Commandeering State Government: Renewed Confusion Over Federal Power Under the Clean Air Act

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Several recent judicial decisions have caused great confusion over the Environmental Protection Agency’s (EPA) constitutional authority to compel state implementation and enforcement of air pollution control plans promulgated pursuant to the Clean Air Act.¹ The United States Supreme Court first declined review of United States v. Ohio Department of Highway Safety,² in which the Sixth Circuit Court of Appeals held that EPA had not violated the tenth amendment when it compelled Ohio to deny title registrations to those vehicles failing to meet federally-promulgated emissions standards.³ Yet in Hodel v. Virginia Surface Mining and Reclamation Association,⁴ the Court cited with apparent approval District of Columbia v. Train⁵ and a related line of circuit cases in conflict with the ODHS court’s dictum on the tenth amendment issue.⁶ Finally, in FERC v. Mississippi⁷ the Court added to this confusion with an opinion that demonstrated little deference to state sovereignty and indicated that in future cases the Court would not categorically disapprove federally-compelled state regulation.⁸

This article’s basic purpose is to analyze the ODHS decision,⁹ indicate how it is inconsistent with Train¹⁰ and other important prior authority, and examine the Court’s further confusion of the issue of EPA-

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² 635 F.2d 1195 (6th Cir. 1980), cert. denied, 451 U.S. 949 (1981) [hereinafter cited as ODHS]. Justice Powell would have granted review. Id.
³ 635 F.2d at 1205.
⁶ 452 U.S. at 288.
⁷ 102 S. Ct. 2126 (1982).
⁸ See id. at 2137-43.
⁹ See infra text accompanying notes 123-159.
¹⁰ See infra text accompanying notes 156-159.
compelled state regulation in *Hodel* and *FERC*. The final section of the article recommends an appropriate way to resolve this confusion.

The article concludes, first, that although the *ODHS* holding is relatively narrow, the Sixth Circuit court's dictum, if adopted in future cases, would support overly broad assertions of authority by EPA for compelling state adoption of detailed comprehensive air quality control plans. Existing precedent as cited in *Hodel* suggests that the courts must make a more discriminating analysis of the Agency's authority in this area. Yet, the *ODHS* court failed to recognize any need for separate analysis with regard to each discrete provision of a comprehensive plan. Instead, the court appears to assume, based in part on a debatable reading of *National League of Cities v. Usery*, that the federal interest in environmental protection is paramount in all respects to an inconsistent state interest thereby obviating the need for a more refined analysis of federally-compelled state regulation.

This article argues that in future opinions the Supreme Court will want to eliminate the inconsistency raised by these decisions. The Court will want to clarify in particular whether it concurs with the *ODHS* court's adoption of the balancing approach relative to environmental protection suggested by the Blackman concurrence in *National League of Cities*. Under Justice Blackmun's interpretation of the majority opinion in *National League of Cities* the federal interest in this area always would be paramount to state sovereignty interests.

The article suggests further, as did the Court in *FERC*, that *National League of Cities* fails to provide a definitive answer to the question of whether the federal government can use the medium of state law to accomplish its own goals. Such commandeering of state legislative and regulatory power presents a qualitatively different situation than where, as in *National League of Cities*, the states themselves are the ultimate targets of federal regulation.

In contrast to the *FERC* majority, however, this article argues that federal conscription of state regulatory machinery always should be impermissible. EPA's purported authority to compel states to legislate or regulate appears to be a violation of Article IV, section 4 of the Constitution, which guarantees to each state a republican form of gov-

11. See infra text accompanying notes 162-268.
12. See infra text accompanying notes 269-276.
13. See infra text accompanying notes 144-148.
16. 635 F.2d at 1205.
17. See 102 S. Ct. at 2137.
18. See infra text accompanying notes 270-272.
19. Id.
20. See infra text accompanying notes 272-276.
Although the courts have traditionally relegated the guar-

anty clause to a position of constitutional impotence,\textsuperscript{22} the clause could
serve as the clearest available standard for holding that compelled state
cooperation with federal regulatory objectives is beyond the scope of
federal power contemplated by the Constitution—regardless of how
compelling the federal interest may be.

I

JUDICIAL BACKDROP

The Clean Air Act requires EPA to establish national primary and
secondary standards for ambient air quality (the National Ambient Air
Quality Standards or NAAQS) for pollutants that it determines are det-
rimental to the public health or welfare.\textsuperscript{23} The primary air quality
standards constitute maximum levels allowable consistent with the
public health.\textsuperscript{24} With certain exceptions, states must achieve these pri-
mary standards no later than three years following EPA’s approval of
the individual state implementation plan (SIP).\textsuperscript{25} The secondary stan-
dards constitute maximum levels allowable consistent with the public
welfare.\textsuperscript{26} The Act requires states to meet these standards within a rea-
sonable time.\textsuperscript{27}

Individual states have the opportunity to assume primary re-
ponsibility for achievement of the NAAQS.\textsuperscript{28} The Act sets out a nine-
month period after EPA establishes the national standards within
which states are to submit proposed SIPs, which are to include, \textit{inter alia}:

\begin{quote}
emission limitations, schedules, and timetables for compliance with
such limitations, and such other measures as may be necessary to insure
[sic] attainment and maintenance of such primary or secondary stan-
dard, including, but not limited to, \textit{transportation controls}, air quality
maintenance plans, and preconstruction review of direct sources of air
pollution.\textsuperscript{29}
\end{quote}

The Act directs the Administrator to approve the State’s plan where
EPA finds the plan adequate under these and other requirements of
section 110(a)(2).\textsuperscript{30} If, however, the Agency finds a proposed SIP inade-
quate, the Act permits the Administrator to disapprove part or all of

\begin{itemize}
\item \textsuperscript{21} See \textit{infra text} accompanying notes 274-276.
\item \textsuperscript{22} See \textit{infra text} accompanying notes 275-276.
\item \textsuperscript{23} 42 U.S.C. § 7409 (Supp. IV 1980).
\item \textsuperscript{24} 42 U.S.C. § 7409(b)(1) (Supp. IV 1980).
\item \textsuperscript{26} 42 U.S.C. § 7409(b)(2) (Supp. IV 1980).
\item \textsuperscript{27} 42 U.S.C. § 7410(a)(2)(A)(ii) (Supp. IV 1980).
\item \textsuperscript{28} \textit{See} 42 U.S.C. § 7410 (Supp. IV 1980).
\item \textsuperscript{29} 42 U.S.C. § 7410(a)(2)(B) (Supp. IV 1980) (emphasis added).
\end{itemize}
the plan and to promulgate and enforce a plan developed fully or partially by the Agency.31

EPA concluded early on that it did not have resources adequate to enforce the transportation control plans.32 This shortcoming was particularly significant since motor vehicles are a major source of pollution caused by carbon monoxide, hydrocarbons, nitrogen oxides, and photochemical oxidants.33 EPA reasoned that since direct federal enforcement was not feasible and the need to control motor vehicle pollution was profound, in the absence of an unambiguous statutory allocation of ultimate enforcement responsibility for SIPs the states possessed the primary obligation to promulgate and enforce transportation control plans.34 The Agency reasoned that it had secondary responsibility and thus could compel states to promulgate and enforce such plans, even to the point of requiring the states to pass enabling legislation.35

EPA's authority to compel states to enforce transportation control plans has been the object of judicial and scholarly debate for years.36 The various positions have been well-delineated,37 and there is no need to recapitulate the dialogue here. Instead, the objective here is to analyze the currently confused state of authority relating to this issue and to suggest a way out of that confusion.

A. Maryland v. EPA and Brown v. EPA

Brown v. EPA38 and Maryland v. EPA39 first raised the issue of the constitutionality of EPA's authority to compel states to enforce federally promulgated regulations. In both cases, appellate courts invalidated EPA orders to state authorities, which would have required officials to legislate and implement specified inspection and mainte-

34. See Gordon, supra note 33, at 1119-25.
35. See id. at 1121 n.73 and accompanying text.
36. In general, commentators have differed over the issue of whether Congress can force states to adopt transportation control plans under prevailing principles of federalism, especially when new legislation is necessary. Compare, e.g., Comment, The Clean Air Amendments of 1970: Can Congress Compel State Cooperation in Achieving National Environmental Standards?, 11 Harv. C.R.-C.L. Rev. 701 (1976) (supporting broad Congressional power) with Comment, State Responsibility for the Administration of Federal Programs Under the Clean Air Amendments of 1970: A Statutory and Constitutional Analysis, 36 Md. L. Rev. 586 (1977) (rejecting broad Congressional power) and with Gordon, supra note 33 (balancing approach).
37. Id.
nance requirements, as being beyond EPA's authority under section 110 of the Act. In Brown, the Ninth Circuit Court held that such orders also were beyond the Agency's authority pursuant to section 113.40 While neither court based its holding on the issue of whether the Administrator possesses constitutional power to compel passage of state regulation, both courts clearly stated that they did not believe such authority existed.41

In Brown, the plaintiffs petitioned the Ninth Circuit Court of Appeals for review of EPA-promulgated SIP provisions for control of photochemical oxidants in all of California's Air Quality Control Regions.42 EPA's plan required the state to report the date on which it would recommend legislation necessary to implement the vehicle inspection and maintenance provisions.43 This plan also mandated that California submit "[a] signed statement from the Governor and State Treasurer identifying the sources and amounts of funds for the program [and the] text of needed legislation [if existing legislation did not authorize the necessary program funding]."44 The Agency argued that obedience to these requirements was mandatory.45

The court found that the Act, including sections 110 and 113, does not give EPA clear authority to compel state legislation.46 The court observed that such authority, if it existed, would most likely be provided by section 113(a)(2).47 This section applies to SIP violations that

40. See 521 F.2d at 832-37.
41. See Maryland v. EPA, 530 F.2d at 224-28; Brown v. EPA, 521 F.2d at 837-42.
42. For citations to the regulations at issue, see Brown v. EPA, 521 F.2d at 831.
43. 521 F.2d at 830.
44. Id. at 830 (citing 40 C.F.R. § 52.242(f) (1974)).
45. 521 F.2d at 830.
46. Id. at 832.
47. Id. at 832-34. Section 113(a)(1) as codified at 42 U.S.C. § 7413(a)(1) provides:
(a) Determination of violation of applicable implementation plan or standard; notification of violator; issuance of compliance order or initiation of civil action upon failure to connect; effect of compliance order; contents of compliance order.
(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.
EPA has incorporated this enforcement authority into its regulations. See 40 C.F.R. § 52.23 (1976).

Section 113(a)(2), codified at 42 U.S.C. § 7413(a)(2), provides:
(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such state satisfies the Administrator that it will enforce such plan
appear to result from a failure of the State in which the plan applies to enforce the plan effectively." The court noted, however, that section 113 appears to be aimed at granting EPA authority to enforce a plan against those polluters who are not subject to state enforcement. This section does not clearly apply to the states themselves even though they would seem to be "persons" under the Act. The court pointed out that subdivision (a)(1) and (a)(2) use the term "state" in such a manner as to distinguish it from the term "person."

Because of these ambiguities, the Brown court refused to find authority in the Act for EPA's order requiring passage of state legislation. The opinion asserts that Congress could not have intended to make such a profound change in the federal-state relationship in an ambiguous manner. To construe the Act as conferring on EPA the authority to compel states to pass legislation would be to raise "fundamental constitutional questions" not indicated on the face of the statute. The court also observed that applicable legislative history (which it believed to be ambiguous as well) suggested a more cooperative approach to implementation of the Act, which conflicted with the interpretation urged by EPA.

Although the court's holding permitted it to avoid confronting the constitutional issues directly, it nevertheless expressed concern as to the constitutionality of EPA's assertion of authority. The court found that the Agency was attempting to control state governance of com-

(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.

In ODHS, the Sixth Circuit Court of Appeals quoted the district court's summary as to the relation between the two subsections of § 113:
I am convinced that if the Administrator is confronted with a non-enforcing state, his procedure under this statute is governed by subsection (a)(2) of § 1857c-8 (§ 113), which specifically concerns a case where violations are so widespread that they appear to result from the state's non-enforcement. I do not believe that the Administrator can avoid proceeding under subsection (a)(2) by including specific state enforcement avenues in his § 1857c-5(c) [§ 110(c)] promulgations and the issuing orders against the state under subsection (a)(1).

635 F.2d at 1198.
49. Id. at 834.
50. Id.
51. Id.
52. Id. at 834-35.
53. Id. at 834.
54. See id. at 837-42.
55. Id. at 835.
56. See id. at 835-37.
57. See id. at 837-42.
merce under the guise of congressional authority over commerce. The court argued, thus, that congressional control over state governance of commerce would “reduce the states to puppets of a ventriloquist Congress.” The court observed also that federally-compelled state legislation would sever spending from taxing at the state level and that, therefore, the petitioner’s contention that this would seriously impair the republican form of government in the states was “not irresponsible.” The court stated:

The power of each voter of each state over state expenditures, to the extent not supplied by the Federal government, would be less than his power over state taxation. Voters of other states, acting through their representatives in Congress, would dilute the strength of the voters of the states whose revenues would be spent as Congress directs. A structure in which all power on the part of states to spend was vested in Congress while the power and obligation to tax remained with the states would encourage few even casually acquainted with the writings of Montesquieu and the Federalist papers to assert that the states enjoyed a Republican form of Government.

The court observed that its unwillingness to approve federally-compelled state legislation was not inconsistent with the obligation of state courts to recognize the supremacy of federal law. As distinguished from other state officers, state judges are bound to observe federal law “by the special direction of the supremacy clause.” The court opined further that the federal judicial system itself supported its opposition to the Administrator’s position since the eleventh amendment ordinarily bars federal courts from compelling state officers to perform affirmative acts.

Similar to the action in Brown, Maryland v. EPA was a consolidated action in which Maryland and certain large employers challenged several SIP provisions promulgated by EPA following its disapproval of portions of a plan proposed by the state. The employ-

58. See id. at 839.
59. See id.
60. Id.
61. Id. at 840.
62. Id.
63. Id.
64. Id. at 841.
65. Id. (quoting Hart, The Relations Between State and Federal Law, 54 COLUM. L. REV. 489, 515-16 (1954)).
66. Id.
67. The petitioners in Maryland v. EPA included Sears, Roebuck & Company, Safeway Stores, General Motors Corporation, The May Department Stores Company, and Bethlehem Steel Corporation. 530 F.2d at 215.
68. 530 F.2d at 219.
ers objected to a regulation\(^6\) requiring each employer in the Metropolitan Baltimore Intrastate Air Quality Control Region maintaining more than 700 employee parking spaces (reduced later to employers with more than 70 spaces\(^7\)) to submit to EPA a plan for encouraging its employees to use mass transit facilities.\(^8\) Because the Agency had not established a rational standard to determine the adequacy of such plans, the court invalidated the regulation for being impermissibly vague.\(^9\) The court also invalidated the regulation because EPA had failed to follow the notice and comment procedures required for adoption of regulations.\(^10\)

The State of Maryland objected to EPA-promulgated SIP provisions that required the state to establish and submit the text of "legally adopted regulations" governing vehicle inspection and maintenance, vehicle pollution control retrofitting, and the establishment of bikeways and parking facilities.\(^11\) The inspection and maintenance and retrofit regulations required submission to the Agency of the text of those statutes and regulations necessary to adopt and fund to the program.\(^12\) After a lengthy dictum on its reservations as to EPA's constitutional authority to adopt such "astonishing regulations,"\(^13\) the court held that section 110 of the Clean Air Act did not authorize EPA to require the states to adopt and submit programs under pain of civil or criminal penalties.\(^14\) The court argued that the statute simply invites the states to administer air quality programs and authorizes EPA to administer these programs where states decline.\(^15\)

Describing its constitutional objections to the regulations, the court cited the guaranty clause\(^16\) as a limitation on congressional authority to compel state legislation.\(^17\) The court also observed that the Constitutional Convention rejected a proposal to enable Congress to revise, negate, or annul state laws.\(^18\) This observation led the court to reason that if Congress could not revise, negate, or annul a state legisla-

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\(^6\) 40 C.F.R. § 52.1105 (1982).
\(^7\) 40 Fed. Reg. 29,715 (1975) (codified at 40 C.F.R. § 52.1105(9) (1982)).
\(^8\) 530 F.2d at 218.
\(^9\) Id. at 221.
\(^10\) Id. at 222. The private petitioners challenged several other provisions which were rescinded or reopened for comment while the suit was pending. The court did not consider these provisions. Id. at 223.
\(^11\) Id. at 224 (citing 40 C.F.R. §§ 52.1095(c), 52.1096-1100 & 52.1106 (1974), respectively).
\(^12\) See 40 C.F.R. § 52.1095 (1976).
\(^13\) 530 F.2d at 224-27.
\(^14\) Id. at 227.
\(^15\) Id. at 228.
\(^16\) U.S. CONST. art. IV, § 4.
\(^17\) 530 F.2d at 225.
\(^18\) Id. (citing Elliot's Debates (Michie Ed., Vol. I, Book I, 149, 400-01)).
ture's enactments, it similarly could not direct it to enact legislation.\textsuperscript{82}

B. District of Columbia v. Train

In \textit{Train}, Maryland, Virginia, and the District of Columbia, among others,\textsuperscript{83} petitioned for review of EPA regulations establishing an extensive transportation control program. This plan was to be included in the air quality implementation plan for the National Capital Interstate Air Quality Control Region.\textsuperscript{84} The Agency promulgated its own regulations after it found deficiencies in each state's SIP, including the states' failure to guarantee adoption of laws necessary to carry out transportation control programs.\textsuperscript{85}

The regulations\textsuperscript{86} challenged in \textit{Train} imposed five separate transportation control measures: (1) Purchase of several hundred new buses;\textsuperscript{87} (2) Creation of express bus lanes;\textsuperscript{88} (3) Adoption of an inspection and maintenance program and of an enforcement apparatus to prevent intentional readjustment after inspection;\textsuperscript{89} (4) Creation of a bicycle lane network and adoption of a requirement that certain auto-

\textsuperscript{82} 530 F.2d at 225.
\textsuperscript{83} The other petitioners were Prince William County, Virginia and the cities of Alexandria and Fairfax, Virginia. In passing upon the constitutionality of the program in question, the court observed: "[T]he federal government will be able to order the subdivision of the states to enact, administer and enforce federal regulatory programs only to the extent that it possesses the same power over the states." 521 F.2d at 990 n.24.
\textsuperscript{84} See 521 F.2d 977. The National Capital Interstate Air Quality Control Region consisted of Prince George's and Montgomery Counties in Maryland; Arlington, Fairfax, Loudon and Prince William Counties and the cities of Alexandria, Fairfax, and Falls Church in Virginia; and the District of Columbia. \textit{Id.} at n.1.

The court treated the District of Columbia for most purposes as if it were a state. \textit{Id.} at 977 n.2. The court recognized that since the District of Columbia is a federal entity it "is obviously in a somewhat different status than the states with regard to the extent of control Congress can assert over its affairs and does not enjoy the independent protections afforded to the states because of their sovereign status." \textit{Id.} at 995. Nevertheless, the court noted both that the Act treats the District of Columbia as a state for SIP purposes and that EPA had placed considerable emphasis on assuring required uniformity. \textit{Id.} The court, therefore, made its holding equally applicable to the District of Columbia subject to an EPA determination that uniformity could be abandoned. \textit{Id.}

\textsuperscript{85} See \textit{id.} at 978 (citing 38 Fed. Reg. 16,556-57, 16,558-59, 16,563 (1973)).
\textsuperscript{86} The \textit{Train} plaintiffs did not challenge certain EPA-promulgated provisions, including provisions for gasoline vapor recovery, parking management, and dry cleaning solvent evaporation control. EPA revoked other measures included in the plan as originally promulgated. The plaintiffs did not contest provisions which related to those which had been revoked. See 521 F.2d 980.
\textsuperscript{87} See 40 C.F.R. \textsection 52.476(9) (1976) (included in the District of Columbia plan); 40 C.F.R. \textsection 52.1080(g) (1982) (included in the Maryland SIP); 40 C.F.R. \textsection 52.2435(e) (1982) (included in the SIP for Virginia).
\textsuperscript{88} See 40 C.F.R. \textsection 52.476(h) (1980) (applicable to the District of Columbia); \textsection 52.1080(h) (1982) (included in the Maryland SIP); 40 C.F.R. \textsection 52.2435(f) (1982) (applicable to Virginia).
\textsuperscript{89} See 40 C.F.R. \textsections 52.490, 52.1089 & 52.2441 (1982) (included in the SIPs of the District of Columbia, Maryland, and Virginia, respectively).
mobile parking lots provide bicycle storage facilities;\(^9^0\) (5) Retrofit of several different categories of vehicles with emission control devices.\(^9^1\)

Under the inspection and maintenance program, the states were ordered to submit detailed compliance schedules for implementing the program as well as the text of all proposed statutes and regulations necessary for enforcement.\(^9^2\) The EPA regulations ordered the states to submit, by a certain date, validly-adopted regulations implementing the program in accordance with EPA specifications.\(^9^3\) In addition, the EPA program prohibited states from registering noncomplying vehicles or permitting them to operate on state streets and highways.\(^9^4\)

Initially, the court considered the extent of EPA's authority under section 110(c) of the Act.\(^9^5\) The court determined that where the Administrator found a state plan deficient his exclusive recourse under section 110(c) would be to promulgate his own plan directly controlling the sources of pollution.\(^9^6\) The Agency could not order states to submit and enact regulations after having disapproved the first set of proposed regulations. The court held, therefore, that since the Administrator had not promulgated his own plan after disapproving the state plan, he had failed to perform his duty under section 110(c).\(^9^7\)

The court held also that EPA could not rely on transportation control studies and retrofit device evaluations mandated under the regulations “to fill in the details of the regulations and to create an evidentiary record supporting [the regulations'] adoption.”\(^9^8\) The court found that to the extent EPA had depended on these studies and evaluations it had failed in its statutory responsibility under section 110(c).\(^9^9\) The court as a consequence invalidated many of EPA's inspection and maintenance requirements.\(^1^0^0\)

The *Train* court concluded, however, that EPA did possess authority to prohibit vehicle registration.\(^1^0^1\) The court found a “difference between ordering the states to adopt a particular statute and ordering

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90. See 40 C.F.R. §§ 52.491, 52.1090 & 52.2442 (1982) (applicable to the District of Columbia, Maryland, and Virginia, respectively).
92. See 521 F.2d at 980.
93. See id.
94. See id.
95. See id. at 986.
96. Id.
97. Id.
98. Id.
99. Id.
100. Id. at 986-87.
101. Id. at 987.
them to enforce a federal regulation against vehicles which they register," and opined that the Act specifically denies EPA the authority to order the states to adopt particular statutes. On the other hand, the opinion noted, the Act is silent as to whether EPA can order the states to enforce a federal regulation. The court concluded that both section 110(a)(2)(G) and legislative history suggest that EPA possesses authority to require state enforcement, though it did observe that the actual language of the Act may not in all instances support the broad interpretation suggested by the legislative history.

Having found arguable statutory authority for EPA to require states to enforce federal regulations, the court next considered whether such authority would be constitutional. The court upheld the constitutionality of the bus purchase and bus lane requirements on the ground that the states were the operators of the bus systems and, as "indirect" source operators, were subject to federal regulation under the supremacy and commerce clauses. The court also found the vehicle registration prohibition constitutional, although not on the "indirect" source operator theory. The court opined, rather, that the vehicle registration prohibition was merely a rule governing commerce on state streets and highways analogous to federal legislation prohibiting railroads from using unsafe equipment. The registration prohibition related to "existing activities" already carried on by the states, and did not require them to enact new legislation or regulations. In essence, the court viewed the regulation as ordering the states to act in a manner consistent with direct federal regulation of citizens rather than ordering the states to enforce the federal regulations.

In contrast to its holdings with regard to the vehicle registration prohibition, the court found the inspection and maintenance regulations unconstitutional because they forced the states to enforce federal

102. Id.
103. Id.
104. Id.
106. See 521 F.2d at 987-88.
107. Id. at 988.
108. Id.
109. 521 F.2d at 989. The court likened the bus requirements to federal safety regulations applicable to state-owned railroads upheld in United States v. California, 297 U.S. 175 (1936). Id.
110. Id. at 991.
112. 521 F.2d at 991.
These regulations required extensive new state initiatives to establish retrofit programs and to evaluate and approve control services. The court viewed this scheme as "substituting compelled state regulations for permissible federal regulation under the guise of the commerce power." The Train court remanded the entire set of inspection and retrofit regulation to the Agency on the theory that the vehicle registration prohibition was meaningless on the absence of valid regulations establishing approved retrofit devices or emission standards.

Both Brown and Maryland involved a vehicle registration prohibition similar to those at issue in Train and in ODHS. Unlike both Train and ODHS, however, Maryland and Brown invalidated the registration prohibition regulation along with other inspection and maintenance provisions without referring explicitly to the registration prohibition. The court may have seen no need to address the registration prohibition since this provision really stands or falls with the other provisions. Since Maryland and Brown did not specifically discuss the registration prohibition, these cases are not necessarily inconsistent with Train.

The ODHS opinion is misleading, therefore, when it observes that other courts' opinions which have considered the issue of compelled state regulation have not treated the issue uniformly. With the exception of only one federal appellate court, these courts have denied EPA's alleged enforcement authority in this area.

II
THE ODHS DECISION

ODHS began when EPA disapproved certain provisions of Ohio's state implementation plan governing attainment and maintenance of the primary standards for photochemical oxidants for the Cincinnati

113. See id. at 992.
114. Id.
115. Id.
116. 521 F.2d at 995.
117. The Maryland provision was codified at 40 C.F.R. § 52.1095(a) (1974). The California provision was codified at 40 C.F.R. § 52.242(a) (1974).
118. See Maryland v. EPA, 530 F.2d 215, and Brown v. EPA, 521 F.2d 827.
119. 521 F.2d at 995.
120. 635 F.2d at 1200.
121. See Pennsylvania v. EPA, 500 F.2d 246, 258-63 (3d Cir. 1974). The same court's opinion in Delaware Valley Citizens' Council for Clean Air v. Pennsylvania, 678 F.2d 470 (3d Cir. 1982) has cast considerable doubt on the continued vitality of Pennsylvania v. EPA. See also infra note 150 and accompanying text.
122. See Brown v. EPA, 521 F.2d 827; Maryland v. EPA, 530 F.2d 215; and Train, 521 F.2d 971.
area.\textsuperscript{123} Subsequent to the disapproval, the EPA promulgated its own regulation requiring a vehicle inspection and maintenance program for Cincinnati and Hamilton County, Ohio.\textsuperscript{124} Upon adoption, the regulation became part of the Ohio SIP.\textsuperscript{125}

Both Cincinnati and Hamilton County established inspection facilities pursuant to the EPA requirement. The state of Ohio (acting through its Department of Highway Safety), however, refused to deny registration to vehicles that failed inspection at these facilities.\textsuperscript{126} EPA issued a notice of violation and later a compliance order to Ohio, but neither of these resulted in compliance. EPA then sought an injunction ordering the Ohio Department of Highway Safety and its director to comply.\textsuperscript{127} In an unpublished memorandum opinion, the district court held that section 113(a)(1) did not give EPA authority to proceed directly against a state for failing to enforce an implementation plan.\textsuperscript{128}

The district court concluded instead that section 113(a)(2) of the Act provided the only remedy available when a state refused to enforce a federally-promulgated provision of a SIP.\textsuperscript{129} This allows EPA to proceed directly against the persons who violate the SIP provision where it appears that the violations result from failure to enforce the plan properly.\textsuperscript{130} The district court explained that subdivisions (a)(1) and (a)(2) did not constitute two alternative and mutually exclusive enforcement options where states fail to enforce SIP provisions.\textsuperscript{131}

On appeal, EPA argued that subdivisions (a)(1) and (a)(2) were entirely alternative enforcement options and that subdivision (a)(2) contemplated only chronic and widespread state failure to enforce rather than isolated cases of individual noncompliance.\textsuperscript{132} Subdivision (a)(1), on the other hand, was designed as a remedy for individual cases in which a private or a state facility caused the violations.\textsuperscript{133} The Agency

\begin{itemize}
\item \textsuperscript{123} 635 F.2d at 1197.
\item \textsuperscript{124} The regulation which prompted the controversy, 40 C.F.R. § 52.1878(e) (1981), provided in pertinent part:
\begin{quote}
After December 31, 1975, no program in the County of Hamilton, the City of Cincinnati, the State of Ohio shall allow the registration of title, or allow the operation on streets, roads, or highways under its control of any light-duty, spark-ignition-powered motor vehicle subject to [this section] that does not comply with the applicable standards and procedures, as defined in paragraph (d)(2) of this section. This shall not apply to the initial registration of new vehicles.
\end{quote}
\textsuperscript{635 F.2d at 1197. This regulation technically was not under challenge in ODHS, but rather, inter alia, EPA's power to enforce it against the State of Ohio. 635 F.2d at 1197 n.2.}
\item \textsuperscript{125} 635 F.2d at 1197.
\item \textsuperscript{126} Id.
\item \textsuperscript{127} Id. at 1197-98.
\item \textsuperscript{128} See id. at 1198.
\item \textsuperscript{129} Id.
\item \textsuperscript{130} 42 U.S.C. § 7413(a)(2) (1976 & Supp. IV 1980).
\item \textsuperscript{131} See 635 F.2d at 1198.
\item \textsuperscript{132} Id. at 1199.
\item \textsuperscript{133} Id.
contended further that because Ohio was the owner and operator of its highways, it had a direct obligation to ensure that those vehicles failing to comply with the vehicle emission inspection program did not use its highways. According to EPA, where the state fails in this obligation it becomes a "person" subject to a direct enforcement action under section 113(a)(1).

Ohio conceded that it would be subject to direct enforcement under section 113(a)(1) if its own vehicles violated emission limitations. Ohio contended, however, that any other emission limitations violation would result from the activities of private individuals and not those of the state. The state read section 113(a)(1) as "designed to require compliance by persons whose activities cause the pollution, not as a mechanism for requiring the states to enforce an EPA plan." Ohio argued also that the tenth amendment barred EPA from requiring states to prohibit use of state highways by vehicles which had not complied with the vehicle emission inspection program.

Reversing the decision below, the Sixth Circuit Court of Appeals held that EPA could maintain a direct enforcement action against Ohio under section 113(a)(1) for failure to comply with the "provisions of the implementation plan"—not simply with the vehicle registration requirement. The court thus seemed to base its holding on the existence of statutory authority for EPA enforcement of SIP provisions in

134. Id. at 1198.
135. Id. Section 302(e) of the act, 42 U.S.C. § 7602(e), provides that "the term 'person' [when used in the Act] includes an individual, corporation, partnership, association, state, municipality . . . ." Id. at 1198 n.4.
136. Id. at 1199. EPA cited several passages in the legislative history of the subsequent (i.e. 1977) amendments to the Act in support of this position. 635 F.2d at 1202-3. See H.R. REP. NO. 294, 95th Cong., 1st Sess. 290-91, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 1077, 1369-70. See also 123 CONG. REC. S9168 (daily ed. June 8, 1977) (statement of Sen. Muskie). As the court notes, however, these passages refer only to section 113 and do not distinguish between subsections (a)(1) and (a)(2). Id. at 1203. Moreover, the court failed to recognize that such congressional remarks, which amount to retrospective observations as to legislative intent at the time Congress originally adopted the provision (in this case in 1970), are not favored by the courts. See Weinberger v. Rossi, 102 S. Ct. 1510, 1517 (1982); TVA v. Hill, 437 U.S. 153, 193 (1978); Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974); National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 639 n.34 (1967); United States v. United Mine Workers of America, 330 U.S. 258, 282 (1947). See also, Note, Intent, Clear Statements and the Common Law, Statutory Interpretation in the Supreme Court, 95 HARV. L. REV. 892 (1982).
137. 635 F.2d at 1199.
138. Id.
139. Id.
140. U.S. CONST. amend. X. The tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
141. 635 F.2d at 1200.
142. Id. at 1204.
general and not just vehicle registration requirements.\textsuperscript{143} By adopting this needlessly broad approach to the narrow issue of the vehicle registration provisions, the court accepted the EPA argument that subdivisions (a)(1) and (a)(2) are alternative enforcement mechanisms and that the statute authorizes EPA to proceed against a state under either subdivision.\textsuperscript{144}

Curiously, the court stated that it did not base its decision on EPA’s “convoluted arguments” concerning Ohio’s status as an owner of a pollution source that violated emission standards.\textsuperscript{145} Instead, the court based its statutory holding on a theory which rejects EPA’s indirect operator concept and adopts a similar, but largely unarticulated, view of state responsibility resulting from state ownership and control of highways:

Ownership and control of streets and highways, along with the historic practice of licensing vehicles, however, do combine to provide a completely rational basis for placing upon the State the obligation to prevent use of these facilities by noncomplying vehicles. When the State fails to perform that duty it becomes a person in violation of a requirement of the implementation plan.\textsuperscript{146}

The court thus refused to find that Ohio was an operator of a pollution source, but held nevertheless that the state was a “person” violating an SIP due to the state’s special responsibility for the operation of highways. The court based its holding squarely on the ground that the state’s refusal to regulate the acts of private citizens had caused a violation of the Act.\textsuperscript{147} This contrasts with the indirect operator theory, under which the violation-causing acts of private citizens would be attributed to the state.\textsuperscript{148}

The court’s formulation of state responsibility forced it to consider the constitutionality of such a federal intrusion on state sovereignty.\textsuperscript{149}

\textsuperscript{143} See id. at 1199.

\textsuperscript{144} The court completely ignored the persuasive analysis of the EPA’s statutory enforcement authority set out in District of Columbia v. Train, 521 F.2d 971. See, 635 F.2d at 1200. In that case, the court reasoned that if § 113(a)(2) did not constitute a limitation on EPA’s enforcement authority against unconsenting states, and was simply an alternative enforcement mechanism, it would add nothing to EPA’s authority under § 113(a)(1). See 531 F.2d at 985.

\textsuperscript{145} 635 F.2d at 1204.

\textsuperscript{146} Id.

\textsuperscript{147} Id.

\textsuperscript{148} Id. at 1204.

\textsuperscript{149} Id. at 1200-01. The court cited Brown v. EPA, 521 F.2d 827 (\textit{Brown I}); District of Columbia v. Train, 521 F.2d 971; and Maryland v. EPA, 530 F.2d 215. 635 F.2d at 1200-01. The Supreme Court vacated the judgments in these three cases after EPA decided not to seek review of the regulations invalidated by these cases. EPA v. Brown, 431 U.S. 99 (1977). The ODHS court also cited Pennsylvania v. EPA, 500 F.2d 246, which upheld an EPA regulation requiring state enforcement of a federally-promulgated transportation control plan. 500 F.2d at 257. The continued vitality of this case is in doubt because of a subsequent decision by the Third Circuit Court of Appeals. Delaware Valley Citizens’ Council
Early in its opinion, the court set the stage for consideration of the tenth amendment issue by discussing *Train* and other existing precedent. The court observed that the "precise issue in this case—whether EPA may proceed directly against a state to require enforcement of an EPA-promulgated provision of an implementation plan—appears not to have been treated by any court, at least in its present setting." This observation is true to the extent that the case involves a determination of EPA's enforcement authority against a state under section 113(a)(1) of the Act in an actual enforcement action rather than on review of a substantive regulation as in the prior cases. The novelty of *ODHS* stops there, however. The court in fact faced the same type of tenth amendment problem involved in the earlier cases, and its treatment of these cases as only marginally relevant seems inexplicable.

Unfortunately, in addressing the issue of federally-compelled state regulation the court did not analyze the depth of the intrusion posed by a vehicle registration provision as compared with other implementation plan provisions, as did the court in *Train*. Instead, the court invoked *National League of Cities*, made the familiar incantation of the weighty federal interest in environmental protection, and found no substantial intrusion on state sovereignty.

*ODHS* differs from *Train* in two respects. Most importantly, *Train*, unlike *ODHS*, does not hold that the EPA is constitutionally empowered to enforce any implementation plan provision compelling state regulation of its citizens no matter how intrusive. Although the specific holding in *ODHS* is relatively narrow, the court's statement and analysis of the issue appear to suggest that EPA possessed broad power, particularly if one presumes that the broad sweep of the court's

for Clean Air v. Pennsylvania, 678 F.2d 470 (3d Cir. 1982). The *ODHS* court additionally discussed Brown v. EPA, 566 F.2d 665 (9th Cir. 1977) (*Brown II*), which took the same disapproving view of revised EPA regulations as in *Brown I*. The court briefly mentioned *Friends of the Earth v. Carey*, 552 F.2d 25 (2nd Cir. 1977), cert. denied, 434 U.S. 902 (1977), but distinguished it both because it involved a citizen action rather than an EPA action and "the provisions in question had been formulated by the State and City of New York, not by EPA." 635 F.2d at 1200 n.5.

150. 635 F.2d at 1200.
151. See id. at 1200-01.
152. *Id.* at 1204-05.
153. 521 F.2d at 990-92.
154. 426 U.S. 833.
155. 635 F.2d at 1205. The majority did not respond to the dissent's charge that legislation was necessary to implement the registration prohibition. *Id.* at 1206-07.
156. 521 F.2d 971. The Court of Appeals for the District of Columbia Circuit recently reaffirmed this position in an opinion which cited *ODHS* with approval. *State Water Control Bd. v. Washington Suburban Sanitary Comm'n*, 654 F.2d 802, 807-08 (D.C. Cir. 1981). This case held, *inter alia*, that a county's tenth amendment rights, as interpreted in *National League of Cities*, had not been violated by a district court injunction ordering restoration of funding for sludge composting site. *Id.* at 806-08.
157. See supra text accompanying notes 142-144.
dictum on EPA’s authority under section 113 is coextensive with con-
gressional power to grant that authority under the commerce clause.  
Additionally, the Train court predicated its holding as to the registra-
tion prohibition on the fact that no new legislation or regulations were 
necessary for implementation and that the states had been left free to 
decide how to implement the requirement.\textsuperscript{158} Although the ODHS 
court makes a similar assertion, the dissenting opinion emphatically 
maintains that such legislation was necessary.\textsuperscript{159}

III

RENEWED CONFUSION

As the ODHS dissent noted, EPA previously had disavowed its 
authority to compel states to promulgate and enforce implementation 
plans.\textsuperscript{160} The ODHS majority chose to ignore this disavowal and in-
stead renewed the debate over the constitutionality of federally-com-
pelled state regulation of private citizens. One could argue that the 
issue had never been laid to rest, but it is odd that the ODHS court 
chose to confront this issue when it could have upheld the registration 
ban without including needlessly broad dictum.\textsuperscript{161}

The Supreme Court most likely left the decision standing since the 
narrowness of the holding did not provide an appropriate forum for 
dealing with the broader issues raised by the decision. The Court’s 
decision against review nevertheless affords a repose to the opinion that 
is unwarranted.

A. The Hodel Decision

The Supreme Court cited the EPA cases\textsuperscript{162} with seeming approval 
in Hodel v. Virginia Surface Mining and Reclamation Association.\textsuperscript{163} 
Hodel involved a preenforcement challenge to the constitutionality of 
the Surface Mining Control and Reclamation Act of 1977 (SM-
CRA).\textsuperscript{164} SMCRA requires, \textit{inter alia}, that surface coal mining opera-

\textsuperscript{158} 521 F.2d at 990-92.  
\textsuperscript{159} 635 F.2d at 1206-07.  
\textsuperscript{160} \textit{Id.} at 1208. \textit{See also} Brown v. EPA (\textit{Brown II}), 566 F.2d 665, 668 (9th Cir. 1977); 
\textsuperscript{161} The court’s broad language is even more interesting in juxtaposition with its hold-
ing that municipal airport employees were not covered by the Fair Labor Standards Act 
because airport operation was an integral function of city government. \textit{See} Amersbach v. 
City of Cleveland, 598 F.2d 1033 (6th Cir. 1979).  
\textsuperscript{162} For the remainder of this article, the term “the EPA cases” will refer to \textit{Train}, 
\textit{Brown I}, and \textit{Maryland}.  
\textsuperscript{163} 452 U.S. 264 (1981). The so-called “prime farmland” and other general provisions 
of the Surface Mining Control and Reclamation Act of 1977 were unsuccessfully challenged 
tors observe an extensive set of standards governing environmental protection and reclamation measures.\textsuperscript{165} The Act also provides a mechanism, similar to that under the Clean Air Act, by which states may apply for and receive permanent responsibility for administering a surface mining control program within their boundaries.\textsuperscript{166} The statute directs the Secretary of the Interior, in a matter similar to provisions affecting the Administration under the Clean Air Act, to develop and implement a permanent federal program for those states which fail to submit an adequate program.\textsuperscript{167}

In late 1978, an association of coal producers, a number of its member companies, and four individual landowners sued for declaratory and injunctive relief primarily from the Act's performance standards.\textsuperscript{168} The plaintiffs raised a number of constitutional objections,\textsuperscript{169} including a tenth amendment claim that the Act impaired state freedom to structure integral operations in areas of traditional functions.\textsuperscript{170} While the district court rejected several of the constitutional objections, it sustained others, including the tenth amendment claim.\textsuperscript{171}

The district court found that the Act's performance provisions\textsuperscript{172} afforded Virginia no leeway in implementing a surface mining control program, because the states' supposed option to elect not to administer the federal program was "no choice at all."\textsuperscript{173} In effect, the Act forced the states to follow the direction of the federal government or relinquish control over an area traditionally under their governance. Consequently, the court concluded, the legislative standards impermissibly intruded upon a state's ability to make "essential decisions" in the area of land use, a traditional object of state regulation.\textsuperscript{174}

The Supreme Court reversed the district court's holding to the extent that it found provisions of the Act unconstitutional.\textsuperscript{175} The Court

\begin{itemize}
  \item \textsuperscript{165} 30 U.S.C. § 1265(b) (1976 & Supp. IV 1980).
  \item \textsuperscript{168} The Commonwealth of Virginia and the Town of Wise, Virginia intervened as plaintiffs.
  \item \textsuperscript{169} In addition to the tenth amendment objection, the plaintiffs alleged violations of the commerce clause, the equal protection and due process guarantees of the fifth amendment, and the just compensation clause of the fifth amendment.
  \item \textsuperscript{170} 452 U.S. at 270. The language of the tenth amendment argument was reflective of \textit{National League of Cities}, 426 U.S. at 852.
  \item \textsuperscript{171} \textit{See} 483 F. Supp. 425 (1980).
  \item \textsuperscript{172} The challenged provisions included standards for surface coal mining operations on "steep slopes." The statute defines a "steep slope" as "any slope above twenty degrees or such lesser slope as may be defined by the regulatory authority after consideration of soil, climate, and other characteristics of a region or State." 30 U.S.C. § 1265(d)(4) (1976 & Supp. IV 1980).
  \item \textsuperscript{173} 483 F. Supp. at 432.
  \item \textsuperscript{174} \textit{Id.} at 433.
  \item \textsuperscript{175} 452 U.S. at 286.
\end{itemize}
reasoned that the tenth amendment challenge must fail since SMCRA did not regulate the states as states and thus did not meet the first prong\textsuperscript{176} of the three-part test of \textit{National League of Cities}.\textsuperscript{177} The Court found that the Act governed only the activities of coal mine operators, who were private parties, and not the states themselves since they were not compelled to enforce the steep-slope standards, to expend any state funds for the program, or to participate in the federal program in any manner.\textsuperscript{178} Consequently, the Court concluded:

[T]here can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program. Cf. \textit{Maryland v. EPA}, 530 F.2d 215, 224-228 (CA4 1975), vacated and remanded \textit{sub nom. EPA v. Brown}, 431 U.S. 99 (1977); \textit{District of Columbia v. Train}, 172 U.S. App. D.C. 311, 330-334, 521 F.2d 971, 990-994 (1975), vacated and remanded \textit{sub nom. EPA v. Brown}, 431 U.S. 99 (1977); \textit{Brown v. EPA}, 521 F.2d 827, 837-842 (CA9 1975), vacated and remanded, 431 U.S. 99 (1977).\textsuperscript{179} At the very least, this comparison with the EPA cases appeared to imply that the Court would embrace the limitations on federal power those cases espouse. The Court's decision to let \textit{ODHS} stand is inconsistent with this implication, however.

Further confusion as to the Court's views in this area stems from the Court's citation in \textit{Hodel} of both \textit{Train} and Justice Blackmun's concurrence in \textit{National League of Cities}.\textsuperscript{180} Justice Blackmun's concurrence stated:

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

\begin{itemize}
  \item \textsuperscript{176} 452 U.S. at 286.
  \item \textsuperscript{177} \textit{Id.} at 288. The three part test is as follows: 1) the challenged statute must regulate the states as states; 2) the federal regulation must address matters that are indisputably attributes of state sovereignty; and 3) it must be apparent that a state's compliance with federal law would directly impair its ability to structure integral operations in areas of traditional functions. \textit{Id.} at 287-88. See also United Transp. Union v. Long Island R.R. Co., 102 S. Ct. 1349, 1353 & n.9 (1982). \textit{National League of Cities} cited “fire prevention, police protection, sanitation, public health, and parks and recreation” as examples of integral state governmental functions, and noted that this list was not exhaustive. 426 U.S. at 851. This list of integral state governmental functions has been expanded by the lower courts. \textit{See, e.g.}, Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979) (operation of municipal airport); United States v. Best, 573 F.2d 1095 (9th Cir. 1978) (driver licensing); NLRB v. Highview, Inc., 590 F.2d 174 (5th Cir. 1979) (health care for sick and elderly persons part of public health function); Davids v. Akers, 549 F.2d 120 (9th Cir. 1977) (adoption of internal procedures by state legislatures); Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981) (education); Alewine v. City Council, 505 F. Supp. 880 (S.D. Ga. 1981) (city bus service); EEOC v. Wyoming, 514 F. Supp. 595 (D. Wyo. 1981) (management of wild land resources).
  \item \textsuperscript{178} \textit{Id.} at 288.
  \item \textsuperscript{179} \textit{Id.} at 288-89.
  \item \textsuperscript{180} 426 U.S. at 856.
\end{itemize}
would be essential. 181

The Hodel court cites this concurrence for the proposition that fulfillment of the National League of Cities three-part test 182 for tenth amendment claims will not always guarantee that the challenge will succeed, because in certain areas the federal interest must prevail no matter how severe the intrusion on state sovereignty. 183 This proposition, however, may not be consistent with Train’s tenth amendment holding, also cited in Hodel, which does not support such broad federal power in the area of environmental protection.

One may read the Court’s posture after Hodel as indicating that the federal government has virtually unchallengeable authority over the states in the area of environmental protection. The ODHS opinion explicitly took this position, 184 even though it may be more reasonable to read Justice Blackmun’s concurrence as extending only to facilities owned and operated by a state. 185 Given the potential in consistency between the EPA cases on the one hand and National League of Cities and Hodel on the other, it seems essential that the court resolve this confusion.

B. FERC: The Growing Dilemma

The Court’s failure to delineate precisely the power of the federal government to compel states to adopt specific legislation has become even more troublesome in the wake of its recent decision in FERC v. Mississippi. 186 FERC involved a constitutional challenge to titles I

181. Id. (emphasis added)
182. See supra note 177 for a description of this test.
183. 452 U.S. at 288 n.29.
184. 635 F.2d at 1205. In fact, a district court in Tennessee already has interpreted ODHS and the Blackmun concurrence to that effect. See United States v. Duracell Int’l, Inc., 510 F. Supp. 154, 156 (M.D. Tenn. 1981). In Duracell, the court held that under the Clean Water Act, 33 U.S.C. § 1319(e) (1976), the tenth amendment would not protect a state from liability for a judgment rendered against a municipality to the extent that state law prevented the municipality from raising revenues needed to comply with the judgment. Rather incredibly, the district court drops the word “facility” from the phrase “state facility compliance” when quoting the Blackmun concurrence, thereby making the passage look even more absolute on the issue of federal supremacy in the area of environmental protection. 510 F. Supp. at 156.
185. National League of Cities concerned state administration, not state control of private activities, and Blackmun’s concurrence must be read in this context. As one district court explained: “Justice Blackmun’s language supports the conclusion that a state as polluter may be forced to comply with federal standards, but that the balancing approach would preclude compelling the state to control its citizens in any particular way.” Friends of the Earth v. Carey, 422 F. Supp. 638, 644 n.11 (S.D.N.Y. 1976), vacated and remanded, 552 F.2d 25 (2d Cir. 1977).
CLEAN AIR ACT

and III\(^{188}\) and section 210\(^{189}\) of the Public Utility Regulatory Policies Act of 1978\(^{190}\) (PURPA), which alleged violations of the tenth amendment and the commerce clause.\(^{191}\)

The objective of PURPA, including titles I and III, is to achieve, where necessary, reforms in the establishment of retail service rates by electric and gas utilities to encourage end-users, particularly those in industry, to conserve energy.\(^{192}\) Congress also intended PURPA to help maximize efficient use of facilities and resources by utilities and to foster equitable retail rates.\(^{193}\)

To provide for the achievement of these goals, Congress required state regulatory authorities and nonregulated utilities\(^{194}\) to "consider" the adoption of specified rate design and regulatory standards.\(^{195}\) The Act, however, not only does not impose any requirement that the specified standards be adopted,\(^{196}\) but also does not provide for any penalty if the deadlines\(^{197}\) established for consideration are not met.\(^{198}\) Even so, the Act empowers "any person" to bring an action in state court to enforce the requirement for consideration of the standards.\(^{199}\)

Section 210 of PURPA promotes the development of cogeneration and small power production facilities,\(^{200}\) by eliminating state and federal regulatory barriers and utility-created obstacles hindering the con-

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191. 102 S. Ct. at 2133.
194. PURPA defines “nonregulated electric utility” as “any electric utility other than a state regulated electric utility.” 16 U.S.C. § 2602(9) (Supp. IV 1980). While PURPA regulates both state regulatory authorities and nonregulated utilities, this article will discuss only regulation of state regulatory authorities as regulation of private conduct does not raise tenth amendment concerns. See 102 S. Ct. at 2146 n.2 (O’Connor, J., dissenting).
195. Section 111 of PURPA, 16 U.S.C. § 2621 (Supp. IV 1980), for example, provides for consideration of the following standards: (1) Cost of service—rates for each class of consumers should reflect the costs of service to that class; (2) Elimination of declining block rates; (3) Time-of-day rates; (4) Seasonal rates; (5) Interruptible rates; (6) Development of load management techniques.
197. State commissions and nonregulated utilities were to have commenced the consideration process by November 9, 1980, and to have made a decision on adopting the standards by November 9, 1981. 16 U.S.C. § 2622(b) (Supp. IV 1980).
200. See 16 U.S.C. § 824a-3 (Supp. IV 1980). “Cogeneration” is the combined production of electricity and some other useful form of energy, such as heat or steam. 16 U.S.C. § 796(18)(A) (Supp. IV 1980). A “small power production facility” is one that has a produc-
struction of qualifying facilities. This section exempts such facilities from "State laws and regulations," and empowers the Federal Energy Regulatory Commission (FERC) to promulgate rules requiring utilities to offer both to sell electricity to qualifying facilities and to purchase electricity from them. Section 210 also directs the Commission to promulgate rules ensuring the reasonableness of the rates governing purchases and sales. Section 210(f) provides that each state regulatory commission must implement the Commission's rules governing electricity purchases and sales between utilities and qualifying facilities. The Commission has power to enforce this requirement in federal court, as do utilities and qualifying facilities when the Commission has failed to act. In 1980, the Commission adopted purchase and sale rules which provided for state implementation either by rule making or on a case-by-case basis.

The State of Mississippi and the Mississippi Public Service Commission in 1979 sought a declaratory judgment that Titles I and III and section 210 were unconstitutional. The plaintiffs alleged that these sections exceeded Congress' power under the commerce clause and that they impermissibly intruded on state sovereignty under the tenth amendment. The district court agreed with these contentions, reasoning that the establishment of retail rates for intrastate purchases and sales of electric power was a function exclusively within the sovereign power of the States. Citing the tenth amendment, the court stated that "[t]he sovereign state of Mississippi is not a robot, or lackey which may be shuttled back and forth to suit the whim and caprice of the federal government."

On appeal to the Supreme Court, the appellees argued that

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2. Id. at 2.
PURPA was not within the commerce power since it regulated state “governance of commerce” rather than commerce itself, citing the EPA cases for support of this distinction. They argued also that the federal interest behind PURPA was not paramount to state sovereignty interests since PURPA would not result in substantial savings of oil and did not constitute temporary emergency legislation of the type approved in *Fry v. United States*.

The heart of the appellees’ argument, however, was that PURPA violated the tenth amendment by directly and substantially intruding upon traditional functions of state government, thus failing the *National League of Cities* test as amplified by *Hodel*. According to the appellees PURPA directly regulates the states as states by imposing regulatory responsibilities and procedural requirements upon state public service commissions. Furthermore, the statute addresses matters connected with state sovereignty since utility regulation is a function of the state police power. Finally, PURPA impairs the states’ ability to structure integral operations by drastically interfering with their ability to make fundamental policy choices in the area of utility regulation and imposing substantial additional cost burdens. Thus, the appellees argued, the statute fails all three prongs of the *National League of Cities* test.

The Commission, on the other hand, argued that Congress enacted PURPA as a less intrusive means of achieving the federal goal than would have been outright preemption, which was within Congress’ authority. The Commission cited the EPA cases in support of its argument that it acted less intrusively than did the EPA Administrator.

In contrast to the EPA cases, the provisions of Section 210 and the...
Commission's regulations promulgated thereunder do not compel the states to regulate in an area where they have chosen to remain inactive [citations omitted] or to enact legislation, promulgate regulations, or expend state funds. Moreover, unlike the EPA cases, where the states were directed to carry out a detailed regulatory program, the states have great flexibility to determine the means of compliance.220

The appellees answered this argument by claiming that even if Congress could pre-empt the field of utility regulation it could not do so by substituting "compelled state regulation for permissible federal regulation," and cited *Train* for this proposition.221

The Supreme Court reversed the district court in a decision delivered by Justice Blackmun.222 Justice O'Connor filed a partial dissent in which the Chief Justice and Justice Rehnquist joined.223

In analyzing the commerce clause claim, the Court held that PURPA was within congressional power224 under the prevailing rational basis test for analyzing the constitutionality of legislation enacted under the commerce clause.225 The opinion entirely bypassed the argument that PURPA regulates state governance of commerce rather than commerce itself. The Court stated simply that Congress made specific findings that the regulated activities "have an immediate effect on interstate commerce," and, because these findings were reasonable, the inquiry should end there.226

The majority considered section 210's exemption of qualifying facilities from state laws and regulations separately from that section's requirement that state utility commissions implement the Commission's rules governing power purchases between qualifying facilities and electric utilities.227 The Court held that the statute "does nothing more than pre-empt conflicting state enactments in the traditional way,"228 and therefore presented no constitutional problem since Con-
gress possesses preemption power under the commerce clause in those areas regulated by section 210. 229

After upholding the exemption provision of section 210, the Court noted that compelling state utility commissions to implement the Commission's rates regulating purchases between electric utilities and qualifying facilities was "more troublesome." 230 Nevertheless, the Court stated that, as implemented by the Commission, the federal program "simply require[s] the Mississippi authorities to adjudicate disputes arising under the statute." 231 The Court also observed that "[d]ispute resolution of this kind is the very type of activity customarily engaged in by the Mississippi Public Service Commission." 232 The Court viewed Testa v. Katt 233 as controlling on this point. 234

In Testa, the courts of Rhode Island had refused to entertain treble damage claims under the Emergency Price Control Act 235 even though they heard analogous state causes of action. 236 The Supreme Court upheld the federal program, observing that the Rhode Island courts possessed "jurisdiction adequate and appropriate under established local law to adjudicate this action." 237 The Court also observed that the states must heed the constitutional command that "the policy of the federal Act is the prevailing policy in every state." 238

The FERC Court believed that the type of claim which the Mississippi Public Service Commission could entertain under state law was analogous to those which would arise under PURPA, and therefore the reasoning of Testa should be applicable. 239 On a point contested by the dissent, Justice Blackmun saw no constitutionally significant difference in the fact that the instant circumstances, unlike those in Testa, concerned an administrative body with quasi-legislative powers rather than the judicial branch of state government. 240 In his view, the judicial department has "always been recognized as a co-equal part of the State's sovereign decisionmaking apparatus" 241 and that intrusions upon state judicial decisionmaking impaired state sovereignty as much

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229. 102 S. Ct. at 2137.
230. Id.
231. Id.
232. Id.
234. 102 S. Ct. at 2137.
235. 56 Stat. 34, as amended.
236. 330 U.S. at 394.
237. Id. at 394.
238. Id. at 393.
239. See 102 S.Ct. at 2138.
240. Id. For O'Connor's view, see infra text accompanying note 261.
241. 102 S.Ct. at 2139 n.27.
as intrusions upon a state's quasi-legislative functions.\textsuperscript{242}

In upholding PURPA's provisions concerning mandatory state consideration of ratemaking standards, the Court began by rejecting the proposition that the states and the federal government always must be viewed as co-equal sovereigns.\textsuperscript{243} According to the majority, this proposition was "not representative of the law today," since it had its roots in a "rigid and isolated statement"\textsuperscript{244} from the court's 1860 opinion in \textit{Kentucky v. Dennison}.\textsuperscript{245} The Court viewed PURPA's mandatory consideration approach as simply a less intrusive means to achieve the federal objective than would have been the permissible alternative approach of outright preemption of ratemaking authority.\textsuperscript{246} Indeed, as the Court observed, PURPA would impose no requirements on states that chose not to maintain public utility commissions.\textsuperscript{247} The majority also upheld the procedural standards accompanying the mandatory consideration provisions on the ground that if Congress can require a state administrative body to consider regulations in a preemptible field, Congress can also prescribe certain "procedural minima" for carrying out this task.\textsuperscript{248}

While analyzing PURPA's mandatory consideration approach, Justice Blackmun indicated some indecision on his part as to the proper limits of the federal government's power to intrude upon state sovereignty in order to achieve a federal objective.

While this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations, cf. \textit{EPA v. Brown}, 431 U.S. 99 . . . (1977), there are instances where the Court has upheld federal statutory structures that in effect directed state decision-makers to take or to refrain from taking certain actions. . . .\textsuperscript{249} An certainly \textit{Testa v. Katt}, supra, . . . reveals that the Federal Government has some power to enlist a branch of state government—there the judiciary—to further federal ends . . . .

Whatever all this may forebode for the future, or for the scope of federal authority in the event of a crisis of national proportions, it plainly is not necessary for the Court in this case to make a definitive choice between competing views of federal power to compel state regulatory activity. Titles I and III of PURPA require only \textit{consideration} of federal standards.\textsuperscript{250}

\begin{thebibliography}{99}
\item 242. \textit{Id.}
\item 243. \textit{Id.} at 2138.
\item 244. 102 S. Ct. at 2138.
\item 245. 65 U.S. (24 How.) 66 (1860).
\item 246. \textit{Id.} at 2140.
\item 247. \textit{Id.}
\item 248. \textit{Id.} at 2143.
\item 250. 102 S. Ct. at 2139-40.
\end{thebibliography}
Justice Blackmun thus approaches, but does not resolve, the issue of federally-compelled state regulation. Despite this avoidance of the issue, it seems the FERC majority presently may favor a more expansive view of federal power to compel state action suggested by the Courts in National League of Cities and Hodel. For the majority, Blackmun noted that

the Court has recognized that valid federal enactments may have an effect on state policy—and may, indeed, be designed to induce state action in areas that otherwise would be beyond Congress' regulatory authority. ... Thus it cannot be constitutionally determinative that the federal regulation is likely to move the States to act in a given way, or even to "coerce[e] the States" into assuming a regulatory role by affecting their "freedom to make decisions in areas of "integral governmental functions." 251

Hence, although some of Justice Blackmun's statements seem both vague and qualified, it appears that the FERC Court may be moving away from the heightened reverence for the tenth amendment characteristic of National League of Cities and Hodel. Justice O'Connor took this view in her stinging critique of the majority opinion.

In a partial dissent, Justice O'Connor agreed that Congress acted within its authority under the commerce clause in adopting PURPA.252 Justice O'Connor also concurred with the majority's tenth amendment holding on the attack on section 210.253 In her view, the federal government could permissibly exempt qualifying facilities from state requirements through its preemptive powers, as this did not involve regulating the states as states.254 In addition, as interpreted by the Commission, section 210 required state public utility commissions simply to resolve disputes between qualifying facilities and utilities, a judicial function the Mississippi Public Service Commission had exercised under similar circumstances pursuant to state law.255 Justice O'Connor agreed with the majority's citation of Testa for the proposition that, in exercising judicial power, a state may not discriminate between "analogous federal and state causes of action."256

Justice O'Connor, however, strongly disagreed with the majority's tenth amendment holding on titles I and III, viewing these portions of the statute as failing all three parts of the National League of Cities

251. Id. at 2141 (quoting Hodel, 450 U.S. at 289) (emphasis added).
252. Id. at 2145.
253. Id. at 2146 n.1.
254. Id.
255. Id.
256. Id. Justice O'Connor expressed some reservations about the provision in section 210 authorizing the Commission, qualifying facilities, and electric utilities to "enforce" state implementation of the Commission's rules, but declined to express an opinion in the absence of a "concrete controversy." Id.
Not only do titles I and III regulate the "states as states," they also address "attribute[s] of state sovereignty," since they set "the agendas of agencies exercising delegated legislative power" which is really indistinguishable from directly regulating state legislatures themselves. PURPA also impairs state ability to "structure integral operations in areas of traditional governmental functions," since "utility regulation is a traditional function of state government, and the regulatory commission is the most integral part of that function."

Moreover, Justice O'Connor emphatically rejected the majority's application of the Testa principal to legislative power.

Because trial courts of general jurisdiction do not choose the cases that they hear, the requirement that they evenhandedly adjudicate state and federal claims falling within their jurisdiction does not infringe any sovereign authority to set an agenda. As explained above, however, the power to choose subjects for legislation is a fundamental attribute of legislative power, and interference with this power unavoidably undermines state sovereignty.

The dissent also objected to the majority's position that titles I and III constituted simply a less intrusive approach to federal regulation that would have been outright preemption. Justice O'Connor strongly rejected the argument that states could remain free to avoid any regulation under PURPA simply by ceasing to regulate public utilities. In Justice O'Connor's view, such a position is an "absurdity" since. If taken to its logical extreme the majority's view could support any type of federal control over state government, since states would always be free to abolish their legislatures and other branches of government. Moreover, Congress is permitted to legislate only through "certain channels" as Congress cannot always reach "the same destination by a different route."

Justice O'Connor also maintained that titles I and III were unduly intrusive because they inhibit state administrative innovation and, unlike the case of outright preemption, force the states to continue committing resources to the area. Moreover, local citizens have difficulty

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257. For discussion of this test, see supra note 177.
258. 102 S. Ct. at 2147.
259. Id. at 2147-48. It has been held that the power of the Mississippi Public Service Commission to set utility rates is purely legislative in character. See Mississippi Public Service Commission v. Mississippi Power Company, 337 So. 2d 936, 939 (Miss. 1976) (citing Mississippi Public Service Comm'n v. Hinds County Water Co., 195 So. 2d 71, 78 (Miss. 1967)). See also Brief for Mississippi Power & Light Co., supra note 212, at 28.
260. 102 S. Ct. at 2148.
261. Id. at 2150-51.
262. Id. at 2151-52.
263. Id. at 2149.
264. Id. at 2151.
265. Id. at 2152.
holding utility commissions accountable for their decisions because PURPA blurs the lines of political responsibility in relation to local problems.266 Indeed, as Justice O'Connor concluded, "[i]f we want to preserve the ability of citizens to learn democratic processes through participation in local government, citizens must retain the power to govern, not merely administer, their local problems."267 The dissent ended with a brief discussion maintaining the constitutional history also did not support broad coercive federal power over state governments.268

IV
CONFRONTING THE PROBLEM

Justice O'Connor's concerns with the majority opinion appear well-founded. She seems correct in her assertion that the Court treads on dangerous ground when it applies the Testa rule to what essentially are state legislative functions. As a practical matter, since Congress could theoretically avoid direct regulation of any activity affecting commerce simply by passing laws compelling state governments to enact legislation, this analysis could lead to an obliteration of the distinction between state and national governments. Such an assertion of congressional power may not have seemed particularly troublesome historically. Today, however, Congress' commerce power seems limited only by the bounds of rationality, and, therefore, the potential for federal encroachment in the sphere of state government could be almost boundless.

If one accepts Justice Blackmun's analysis in FERC, it would follow that where Congress can regulate an activity it could force states to do the same, whether or not they are willing. Indeed, under FERC compelled state regulation is a more desirable alternative to the protection of state sovereignty than would be outright preemption. Moreover, Justice Blackmun has gone further and suggested in FERC that federal control of state government may not be limited even by the commerce power since under the constitution Congress may possess the authority to compel states to do those things it could not do directly.269

In both Hodel and FERC the Court came extremely close to the issue of federal coercion in the Clean Air Act context but failed to give a clear indication of its position. In Hodel, however, the Court's citation of the EPA cases appeared to suggest potential opposition to federal compulsion of state legislation, whereas in FERC the citation to the EPA cases seems aimed simply at demonstrating that the Court has

266. Id.
267. Id. at 2153. See also Guida & Solimine, supra note 228, at 13 & n.79.
268. Id. at 2154-57.
269. See supra text accompanying note 250.
never taken a stand against such coercion.\textsuperscript{270} Moreover, the majority either ignored or implicitly rejected the distinction between regulation of commerce and "state governance of commerce" contained in the EPA cases.\textsuperscript{271} \textit{FERC} clearly suggests that the constitutional permissibility of federal coercion of state government to effect federal purposes is an issue of degree rather than kind.\textsuperscript{272} An integral part of such a "degree" analysis will have to be a balancing of federal necessity against state sovereignty interests. If the Court adopts Justice Blackmun's expansive view of the federal interest in environmental protection announced in his \textit{National League of Cities} concurrence, then it seems entirely possible that the Court would uphold the \textit{ODHS} analysis of the Administrator's constitutional authority under the Clean Air Act.

In any case, the continued viability of state sovereignty seems far too important a part of our federal system to trust exclusively to future judicial assessments of the relative impact of federal legislation on state government. To be sure, the analysis in \textit{National League of Cities} does depend on future judicial assessments of the intrusiveness of federal action, but that endeavor takes place pursuant to the tenth amendment and not in spite of it. That is, when Congress regulates states and private citizens across the board, the \textit{National League of Cities} test is applied to ensure that otherwise valid legislation does not unduly encroach on state sovereignty interests. Where Congress seeks to utilize state lawmaking authority, however, the federal legislation is not "otherwise valid." In that case, other provisions of the Constitution, as explained below, should be read as barring exercise of such power. Indeed, federal commandeering of state legislative powers should not be evaluated under \textit{National League of Cities} because it presents a qualitatively different question. As Justice Blackmun himself recognized, the question presented in \textit{FERC} and the EPA cases concerns federally-compelled state implementation of a federal program. \textit{National League of Cities} concerned federal regulation of state government administration.

It may appear on cursory examination that these questions really do not differ. Indeed, federal enforcement of air pollution standards affecting state-owned sources would force the state to legislate to the extent that it would be required to appropriate funds for the purchase of necessary control equipment. Legislation for purposes of state compliance with federal pollution control laws does not interfere, however, with the representative processes of state government. In that case states would remain free, at least theoretically, to abandon the activity

\begin{footnotesize}
\textsuperscript{270} 102 S. Ct. at 2138.
\textsuperscript{271} Id.
\textsuperscript{272} See infra text accompanying notes 224-268.
\end{footnotesize}
causing noncompliance. Federally-compelled state legislation, on the other hand, is inconsistent with maintenance of the state's representative government. States would be forced to legislate regardless of the views of citizens' representatives.

In those circumstances where states have no choice in a matter as prescribed by the federal government, courts should find a violation of the guaranty clause. While the Supreme Court historically has viewed the guaranty clause as nonjusticiable out of fear of opening up a vast new realm of constitutional law which could take the judiciary perilously close to usurping the authority of other branches of government, EPA's theory of federally-compelled state regulation appears to be a clear violation of the policies underlying the clause. The guaranty clause could be applied to this issue with considerable effect and without posing problems of future expansiveness. As the Court stated in *In re Duncan*:

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

Thus, the Supreme Court should analyze the constitutionality of federally-imposed air quality control plans under both the tenth amendment and the guaranty clause. Where a federal plan component directly requires state enactment of legislation or quasi-legislative administrative regulations, the Court should find a violation of the guaranty clause without reaching the tenth amendment analysis. Where a plan component merely requires state enforcement, the federalism analysis should proceed along the lines of *National League of Cities*

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274. For example, the Supreme Court once stated:

> The high power has been conferred on this court of passing judgment upon the acts of the State sovereignties, and of the legislative and executive branches of the federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums. No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it.


and Hodel. This approach reflects all of the salient elements of the judicial analyses set forth in Train, Maryland, and Brown. It also appears to add a distinctive flexibility to the analysis of a complex area of federal-state relations without risking total elimination of the state sovereignty principle.

CONCLUSION

For over six years, the issue of EPA's authority to compel states to promulgate and enforce its air quality plans has been in controversy. Although the issue long appeared to be settled by default, the controversy has now been revitalized. The Court's willingness to let the ODHS decision stand along with its decision in FERC suggests a tilt away from the degree of reverence to state sovereignty the Court appeared to adopt in Hodel and National League of Cities.

This article has suggested that the Court should carefully consider the constitutionality of federally-promulgated air quality control plans in observance of fundamental principles of federalism. The Court should consider such plans on a component-by-component basis, as in Train. SIP provisions that require the enactment of laws and regulations against the will of state government should be found to violate the guaranty clause. Remaining SIP elements should be subjected carefully to the tenth amendment standards enunciated in National League of Cities and Hodel.