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Enforcing Transportation Control Plans: The Environmental Protection Agency vs. The States

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ENFORCING TRANSPORTATION CONTROL PLANS: THE ENVIRONMENTAL PROTECTION AGENCY VS. THE STATES

I. Introduction

In two recent actions[1] the Supreme Court has narrowed the controversy that surrounded federal procedures for enforcing the Clean Air Act.[2] Without discussing the statutory and constitutional issues raised during years of litigation,[3] the Court has removed a major hurdle that faced the Environmental Protection Agency (EPA) and environmental groups seeking implementation of plans intended to control and abate air pollution. Simultaneously, the broad authority sought by the EPA and challenged by the states has been limited.

The Clean Air Act,[4] a long and complex statute, was enacted "to protect and enhance the quality of the Nation's air."[5] It provides for the establishment of national ambient[6] air quality standards[7] and the means for their attainment.[8] The Act sets out numerous methods to achieve the established standards. Notable among these are

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1. EPA v. Brown, 97 S. Ct. 1635 (1977); Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir. 1977), *cert. denied, sub. nom.* Beame v. Friends of the Earth, 431 U.S. 99 (1977).

2. 42 U.S.C. §§ 1857 (1970) (hereinafter Act). *See* enforcement procedures in section 113 of the Act, 42 U.S.C. § 1857c-8 (1970).

3. *See* Brown v. EPA, 521 F.2d 827, 832-42 (9th Cir. 1975). *See also* Friends of the Earth v. Carey, 552 F.2d 25, 29-33, 36-39 (2d Cir. 1977).

4. The Act covers numerous topics and issues, including research, 42 U.S.C. § 1857b (1970), establishment of standards, *id.* § 1857c-5 to c-7 and vehicle emissions, *id.* § 1857f-1 to f-12. This Comment will focus on the two sections concerning state implementation plans, *id.* § 1857c-5, and federal enforcement procedures, *id.* § 1857c-8.

5. *Id.* § 1857(b)(1).

6. Friends of the Earth v. Carey, 552 F.2d 25, 30 (2d Cir. 1977).

7. 42 U.S.C. § 1857c-4 (1970). The Act provides that the ambient standards established will apply nationally. However, a key element is that their attainment is essentially a local matter. The Act, therefore, places responsibility on the states, Id. § 1857c-2(A). There is a variation to the requirement that the states individually provide for attainment of the standards. That exception is that certain areas not entirely within, or larger than, a single state may be designated an air quality control region. *Id.* § 1857c-2(b) (*e.g.*, the designation of the tri-state area surrounding New York City as the New Jersey-New York-Connecticut Interstate Air Quality Control Region. Friends of the Earth v. EPA, 499 F.2d 1118, 1120 n.1 (2d Cir. 1974)).

8. *See generally*, 42 U.S.C. §§ 1857b & 1857c, concerning research and grant provisions of the Act.

reducing pollutants discharged from stationary sources[9] such as factories and refineries, and limiting the volume of pollution from mobile sources, primarily motor vehicles, by raising automobile exhaust emission standards[10] and controlling the ordinary use of automobiles.[11] To accomplish the latter goal, the Act required each state to develop a transportation control plan (TCP).[12] A TCP may contain various strategies, such as creating express bus lanes, establishing bikeways, requiring the imposition of tolls on bridges, designed to reduce the use of motor vehicles and the resulting pollution.

Pursuant to section 110 of the Act,[13] each state was to design a plan and submit it to the EPA, which could approve or request revision of the plan.[14] If a state failed to submit or revise a plan, the EPA was authorized to promulgate a plan for it.[15] If a state refused to comply with a plan promulgated by the EPA, the Act granted the Administrator of the EPA broad power to seek injunctive relief and civil and criminal sanctions for noncompliance.[16]

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9. *Id.* § 1857c-6.

10. *Id.* § 1857f-1.

11. *Id.* § 1857c-5.

12. The statute refers to a state implementation plan (SIP). 42 U.S.C. § 1857c-5 (1970). Because that is a generic term used throughout the statute, most courts, when referring to the plans discussed in this Note, use transportation control plan (TCP), a more descriptive term. *See* Friends of the Earth v. Carey, 552 F.2d 25, 38 (2d Cir. 1977); District of Columbia v. Train, 521 F.2d 971, 978 (D.C. Cir. 1975); Brown v. EPA, 521 F.2d 827, 829 (9th Cir. 1975).

13. 42 U.S.C. § 1857c-5 (1970).

14. *Id.* § 1857c-5(a)(1). This provision required the Administrator to approve any plan or portion of a plan that met specified criteria. These criteria required that the plan had to have certain components giving reasonable assurance that the standards would be met. *Id.* § 1857c-5(a)(2)(A)-(H).

15. *Id.* § 1857c-5(c). The bases for the Administrator promulgating a plan are either failure to act within the prescribed time, *id.* § 1857c-5(c)(1), or failure to comply with the criteria set forth in the statute. *Id.* § 1857c-5(a)(2)(A)-(H). The Administrator must act promptly and the plan promulgated must meet the same statutory criteria. *Id.* § 1857c-5(c).

16. *Id.* § 1857c-8. Section 113(a)(1)-(2) provides that:

> (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.
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> (2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violation appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such

The basic issue raised was whether the EPA could compel a state to act to abate pollution using methods prescribed by the federal government. States argued that the Act did not authorize the use of coercive action, especially when state funds and governmental action were required for implementing a plan. The states argued that if the Act did authorize such action, it violated the commerce clause[17] and the tenth amendment of the Constitution.[18]

This Comment will examine the treatment of the TCPs by the courts, and discuss the statutory and constitutional objections raised to challenge enforcement of the plans. The discussion will start with an early and important court of appeals case, *Pennsylvania v. EPA*,[19] holding that an imposed plan was enforceable, and three subsequent cases in which three other federal appeals courts reached the opposite conclusion.[20] The Comment will then consider the issues involved in New York's TCP, a plan proposed and designed by the State and City of New York, which the Second

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failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satifies the Administrator that it will enforce such plan (hereafter referred to in this section as 'period of federally assumed enforcement'), the Administrator may enforce any requirement of such plan with respect to any person—(A) by issuing an order to comply with such requirement, or (B) by bringing a civil action under subsection (b) of this section.

Id. § 1857c-8(a)(1)-(2).

Section 113(b) of the Act provides that:

The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person (1) violates or fails or refuses to comply with any order issued under subsection (a) of this section; or (2) violates any requirement of an applicable implementation plan during any period of Federally assumed enforcement after having been notified by the Administrator under subsection (a)(1) of this section of a finding that such person is violating such requirement . . . .

Id. § 1857c-8(b). Section 113(c) provides for fines of not more than $25,000 per day of violation or imprisonment not to exceed one year of any person who knowingly violates any requirement of an applicable plan after receiving the notice provided in section 113(a)(1) or fails to comply with an order issued under section 113(a). *Id.* § 1857c-8(c). This section provided the basis for the litigation discussed in this Comment. Construction of its language was a critical factor in one major case. Brown v. EPA, 521 F.2d 827, 834-37 (9th Cir. 1975).

17. U.S. CONST. art. I, § 8, cl. 3.

18. U.S. CONST. amend. X.

19. 500 F.2d 246 (3d Cir. 1974) [hereinafter *Pennsylvania*].

20. Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *vacated*, 431 U.S. 99 (1977) [hereinafter *Brown*]; District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *vacated*, 431 U.S. 99 (1977); Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975), *vacated*, 431 U.S. 99 (1977). These cases are discussed in part II *infra*.

Circuit Court of Appeals held to be binding and enforceable.[21] Finally, it will examine the Supreme Court's treatment of the conflicting circuit court decisions[22] and the New York case.[23]

II. The Promulgation and Enforcement of TCPs by the EPA

The earliest case in which a state challenged the EPA's efforts to promulgate by regulation and enforce a TCP was *Pennsylvania v. EPA*.[24] In that case the state challenged the EPA's requirement that it establish a program to ensure the installation of an air bleed retrofit[25] on pre-1968 vehicles. In addition, the TCP required Pennsylvania to set up bikeways, to limit public parking in certain cities and to implement other specific strategies.[26] The state challenged only the regulation requiring the air bleed retrofit program.[27]

The Third Circuit held that the application of this regulation and the federal enforcement procedures under the Act were valid.[28] Initially, the court considered the facts on which EPA determined that the air bleed retrofit program was needed.[29] It found sufficient support in the regulations promulgating the plan to show that the EPA action was not arbitrary or capricious. The court then discussed the crucial issue of whether the enforcement procedures of the Act could be applied to the state. Section 113 of the statute[30] authorized the EPA to proceed against the state by administrative order of civil

21. Friends of the Earth v. Carey, 535 F.2d 165 (2d Cir. 1976) [hereinafter *Friends II*]. The Second Circuit later reaffirmed the position taken in this case when, on remand, the district court, relying on *Brown*, refused to order implementation. An appeal followed and the Second Circuit refused to alter its position. Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 296 (1977) [hereinafter *Friends III*]. These cases are discussed in part III *infra*.

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

23. Beame v. Friends of the Earth, 98 S. Ct. 296 (1977); Carey v. Friends of the Earth, 98 S. Ct. 296 (1977).

24. 500 F.2d 246 (3d Cir. 1974).

25. *Id.* at 248. An air bleed retrofit is a device installed on internal combustion engines which forces air into the engine resulting in more complete combustion. *Id.* at 249.

26. Other strategies in the TCP for Pennsylvania included establishing a computer carpool matching system, creating exclusive bus lanes, and establishing a vehicle emission testing system. *Id.*

27. *Id.*

28. *Id.* at 263. Although upholding the application of this strategy to the eastern portion of the state the court held its application to the western portion was invalid. *Id.* The court found that the study conducted in the western portion of the state by the EPA was deficient and did not provide an adequate basis to mandate this requirement. *Id.* at 251.

29. *Id.* at 251-54.

30. 42 U.S.C. § 1857c-8.

action to secure compliance with a requirement or a plan.[31] However, the EPA could also seek criminal sanctions against a person who knowingly violated a plan or failed to comply with an order.[32] The state challenged the applicability of these statutory provisions to the states.[33]

The court framed the issue more broadly. It said the implication of the state's claim was also to challenge the substantive regulation requiring the air bleed retrofit and, more importantly, to question "the power of the Federal Government to require a state to enforce an implementation plan."[34]

Although the federal regulation required vehicle owners to install the air bleed retrofit, the EPA also required the state to submit legally adopted regulations to establish an inspection program, to cease registration and prohibit operation of non-complying vehicles and to submit an enforcement schedule to the EPA.[35] The state essentially argued that the EPA requirements compelled the state to enforce federal regulations, thereby requiring the exercise of state police power and the expenditure of state funds, which was not the intent of Congress.

Initially the court considered whether the enforcement scheme of the Act contemplated that the EPA might require a state to enforce the substantive strategies of an applicable TCP. In determining that this was within the intent of Congress the court noted that "[t]here are only two ways in which [the EPA] could ensure that these strategies would be implemented: by applying the resources of the Federal Government to implementing them or requiring the Commonwealth to do so."[36] The court agreed with the EPA's view that direct federal enforcement was impractical and inefficient.[37]

31. *Id.* § 1857c-8(a)(2). Under this provision the Administrator is authorized to act after concluding the state has failed to enforce the plan, giving notice to the state and giving public notice. The period from the giving of public notice until enforcement is assured is known as "'the period of federally assumed enforcement.'" *Id.* The language of this section was carefully considered in subsequent cases and the section is reproduced in full in the discussion of those cases.

32. *Id.* § 1857c-8(c).

33. 500 F.2d at 254. The regulation concerning enforcement, 40 C.F.R. § 52.23 (1974), applied to all states for which the EPA had promulgated a TCP. *Id.*

34. 500 F.2d at 256.

35. *Id.* at 249.

36. *Id.* at 257.

37. *Id.* at 257-58.

But it further reasoned that because the Congress required the state to implement testing and inspection systems for auto emissions, "it seems unlikely that it would have had any objection to requiring states to carry out other programs to reduce pollution from in-use-vehicles."[38] Thus the court found that the EPA was within its statutory authority in requiring the state to implement the air bleed retrofit strategy and compelling the state to do so by applying the enforcement procedures available under the statute.[39]

A second question was whether this statutory provision was authorized by the commerce clause of the Constitution.[40] The court began its constitutional analysis with a discussion of *Maryland v. Wirtz*.[41] In that case the Supreme Court held that application of minimum wage, maximum hour laws to employees of state-operated schools and hospitals was constitutionally permissible.[42] In *Wirtz*, the state had claimed that the federal regulation affected a state governmental function beyond the reach of the commerce clause, violating the state's sovereignty. The Court had held, in part, that state economic activities in which private persons are also engaged are subject to federal regulation under the commerce clause.[43] The state in *Pennsylvania* sought to distinguish its position from and limit the holding of *Wirtz*. It asserted that the operation of schools and hospitals was an activity engaged in by private individuals, but that the registration and inspection of motor vehicles was not. Therefore, the state claimed that this uniquely governmental function was beyond the reach of federal commerce clause authority.[44] The court rejected this argument, saying that the issue in *Wirtz* was not the type of activity, but whether the activity affected commerce.[45]

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38. *Id.* at 258. The court here cited § 110(a)(2)(G) of the Act, 42 U.S.C. § 1857c-5(a)(2)(G), which requires states to implement inspection programs to assure compliance with vehicle emission standards and to devise strategies to reduce pollutant discharge. It then inferred that Congress also intended the states to enforce substantive regulations. 500 F.2d at 258. The court cited legislative history, 116 CONG. REC. 19204 (1970), in support of its conclusion. *Id.* Another court has characterized the legislative history as being ambiguous on this point. Brown v. EPA, 521 F.2d 827, 835 (9th Cir. 1975).

39. 500 F.2d at 259.

40. *Id.* at 259-63.

41. 392 U.S. 183 (1968).

42. *Id.* at 193-99.

43. *Id.* at 195-99.

44. 500 F.2d at 259.

45. *Id.* at 259-60. The court pointed out that the commerce clause issue must be determined by the type of activity, not the identity of the actor. This follows because an activity

The state also argued for a narrow interpretation of *United States v. California*,[46] in which the Supreme Court had held that a state-operated railroad was subject to the same federal operating regulations as were other railroads.[47] The state in *Pennsylvania* sought to limit *California* to its facts,[48] arguing that the decision was limited to commercial activities. The Third Circuit, however, found no such limitation suggested by *California*.[49]

The court said the controlling issue in *Wirtz* and *California* was not the governmental-proprietary distinction, but whether the regulated activity affected commerce and whether the legitimate state activity — compensating hospital employees, operating a railroad, or controlling pollution — may ultimately be subjected to the authority delegated to the federal government. The court concluded, following *California*, that activities with similar effects on commerce are to be treated the same regardless of the entity which engages in them.[50] The distinction between automotive transportation systems maintained only by states and railroads and hospitals run by both states and by private persons was, the court said, irrelevant.[51] The court stressed that federal enforcement of the TCP, rather than violating sovereignty, comported with the federalist principles of the Constitution and with the "interlocking governmental structure" created by the Act.[52]

A little more than a year later, three other circuits considered similar cases and reached opposite conclusions.[53] Although the three

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that is subject to regulation may be engaged in by a state and not exempted from regulation for that reason. The court also noted that any regulation, valid or not, will interfere with the state's power. In a footnote the court distinguished Congress' permissible regulation of wages from the impermissible determination as to how duties are performed. *Id.*

46. 297 U.S. 175 (1936).

47. *Id.*

48. 500 F.2d at 260.

49. *Id.*

50. *Id.* at 260-61. In light of subsequent criticism of this reasoning, Brown v. EPA, 521 F.2d 827, 838 n.45 (9th Cir. 1975), it appears that the court relied more on the similarity of activity conducted by the state and failed to distinguish between the state's own activities and its regulatory power over third parties.

51. 500 F.2d at 261.

52. *Id.* at 262.

53. The two cases not discussed in this Comment are Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975), *vacated*, 431 U.S. 99 (1977) and District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *vacated*, 431 U.S. 99 (1977). In *Maryland* the state challenged an EPA regulation requiring it to submit legally adopted regulations, the text of statutory proposals for the programs and the funding needed to implement various strategies. 530 F.2d at 224.

courts used different emphases in their decisions, they were essentially similar in their reasoning and holdings. Of these three cases the most instructive is *Brown v. EPA*.[54] In *Brown*, EPA regulations required California to implement strategies to control the emission of photochemical oxidants and carbon monoxide. The required strategies, part of the state's TCP, included a computerized car pool matching system, preferential car pool and express bus lanes and an inspection and maintenance program to reduce emission of pollutants.[55] The EPA contended that it was authorized to bring legal actions against the state pursuant to the federal enforcement procedures of the Act because of the state's failure to implement the aforementioned programs. The EPA sought injunctive relief and sued to hold the state officials in civil contempt, impose a receivership on state functions, and to force reallocation of funds in the state budget.[56] Although it eventually discussed the constitutional issues of the state's challenge, the court held that

> the Clean Air Act does not authorize the imposition of sanctions on a state or its officials for failure to comply with the Administrator's regulations which direct the state to regulate the pollution-creating activities of those other than itself, its instrumentalities and subdivisions and the municipalities within its borders.[57]

The court recognized that the federal government could sanction a state for polluting the air; however, it could not sanction a state that did not regulate polluters in the way the EPA directed. The court found that the Act did not give the EPA the authority it claimed and that the exercise of such authority, if allowed, would raise serious constitutional problems. Thus the court's ruling was in direct contradiction to *Pennsylvania*.

The court held that "the EPA was without authority under the statute . . . to require Maryland to establish the programs and furnish the legal authority for the administration thereof." *Id.* at 228. In *Train* the court similarly found that the Administrator's regulations requiring local legislation to implement a retrofit program and create bicycle lanes and an inspection program exceeded the statutory authority. 521 F.2d at 986-87.

54. 521 F.2d 827 (9th Cir. 1975), *vacated*, 431 U.S. 99 (1977).

55. *Id.* at 830.

56. *Id.* at 831.

57. *Id.* at 832. The distinction between the state's own activities and its regulation of the activities of others was crucial in determining the extent of both the statutory and constitutional authority. It was also a distinction that the court in *Pennsylvania* did not draw. *Pennsylvania* found that the actor's identity was irrelevant. 500 F.2d at 261. Failure to note this distinction led to the *Brown* court's criticism of *Pennsylvania*. 521 F.2d at 838 n.45.

The court rigorously analyzed the language of the provisions pertaining to federal enforcement procedures.[58] Section 113(a)(2) of the Act[59] provides that when the Administrator finds violations of an applicable implementation plan caused by the state's failure to enforce it, he will notify "the state." The Administrator must then wait for 30 days after the giving of public notice to enforce any strategy of a plan against "*any person*" by issuing a compliance order or by bringing a civil action. The EPA relied on this section in bringing an enforcement action against the state because "person" is defined by the Act to include a "state."[60]

But the court, rather than reading "person" to include "state" in the enforcement section, found that Congress sought to distinguish "person" and "state."[61] As is the case in subsection (a)(2), subsection (a)(1)[62] provides that when the Administrator finds violations of a TCP, he must so notify the violator and the state in which the TCP applied. Thus, rather than "state" being subsumed within "person," the court found that the enforcement provisions treated the state as a separate entity.[63]

The court noted that if Congress had intended to allow an action to be brought against the state, it could have so provided as it had in the notice provision.[64] However in the enforcement section, the notice is to the "state" and the action is against the person in violation.[65]

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58. 42 U.S.C. § 1857c-8.

59. *Id.* § 1857c-8(a)(2) This section provides that:

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

Id.

60. *Id.* § 1857h(e) (emphasis added).

61. 521 F.2d at 834-37.

62. 42 U.S.C. § 1857c-8(a)(1).

63. 521 F.2d at 834.

64. *Id.* The court stated that had Congress intended to allow the EPA to bring an action to be brought against the state it could have made this intent explicit. It also pointed out that, in contrast, the Administrator's regulations had made this intent clear.

65. 42 U.S.C. § 1857c-8(a)(2).

The court noted that, had Congress intended a different effect, it would have been more explicit, particularly in "light of the delicacy with which federal-state relations always have been treated by all branches of the Federal government."[66] The effect of the court's reading of this section is that the EPA may bring an action against the violator of the plan. If this is ineffective or would be inappropriate, and the state fails to enforce the requirement after being notified of the violation, the recourse available to the EPA is direct federal implementation. The court noted that these options were parallel to those under which the TCPs were promulgated.[67]

The Ninth Circuit found that the statute did not permit the EPA to go further and force the state to implement a plan. It said that a contrary reading was incompatible with the Act's "cooperative federalism that made use of techniques such as preemption, delegation of federal authority and other opportunities created for the states to participate in controlling air pollution."[68] It further noted that such a reading would transform the states into departments of the EPA.[69]

If the EPA's interpretation were given effect, the court said, serious constitutional problems would arise. The EPA, relying on *Wirtz* and *California*, argued that valid regulations of commerce do not become invalid because a state is engaging in the regulated activity. Furthermore, the state may be as validly required to control air pollution as it is to operate its railroad in conformity with federal safety regulations.[70] But the state argued that under the commerce power it could not be compelled to take governmental action with respect to activities within the reach of the commerce power.[71] Thus it conceded that control of air pollution was a valid subject for federal regulation, but contended that the state could be compelled to regulate an activity within federal authority. The court agreed that air pollution in a state was a proper subject of federal regulation, but it found that the commerce clause did not permit the

66. 521 F.2d at 834.

67. *Id.*

68. *Id.*

69. *Id.* at 835. In reaching the same conclusion when considering the extent of the commerce clause, the court said that to accept the EPA's argument "would reduce the states to puppets of a ventriloquist Congress." *Id.* at 839.

70. *Id.* at 837-38.

71. *Id.* at 838.

federal government to compel the state to regulate pollution in the manner directed by the federal government.[72]

This limiting of the authority given by the commerce clause was based on the decision in *Wirtz* which the court of appeals said distinguished between a state engaging in commerce and the state's regulation of the commence of others. This distinction, not the removal of the governmental-proprietary distinction, was the basis of *Wirtz*. In either instance the "commerce" is subject to federal regulation, but the state's regulation of commerce is not itself "commerce" subject to federal authority.[73]

The court pointed out that the Administrator was not merely insisting that the state regulation not burden commerce, nor was he merely seeking to establish that federal authority in the area of air pollution was preemptive of state action.[74] The EPA's position was a far more radical departure from conventional commerce clause theory than these two doctrines. The court asserted that its restriction of the EPA's authority would neither deprive it of the ability to regulate air pollution nor raise the constitutional problems occasioned by a broader reading;[75] that is, a serious effect "on the structure of the existence of our federal system."[76] Also the court noted that federal law often told the states not to do certain things, but that it rarely compelled the states to act affirmatively.[77]

III. State-designed Plans and Citizen Suits: A Counterpoint

During and after the period in which the courts decided *Pennsylvania* and *Brown*, the Second Circuit found the New York TCP enforceable in *Friends of the Earth v. Carey (Friends III)*.[78]

72. *Id.* at 839.

73. *Id.*

74. *Id.* at 839-40. The court cited several cases holding that in its power to regulate commerce Congress may prevent the state's exercise of police powers that burden interstate commerce, Pike v. Bruce Church, 397 U.S. 137 (1970), Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959), Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945), and that Congress may pre-empt local authority in certain situations, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963), Campbell v. Hussey, 368 U.S. 297 (1961), Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947), Hines v. Davidowitz, 312 U.S. 52 (1941).

75. *Id.* at 840. The court pointed out some acceptable means that Congress could employ to achieve the goals sought by the EPA. These included economic incentives and limiting the ways states could regulate aspects of commerce if they chose to regulate it at all.

76. *Id.*

77. *Id.* at 841.

78. 552 F.2d 25 (2d Cir. 1976).

However, this case had two significant features that made it distinguishable from *Pennsylvania* and *Brown*. The first was that the suit was brought by environmental groups under the Act's citizen suit provision[79] rather than by the EPA seeking enforcement. The second and more important distinction was that the TCP involved was developed and designed by the State and City of New York.[80] Although the TCP contained many strategies, those challenged in the case were a reduction in business-district parking, decreases in taxicab cruising, imposition of tolls at certain bridges and night time freight movement programs. The intended effect of these strategies was to limit vehicle use in the New York City metropolitan area to reduce the levels of carbon monoxide, hydrocarbon and photochemical oxidant pollutants to the levels permitted by the EPA.

In the course of the litigation the TCP was before the Second Circuit on three occasions. In *Friends I*, the court found the plan valid in all material aspects.[81] Subsequently, the plan was held to be enforceable against the city and state despite the continued negotiation of consensual administrative orders and difficulties involved in court supervision of the implementation of *Friends II*.[82] Nevertheless, after these two decisions, the district court heard a constitutional challenge to the TCP[83] and its decision "all but emasculated the Plan as an enforceable instrument."[84] The district court had relied on *Brown*[85] and a recent Supreme Court case, *National League of Cities v. Usery*.[86]

National League of Cities held that extension of minimum wage and maximum hour regulations to virtually all state and municipal employees exceeded the authority of the commerce clause.[87] This decision also overruled *Wirtz*, saying that such an attempt to regulate commerce displaced the states' sovereign authority concerning

79. 42 U.S.C. § 1857h-2. This was significant because the court did not have the language of § 113, 42 U.S.C. § 1857c-8, concerning federal enforcement procedures, before it. Therefore it did not have to consider whether the Act allowed the EPA to proceed against a state that failed to enforce a plan or only against the "person" in violation of the plan.

80. 552 F.2d at 30.

81. Friends of the Earth v. Carey, 499 F.2d 1118 (2d Cir. 1974).

82. Friends of the Earth v. Carey, 535 F.2d 165 (2d Cir. 1976).

83. *See* 552 F.2d at 29.

84. *Id.*

85. *Id.*

86. 426 U.S. 833 (1976).

87. *Id.* at 854-55.

the conduct of integral government functions and would impair their ability to manage their own relations with their employees.[88] Following this reasoning, the district court found that the TCP bound the state only to the extent that it was a polluter itself. It could not be compelled to regulate other polluters.[89]

The decision of the district court, *Brown*, and *National League of Cities* notwithstanding, *Friends III* again found the TCP enforceable and distinguished both *Brown*[90] and *National League of Cities*.[91] While not expressing a view as to the correctness of *Brown*, the court said that "the facts and issues here are significantly different and clearly distinguishable."[92] The major difference was that the state and city were the architects of the plan. Rather than having the EPA promulgate a plan, the State and City of New York had formulated their own policy and made their own decisions as to how they would control pollution to meet the standards and requirements of the Act.

The court did not find any impermissible interference with the governmental functions of the state and city. This had been a decisive factor in *Brown*.[93] The court found that rather than an imposition, there was a pact between the federal and local governments.[94] Under the Act's scheme of cooperative federalism, the state and city had made two deliberate policy choices. The first and most critical was that they, not the federal government, would decide which strategies to employ. Secondly, the local governments chose the strategies they would implement. Thus the court would not allow the local branches of government to "renege on their own creation and commitment."[95]

Friends III then considered the effect of *National League of Cities* and whether the TCP and the EPA's efforts to control pollution constituted an impermissible impairment of integral government functions.[96] Again the court readily distinguished the two cases.

88. *Id.* at 845-46.
89. 552 F.2d at 29.
90. 552 F.2d at 36.
91. *Id.* at 38.
92. *Id.* at 36.
93. *Id.*
94. *Id.* at 37.
95. *Id.* at 34.
96. *Id.* at 37-38.

The court first noted the concession that air pollution was subject to federal regulation. Then it stated that *National League of Cities* had found only that the means, not the subject matter, of regulation were invalid. Thus if the subject matter could be validly regulated, the question became whether the means employed were permissible. To make this determination the court said a test that weighed the reason for the regulation against the extent of the intrusion must be applied.[97] In this case the court balanced the need to abate pollution against the burden imposed upon the local government.

The court found the TCP posed at most a minimum of interference in that the state and city, by designing the TCP, had exercised their authority. Therefore they could not claim an impermissible interference with their sovereign prerogatives. On the other hand air pollution was a recognized, serious problem in urban areas and its abatement was a national policy. On this basis the court found that the enforcement of the plan was not an impermissible interference under the rules of *National League of Cities*.

Friends III also noted that the claimed interference was not with an integral government function.[98] Contrasting *National League of Cities*, in which the federal action would effectively dictate policy and perhaps budget priorities, the court found that implementation of the plan would require at most only procedural or regulatory changes. Any financial obligations resulting would not be impositions since they were considered in the design of the TCP.

The determination of whether an activity was an integral government function was not based solely on the longevity of it. Although localities historically had regulated transportation and traffic, their concern had not been regulation to control pollution. And the mere traditional concern, especially when it is for a particular and different purpose, would not result in an activity becoming an integral government function for all purposes. In making this observation the court noted that *National League of Cities* had reaffirmed *United States v. California*, which held that a state-operated railroad was not beyond federal regulation merely because it was state-operated. Thus the activity in *Friends III*, like that in *California*, while admittedly governmental, was not an integral function. The federal regulation was not directed towards the locality's historical

97. *Id.* at 37.
98. *Id.*

concern, nor would it impinge upon financial and policy decisions as the regulation in *National League of Cities* had.[99]

Friends III did acknowledge that *National League of Cities* had imposed a restriction on the commerce clause authority, but it found that the present facts were closer to those in *Fry v. United States*.[100] *Fry*, which had been distinguished and left intact by *National League of Cities*, concerned the Economic Stabilization Act of 1970 and the President's authority under it to freeze the wages of state employees. That action, challenged as being in excess of commerce clause authority, was upheld because the legislation addressed a serious national problem, because its implementation was designed to have a minimal impact on the states' authority and because it displaced no state discretion in the area of governmental operation. The court saw the enforcement mechanism involved in the case before it as having attributes similar to *Fry* and lacking the intrusive features found in *National League of Cities*.[101]

IV. TCPs in the Supreme Court

The Supreme Court has considered an appeal from *Brown* and denied an application for certiorari in *Friends III*. In the former case the Court vacated the lower court's decision[102] leaving *Pennsylvania*, which had held an imposed plan enforceable, as the leading decision on that question. In denying certiorari in *Friends III*,[103] the Court let

99. *Id.* In reaching its conclusion that the TCP was not an impermissible interference with an integral government function the court isolated these distinguishing features: the plan had been designed by the state and city; its effect on policy and budget was minimal; any costs were contemplated by the city in the plan's design; and operation of streets and bridges to control pollution was not an integral government function.

100. 421 U.S. 542 (1975).

101. 552 F.2d at 39. The *Brown* court also cited *Fry* as an "'unintrusive'" regulation of commerce. 521 F.2d at 839.

102. EPA v. Brown, 431 U.S. 99 (1977); EPA v. Maryland, 431 U.S. 99 (1977); Train v. District of Columbia, 431 U.S. 99 (1977); Train v. State Air Pollution Control Bd., 431 U.S. 99 (1977).

103. Beame v. Friends of the Earth, 98 S. Ct. 296 (1977); Carey v. Friends of the Earth, 98 S. Ct. 296 (1977). The City of New York had previously applied to Mr. Justice Marshall for a stay in the enforcement of the Second Circuit's order in *Friends III*. Beame v. Friends of the Earth, 98 S. Ct. 4 (1977). Characterizing the case as "the most recent skirmish in a long legal battle," Justice Marshall noted that "the fact that New York promulgated its own plan makes this case significantly different from *Brown*." In stating that the applicant had not met its burden of persuasion, Justice Marshall found that the delay by the city in seeking a stay undercut its allegations that enforcement of the order would have little impact on pollution and would place unreasonable burdens on the city. *Id.* at 7. The respondents argued

stand the Second Circuit's decision holding a state-designed plan enforceable.

In *EPA v. Brown* the Court vacated the decisions of the various circuits and remanded the cases for consideration of mootness. This situation arose for two reasons. First, because the EPA conceded that requiring states to submit legally adopted regulations to implement a plan was invalid unless modified.[104] Second, the EPA's appeal also challenged only the invalidation of the regulation requiring state inspection and maintenance programs.[105] This led the Court to conclude that "the case has undergone a great deal of shrinkage since the decisions below."[106]

V. Conclusion

Although the Supreme Court's treatment of the TCPs was insubstantial and was not addressed to the statutory and constitutional issues presented, its actions removed certain issues from contention. First, the state-designed plans may be enforced against a state through a citizen suit. Second, the EPA may enforce a TCP that it has promulgated by regulation to the extent that it does not require the states to submit legally adopted regulations or legislation to accomplish implementation. Third, both the imposed and state-designed TCPs will have substantially the same effect. Had the *Brown* and *Friends III* circuit court decisions both been upheld, the anomalous result would have been that a state that made an attempt to comply with the Act would have been bound, while one that did nothing would have been beyond the reach of the EPA.

Now the decisions have a harmony that previously did not exist. It also seems clear that negotiated implementation of the TCP's will become the standard practice. In both lines of cases, lengthy and costly litigation has led to very little actual implementation,[107] and

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that rather than a burden, enforcement of the order would have economic benefits. Holding in favor of the respondents, Justice Marshall said that any adverse economic impact could be remedied by an accommodation with the EPA. *Id.* at 7.

104. 431 U.S. 99 (1977).

105. *Id.*

106. *Id.* Justice Stevens dissented, saying that until the regulations in question were actually rescinded the case was not moot and that the EPA's admission of the invaldity of the regulations was not grounds for vacating the judgments of the court of appeals. Justice Stevens said that either the writs should be dismissed or the case decided on its merits. The Court's decision, he said, gave "the Government a partial victory . . . for an apparent concession." *Id.*

107. Council on Environmental Quality, *Environmental Quality* 4 (1976).

serious problems, such as funding and legislative authority for implementation, still exist. The EPA's victory, limited as it is, may prove to be somewhat Pyrrhic in that the states do not appear to be rushing towards implementation and the agency has conceded the invalidity of some of its strongest weapons to combat this. If it may be said that the legal issues have been resolved, it must surely be admitted that the practical problems may have just begun.

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