aug. 12, 1994). Senator Warner declared that the state would not "let Uncle Sam come down with a heavy foot and crush us." *Id.*

Two environmental groups subsequently sued EPA for failing to sanction Virginia. *Suit Challenges EPA Failure to Sanction Virginia*, 25 Env't Rep. (BNA) 994 (Sept. 16, 1994). Virginia then filed suit to enjoin EPA from imposing sanctions. *Virginia Seeks to Block Federal Sanctions for Failure to Meet Clean Air Act Provisions*, 25 Env't Rep. (BNA) 1797 (Jan. 20, 1995). The suits are still pending as of this writing.

161. *See Numerous States Still Facing Sanctions for Missed SIP Revision Deadlines, EPA Says*, 25 Env't Rep. (BNA) 2102 (Apr. 15, 1994).

A lawsuit challenging EPA's approval of SIPs also helped to force EPA's hand. In *NRDC v. EPA*, 22 F.3d 1125 (D.C. Cir. 1994), the court of appeals held that EPA's approval of "committal SIPs"—revisions to which the state agency had committed, but which were not yet adopted under state law—did not satisfy the Clean Air Act's requirement to submit adequate SIPs. *Id.* at 1133. The court ordered EPA to approve or disapprove all I/M programs by July 15, 1994. *Id.* at 1136-37.

162. *Browner Signs Rule to Set Sanctions for States Still Delinquent on SIPs*, 25 Env't Rep. (BNA) 581 (July 29, 1994). The states listed by EPA were Arizona, California, Indiana, Maine, Maryland, Missouri, Tennessee, Vermont, and West Virginia. *Id.* EPA subsequently announced that it would impose additional sanctions on Vermont and West Virginia. *Vermont, West Virginia Still Delinquent on SIP Revisions Face 'Offset' Sanction*, 25 Env't Rep. (BNA) 863 (Sept. 9, 1994).

163. *States Allowed to Draft Hybrid I/M Programs But Must Reduce VOC Emissions by 15 Percent*, 25 Env't Rep. (BNA) 1606 (Dec. 16, 1994). States immediately responded to EPA's newly acquired flexibility by delaying their I & M programs. *See, e.g., Rhode Island Delays Implementation of I/M Program*, 25 Env't Rep. (BNA) 1810 (Jan. 20, 1995); *Georgia Delays Start of I/M Program*, 25 Env't Rep. (BNA) 1850 (Jan. 27, 1995).

moratorium on sanctions against states, and to withhold sanctions if a state was making a good faith effort to comply with the Clean Air Act.<sup>164</sup> Although EPA was reluctant to agree to a complete moratorium, it made clear that it was flexible with regard to the requirements for I & M programs.<sup>165</sup>

Relations between EPA and the states changed under the 1990 amendments. Two points are worth noting here. First, in the 1990 amendments, EPA lost much of its flexibility to defer sanctions against states that did not submit I & M programs. Once EPA makes a finding of inadequacy, which it cannot fail to do if a state with a nonattainment area does not submit an I & M program, sanctions must be imposed eighteen months later if the state has not corrected the deficiency, and increased six months after that if the problem is still unresolved.<sup>166</sup> Congress constrained EPA's ability to work with states by delaying sanctions.

Second, after the 1990 amendments, EPA sent the states mixed signals about sanctions. The agency first announced that it could impose sanctions immediately, rather than waiting the full eighteen months, which suggested a relatively aggressive stance toward recalcitrant states.<sup>167</sup> Nearly a year later, EPA reversed its position three times within two months on the issue of pursuing sanctions against California.<sup>168</sup> Two months later, the agency announced its approval of an I & M program that did not comport with its own regulations, but at the same time it also discouraged other states from seeking approval for similar programs.<sup>169</sup> Then, after the 1994 elections, EPA declared its willingness to approve hybrid programs.<sup>170</sup> Whereas EPA seemed to be engaged in a deliberate strategy to negotiate with the states under the 1977 amendments, EPA now vacillated between using

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164. *Moratorium on Sanctions Under Clean Air Act Among Dozens of EPA Actions Sought by States*, 25 Env't Rep. (BNA) 1827 (Jan. 27, 1995).

165. *States, EPA Moving Forward on Initiatives to Add Flexibility to Clean Air Act Rules*, 25 Env't Rep. (BNA) 1860 (Feb. 3, 1995); *Proposal Would Allow Varied Approaches for State Inspection Maintenance Programs*, 25 Env't Rep. (BNA) 2524 (Apr. 28, 1995). There have been legislative attempts to weaken EPA's requirement for separate test and repair facilities. See *Rescission Bill Would Prevent EPA Penalties Against States Without Centralized I/M Programs*, 26 Env't Rep. (BNA) 218 (May 19, 1995). Although the budget bill was vetoed, 141 CONG. REC. H56683 (June 7, 1995), the provision may well appear in a future bill.

166. 42 U.S.C. § 7509(a).

167. 59 Fed. Reg. 1476 (1994) (final rule regarding criteria for exercising discretionary sanctions).

168. See *supra* notes 148-154 and accompanying text.

169. See *supra* notes 156-158 and accompanying text.

170. See *supra* notes 163-165 and accompanying text.

all the coercive power at its disposal and making expedient political deals.

Despite these differences, events under both the 1977 and 1990 amendments suggest that the states have been able to deal with, rather than submit to, EPA. The states have not been free to disregard federal policy—that model of states as wholly autonomous units of government is long gone—but the states have been able to work compromises with EPA rather than be slavishly subject to federal dictates.

### C. *The Inevitability of State Autonomy in Environmental Law*

The federal legislative assaults on state sovereignty have drawn blood, but they have not been fatal. Although air pollution policy has been substantially centralized since 1965, and although the federal courts have largely withdrawn from providing constitutional protection from federal laws restricting state authority and state autonomy, states continue to play a significant independent role in the control of air pollution.

One reason may be, as some academics have argued, that the structure of the national political system—both Congress and the Executive—ensures that states are adequately represented in the national political process.<sup>171</sup> Federal legislators, in particular, are accountable to local, state-based constituencies. By extension, federal bureaucrats, who answer to their congressional patrons through formal and informal oversight, are made aware of and become sensitive to state concerns.

This structuralist argument, however, can only be part of the answer in environmental law. The states' trump card is their indispensability. Substantial participation by state officials and state bureaucracies is essential if the federal government is to achieve its environmental goals. Since the 1970 enactment of the Clean Air Act, legislators and EPA officials have known that the federal government does not have, and probably never will have, the resources to implement federal air pollution policy without considerable state assistance. Because, as a practical matter, the federal government must rely on state governments to carry out federal environmental policy, state concerns and preferences will continue to receive careful consideration in the legislative and administrative process.

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171. See *supra* note 15; see also Kramer, *supra* note 1, at 1522-42 (arguing that federal policy-makers may be sensitive to state concerns, in part, because political parties link the interests of federal and state office holders).

There are three reasons why substantial state participation is almost inevitable in federal environmental law. First, environmental regulation touches on areas—such as land use control and protection of public health and natural resources—that have been in the domain of state and local agencies for decades. Given the existence of these state agencies (understaffed and unsophisticated as they might have been in 1970), and the fact they represent a source of state political power, Congress would have needed overwhelmingly compelling and politically acceptable reasons to disregard the states in new federal regulatory programs. In a sense, the very existence of the federalist system—which permitted the development of state land use and public health regulation—has helped to check the growth of the federal bureaucracy in these and related areas. Rather than displace state agencies, Congress has sought to enlist them to administer the critical details—monitoring, recordkeeping and reporting, allocation of emission limits, permit issuance, renewal and revocation, and administrative, civil and criminal enforcement—that are essential to statutes such as the Clean Air Act.<sup>172</sup> It might have been different if the air pollution program were administratively simple, but the breadth and complexity of the Clean Air Act's requirements ensure the need for a large state environmental bureaucracy.<sup>173</sup>

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172. See EPA, *Enforcement Accomplishments Report FY 1993*, at 2-1 to 2-5 (1994) (showing that there is far more state civil and administrative enforcement than there is federal administrative and civil enforcement).

173. At present, state air pollution control budgets exceed corresponding federal expenditures. For example, the California Air Resources Board, which is responsible for mobile sources and sets statewide standards and policies, has an annual budget of approximately \$101 million and has roughly 900 employees. Governor's Budget: 1993-94 p. EP-1. In addition, the South Coast Air Quality Management District, which is responsible for stationary source pollution in the Los Angeles Basin, has a budget of \$107 million and employs 960 people (FY 93-94). South Coast Air Quality Management District, *Three Year Budget Forecast: Fiscal Years 1995-96/1996-97/1997-98*, at 1 (undated). The Bay Area Air Quality Management District, which regulates stationary source pollution in the San Francisco Bay Area, has a budget of \$31 million and employs 340 people (FY 93-94). Bay Area Air Quality Management District, *Approved Budget Fiscal Year 1994-95*, at 2 (June 15, 1994). The total budget for these two districts and the state is \$239 million. Of course, California has other air pollution control districts, and there are 49 other states and the District of Columbia.

EPA's air pollution control budget for FY 1993 was \$138 million in the air pollution program (essentially salaries), \$96 million in research and development, and \$275 million for pollution abatement, for a total of \$509 million. Executive Office of the President, *Budget of the United States Government: Appendix, Fiscal Year 1995*, at 791-93. Of that, approximately \$200 million is sent to the states in federal grants, leaving only \$213 million for federal regulation and enforcement. Lee Dihhns et al., *Regulation of Air Quality: Who is Leading Whom?*, in FEDERAL VERSUS STATE ENVIRONMENTAL PROTECTION STANDARDS: CAN A NATIONAL POLICY BE IMPLEMENTED LOCALLY 12, 13 (ABA ed., 1990).

Second, the diversity of local conditions greatly magnifies the federal government's need to work with the states. The Nation spans a continent, with an astonishing range of environmental conditions and problems. Differences in climate and weather (*e.g.*, patterns of temperature, wind, rainfall, humidity), geography (*e.g.*, deserts, mountains, plains, coastal regions), the relative importance of sources and types of pollution (*e.g.*, cars, large utilities and factories, numerous small sources), environmental and public health risks (*e.g.*, special need for visibility control, size of affected human population), and economic conditions confound attempts to have a successful, highly centralized regulatory program. The knowledge necessary to administer any air pollution control program—to set implementation and enforcement priorities and to plan for future development—can be found only at the local level. The practical need to tailor implementation and enforcement to local conditions requires decision-makers who have, in addition to an adequate knowledge of these conditions, a sympathetic orientation toward local conditions. Effective implementation requires some consideration and accommodation of local concerns. Precisely because they are local, and locally accountable, state and local officials bring that knowledge and orientation to implementation and enforcement. A successful federal air pollution control program requires the willing participation of state administrative agencies.

Third, the implementation and enforcement of environmental law remain controversial. The most bitter controversies frequently are not at the federal level, where the magnitude and distribution of costs and benefits of federal policy are often vague, but at the local level, where the regulatory costs and the lost opportunity costs may be quite concentrated. In addition, many environmental decisions affect land use and public health, which historically have been a source of state and local political power. Precisely because a substantial amount of implementation and enforcement takes place locally, and because the political, environmental and economic impacts of environmental decisions are felt locally, local political support is important if federal air pollution goals are to be achieved. As illustrated by the experience with land use and transportation control plans and I & M programs, federal regulators who routinely ignore important state concerns, in the end, are more likely to encounter political resistance, delay, and possibly failure. Over the long term, local political support must be enlisted, not coerced. Enlisting local political support will require the federal government to modify its goals and methods in light of state

concerns and preferences, and more importantly to share policy-making and enforcement power.

### III. THE CAUSES AND CONSEQUENCES OF CENTRALIZATION

Recently, the *New York Times* ran a front page article about state resistance to federally mandated motor vehicle inspection and maintenance programs.<sup>174</sup> The article quoted Governor Pete Wilson, of California, telling a congressional committee: "We're the ones who breathe our air, not the Federal bureaucrats in Washington."<sup>175</sup> A little later, the article quoted EPA Administrator Carol Browner as saying that the substantive provisions and deadlines in the Clean Air Act should not be relaxed: "The American people were told they would have clean air."<sup>176</sup> This posturing reminded me of the 60's joke in which the revolutionary leader announced to his followers that after the Revolution, everyone would have chocolate chip cookies. One cadre meekly pointed out that he did not like chocolate chip cookies. "After the Revolution, everyone will like chocolate chip cookies," the leader explained evenly.

Not all state officials, of course, think that the states should be able to establish their own environmental standards free from federal interference.<sup>177</sup> Nonetheless, state politicians and state agencies regularly balk at federal requirements for state environmental programs, thereby giving the impression that the federal requirements frequently are an unwelcome intrusion into local affairs. Far from being destructive, however, the tension between federal and state priorities has promoted the development and growth of states as environmental policy-makers.

The usual justifications for a dominant federal role in environmental regulation are to take advantage of economies of scale with regard to research and data collection, to regulate interstate pollution, and to replace unduly weak state regulation.<sup>178</sup> The first two

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174. J.C. Verhovek, *Texas Joins Parade of States Colliding with Clean Air Act*, N.Y. TIMES, Feb. 14, 1995, at A1.

175. *Id.*

176. *Id.*

177. Some officials may think that federal responsibility for basic policy decisions will help them to deflect political criticism and controversy ("The Feds made me do it."). Others may welcome federal authority because they believe that state governments will not adequately protect the environment. Still other state officials may believe that federal research and rule-making will conserve state administrative resources.

178. See generally Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1211-19 (1977) (discussing the rationales for centralization).

arguments are not controversial, but they also do not justify an intrusive federal pollution program. The third argument—unduly weak state programs—is more controversial, but if persuasive would justify a more intrusive federal program.

The argument about economies of scale does not require much elaboration. In terms of efficiency, it makes little sense for each state to duplicate the underlying research and collection of data necessary to regulate air pollution. There are also economies of scale in standard setting when the standards are nationally uniform. These economies, however, do not support the substantial federal role in implementation and enforcement, or in oversight of state agencies.

The need for the federal government to regulate interstate pollution is fairly self-evident. As environmentalists are fond of saying, pollution knows no boundaries, and it seems unlikely that upwind states would ever adequately take into account the concerns of downwind states. The upwind states lack any incentive to cooperate with the downwind states, and the transactional costs of establishing interstate regulation are too high for the states, except in special cases. The federal legislature, by contrast, has a national focus and is a natural forum to establish regulations and procedures to resolve interstate conflicts. Consequently, it should be better able to regulate interstate pollution.

Interstate air pollution, however, was not a significant concern of the Congress that enacted the 1970 Clean Air Act. The first substantive provisions governing interstate pollution were not adopted until 1977,<sup>179</sup> and those provisions did not deal effectively with interstate pollution.<sup>180</sup> Not until the 1990 amendments did Congress adopt extensive interstate pollution provisions, including provisions dealing with interstate ozone transport and acid rain.<sup>181</sup> Even with the new interstate pollution provisions, however, the vast bulk of the Act deals with intrastate pollution.

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179. See Clean Air Act Amendments of 1977, Pub. L. No. 95-95, §§ 108(a)(4), 123, 91 Stat. 685, 693, 724-25 (codified as amended at 42 U.S.C. §§ 7410(a)(2)(D), 7426) (concerning implementation plans and abatement of interstate pollution).

180. See Kay M. Crider, Comment, *Interstate Air Pollution: Over a Decade of Ineffective Regulation*, 64 CHI.-KENT L. REV. 619 (1988) (examining the ineffectiveness of interstate pollution regulation under the 1977 Clean Air Act Amendments); Comment, *Interstate Air Pollution Abatement and the Clean Air Act Amendments of 1990: Balancing Interests*, 62 U. COLO. L. REV. 957, 960-71 (1991) (discussing enforcement problems under the interstate pollution provisions of the 1977 Act).

181. 42 U.S.C. § 7506a (Supp. V 1993) (authorizing establishment of interstate transport commissions to make recommendations to EPA); *id.* § 7511c (establishing special requirements for an ozone transport region in the Northeast); *id.* §§ 7651-7651o (acid rain program).

The principal justification for federal air pollution regulation has been that environmental protection is of great national importance and that states have been unwilling or unable to deal with pressing air pollution problems.<sup>182</sup> Lack of adequate state administrative resources and systematic problems in state policy-making processes prevented states from adopting needed environmental programs.

There are certainly strong historical precedents for filling a state policy vacuum with federal law. For example, the states were in no position to address the economic problems underlying the Great Depression. They lacked not only significant resources and expertise, but also an integrated view of the national economy that required a national authority to deal with problems of unemployment, industrial and agricultural productivity, banking, and securities. State political boundaries had become irrelevant, and even a hindrance, to the resolution of the economic crisis.

Civil rights is another area in which the exercise of federal authority was essential. Without federal civil rights legislation in the 1960s, it is doubtful that the Nation would have made much progress in defining and protecting civil rights. What was controversial before 1964—basic voting rights and rights to be free from discrimination by private actors—we now take for granted. The newly defined federal statutory civil rights,<sup>183</sup> as well as the availability of federal courts to enforce those rights, helped to bypass indifferent and hostile state officials. As Scheiber emphasizes, our history thus belies the notion that federalism is necessarily congruent with individual liberty.<sup>184</sup> The 1960s federal civil rights legislation renewed the promises of the Civil War Amendments adopted by the Radical Republicans who dominated Congress a century earlier, and it became the model for state civil rights legislation.

It is probably equally true that in 1970 most states could not be relied upon to establish an adequate environmental policy. In floor debates and legislative reports, members of Congress repeatedly stated their belief that the states had failed to adopt effective air pollu-

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182. See *supra* notes 32 and 60 and accompanying text.

183. See, e.g., Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended 42 U.S.C. §§ 1971-1973gg-10 (1988 & Supp. V 1993)); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1981-2000h-16 (1988 & Supp. V 1993)).

184. Scheiber, *Federalism and Legal Process*, *supra* note 2, at 706 (“[T]here was a grotesque failure of egalitarian ideals and civil rights. It was, of course, the continued vitality of federalism that permitted the hegemony of segregationist institutions and the violence against blacks, antisindicalism and other repressive state laws in the 1920s, and the horrors of the criminal process from arrest through imprisonment.”).



tion programs because they were engaged in a "race-to-the-bottom."<sup>185</sup> States that were eager to attract and keep economic development purportedly competed against each other by relaxing environmental regulations below some optimal level.<sup>186</sup>

Even without interstate competition for business, states may have been unreasonably biased against environmental protection. State and local officials may have been unduly sensitive (more so than federal officials) to the relatively concrete, immediate costs of environmental regulation and foregone development,<sup>187</sup> and indifferent to the value of the highly diffuse, amorphous, future benefits of environmental regulation.

Finally, state-by-state development of environmental policy—which was Congress's preferred route before 1970—is necessarily slow and uncertain under the best of circumstances. Establishing state bureaucracies with adequate resources and authority to address environmental problems, at a time when the causes and scope of the problems were poorly understood, would take time. Moreover, the process of legislative reform had to be repeated fifty times.<sup>188</sup> An environmental policy that relied on state legislative initiative thus favored the status quo.

In any event, the states had done little by 1970 to address the worsening air pollution problem. State legislatures had not provided state agencies with the necessary legal authority and technical and administrative resources. If environmental protection was a national political priority, it required national legislative intervention.<sup>189</sup>

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185. See *supra* note 60.

186. The race-to-the-bottom idea is premised on the notions that states normally are unable or unwilling to cooperate with each other in setting environmental standards and that investment capital is highly mobile. See Stewart, *supra* note 178, at 1212 (discussing the effects of individual states lowering standards to attract moving capital); Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 747 (1977) (analyzing the possible results in the absence of a federal nondegradation requirement).

The race-to-the-bottom rationale for national standards has been challenged as lacking an adequate theoretical basis and as being inconsistent with experience over the last 20 years. See Revesz, *supra* note 62.

187. Stewart, *supra* note 178, at 1213-15.

188. See generally Macey, *supra* note 35, at 271-73 (describing the reasons why an interest group seeking wealth transfers, such as environmental legislation, will generally prefer federal law over state law).

189. It is easy, however, to overstate the parochialism of state and local governments. Even in the 1960s, some state and local governments were leading, not following, the federal government toward greater environmental protection. See, e.g., *supra* note 65. One of the reasons that some industries acquiesced in federal air pollution legislation was the prospect of preempting state air pollution legislation. See E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313,

Despite the imposition of federal priorities and requirements over the last twenty-five years, many state legislatures and agencies have become significant players in environmental policy-making. Today, many state and local governments are quite active in formulating environmental policy, in some cases more so than the federal government. For example, while the federal government has been notoriously slow to adopt regulations for hazardous air pollutants,<sup>190</sup> some states and local governments pushed ahead to establish both standards and right-to-know requirements.<sup>191</sup> Professor Hays has noted "the politically decentralizing tendency that is inherent in much environmental action."<sup>192</sup> Environmental benefits and regulatory costs are most keenly felt locally, and today reformers may find the state legislature or state agencies more accessible than a distant federal government that is reluctant to spend its resources on issues of local interest.

But the dramatic growth of state environmental regulation over the last twenty-five years cannot be ascribed solely or even primarily to the localism inherent in environmental problems. After all, left to their own devices, states had done little to regulate the environment before 1970. A principal reason for the growth and sophistication of state regulation, paradoxically, is the centralization of environmental policy beginning in 1970. First, federal environmental legislation often has been a model for state environmental legislation and a springboard for innovative regulation that goes beyond the federal minimum, thereby giving life to Brandeis's description of the states as laboratories of experimentation in public policy.<sup>193</sup> In the Clean Air

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329-33 (1985) (describing how the ability of state legislators to externalize the costs of environmental regulation to other states convinced the auto and soft coal industries to support nationally uniform, predictable, and possibly less stringent federal legislation); Samuel P. Hays, *The Politics of Environmental Administration*, in *THE NEW AMERICAN STATE: BUREAUCRACIES AND POLICIES SINCE WORLD WAR II* 41-42 (Louis Galambos ed., 1987) (describing industry efforts to seek federal regulation of air pollution, noise pollution, and coastal zone management as a means to avoid stricter state regulation). Those little laboratories of experimentation helped to promote the development of environmental policy.

190. Dwyer, *supra* note 86.

191. See, e.g., CAL. HEALTH & SAFETY CODE §§ 25249.5-.13 (West 1986) (requiring businesses to warn persons exposed to listed carcinogens or reproductive toxins); *id.* §§ 39650-39675 (West 1986 & Supp. 1995) (requiring emissions standards for toxic air contaminants); *id.* §§ 44300-44394 (West Supp. 1995) (requiring facilities to submit an inventory of toxic emissions, to prepare and publicly release a health risk assessment, and to implement measures to reduce emissions).

192. Hays, *supra* note 189, at 41.

193. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also Charles Fried, *Federalism—Why Should We Care?*, 6 HARV. J.L. & PUB. POL'Y 1, 2-3 (1982) (arguing that the states work best as laboratories for experimentation only under certain competitive conditions).

Act, for example, Congress authorized California to run a pilot program with clean-fuel vehicles,<sup>194</sup> and the National Environmental Policy Act<sup>195</sup> spawned similar (and sometimes more stringent) legislation in fifteen states and the District of Columbia.<sup>196</sup>

Second, federal funding and federal environmental legislation have promoted the development and growth of state environmental bureaucracies and expertise. States that want to assume administrative responsibilities under federal environmental statutes—and most states do—must establish agencies with an adequate number of trained staff and adequate resources and legal authority.<sup>197</sup> As they grow in size and sophistication, the state agencies in turn become centers of environmental policy-making, which set their own goals and priorities<sup>198</sup>

#### IV. CONCLUSION

The trend toward centralization in air pollution policy is more textured than the term suggests. First, there are practical administrative and political limits to centralization. Although it has as much legal authority as it needs, the federal government cannot implement its air pollution program without the substantial resources, expertise, information, and political support of state and local officials. Congress and EPA can quell minor revolts among state agencies, but widespread dissatisfaction—manifested in the time-honored “go-slow” approach—will bring EPA and even Congress to the bargaining table.

Second, while we have long realized that the states can produce innovative policies and programs that the federal government can appropriate, it is increasingly clear that centralization paradoxically gives states greater opportunity and incentives to undertake policy experimentation. Federal funding for state environmental programs and capital improvements (*e.g.*, sewage treatment facilities) directly promote the growth of state expertise and state authority. Moreover, the

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194. 42 U.S.C. § 7589 (Supp. V 1993).

195. 42 U.S.C. §§ 4321-4370d (1988 & Supp. V 1993).

196. DANIEL R. MANDELKER, *NEPA LAW AND LITIGATION* 12-2 to 12-6 (2d ed. 1994).

197. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7410(a)(2)(E).

198. In the aggregate today, state expenditures on the environment well exceed federal expenditures. Federal expenditures for the environment in fiscal 1991 totaled \$18.6 billion. COUNCIL ON ENVIRONMENTAL QUALITY, *ENVIRONMENTAL QUALITY: 22ND ANNUAL REPORT* 57-58 (1992). By contrast, in 1990 state and local expenditures totaled \$55 billion (1990 dollars), with roughly \$12.3 billion spent on natural resources, \$14.2 billion on parks and recreation, \$18.3 billion on sewerage, and \$10.1 billion on solid waste management. *Id.* at 293, Table 13. State air pollution budgets also exceed federal regulatory efforts. *See supra* note 173.

federalist model for federal pollution programs virtually requires states to develop their own environmental bureaucracies, which in turn develop their own goals and agendas.