ALLOCATING DECISIONMAKING IN THE FIELD OF ENERGY RESOURCE DEVELOPMENT: SOME QUESTIONS AND SUGGESTIONS

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> No easy remedy will solve the energy crisis. Solutions, however, will emerge from a recognition and comparison of benefits and risks, possibilities and obstacles, across a wide range. Political choices are therefore involved, which is why the engergy crisis is a crisis of our political system.[1]

INTRODUCTION

An inevitable by-product of a commitment to a federal system of government is delay. The diffusion of power occasioned by competing public entities can result in an inability to obtain speedy implementation of social policies. This characteristic of delay inherent in our federal system of government has both positive and negative aspects. On the one hand, delay and inefficiency tend to beget reflectiveness—what at first seems like a good idea or program may upon reflection prove to have been hastily conceived.[2] On the other hand, the inability to act expeditiously may unduly deny to a society the wherewithal to avoid stagnation and decline. The ideal is to navigate safely between the Scylla of haste and the Charybdis of ineffectiveness.

Recent concern over energy resource availability has resulted in a quickening of federal interest in energy resource discovery, exploitation, sale, and use.[3] This federal interest does not, however, operate in

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1. ENERGY FUTURE: REPORT OF THE ENERGY PROJECT AT THE HARVARD BUSINESS SCHOOL 13 (R. Stubaugh & D. Yergin eds. 1979).

2. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1308 (1976).

3. Since 1970, Congress has enacted major legislation in the fields of: (1) oil and gas (Emergency Petroleum Allocation Act, 15 U.S.C. §§ 751-760 (1976), Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2841 (Supp. III 1979), Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432 (Supp.

virgin territory. Energy development and use traditionally have been areas of state concern. Accommodation of competing state and federal interests has not been easy. Congress' initial policy of deference to state authority has increasingly given way to a policy that evidences the paramount status of federal regulation.[4] Yet Congress, even when providing for the supremacy of federal rules, has consistently chosen to operate through state agencies and has invariably provided some mechanism for assuaging local sensibilities.[5]

The purpose of this Article is to examine the extent and limits of Congress' power to provide for federal regulation of energy resources. In this regard, the Article will address two major questions: How far can Congress go in preempting or overriding traditional state regulation in this field?[6] How far can Congress go in demanding that state agencies implement federally sponsored policies?[7] The recently proposed Priority Energy Project Act of 1980 [PEPA][8] represents a useful vehicle for discussion of these questions.

PEPA was designed to achieve some efficiency in the regulation of the licensing and construction of energy projects. PEPA was a response to the regulatory quagmire that had supposedly resulted in the withdrawal of numerous energy projects, including the recent Sohio pro-

III 1979)); (2) coal (Powerplant and Industrial Fuel Use Act, 42 U.S.C. §§ 8301-8483 (Supp. III 1979), Surface Minng Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 (Supp. III 1979)); (3) electricity (Public Utility Regulatory Policies Act, 16 U.S.C. §§ 2601-2645 (Supp. III 1979)); and (4) energy conservation (Energy Conservation Act, 42 U.S.C. §§ 6201-6422 (1976 & Supp. III 1979), National Energy Conservation Policy Act, 42 U.S.C. §§ 8201-8278 (Supp. III 1979)).

4. For example, the Mineral Leasing Act, 30 U.S.C. §§ 181-287 (1976 & Supp. III 1979) expressly provides that none of its "provisions shall be in conflict with the laws of the State in which the leased property is situated." *Id.* § 187. Two recent congressional enactments that govern the management of federal lands—the Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1976 & Supp. III 1979), and the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 (Supp. III 1979)—disregard the nonconflict clause insofar as coal extraction on federal lands in concerned.

5. For example, the Coal Leasing Amendments Act contains several provisions that allow the states the equivalent of a "veto" over coal leasing on certain federal lands (national forests) within the state. *See* Hustace, *The New Federal Coal Leasing System*, 10 NAT. RESOURCES LAW. 323, 326 (1977). The Surface Mining Act expressly allows for state regulation of strip mining within the borders of the state. 30 U.S.C. §§ 1253-1255 (Supp. III 1979). *See* Comment, *Conversion to Coal Under the National Energy Plan and the Environment: The Delicate Art of Balancing*, 9 TEX. TECH. L. REV. 487, 531-32 (1978). Even the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1782 (1976 & Supp. III 1979), perceived by some as a declaration of federal hegemony over federal lands in the West (*see The Angry West*, NEWSWEEK, Sept. 17, 1979, at 38-39), becomes on balanced reflection simply a congressional expression of the reality of the current federal practice of intensive land management. The 1976 Land Policy Act is less a gauntlet thrown down to the states than it is an expression of congressional intent to give legitimacy and direction to the reality of federal land management. H.R. REP. No. 94-1163, 94th Cong., 2d Sess. 1 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6175, 6175.

6. See text & notes 195-211 *infra*.

7. See text & notes 326-434 *infra*.

8. S. 1308, 96th Cong., 1st Sess. (1979) (as amended and reported out of conference). *See* H.R. REP. No. 96-1119, 96th Cong., 2d Sess. (1980). All textual references to PEPA are to the bill as reported in this Conference Report.

ject.[9] Although the House of Representatives rejected the conference bill that would have enacted PEPA,[10] it is unlikely that the issues raised by PEPA are foreclosed. Provisions similar to those found in PEPA already appear in enacted legislation.[11] In addition, federal regulatory agencies have, on occasion, demonstrated a desire to implement administratively a PEPA-type program.[12] Finally, and perhaps most importantly, PEPA remains a possible solution to an existent problem. Federal-state jurisdictional conflicts over energy resources are real and continue unabated. While PEPA is flawed in many respects, it is a proposal that is sensitive to a present void in harmonious state-federal relations. Hence, even if PEPA is not enacted in its present form, it can be expected that a similar measure will be before the 97th Congress, which convenes in 1981.[13] It is hoped that the observations and suggestions offered in this Article concerning PEPA will prove helpful to those whose responsibility it will be to draft, enact, and implement the measure that will be a true energy project expediting act.

The format this Article will take is as follows: Part I of this Article will briefly review the agency proposed to implement PEPA—the Energy Mobilization Board. Congress' authority to provide for procedural and substantive mechanisms to expedite energy project licensing and construction will be discussed in Part II. Part III will examine the principle of federalism as a legal and normative constraint upon the power of Congress to regulate the relation between the national government and the states. This examination will include an evaluation of the impact that enactment of legislation modeled on PEPA would have

9. The Sohio project was a west-to-east crude oil transportation system designed to transport Alaska North Slope crude oil from the west coast to refining centers in the central and eastern portions of the country. According to Sohio, its decision to abandon the project was based in part upon the eroding economics of the project. Sohio's estimates of the costs had increased, and the amount of crude oil remaining to be transported had significantly decreased. Sohio claimed that the reason for this situation was the difficulty it experienced in complying with various statutory and regulatory guidelines administered by federal, state, and local agencies. *See* GENERAL ACCOUNTING OFFICE, COMPTROLLER GENERAL OF THE UNITED STATES, THE REVIEW PROCESS FOR PRIORITY ENERGY PROJECTS SHOULD BE EXPEDITED 21-36 (1979) [hereinafter COMPTROLLER'S REPORT]. Of course, claims by interested companies must be evaluated carefully. Thus, Sohio's claim that it had expended over $50 million to secure 700 permits must be reviewed in light of contrary claims that approximately 600 of those permits were for local rights-of-way and that the project delay was more the result of Sohio's intransigence than the result of regulatory failure. *See* 125 CONG. REC. H9988 (daily ed. Oct. 31, 1979) (remarks of Rep. Moffett); *id.* S13,895 (daily ed. Oct. 2, 1979) (remarks of Sen. Cranston). *See also* text & note 204 *infra.*

10. *See* EN. USERS REP. (BNA), July 3, 1980, at 3.

11. Title V of the Natural Gas Policy Act of 1978 evidences some attempt to impose federal standards regarding administration and procedure on state agencies with jurisdictional authority over natural gas within the state. 15 U.S.C. §§ 3301, 3411-3413, 3415 (Supp. III 1979).

12. For example, the Environmental Protection Agency recently attempted, under the enforcement provisions of the Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. III 1979), to require state officials to enforce and implement EPA-drafted Transportation Control Plans [TCP's]. Failure to do so would subject state officials and the state itself to civil and criminal penalties. The issue is discussed at text & notes 393-408 *infra.*

13. *See* EN. USERS REP. (BNA), October 23, 1980, at 8.

on state and local decisionmaking and an assessment of whether PEPA, as proposed, is consistent with the principles of federalism that have served as the model of federal-state relations for this nation. Part IV of this Article will offer several suggestions for avoiding the significant constitutional difficulties raised by PEPA.

PART I. THE ENERGY MOBILIZATION BOARD—STRUCTURE AND APPROACH

A. *Introduction and Overview*

The Energy Mobilization Board [EMB], proposed under PEPA, was charged with (1) designating certain energy projects as "priority energy projects;"[14] (2) providing coordinated and expeditious schedules for federal, state, and local government decisionmaking with respect to designated "priority energy projects;"[15] and (3) establishing procedures for ensuring that "priority energy projects" complete the permitting and licensing processes within stated statutory time guidelines.[16] In addition, the proposed EMB was authorized to recommend, subject to Presidential concurrence and congressional approval, the waiver of certain federal substantive requirements in existence at the time of project consideration that might impede approval of the "priority energy project."[17] The EMB was also empowered to exempt "priority energy projects" from substantive requirements enacted after construction of the "priority energy projects" had commenced.[18]

The proposed EMB was not specifically empowered to make initial decisions on behalf of federal, state, or local governmental entities. The EMB was, however, authorized, upon finding that federal, state, or local governmental decisionmakers were not in compliance with the project decision schedule, to make substantive decisions in accordance with the substantive requirements that would have governed decisionmaking by the tardy entity.[19]

The relationship between the EMB and the courts, established in the conference bill, was somewhat crazy quilt and was more reflective of legislative compromise than logical consistency.[20] Judicial review of EMB decisions was to be vested initially in the Temporary Emergency

14. H.R. REP. No. 96-1119, 96th Cong., 2d Sess. § 302(a)(1) (1980) [the bill as set forth in this report is hereinafter cited as PEPA].
15. PEPA, *supra* note 14, § 305.
16. *Id.* §§ 311-313.
17. *Id.* § 317.
18. *Id.* § 316.
19. *Id.* § 315.
20. *See* EN. USERS REP. (BNA), Apr. 3, 1980, at 6; JOINT EXPLANATORY STATEMENT OF THE COMM. OF CONFERENCE, H.R. REP. No. 96-1119, 96th Cong., 2d Sess. 57-58 (1980) [hereinafter PEPA EXPLANATORY STATEMENT].

Court of Appeals.[21] On the other hand, enforcement actions by the EMB were to be commenced in the district courts.[22]

B. *Organization and Structure of the Energy Mobilization Board*

The proposed EMB was to be composed of three members, appointed by the President, with the advice and consent of the Senate.[23] The President was directed to designate one of the members to be the chairman, who was required to devote full working time to the affairs of the board.[24] Board members were to be persons who, as a result of their training, experience, and attainments in academia, industry, commerce, and/or government, were exceptionally well qualified to perform the duties of their office.[25] The chairman of the board was to be the chief executive officer of the board, and the management and direction of the board were to be statutorily vested in him.[26] The EMB was authorized to promulgate such rules and regulations as necessary to govern its operations and organization.[27]

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21. PEPA, *supra* note 14, § 402.
22. *Id.* § 314.
23. *Id.* § 201(b).
24. *Id.*
25. *Id.* § 201(c). The requirement that the members of the proposed EMB have experience in fields that can be intuitively characterized as pro-development suggests the basic theme of PEPA. This pro-development bias is reflective of former President Carter's desire that energy projects that need to be built will be built. *See* 15 WEEKLY COMP. OF PRES. DOC. 1235, 1239-40 (1979). Similar pro-development attitudes can be found in other bills designed to create an Energy Mobilization Board. Thus, S. 1516, 96th Cong., 1st Sess. (1979), *reprinted in* 125 CONG. REC. S9422-29 (daily ed. July 13, 1979) (introduced by Sen. Bentsen) required at least three members of the five-man board to "have had experience in private banking or the finance industry, or in engineering or in the management of a large commercial project." S. 1516, 96th Cong., 1st Sess. § 205(a) (1979).
26. PEPA, *supra* note 14, § 202(g).
27. *Id.* § 202(a)(5). PEPA's approach to administrative procedure was interesting. The Senate bill exempted PEPA from the coverage of the Administrative Procedure Act [APA]; the House bill provided for procedures similar to those contained in § 401 of the Department of Energy Organic Act. The conference bill attempted to combine both, *see* PEPA EXPLANATORY STATEMENT, *supra* note 20, at 51, and resembled neither. Section 204(a) initially stated that PEPA was subject to the APA, and § 204(c) stated that PEPA's major functions should be carried out by order, as defined in the APA. Section 204(b)(3), however, exempted the EMB from the APA requirements regarding the rendering of orders. Since EMB decisionmaking would often have been by order, a significant void was created by the failure to specify necessary procedural safeguards. Such a gap would inevitably be filled by the judiciary, with largely unforeseeable consequences, because some due process protections would have to be employed before persons could be denied the benefits or protections of the statutory scheme. *See* Grace Towers Tenants Ass'n v. Grace Housing Development Fund Co., 538 F.2d 491, 494 (2d Cir. 1976) (applying the *Roth* principle, Board of Regents v. Roth, 408 U.S. 564 (1972), to rulemaking); Thompson v. Washington, 497 F.2d 626, 641 (D.C. Cir. 1973) (giving tenants of low income housing units a statutory right to be heard prior to government approval of a rent increase). Moreover, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), indicates that the Court will not necessarily allow a standardless exercise of discretion to be exercised in an irrational manner. *Id.* at 415-16. As a consequence, some right of participation may be compelled in order to insure an adequate record, at least where judicial review is available from the action or decision of an EMB-type agency. Greater legislative guidance would clearly be in order. All that was furnished for PEPA was a staff summary indicating that the conferees intended that EMB decisionmaking be "informal." *See* ENERGY MOBILIZATION BOARD, SUMMARY OF AGREEMENTS BY CONFEREES 1 (May 1, 1980) (copy on file with the *Arizona Law Review*).

C. *Procedures and Criteria for Designating Priority Energy Projects*

PEPA was intended to expedite "agency action"[28] regarding energy project licensing and construction. This goal was to be achieved through the creation of the EMB and the vesting of authority in the EMB to provide coordinated, prompt, and simplified permitting, licensing, and approval of energy projects that were determined to be in the national interest. Projects were deemed to be in the national interest if they satisfied one or more generalized standards.[29] The EMB de-

28. PEPA, *supra* note 14, § 102(2). The term "agency action" was to be broadly interpreted. *See* PEPA EXPLANATORY STATEMENT, *supra* note 20, at 49.

> The conferees, in section 102(2), defined the term "agency decision or action" to mean any decision or action by any Federal or non-Federal agency affecting an energy project. The term is intended to include the broadest possible range of agency activities affecting such projects, including (but not limited to) any permit, license, lease, certificate, right-of-way, approval of financial assistance, rate, ruling or decision authorized, required, or issued by any such agency.

Id.

29. *See* PEPA, *supra* note 14, § 302(c), which provides:

> In determining whether to make a designation, or to deny an application, under subsection (a), the Board shall consider—
>
> (1) the extent to which the energy project would reduce the Nation's dependence upon imported oil or upon other nonrenewable resources;
>
> (2) the magnitude of any economic, social, and environmental impacts and costs associated with the energy project in relation to the impacts and costs of alternatives to the project;
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> (3) the extent to which the energy project would make use of renewable resources;
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> (4) the extent to which the energy project would conserve energy;
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> (5) the extent to which the energy project would contribute to the development of new production or conservation technologies and techniques;
>
> (6) the time that would normally be required to obtain all necessary agency decisions and actions;
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> (7) the adverse impacts that would result from—
>
> (A) the designation of the energy project as a Priority Energy Project, or
>
> (B) any delay in completion of the energy project which would result from the failure to make such a designation;
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> (8) the extent to which the energy project would impinge upon the quality and quantity of presently available and future water resources;
>
> (9) the comments received concerning the energy project;
>
> (10) the effect on regions of the country that will be most directly affected by the energy project;
>
> (11) the availability of significant economic, environmental, or technical data; and
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> (12) the anticipated effects upon completion in the energy industry, and the extent to which such designation will create competitive inequities among applicants.
>
> Any order designating an energy project under this section shall contain a statement of the basis on which such designation was made and such other information as the Board deems appropriate.

Although the standards were framed in equivocal terms, it is evident that the intent was that the standards be used to "fast track" projects that would meaningfully improve the energy supply picture in the United States. In any event, the absence of a tilt in the statutory standards should not affect the legality of delegation of authority to an EMB-type agency. *See* Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 558-59 (1976) (upholding a delegation of authority to the President to impose license fees, even though the Trade Act itself spoke only of quantitative restrictions, such as import quotas). The scope of the delegation in the Trade Act and PEPA are substantially the same, *i.e.*, they both contain stated objectives of preservation of the national security and provide a checklist of generalized criteria designed to guide agency action. *Compare* 19 U.S.C. § 1862(c) (1976) *with* PEPA, *supra* note 14, § 302. It is perhaps also of importance that initial judicial review of any delegation issues raised by PEPA would be before the Temporary Emergency Court of Appeals. *See* PEPA, *supra* note 14, § 401. The Emergency Court has taken a very liberal attitude toward the delegation doctrine and agency discretion. *See*

cisional process in this area was largely unfettered. Its basic decision was not subject to judicial review;[30] nor was the EMB required to create much of a record explaining its decision.[31]

The expediting process—often referred to as "fast tracking"—was to be initiated by a request to designate an energy project as a "priority energy project."[32] The request could be made by "any person planning or proposing an energy facility."[33] Within fifteen days of receipt of the request, the EMB was required to publish notice of the filing of the designation request, together with a description of the application, in the Federal Register.[34] Interested persons were to be afforded at least forty-five days to submit written comments concerning the request.[35]

DeRieux v. Five Smiths, 499 F.2d 1321, 1333 (Temp. Emer. Ct. App.), *cert. denied*, 419 U.S. 896 (1974). A broad delegation in the Emergency Petroleum Allocation Act, 15 U.S.C. § 753(b) (1976), was upheld by the Temporary Emergency Court in Condor Operating Co. v. Sawhill, 514 F.2d 351, 359 (Temp. Emer. Ct. App.), *cert. denied*, 421 U.S. 976 (1975). The court stated:

> Where the obvious intent of Congress is to give the President and his delegates broad power to do what reasonably is necessary to accomplish legitimate purposes rendered necessary by a recognized emergency, and regulations are fashioned to implement the Congressional mandate, the court should not interfere with the prerogative of the agency to select the remedy which for rational reasons is deemed most appropriate.

Id. at 359.

Yet the magnitude of the powers that would have been vested in the EMB by PEPA, the scope of facilities over which the board would have had authority, and the absence of any precise limitations in the delegation could have proved troubling. Furthermore, to the extent that the delegation infringed upon constitutionally protected interests, judicial deference to essentially standardless delegations might dissipate. *See* Schwartz, *Of Administrators and Philosopher-Kings: The Republic, The Laws and Delegations of Power*, 72 NW. U.L. REV. 443, 457 (1978). For example, in Kent v. Dulles, 357 U.S. 116 (1958), the Supreme Court narrowly construed the discretion given to the Secretary of State over passports because of the important liberty interest involved in freedom to travel. *Id.* at 129. Similarly, in SEC v. Sloan, 436 U.S. 103 (1978), the Supreme Court refused to imply a broad congressional delegation of power to the SEC for the purpose of summarily suspending trading in a security by tacking the statutorily authorized ten-day suspension. To confer such an "awesome power" on the SEC would require "[a] clear mandate from Congress." *Id.* at 112. These decisions evidence a judicial sensitivity to congressional delegations of authority in areas of constitutionally protected interests. Since PEPA also raised fundamental questions regarding the proper relation between the federal government and the state, *see* text & notes 326-434 *infra*, legislation modeled on PEPA may occasion a spillover of this concern. Even if the courts would equate the tenth amendment/federalism interests present in PEPA with the first amendment and property interests present in *Kent* and *Sloan* respectively, a caveat must be noted. The Supreme Court has not expressly backed down from the position asserted in *Algonquin SNG* that delegation of authority does not require painstaking detail. Both *Kent* and *Sloan* are construction cases and do not purport to resurrect the rigorous delegation doctrine expressed in Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) and Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), even in cases involving interference with constitutionally protected interests. The presence of constitutionally protected interests may demand no more than a clearer statement from Congress that the agency actually has authority in the field; alternatively, it may require that Congress specify with greater precision the standards for agency action. Only the latter requirement would affect the delegation doctrine in any meaningful way. The former requirement could be satisfied by pro forma statements. The maintenance of some ambiguity is probably intended by the Court. It serves as both a means of alerting Congress to judicial concern over a particular purported delegation and as a means of avoiding the unnecessary creation of nonnegotiable positions which may presage congressional-judicial conflicts.

30. PEPA, *supra* note 14, § 403(2).
31. *Id.* § 301. *But see* note 27 *supra*.
32. PEPA, *supra* note 14, § 301.
33. *Id.* § 301(a).
34. *Id.* § 301(d)(1).
35. *Id.* § 301(d)(2).

PEPA provided that no later than forty-five days after the expiration of the comment period, the EMB was required to decide whether to designate as a "priority energy project" the energy project described in the request.[36] The EMB was authorized, however, to extend the comment and designation deadlines for an indefinite period of time if the application was incomplete or if more time was necessary to afford interested parties a reasonable time to comment.[37]

Not later than sixty days after designating a proposed facility as a "priority energy project," the EMB was required to publish in the Federal Register a project schedule containing deadlines for all agency action relating to the project.[38] The project decision schedule was supposed to clearly identify the order in which licenses, permits, and other governmental approvals were to be obtained by the "priority energy project" before the project could be completed.[39] The project decision schedule established the lawful decisionmaking deadlines for all governmental agencies responsible for reviewing applications filed by the "priority energy project."[40] Any agency with authority to approve or reject an application, or proponents of any "priority energy project," were authorized to petition the EMB to extend a deadline or to modify the project decision schedule at any time prior to completion of the project.[41] The agency or proponent was required to show that it had exercised due diligence in attempting to comply with the project decision schedule and that it would be impractical for the agency to reach a decision or complete the required action within the specified time.[42]

D. *Designation of Priority Energy Projects*

PEPA was designed to encourage cooperative decisionmaking where possible. To that end, the legislation attempted to structure the "fast tracking" process so as to avoid interagency and interjurisdictional conflict.[43] Section 304 of PEPA directed that any agency with authority to grant or deny any approval or to perform any action necessary to the completion of a facility designated as a "priority energy

36. *Id.* § 302(a).
37. *Id.* § 306(3).
38. The period was computed by adding the thirty days allowed for agencies to transmit information to the EMB after notice of project designation had been published in the Federal Register, *id.* § 304, to the thirty days allowed for EMB review of the agency transmittals, *id.* § 305(a). As with the initial commenting period, extensions were available. *Id.* § 306(4)-(5).
39. *Id.* § 305(a).
40. *Id.* § 305(g)(2).
41. *Id.* § 305(h)(1).
42. *Id.* § 305(h)(1)-(3).
43. *See id.* § 305(d) which provides: "Where possible, the Board shall negotiate and enter into written cooperative agreements with each affected non-Federal agency concerning the establishment of deadlines on a Project Decision Schedule."

project" must comply with specified requirements.[44] Compliance was required within thirty days after a notice appeared in the Federal Register indicating that a facility had been designated as a "priority energy project."[45]

First, each agency was charged with preparing a compilation of all significant actions required of the agency before the "priority energy project" could be completed.[46] This provision was designed to identify agency licensing, permitting, and approval processes. The provision purported to seek only the minimization of delay in the construction of energy projects. PEPA was not concerned with agency supervision of the operation of the energy project.[47] Second, each agency was required to disclose the procedural requirements applicable to all agency actions undertaken with respect to the energy project.[48] Third, each agency was directed to declare all significant actions to be performed and information to be provided by the applicant with respect to the energy project.[49] Taken together, the three requirements served as a regulatory sunshine provision by requiring agencies to affirmatively disclose their regulatory interests and requirements.[50]

As to each of these reporting requirements a coercive sanction was implied: an agency would not be permitted to use in its decisionmaking process requirements, procedures, or information not specified in the various disclosures. Agency disclosure of its requirements and procedures for project decisionmaking was intended to define the universe of factors that an agency might consider in approving or disapproving a project application. The sanction would have arisen because the EMB was directed to draw up the project decision schedule in part from the information provided by the agency.[51] The project decision schedule

44. *Id.* § 304.
45. *Id.*
46. *Id.* § 304(1)(A).
47. Supervision over the day-to-day operation of energy facilities is already extensively controlled by federal statute. *See* note 3 *supra*. Indeed, the thrust of federal environmental regulation in the 1970's was to subject the states to uniform federal standards that were implemented by the states. *See* S. REP. No. 91-1196, 91st Cong., 2nd Sess. 11-15 (1970). Under legislation modeled on PEPA, operations supervision would, however, be subject to the EMB's power to waive the need for the "priority energy project" to comply with substantive requirements adopted during the grandfather window, see text & notes 81-92 *infra*, and to the EMB's power to recommend waivers of existing federal legislation, see text & notes 62-80 *infra*.
48. PEPA, *supra* note 14, § 304(1)(B).
49. *Id.* § 304(1)(C).
50. If "fast track" legislation modeled on PEPA is introduced in the 97th Congress, the disclosure requirements should be modified to include not only a compilation of each agency action that must be completed before a "priority energy project" can be approved, but also a listing of the requirements that will be imposed upon the project applicant in connection with each such action before a final decision with respect to that action can be made. If the agency is not required to relate its substantive and procedural regulations to specific applicant requirements, little real guidance is provided.
51. PEPA, *supra* note 14, § 305(a), (g)(1).

would have then become, upon promulgation, a binding constraint upon the scope, manner, and method of agency decisionmaking.[52] Hence, while failure to include an agency requirement or procedure in the submission would not have per se precluded agency consideration of the requirement or use of the procedure,[53] the project decision schedule implemented in reliance upon the submission might have significantly affected the agency's ability to rely upon the undisclosed requirement or procedure.[54]

The proposed EMB was authorized to review the submissions, consult with the involved agencies, and then publish a project decision timetable and deadline that was mandatory for the involved agencies.[55] The EMB's project decision timetable and ultimate deadline superseded all contrary or inconsistent law relating to timetables for priority energy project decisionmaking.[56]

The sanction to be imposed upon decisionmakers who failed to comply with the project decision schedule was severe. The proposed EMB was authorized either to seek an injunction requiring agency decisionmakers to conform to the project decision schedule[57] or to make the decision itself.[58]

E. *Waivers of Substantive Law*

The issue of whether the EMB could effect waivers of substantive requirements that impeded the approval and construction of energy

52. *Id.* § 305(g)(2).

53. PEPA was not intended to change the substantive standards under which agencies exercise their decisionmaking functions. *See id.* § 315(c). Moreover, PEPA specified the extent to which the EMB could impose procedural streamlining on involved agencies. *See id.* §§ 311-312 (federal), 313 (state and local). In view of Congress' ability to speak directly on the subject of federal alteration of the decisionmaking process, the creation of an implied sanction for omissions in complying with information-transmission requirements should not be expected. The sanction for information-transmission omissions was that the EMB might impose a particularly onerous timetable under which agency decisionmaking was required to be rendered and, because of the omissions, might not be favorably inclined to consider granting modification of the project decision schedule under § 305(h).

54. The information transmission clause also included the requirement that the agency propose a tentative project decision schedule, *id.* § 304(2), and a statement of funds and personnel available for taking agency action relative to the energy project, *id.* § 304(3). The information was designed to assist the EMB in devising a final, project-wide decision schedule which was required to follow, to the extent possible, the tentative schedules submitted by the agencies and to be feasible for the agency to implement. *See id.* § 305(g)(1)(A)-(B).

55. *Id.* § 305(a).

56. *Id.* § 305(g)(2).

57. *Id.* § 314.

58. *Id.* § 315(b). The authority to supplant state decisionmakers was constrained in one material way. If the state had enacted a comprehensive state siting law for proposed energy projects, EMB was not permitted to supplant state decisionmakers who were operating under the state siting law, before the last deadline on the project decision schedule for federal, state, and local decisions had been reached. *Id.* § 315(e). The type of state siting law that would qualify was not specifically described. The Conference Report did state, however, that the siting laws of Montana, Oregon, and Washington would qualify under § 315(e). PEPA EXPLANATORY STATEMENT, *supra* note 20, at 55.

projects has received much attention from the Congress, the media, and the public.[59]

PEPA provided for two types of substantive waiver. The first type of waiver would have permitted the negation of existing substantive requirements that would have impeded or hindered the approval and construction of the "priority energy project."[60] The second type of waiver permitted the negation of substantive requirements enacted while the approval process or construction phase was in progress.[61] The two types of waivers were handled somewhat differently in PEPA.

Negation of Existing Substantive Requirements. During the House-Senate conference, convened to iron out differences between the "fast track" legislation passed by the two branches of Congress, the critical issue was the extent to which the final bill would allow waivers of substantive requirements existing at the time of project licensing and approval.[62] The bill approved by the House allowed the EMB to waive substantive provisions of federal law so as to expedite project approval.[63] The Senate bill, however, allowed waiver of only procedural requirements of existing law.[64] Under the Senate bill, the EMB could impose streamlining requirements on federal agencies but could not waive substantive requirements governing an agency's decisionmaking.[65] The compromise agreed to in conference represented a basic acceptance of what each side had expressly placed in its bill.[66] The compromise provided that the House position on substantive waivers would be adopted.[67] Thus, the EMB was authorized to suspend or waive federal laws that posed a substantial block to completion of a priority project. Although the Senate failed to maintain its position on substantive waiver, it did prevail in its position that the EMB should have authority to order procedural waivers.[68]

Under the conference bill, the EMB's ability to impose substantive waivers was subject to several constraints. First, the EMB's action was initially only a recommendation.[69] The EMB could recommend to the President that specific federal statutes be relaxed on a project-by-pro-

59. *See* EN. USERS REP. (BNA), Feb. 28, 1980, at 7-8.
60. PEPA, *supra* note 14, § 317.
61. *Id.* § 316.
62. *See* note 59 *supra.*
63. H.R. 4985, 96th Cong., 1st Sess. § 186(c) (1979), *reprinted in* 125 CONG. REC. H10,100 (daily ed. Nov. 1, 1979).
64. S. 1308, 96th Cong., 1st Sess. §§ 17, 19 (1979), *reprinted in* 125 CONG. REC. S14,058 (daily ed. Oct. 4, 1979).
65. *Id.* § 17(b).
66. *See* PEPA EXPLANATORY STATEMENT, *supra* note 20, at 56.
67. *Id.*
68. *Id.* at 55.
69. PEPA, *supra* note 14, § 317(a)(2).

ject basis. The President could accept or reject that recommendation.[70] Second, if the President accepted the recommendation, the waiver proposal went to Congress. PEPA specifically provided that the waiver proposal be referred first to the congressional committee with jurisdiction over the statute to be waived.[71] Barring formal committee action to delay consideration, each branch of Congress was required to vote on the proposed waiver within sixty days.[72] Congressional approval of the waiver was a condition precedent to the EMB waiver having legal effect.[73]

An important issue not explicitly addressed in PEPA is the scope of the substantive waiver. PEPA did not define the federal laws affected by the waiver; it simply referred to "any Federal statute, rule, regulation, or standard as it applies to the Priority Energy Project if such Federal statute . . . was enacted, or promulgated [prior to the grandfather window[74]]".[75] A question arises whether the concept of "federal law" is limited to laws and regulations enacted and promulgated by federal agencies or whether it includes state and local laws adopted pursuant to federal directives.[76] Recently, a federal district court held that a state implementation plan provision enacted pursuant to the federal Clean Air Act[77] can be enforced as federal law.[78] Thus, it is possible to argue that state substantive law enacted in connection with generic federal legislation is federal law and would have been subject to waiver under PEPA. Militating against such a construction, however, are statements in the legislative history of PEPA that indicated a lack of intent to achieve a federal incorporation of state law as the governing rule of decision.[79] Indeed, during floor debate on the House proposal, it was argued that state laws adopted pursuant to federal direction were not federal substantive laws for purposes of the House bill.[80] Since the language defining the scope of the federal substantive waiver was offered by the House conferees, it could be argued

70. *Id.* § 317(h)(2)(1).
71. *Id.* § 317(m)(1).
72. *Id.* § 317(m)(2).
73. *Id.*
74. The term "grandfather window" is defined at text & notes 81-86 *infra.*
75. PEPA, *supra* note 14, § 317(a)(2). This language was taken almost verbatim from the House Offer of March 31, 1980 to the Senate Conferees. Unfortunately, the House Offer did not address the scope of the language used. *See House Offer to Senate Conferees* (March 31, 1980) (copy on file with the *Arizona Law Review*).
76. Uncertainty over this issue was a significant factor in the House's rejection of the Conference report. *See* EN. USERS REP. (BNA), July 1, 1980, at 7-8.
77. 42 U.S.C. §§ 7401-7642 (Supp. III 1979).
78. Illinois v. Commonwealth Edison Co., 490 F. Supp. 1145, 1150 (N.D. Ill. 1980).
79. *See* 125 CONG. REC. H10,004 (daily ed. Oct. 31, 1979) (rejecting suggestions that PEPA envisioned a general federal incorporation of state law as a federal rule of decision); S. REP. No. 96-331, 96th Cong., 1st Sess. 39-40 (1979).
80. 125 CONG. REC. H10,080 (daily ed. Nov. 1, 1979).

that any construction of the term "federal law" should be limited to laws and regulations promulgated by federal entities. Nevertheless, if new "fast track" legislation is proposed, a clearer statement by Congress on this issue would be helpful.

The Grandfather Window for New Substantive Requirements. PEPA provided for a broad, across-the-board waiver of new regulations and requirements.[81] In effect, designated projects were given immunity from substantive requirements that otherwise would have applied. This broad waiver differed from the federal substantive waiver discussed above.[82] First, the waiver applied to federal, state, and local laws. Second, it was prospective only, applying only to regulations and requirements that would have become effective after the energy project had come into existence.[83] Third, the waiver was effective only as to those regulations and requirements that came into existence within specified time periods, hence the reference to the "grandfather window." For projects commenced prior to the enactment of PEPA, the window would have opened on the date of enactment of PEPA.[84] For other projects, the window was to open on the earlier of (1) the date of commencement of construction of the project, or (2) the date an application for designation of the project was filed with the EMB.[85] The "grandfather window" closed on the date of the

81. PEPA, *supra* note 14, § 316.

82. See text & notes 62-80 *supra*.

83. PEPA, *supra* note 14, § 316(b).

84. *Id.* § 316(b)(1)(A). The term "commenced construction" is specifically defined in § 316(c). The practice of exempting projects that have already "commenced construction" has an established background. The exemption developed from the need to balance public policy, as defined by the new requirements, against the individual hardship caused by the imposition of additional requirements after the decision had been made and the resources committed to construct a project on the basis of the previous regulatory framework. *See* Montana Power Co. v. EPA, 608 F.2d 334, 348-55 (9th Cir. 1979) (discussing the "commenced construction" exemption for compliance with the prevention of significant deterioration standards of the Clean Air Act Amendments).

85. PEPA, *supra* note 14, § 316(b)(1)(B). The difference between the Senate and House treatment of this issue is worth a short digression. The Senate bill designated the commencement of construction as the date from which the EMB's power to exact prospective waivers of substantive requirements would begin. *See* S. 1308, 96th Cong., 1st Sess. § 36(a) (1979). Hence, federal, state, and local laws enacted or promulgated prior to commencement of construction could be used to deny the project the necessary approvals. The House bill, on the other hand, set a very early date from which the power of prospective waiver would arise—approximately 90 days from receipt of the project application by the EMB. H.R. 4985, 96th Cong., 1st Sess. § 186(d)(1) (1979), *reprinted in* 125 CONG. REC. H10,101 (daily ed. Nov. 1, 1979). Thus, legislation designed to prevent construction of a specific project would be practically impossible to enact. The House, however, created a relief procedure whereby the prospective waiver could not be applied if the effect of the waiver would be to contravene "the will of the electorate as ascertained in any local or state initiative or referendum which was specifically related to the establishment of an energy project." *Id.* § 187(b)(6). The House, perhaps institutionally more receptive to the populist ideals patent in initiative and referendum procedures, *see* 125 CONG. REC. H10,085-86 (daily ed. Nov. 1, 1979), was disposed to grant blanket exceptions to the prospective waiver where project antipathy was expressed by the electorate. The Senate, on the other hand, seemed more inclined to allow elected or appointed decisionmakers to express, through enactment or promulgation, their project antipa-

initial commercial operation of the project. In other words, waiver of laws or regulations enacted or promulgated after that date was not permissible.[86] Fourth, the EMB was authorized, without Presidential or congressional concurrence, to order a waiver of new regulations and requirements.[87] Finally, the EMB's decision to waive new regulations and requirements was subject to judicial review.[88]

Although PEPA provided general authority for waivers of new requirements and regulations, the legislation prohibited waivers that would have resulted in violations of primary ambient air quality standards established under the Clean Air Act.[89] Such a constraint could have the effect of geographically isolating "priority energy projects" in predetermined locales where no legally measurable impact upon public health and safety could result. A prospective waiver provision would have its primary impact in attainment areas,[90] because these areas have met primary national ambient air quality standards. Such a waiver

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thy. The Conference Report adopted both positions. Any legislation specifically directed to a particular energy project was to be immune from substantive waiver. *See* PEPA, *supra* note 14, § 316(j)(2).

86. *See* PEPA, *supra* note 14, § 316(b)(2). The term "initial commercial operation" is not defined in PEPA. The Conference Report stated:

> Subsection (a)(4) provides that the Board may exercise its authority under this section during the period beginning on the date of designation of the energy project as a Priority Energy Project and ending on the date of initial commercial operation thereof as determined by the Board. Recognizing the diversity and complexity of energy projects which may qualify for priority designation, the Board shall exercise its discretion, on a case-by-case basis, in determining the point in time at which a Priority Energy Project commences full-scale commercial operation. Prior to such operation, many energy projects require testing and certification. The conferees intend that the Board recognize that Priority Energy Projects may require start-up, testing and preliminary operation before full-scale commercial operation is attained.
>
> In the case of Projects that are not intended to operate commercially, the conferees intend the term "initial commercial operation" to mean full-scale operation of the Project for the Purpose for which it is intended.

PEPA EXPLANATORY STATEMENT, *supra* note 20, at 56.

87. PEPA, *supra* note 14, § 316(a)(2).

88. *Id.* § 405. Judicial review of substantive waivers of federal law achieved under § 317 was limited to the determination of whether the waiver intruded into areas specifically foreclosed by § 317(o). *See id.* § 406(c). Review of grandfather waivers was slightly broader in that the court might review issues going to (1) whether the law waived was within the grandfather window, *id.* § 405(b)(2), and (2) whether the waiver would result in unreasonable harm to health and safety, *id.* § 405(b)(3).

89. *Id.* § 316(j). Primary ambient air quality standards are "ambient air quality standards the attainment and maintenance of which . . . are requisite to protect the public health." 42 U.S.C. § 7409 (Supp. III 1979). There were several other specific exceptions, including antitrust, civil rights, and employee safety legislation. The exception for primary ambient air quality standards was the most important, however, because of the close nexus between energy production and environmental concerns.

90. An attainment area is an area that meets primary and secondary national ambient air quality standards promulgated under the Clean Air Act. *See* 42 U.S.C. § 7407(d)(1)(D)-(E) (Supp. III 1979).

Primary national ambient air quality standards are defined in note 89 *supra*. Secondary ambient air quality standards are those that "specify a level of air quality the attainment and maintenance of which . . . is requisite to protect the public welfare from any known or anticipated adverse effects." 42 U.S.C. § 7409 (Supp. III 1979).

would also have an impact on nonattainment areas,[91] where primary but not secondary criteria have been met. In other words, only in those areas of the country where there exists some play between legislated public health standards and current air quality would a prospective waiver provision even have had a chance for implementation.[92]

F. *Procedural Streamlining*

Although Congress has been quite active in promulgating substantive standards to promote the nation's health and welfare and the productive capacity of the populace,[93] it has generally reserved to the states the responsibility for implementation and enforcement of such standards within each state.[94] In implementing the substantive standards, a state has generally been allowed to use those procedures and methods of decisionmaking that are common to its courts and agencies.[95] PEPA proposed a change in this accepted sharing of regulatory functions between the states and the federal government.

PEPA did not vest the EMB with authority to mandate specific procedures for state and local agencies and courts to follow in considering permits and licenses for designated "priority energy projects."[96] The EMB was, however, vested with authority to prescribe specific procedures for federal agencies to follow in the permitting and licensing of such projects.[97] PEPA did, on the other hand, authorize state and local agencies to adopt, pursuant to federal law, practices not authorized to be undertaken under state or local law.[98] The question of the extent to which the federal government can prescribe procedures for state and local agencies remains unresolved. Numerous federal statutes authorize intervention by federal officials into proceedings before state and local courts and agencies.[99] No significant challenge has been maintained against those procedures, although it should be noted that proce-

91. A nonattainment area is an area not in compliance with primary and secondary national ambient air quality standards established under the Clean Air Act. *Id.* § 7407(d)(1)(A)-(C). As of 1977, over half the country was not in compliance with air quality standards for one or more pollutants. R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY 494 (1978).

92. The conference compromise deleted a provision, contained in the Senate bill, that would have given the EPA and the Department of the Interior limited rights to veto grandfather waivers. *See* S. 1308, 96th Cong., 1st Sess. § 36(A)(2)-(3) (1979). It is debatable whether limited judicial review of the issue whether the grandfather waiver endangers the public health and safety would suffice in the absence of EPA and Interior oversight of EMB decisionmaking.

93. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7401(b)(1) (Supp. III 1979).

94. *See id.* § 7407(a); Train v. NRDC, 421 U.S. 60, 97-98 (1975).

95. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7410 (Supp. III 1979). *But see* text & note 3 *supra.*

96. PEPA, *supra* note 14, § 313(a).

97. *Id.* § 312(a)(1). This provision does not apply to independent federal regulatory agencies, *id.* § 312(a)(2), as those agencies are defined in PEPA. *Id.* § 102(6).

98. *Id.* § 313(a). The voluntary expedited procedures authorization applied only where the state or local agency was considering a designated priority energy project. *Id.* § 313(b)(1).

99. *See, e.g.*, Natural Gas Policy Act, 15 U.S.C. § 3415 (Supp. III 1979).

dures providing for access to decisionmakers are qualitatively different from procedures prescribing how the decisionmaker must resolve a controversy.

An attempt by Congress to control state procedures would, however, have some support in the case law. For instance, in *Dice v. Akron, Canton & Youngstown Railroad*,[100] the Supreme Court held that the determination whether a release was fraudulently obtained was for the jury even though state law committed it to the court.[101] Similarly, and perhaps more expansively, the Court in *Brown v. Western Railway of Alabama*[102] had held that state rules of practice involving the sufficiency of the pleadings could not be applied so as to defeat federal rights.[103] Professor Charles Alan Wright has commented that these cases suggest a constitutional power to control the incidents of a state trial of a federal claim.[104] If correct, this power could easily be extrapolated to cover the incidents of state decisionmaking where federal standards are being applied.[105]

G. *EMB Decisionmaking in Lieu of Decisions by State or Local Agencies*

One of the primary energy project expediting measures proposed under PEPA was the authority granted EMB to arrogate to itself the decisionmaking function of agencies that failed to comply with their project decision schedule.[106] This authority raises several different issues where the affected agencies are of state or local origin, that is, nonfederal agencies.

Initially, it might be observed that granting federal agencies the right to make substantive decisions in conformity with state and local law raises no constitutional difficulty per se. Federal agencies, whether independent or a part of the executive branch, are not constrained by any requirement that the subject matter for their decisionmaking "arise under" the Constitution or laws of the United States.[107] This same

100. 342 U.S. 359 (1952).
101. *Id.* at 363-64.
102. 338 U.S. 294 (1949).
103. *Id.* at 296.
104. C. WRIGHT, FEDERAL COURTS 196 (3d ed. 1976).
105. There remains, however, the question of how particularized a federal standard must be. Can federal interference in state procedures be tolerated as a principle of general application where a question of state law is at issue? In the *Dice* and *Brown* decisions there was a clear federal interest and right involved under the Federal Employers Liability Act, 45 U.S.C. §§ 51-60 (1976). PEPA did not, however, purport to extend federal law into areas of state and local concern so as to create substantive rights as opposed to procedural rights. This point is discussed further at text & notes 106-29 *infra*.
106. PEPA, *supra* note 14, § 315.
107. They are, however, constrained by the requirement that the authority exercised be founded upon a delegated power. *See* text & notes 130-31 *infra*.

compliment, however, does not extend to the article III courts.[108] Since EMB decisions made in lieu of decisions by nonfederal agencies would, under PEPA, be reviewed by the federal courts, the question whether such EMB decisionmaking would satisfy the "arising under" requirement is crucial to determining whether federal judicial review would in fact be available.[109] If review in a federal court would not be available, then the EMB decision would be either nonreviewable or reviewable only in a state court with general jurisdiction over the affected nonfederal agency and energy project.[110]

Under PEPA, EMB decisions in lieu of decisions by a recalcitrant state or local agency were to be rendered in accordance with and under state law.[111] Hence, review of such a decision pursuant to PEPA would place a federal court that was not exercising diversity jurisdiction in the novel position of deciding a case that did not "arise under" the law of the United States, but rather looked solely to the law of a state. It should be noted that this situation would be qualitatively different from the situation where the EMB was seeking judicial enforcement of the project decision schedule.[112] There is significant doubt that, in the former situation, an article III court would have jurisidiction to proceed.[113] The Department of Justice has advised Congress that EMB enforcement of state law in federal courts would be valid under either of two theories: (1) congressional incorporation of state law, or (2) protective jurisdiction.[114] Federal incorporation has been recognized as an appropriate exercise of congressional power, because in such situations "state law does not operate of its own authority, but solely by virtue of

108. U.S. CONST. art. III, § 2.

109. *See* PEPA, *supra* note 14, § 315(c), which provides:

> Whenever the Board determines to make a decision or to take an action in lieu of a Federal or non-Federal agency decision or action, the Board shall take whatever action is necessary to obtain an adequate record to support the final Board decision or action. Any final decision or action of the Board under this section in lieu of an agency decision or action shall be consistent with applicable Federal, State or local law (as may be modified pursuant to this Act) and the Temporary Emergency Court of Appeals shall have original and exclusive jurisdiction to review under such law such final decision or action of the Board, except as provided in section 401(e).

110. *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953). The problem here lies in the specification in PEPA, that a federal court—the Temporary Emergency Court of Appeals—would be the exclusive forum for reviewing EMB decisionmaking in lieu of federal or nonfederal agencies. PEPA, *supra* note 14, § 315(c).

111. PEPA, *supra* note 14, § 315(c).

112. Since the project decision schedule would express a federal mandate, the federal court in decreeing enforcement would not be deciding the underlying issue that was before the agency. Rather, the federal court would decree that the agency was required to make decisions in compliance with the federal timetable.

113. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 415-18, 866-70 (2d ed. 1973) [hereinafter HART & WECHSLER].

114. *Constitutionality of the Energy Mobilization Board Proposal* 9-12 (Justice Dep't Memorandum, July 24, 1979), *reprinted in* 125 CONG. REC. S13,884-87 (daily ed. Oct. 2, 1979).

an authoritative federal legislative command. . . ."[115] In the case of PEPA, there is no specific evidence of any intent, either express or implied, on the part of the drafters to incorporate state law. Indeed, the available indicia of intent point to just the opposite conclusion.[116] The Department of Justice's alternative theory of "protective jurisdiction" is likewise of questionable validity. Protective jurisdiction encompasses the notion that the very grant of jurisdiction becomes the federal law under which the litigation arises.[117] The legitimacy of the theory of protective jurisdiction has been vigorously debated. Justice Frankfurter has argued that " '[p]rotective jurisdiction,' once the label is discarded, cannot be justified under any view of the allowable scope given to Article 3."[118] It has been intimated, on the other hand, that "protective jurisdiction" is within the penumbra of delegated powers entrusted to Congress by the Constitution:

> Isn't protection of Congressionally created or recognized interests an essential purpose of extending the judicial power to cases "arising under * * * the Laws of the United States"? May not that purpose be served by the grant of federal jurisdiction in situations like that of the bank—where an active and articulated Congressional legislative program is at stake—even though the particular cases may involve state substantive law only? In terms of the purposes of the Article III provision, do not such cases truly "arise under" the federal laws creating the program?[119]

PEPA, as proposed, certainly articulated an active federal policy—regulation of the field of energy project approval. Moreover, Congress clearly possesses legal authority to preempt and totally regulate the field.[120] On the other hand, were the Supreme Court to recognize a doctrine of "protective jurisdiction," the relation between federal and state jurisdiction would be fundamentally altered.[121] The very fact that the Supreme Court has never embraced the doctrine, coupled with the tendency of the current Court to read jurisdictional grants literally but narrowly,[122] indicates that proponents of a "protective jurisdiction" theory have an uphill battle.

If Congress adopts legislation similar to PEPA, granting an EMB-

115. HART & WECHSLER, *supra* note 113, at 768.

116. 125 CONG. REC. H10,080 (daily ed. Nov. 1, 1979) (state laws adopted pursuant to federal direction are not federal substantive laws for purposes of the House bill). *See* text & notes 76-80 *supra*.

117. HART & WECHSLER, *supra* note 113, at 859-70.

118. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 474 (1957) (Frankfurter, J., dissenting).

119. HART & WECHSLER, *supra* note 113, at 868.

120. See text & notes 195-211 *infra*.

121. C. WRIGHT, *supra* note 104, at 79.

122. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373-74 (1978); Edelman v. Jordan, 415 U.S. 651, 672 (1974).

type agency authority to arrogate to itself the decisionmaking functions of nonfederal agencies and expressing a desire to limit review to federal tribunals, the courts can be expected to find an "incorporation" of state law in that legislation. Although clear expression of an incorporation doctrine was not present in PEPA or in its legislative history, incorporation would be the clearest route to achieving the general statutory goals expressed in PEPA. A finding that legislation modeled on PEPA worked a preemption of state law upon agency failure to meet a project decision schedule, coupled with the incorporation of state and local law as the applicable rule of decision, would allow for judicial review of EMB decisionmaking before the federal courts.[123] Such a finding would also avoid the problems associated with the extension of federal jurisdiction under the "protective jurisdiction" doctrine. Better yet, in redrafting PEPA, Congress should specifically provide for a conditional preemption and incorporation of state law as the federal rule of decision. This provision would resolve questions regarding the authority of the federal courts to review EMB decisionmaking undertaken in lieu of decisions by nonfederal agencies in cases where project decision schedules have not been met.[124]

PART II. THE IMPACT OF "FAST TRACK" LEGISLATION UPON THE STATES: THE ROLE OF CONGRESS IN DEFINING THE RELATION BETWEEN FEDERAL AND STATE AUTHORITIES

The major consequence of "fast track" legislation, if enacted, will be the new relationship it brings into play between national and state governments. Congress has considered several "fast track" measures that run the gamut from total obliteration of a meaningful, local decisionmaking function[125] to functional noninvolvement in the local decisionmaking process.[126] PEPA was intended to achieve a workable compromise between the two views.[127] PEPA's major feature was the retention of bifurcated decisionmaking combined with the imposition on that process of certain constraints deemed not to interfere with a

123. *See* PEPA, *supra* note 14, § 315(c); note 199 *infra*.

124. Failure to clarify the issue might encourage state agencies to simply reject energy project applications for permits or licenses. Under PEPA, such decisionmaking was protected from EMB interference: "The provisions of this section shall not be used for any final agency decision or action. . . ." PEPA, *supra* note 14, § 315(a).

125. H.R. 4862, 96th Cong., 1st Sess. (1979) (vesting the EMB with authority to waive both substantive and procedural state and local laws that delay or threaten to delay the timely approval and licensing of designated energy projects).

126. H.R. 4985, 96th Cong., 1st Sess. (1979), *reprinted in* 125 CONG. REC. H10,100 (daily ed. Nov. 1, 1979) (providing that EMB could propose but not enforce project decision schedules for state and local governments).

127. *See* S. REP. No. 96-331, 96th Cong., 1st Sess. 16-19 (1979).

viable role for local decisionmaking.[128] Nevertheless, concerns remain over the legality of such a bold push into the field of energy and natural resource development.[129]

A. *Overview*

In almost every respect the Constitution vests in Congress the power to define the nature of the relationship that shall exist between the federal government and the states. That power is subject, however, to two important limitations. First, Congress' power is limited to those duly enumerated powers specified in the Constitution. Consequently, it is only within the framework of those powers, as amplified by the necessary and proper clause,[130] that Congress may legislate. Of course, this notion of limitation is itself constrained by the expansive fashion with which the delegation has come to be viewed.[131]

A second limitation is imposed upon the delegated powers themselves. The Supreme Court has articulated a constitutional postulate that Congress may not use its delegated powers to usurp functions and invade matters "essential to [the] separate and independent existence" of the states.[132] The scope of this limitation is uncertain.[133] One point does, however, appear clear: congressional attempts to redesign the basic form of federalism will have to give due concern to the essential role of the states.[134]

Congress' power to legislate with respect to energy projects stems

128. This view was repeatedly asserted during debate on the floor of the Senate prior to passage of the Senate version of PEPA. *See, e.g.*, 125 CONG. REC. S13,860 (daily ed. Oct. 2, 1979) (statement of Sec. Charles Duncan); *id.* S13,861-62 (remarks of Sen. Domenici); *id.* S13,866 (remarks of Sen. Johnson).

129. *See* S. REP. NO. 96-331, 96th Cong., 1st Sess. 57 (1979) (remarks of Sen. Wallop).

130. U.S. CONST. art. I, § 8, cl. 18.

131. For example, under the commerce clause, Congress possesses a navigation power. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190 (1824). This navigation power extends to all streams that are, were, or could be navigable, and it extends to nonnavigable streams that affect the navigable capacity of navigable streams. *See* United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690, 708 (1899). *See generally* 2 CLARK, WATERS AND WATER RIGHTS § 101.1, at 5-9 (1967). Furthermore, the navigation power is not limited to navigation of waterways per se: "Congress may . . . use the waters of both navigable and nonnavigable streams for whatever purposes and in whatever manner it wishes." *Id.* § 101.2(a). Thus, even though the Constitution delegates no water rights per se to the federal government, rights to the waters of both navigable and nonnavigable streams have been found to reside in the federal government pursuant to judicial interpretation of the commerce power, as amplified by the necessary and proper clause.

Although Congress' power over the waters of streams subject to the navigation power is plenary, this does not mean that the power is always exercised in a plenary fashion. Congressional power has been apportioned among a variety of federal agencies and the states and their agencies. Englebert, *Federalism and Water Resource Development*, 22 LAW & CONTEMP. PROB. 325, 327 (1957). Consequently, the scope of federal rights in the waters of streams subject to the navigation power is first and foremost a question of congressional intent. *See* Chemehuevi Tribe v. Federal Power Comm'n, 420 U.S. 395, 405-08 (1975).

132. National League of Cities v. Usery, 426 U.S. 833, 845 (1976).

133. See text & notes 326-434 *infra*.

134. See text & notes 326-445 *infra*.

from several constitutional clauses: the commerce clause,[135] the spending clause,[136] the property clause,[137] and the war powers clauses.[138] PEPA purported to find its validity in the commerce and war powers clauses.[139] Nevertheless, since "[t]he question of the constitutionality of action taken by Congress does not depend upon recitals of the powers which it undertakes to exercise,"[140] the additional delegated powers not specifically relied upon by the authors of PEPA are discussed. Moreover, it may prove preferable to predicate legislation modeled on PEPA on delegated powers other than the commerce power or the war powers.

B. *The Commerce Power*

"The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[141] The greatest power available to Congress in the field of energy resource management and development is the commerce power. In many respects, the commerce power rivals that of the federal purse, for, unlike the power to provide for the general welfare through the expenditure of funds, the commerce power can be exercised in a purely coercive, regulatory fashion.[142] In addition, the commerce power is partially self-executing in that certain types of state action that affect commerce are prohibited unless and until they are legitimated by Congress.[143]

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135. U.S. CONST. art. I, § 8, cl. 3.
136. *Id.* art. I, § 8, cl. 1.
137. *Id.* art. IV, § 3. Article I contains a separate and distinct property clause which states:
> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

Id. art. I, § 8, cl. 17. The article I clause does not directly apply to PEPA. *See* note 261 *infra.*
138. *Id.* art. I, § 8, cls. 11-16.
139. PEPA, *supra* note 14, § 101(b).
140. Woods v. Miller Co., 333 U.S. 138, 144 (1948).
141. U.S. CONST. art. I, § 8, cl. 3.
142. *See* note 182 *infra.*
143. *See* City of Philadelphia v. New Jersey, 437 U.S. 617 (1978), in which the Supreme Court recently affirmed the self-executing aspect of the commerce clause:
> Although the Constitution gives Congress the power to regulate commerce among the States, many subjects of potential federal regulation under that power inevitably escape congressional attention "because of their local character and their number and diversity". . . . In the absence of federal legislation, these subjects are open to control by the States so long as they act within the restraints imposed by the Commerce Clause itself. The bounds of these restraints appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect to its basic purpose.

Id. at 623.

Prohibition Against State Practices That Burden or Discriminate Against Interstate Commerce. A fundamental problem of the modern industrial state is the frequently inequitable distribution of the risks and benefits associated with energy and resource development—the risks are visited upon one group, the benefits upon another group.[144] Where such circumstances arise, local concern about the creation of risks due to the construction and operation of energy facilities can be expected. An example of one such risk is the burden to industrial societies of waste by-products of industrial and commercial processes. Waste, or pollution as it is more commonly called, is often extremely toxic and represents a substantial cost since it must be stored or transmuted until rendered harmless to the environment.

The problem of waste disposal provides a valuable perspective from which to examine the role of the commerce power with respect to state attempts to prevent the importation of energy risks[145] and, by analogy, the ability of states to prohibit the export of energy or energy facilitating resources such as water[146] beyond the state. This problem of the control of waste was recently before the Supreme Court in *City of Philadelphia v. New Jersey*.[147] In that case, New Jersey's Waste Control Act made it illegal to import solid or liquid waste into New Jersey.[148] The statute adversely affected some landfill operators in New Jersey as well as several cities in nearby states that had waste disposal agreements with the operators. The New Jersey Supreme Court upheld the statute on the ground that the Act advanced important local health

144. *See* Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1219-20 (1977).

145. The Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1976 & Supp. III 1979), introduced a substantial federal presence in the waste production area under the supervision of the Environmental Protection Agency. The Act does, however, specifically provide for concurrent state regulation subject to certain exceptions involving testing requirements and a general prohibition against unauthorized legislation inconsistent with the substantive federal requirements. *Id.* § 2617. The Act is summarized in W. RODGERS, ENVIRONMENTAL LAW § 8.10, at 898-908 (1977). Problems of waste disposal are most pronounced in connection with radioactive waste by-products of nuclear power plants. *See* EN. USERS REP. (BNA), July 5, 1979, at 29-30 (discussing technical and political problems of away-from-reactor waste disposal facilities). Nonnuclear waste, however, raises containment problems equal to or greater than problems associated with nuclear wastes. *See* Watson, *Economic and Environmental Consequences of a Nuclear Power Plan Phaseout*, 3 J. ENERGY & DEV. 277, 309-15 (1978). *See generally* GENERAL ACCOUNTING OFFICE, U.S. COAL DEVELOPMENT—PROMISES AND UNCERTAINTIES (Sept. 22, 1977).

146. *See, e.g.*, MONT. REV. CODES ANN. § 89-867(2) (Supp. 1977) (declaring that a "use of water for slurry to export coal from Montana is not a beneficial use"); CAL. PUB. RES. CODE § 25524.1-.3 (West 1977 & Supp. 1980) (imposing requirements on the certification of nuclear fission thermal power plants in excess of those certification requirements imposed by federal law). In Pacific Legal Foundation v. State Energy Resources Conservation & Dev. Comm'n, 472 F. Supp. 191 (S.D. Cal. 1979), CAL. PUB. RES. CODE § 25524.2 was declared unconstitutional on the ground that the statute, which required the existence and approval of a high-level waste disposal technology as a condition to reactor certification, was preempted by federal law. 472 F. Supp. at 197. See note 206 *infra*.

147. 437 U.S. 617 (1978).

148. *Id.* at 618-19.

and environmental objectives without any economic discrimination against, and with little burden upon, interstate commerce.[149]

The Supreme Court reversed.[150] The Court observed that waste products were an object of interstate trade and therefore entitled to protection under the commerce clause.[151] It then turned to the crucial issue—"determining whether [the Act] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."[152]

The purpose of the Act was in dispute. On the one hand, it was argued that the Act's purpose was to protect the state's environment and the health, safety, and welfare of its people by slowing the flow of waste into New Jersey landfill sites.[153] On the other hand, it was contended that the real purpose was economic, in that the law was intended to stabilize the cost of waste disposal for New Jersey residents.[154]

The Court avoided an analysis of the ends of state legislation and focused instead upon the means used.[155] Since the means used discriminated against interstate commerce, the Act was struck down.[156] The Court found support for its position in prior decisions, which it construed as establishing a near per se rule that economic protectionism achieved by interference with interstate commerce is unconstitutional.[157] The Court's position could not be more direct: legislation that seeks to protect local industry by isolating the state from the larger union will run afoul of the Constitution as an impermissible constraint on interstate commerce.[158]

149. Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth., 68 N.J. 451, 478, 348 A.2d 505, 519 (1975).
150. 437 U.S. at 629.
151. *Id.* at 622-23.
152. *Id.* at 624.
153. *Id.* at 625.
154. *Id.* at 624-25.
155. *Id.* at 626.
156. *Id.*
157. *Id.* at 623-24.
158. *Id.* at 628. In the area of energy and natural resources the Court had previously demonstrated antipathy to local protectionism. In Pennsylvania v. West Virginia, 262 U.S. 553 (1922) and Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229 (1911), the states had attempted to conserve natural resources by banning their export. The Court struck down the bans in both cases; such conduct constituted exactly the type of local protectionism that the commerce clause was designed to prohibit. Pennsylvania v. West Virginia, 262 U.S. at 597-99; Oklahoma v. Kansas Natural Gas Co., 221 U.S. at 254-57. In each case, the Court found that behind the purported goal of conservation lay the impermissible end of economic favoritism motivated by a desire to ensure that local industry would be adequately supplied with natural gas at the expense of other states. Pennsylvania v. West Virginia, 262 U.S. at 597-98; Oklahoma v. Kansas Natural Gas Co., 221 U.S. at 262. Interestingly, in Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908), the Supreme Court, in an opinion by Justice Holmes, upheld a New Jersey statute that prohibited the export of any fresh water "of this state into any other state, for use therein." *Id.* at 353. Much of

The court rejected attempts to equate waste control legislation with quarantine laws.[159] Quarantine-type measures are regarded as permissible because they are designed to prevent traffic in articles that "required destruction as soon as possible because their very movement risked contagion and other evils."[160] By contrast, the Court found both that the harm associated with waste arises only after it is deposited and that the harm resulting from foreign waste cannot be distinguished from that resulting from local waste.[161]

Several general rules follow from the decision. First, the mere characterization of a state statutory scheme as environmental will not alter the essential features of the commerce power. Environmental concerns do not constitute a discrete exception to the centralizing feature of the commerce power. Second, the Court's emphasis upon means and ends suggests a basic reasonableness test where the ends sought to be achieved by the state scheme are permissible.[162] The Court, however, specifically noted that the impermissible objective of protectionism can reside in the means selected to implement the legislation as well as the ends sought to be achieved.[163]

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the force of *McCarter* seems to have been mitigated in Pennsylvania v. West Virginia, 262 U.S. 553 (1922), where the Court, over Justice Holmes' dissent, rejected the argument implicit in *McCarter* that natural resources were not "articles of commerce" until reduced to actual, physical possession through capture. *See id.* at 600-03 (Holmes, J., dissenting). Nonetheless, *Pennsylvania* did not purport to overrule *McCarter*. Whether the express grounds for the *McCarter* decision—the public interest in preserving natural resources and state ownership of the resources—retain validity is unresolved.

The Supreme Court's recent decision in Hughes v. Oklahoma, 441 U.S. 322 (1979), does not resolve the issue. In *Hughes*, the Court held that Oklahoma's prohibition against the transport or shipment outside the state for sale of natural minnows caught from waters within the state violated the commerce clause. *Id.* at 338. The Court rejected the idea that state regulation of wild animals was of no greater consequence for commerce clause purposes than state regulation of other natural resources. *Id.* at 335. Hence, a state statute which embargoed an article of commerce, such as wild animals, was facially discriminatory against interstate commerce. *Id.* at 336. It is important to note, however, that the Court in *Hughes* did not address the issue of the effect of the commerce clause on state-owned resources. Indeed, by rejecting the fiction that the state owned wild animals, *Hughes* was distinctly not a case involving state-owned resources. *See* Geer v. Connecticut, 161 U.S. 519, 539-40 (1896) (Field, J., dissenting); notes 169-70 *infra*.

159. 437 U.S. at 628-29.

160. *Id.* at 627.

161. *Id.* The Court's position is superficially plausible but lacks merit. If waste products constitute a "harm," as the Court seems to imply, then a distinction between foreign waste and local waste misses the mark. The state is physically unable to prevent the creation of local waste except by prohibiting conduct that leads to the production of waste. Moreover, if a state voluntarily undertook to curb its own use of an exhaustible resource such as waste disposal sites, it would merely confer a benefit upon out-of-state waste producers who would likely increase their use of the waste site as in-state residents decreased their use. *See generally* Friedman, *The Economics of the Common Pool: Property Rights in Exhaustible Resources*, 18 U.C.L.A. L. REV. 855 (1971). On the other hand, the state can discretely distinguish between waste already present in the state and foreign waste, which the state can seek to preclude in order to reduce the level of danger. It is one thing for the Court to strike down a state statute that seeks to economically isolate the state from the larger Union; it is quite another thing for the Court to bind the state's hands because the state has failed to confer benefits upon nonresidents by inflicting costs upon its own residents.

162. *See The Supreme Court, 1977 Term*, 92 HARV. L. REV. 5, 62 (1978).

163. 437 U.S. at 626.

The determination of the scope of permissible state regulation under the self-executing limits of the commerce clause is important to "fast track" legislation because of the centrality of water to energy project development.[164] If a state can legitimately impose constraints or conditions upon the availability of water for energy project development, federal attempts to increase the number of energy facilities in the country will be hampered. Consequently, it is important to determine the legitimacy of state policies that are neither intruded upon nor approved[165] by specific federal legislation.

The degree of power possessed by a state over water resources within the state is, at present, unclear.[166] Traditionally, the view was that state power was unfettered and not subject to the commerce clause in its self regulatory aspects. Under the pressure of increasing federal interest in water resources for energy and natural resource development, the traditional view seems to be eroding.

The traditional view was predicated upon the notion that water rights were intangible; they conferred legally enforceable rights to the flow and use of water but not to the water itself.[167] Hence, the com-

164. Holland, *Mixing Oil and Water: The Effect of Prevailing Water Law Doctrines on Oil Shale Development*, 52 DENVER L.J. 657, 660 (1975); Eisenstadt, *Water Law Problems of Solar Hydrogen Production*, 18 NAT. RESOURCE J. 521, 521 (1978); U.S. DEPT. OF THE INTERIOR, REPORT ON WATER FOR ENERGY IN THE UPPER COLORADO RIVER BASIN 58-71 (1974).

165. Congress can waive the commerce clause's applicability to state actions. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 433-40 (1946) (upholding the McCarran Act which allowed a discriminatory tax on out-of-state insurance companies doing business within the state). This doctrine, however, requires specific congressional expression of intent to exempt the state from compliance with the commerce clause. The McCarran Act specifically provides: "Congress declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states." 15 U.S.C. § 1011 (1976). Section 1011 is bolstered by § 1012 which specifically negates any intent of Congress to preempt the regulation of the insurance business. Hence, if state regulation of the insurance business were interdicted, a gap in the field of regulation would result.

166. The uncertainty about the scope of state power to regulate water resources within the state has not prevented several states from attempting to exercise control over the interstate transport of water. *E.g.*, COLO. REV. STAT. § 37-81-101 (1973) (unlawful to divert, carry, or transport waters into other states); WYO. STAT. § 41-3-105 (1977) (approval of legislature required for out-of-state export of water).

167. *See* Martz v. Grazis, *Interstate Transfer of Water and Water Rights—The Slurry Issue*, 23 ROCKY MTN. MIN. L. INST. 33 (1977).

> [E]xcept for cases such as *Carr* [City of Altus v. Carr, 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd per curiam*, 385 U.S. 35 (1966)] where the producer owns the source of supply and the resulting product, a substantive difference exists between typical article of commerce cases and water cases. The appropriator does not have an article of commerce at any time in a proprietary sense; he has only a usufruct under the laws of the state of appropriation. No precedent has been found for extending the commerce clause to water rights; and to the extent that the state is vested with authority to prescribe the conditions and limitations on water rights by the federal Acts of 1866 and 1877, no rational basis for such an extension exists. In other words, the slurry controversy is not centered so much on the question of whether water owned by the pipeline can be transported across the state line but rather whether the slurry pipeline can acquire a right under the laws of the source state to divert water across the state boundary for pipeline purposes.

Id. at 61.

merce clause applied, if at all, only after capture of the resource and reduction to possession.[168] With the demise of the formalistic view that no rights to water exist until capture, the justification for the traditional view has dissipated.[169] In addition, the movement away from the view

168. *See* note 158 *supra*.

169. *See* note 158 *supra*. For constitutional law purposes, water rights are rights in commerce. Hence, most commentators appear to be of the opinion that blanket prohibitions against water export run afoul of the commerce clause. *See* Martz & Grazis, *supra* note 167, at 63-65; Comment, *"It's Our Water!"—Can Wyoming Constitutionally Prohibit the Exportation of State Waters?*, 10 LAND & WATER L. REV. 119, 139-44 (1975). The reversionary interest of the state that can vest if an appropriator of water ceases using the water for a beneficial use may, however, allow the state to make the state ownership argument that was not passed upon in *City of Philadelphia*.

In *City of Philadelphia*, the Court specifically avoided the question whether the same result would have been reached had the waste disposal sites been owned by the state. *See* 437 U.S. at 627 n.6. There is an established, though shaky, line of Supreme Court precedents that permits a state to prefer its own residents over nonresidents insofar as state-owned resources are concerned. As presently formulated, however, this rule suggests that the state's control over resources goes only so far as is "necessary to execute the state's responsibility to safeguard important natural resources." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-33, at 409 (1978). This formulation received qualified acceptance by the Court in Hicklin v. Orbeck, 437 U.S. 518 (1978).

> "[T]he Court has recognized that the States' interest in regulating and controlling those things they claim to 'own' . . . is by no means absolute." . . . Rather than placing a state completely beyond the [privileges and immunities] Clause, a State's ownership of the property with which the statute is concerned is a factor—although often the crucial factor—to be considered in evaluating whether the statute's discrimination . . . violates the Clause.

Id. at 528-29. The Court and Professor Tribe part company, however, in that the Court has interposed an additional limitation, restricting the application of the privileges and immunities clause to fundamental values. *Compare* Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 384-86 (1978) (hunting and fishing interests are not fundamental rights) *with* Hicklin v. Orbeck, 437 U.S. 518, 525-26 (1978) (access to employment opportunities is a fundamental interest). Thus, in *Baldwin*, wild animals were treated as state property, the hunting of which was not a fundamental interest and hence not protected from discrimination. On the other hand, in *Hicklin*, Alaska's stated ownership interest was treated as marginal and attenuated, 437 U.S. at 529, and outweighed by the presence of a fundamental right to employment. Hence, Alaska's discrimination was improper. The Court appeared to be suggesting that in the absence of a constitutionally protected substantive interest, a state has great latitude in setting the terms and conditions under which it will allow exploitation of its property. Unfortunately, the dimensions of this exception to the demands of the privileges and immunities clause are uncertain. This is due, in part, to the fact that Justice Brennan, who dissented in *Baldwin*, wrote the opinion for the Court in *Hicklin*; consequently, the lines of demarcation between the two decisions, particularly on the state ownership issue, are blurred. Another issue left unanswered is the nature of the relation between the state property exception and the commerce clause prohibition against economic isolation. If the commerce clause interdicts state protectionism when directed to its own property, then the decision in *Baldwin* is not only curious, but of little value because both tests would be substantially equivalent. In Hughes v. Oklahoma, 441 U.S. 322 (1979), Justice Brennan stated:

> The State's interest in maintaining the ecological balance in state waters by avoiding the removal of inordinate numbers of minnows may well qualify as a legitimate local purpose. We consider the States' interests in conservation and protection of wild animals as legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens.

Id. at 337. The confusion in this area results in large part from the fact that wild animals were characterized as state property in *Baldwin* but not in *Hughes*. *See* note 158 *supra*.

Recently, in Reeves, Inc. v. Stake, 48 U.S.L.W. 4746 (1980), the Court held that South Dakota's policy of preferred sales to in-state residents of cement manufactured from state-owned plants did not constitute discriminatory regulation of interstate commerce in violation of the commerce clause. The Court's rationale was that "nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 4748 (quoting Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976)). The *Reeves* decision, however, is not a green

that the commerce clause distinguishes between direct and indirect effects gave rise to stricter judicial scrutiny of state actions and increased the likelihood that state attempts to control the entry of water into commerce would be nullified by the Court.[170]

PEPA, however, purported to exempt state water law from its coverage, including the waiver provisions. Section 503 of PEPA exempted state water policies from commerce clause compliance in the following manner:

> The establishment or exercise pursuant to State law, of terms or conditions including terms or conditions terminating use, or permits or authorization for the appropriation, use, or diversion of water for priority energy projects shall not be deemed because of any interstate carriage, use, or disposal of such water to constitute a burden on interstate commerce.[171]

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light for state discrimination in favor of its own citizens insofar as state-owned resources are concerned. The Court was careful to state that it was not passing upon programs that limit access to state-owned natural resources to state residents:

> This argument [that permitting one state to hoard its resources may result in retaliatory embargoes by other states], although rooted in the core purpose of the Commerce Clause, does not fit the present facts. Cement is not a natural resource, like coal, timber, wild game, or minerals. . . . It is the end-product of a complex process whereby a costly physical plant and human labor act on raw materials. South Dakota has not sought to limit access to the State's limestone or other materials used to make cement. Nor has it restricted the ability of private firms or sister States to set up plants within its borders. . . . Moreover, petitioner has not suggested that South Dakota possesses unique access to the materials needed to produce cement. Whatever limits might exist on a State's ability to invoke the *Alexandria Scrap* exemption to hoard resources which by happenstance are found there, those limits do not apply here.

Id. at 4750 (citations omitted).

170. It appears that the full impact of *Hughes v. Oklahoma*, see notes 158 & 169 *supra*, will be experienced in the context of state regulation of water resources. The "fiction" of state ownership over wild animals extends into many sundry fields. *Cf.* Hudson County Water Co. v. McCarter, 209 U.S. 349, 356-57 (1908) (discussing the limited ownership interests of private persons in the water resources of the state). The theory that possession is equivalent to capture is present throughout natural resources law. *E.g.*, Louisiana Gas & Fuel Co. v. White Bros., 157 La. 728, 730, 103 So. 23, 23 (1925) (there is no absolute ownership of minerals in place; under the law of capture, the minerals belong exclusively to the one who produces them).

In the context of water resources, the question is whether they will now be analogized to wild animals or to the rule that recognizes ownership of oil and gas in place beneath the surface of the ground as though part of the land itself. *See* Elliff v. Texon Drilling Co., 146 Tex. 575, 580, 210 S.W.2d 558, 561 (1948). Several factors suggest that water would be governed by the *Hughes* decision and hence subjected to regulation under the commerce clause. First, oil and gas generally occur in geologically closed formations; water, on the other hand, is migratory in nature. Although one could argue that oil, gas, and water are all migratory within their areas of confinement (oil and gas within geological reservoirs; water within water basins), the difference in area encompassed would support different treatment. On an intuitive level, there is a closer nexus between the land and underlying migratory minerals than between land and surface and subsurface waters. Second, the Court has consistently recognized a distinction between water and other resources. *See* Schwartz, *Commerce, The States, and the Burger Court*, 74 NW. U.L. REV. 409, 420-21 (1979). *Cf.* Andrus v. Charlestone Stone Products Co., 436 U.S. 604, 614-17 (1978) (water is not a locatable mineral for purposes of the Mining Law of 1872). Finally, and perhaps most importantly for the purposes here, *Hughes* clearly evidences that the question whether a resource is state-owned is a question of federal law. *See* 441 U.S. at 327-35.

171. PEPA, *supra* note 14, § 503(c). This section tracks identical provisions in the Senate and House bills. *See* PEPA EXPLANATORY STATEMENT, *supra* note 20, at 58.

The scope of the intended exemption was unclear.[172] On its face, the provision did not appear to legitimize blanket prohibitions against the exportation of water such as had been attempted by several states. A more natural construction of the proposed language is that the exemption was designed to provide the state with some leeway to promote, in a nondiscriminatory fashion, certain interests within the state that are water intensive, such as agriculture, over other interests, such as synthetic fuels development.[173] Hence, PEPA as a whole could be read as indicating acceptance of state imposition of conditions on water use by federal projects—a position largely inconsistent with past federal practices.[174] The reference in section 503, however, may have been intended to legitimate only the ends of state water policy, and not the means used to obtain those ends.[175] And as indicated in *City of Philadelphia*, to the extent that discriminatory means or procedures are used, control by the states of water resources may still be subject to some scrutiny.[176] The language used in section 503 was neither as broad nor as definitive of the drafters' intent as the language in other legislation, such as the McCarran Act, where a specific conferral of state authority

172. The water provision was initially amended by Sen. Wallop while the bill was on the floor of the Senate. Sen. Wallop's amendment was designed to

> —[i]nsure that nothing in this act is construed as granting the United States or its agents a new right to use water;
>
> —[i]nsure that appropriations of water for a priority energy project or any energy project be made pursuant to state law;
>
> —[i]nsure that if a State exercises conditions on water permits, that exercise will not be prohibited as being a burden on interstate commerce; and
>
> —[i]nsure that nothing in this act shall alter after [sic] any provision of State water law.

125 CONG. REC. S13,925 (daily ed. Oct. 3, 1979). Significantly, Sen. Wallop's amendment was not offered as a blanket preemption of a viable federal presence in the area of water law. Again, Sen. Wallop's comments are instructive: "Let there be no mistake. My amendment would not limit rights the Federal Government might otherwise have to protect national parks and monuments, national forests, or other reserved federal lands. This amendment would clarify Federal responsibilities regarding energy projects only." *Id.* S13,926 (daily ed. Oct. 3, 1979). The amendment worked only a slight change in § 503 as reported by the Senate Energy and Natural Resource Committee. *See id.* S13,852 (daily ed. Oct. 2, 1979). Yet, it did indicate that § 503 was not seen as emasculating federal authority insofar as federal water rights were concerned. Federal reserved rights are discussed at text & notes 293-305 *infra*.

173. *See* note 172 *supra*.

174. *See, e.g.*, California v. United States, 438 U.S. 645, 679 (1979) (White, J., dissenting).

175. This reading may be curative of constitutional deficiencies associated with imposing discrete restrictions on water use, as, for example, provisions giving a state engineer the power to determine if a water use is in the public interest. *E.g.*, WYO. STAT. § 41-3-104 (1977). The imposition of such restrictions upon a particular product might be viewed as unduly burdensome in the absence of legitimating legislation by Congress. Comment, *supra* note 169, at 137-40. Professor Tribe has stated:

> The principle of Prudential v. Benjamin . . . cannot properly be extended to a conclusion that Congress has limitless power to authorize state discrimination against out-of-state citizens. The Privileges & Immunities Clause . . . for example, confers a personal right against state action unjustifiably discriminating against out-of-state citizens whether or *not* such discrimination is congressionally authorized.

L. TRIBE, *supra* note 169, § 6-31, at 403 n.18. Of course, to the extent that water belongs to the state, the privileges and immunities clause argument is undercut. See notes 158, 169-70 *supra*.

176. See text & notes 147-63 *supra*.

over interstate commerce can be found.[177] Indeed, the presence of specific conferral language may be essential to legitimate state regulation that discriminates against interstate commerce. An examination of PEPA points this out. Section 503 applied only to priority energy projects.[178] Hence, an expansive interpretation of section 503 would raise the anomalous result that states may burden and discriminate against interstate commerce with respect to priority energy projects, but not otherwise. Such a doctrine, however, is incomprehensible. State law that burdens and discriminates against commerce can hardly be selectively upheld or invalidated depending upon whether a particular project has received a priority designation from an EMB-type agency. Such a rule would be highly capricious and would result in a state regulatory scheme that was only partially constitutional. Also, since the state scheme would be declared unconstitutional as soon as it was tested against a nonpriority energy project, the determination of the validity of broadly framed state regulatory schemes would at best be delayed, and not avoided. It is apparent that section 503 contained a limited delegation of power to the states to review, under state law and without interference from the EMB, the water law questions associated with a priority energy project. At a minimum, EMB-designated projects were to be subject to conditions imposed by a state agency as part of securing a water use permit.[179] Section 503 would not, however, justify blanket prohibitions, such as prohibitions against the use of water for an entire class of energy projects, for example, all coal slurry pipelines. Nor did it purport to act as a blanket authorization for state water regulation that burdened and/or discriminated against interstate commerce. Finally, section 503 left unimpaired the power of the United States to acquire water rights by eminent domain[180] or to interpret expansively the reserved rights doctrine.[181] Whether legislation incorporating the approach of PEPA will provide the states with sufficient guarantees of control over energy development within the

177. See note 165 *supra*.

178. See note 172 *supra*.

179. See note 172 *supra*.

180. Martz & Grazis, *supra* note 167, at 65-67. There, the authors discuss problems associated with the expansive exercise by the federal government of its power of eminent domain to acquire water rights. Arguments that the federal power of eminent domain could not be exercised upon water rights belonging to a state would not be persuasive, absent a dramatic shift in the law. *Cf.* Case v. Bowles, 327 U.S. 92, 98-100 (1946) (federally mandated price controls apply to sales of state-owned property); New York v. United States, 326 U.S. 572, 583-84 (1946) (state subject to nondiscriminatory federal tax).

181. See text & notes 293-305 *infra*. PEPA, as amended by the Wallop Amendment, exempted federal reserved rights from coverage under § 503. *See* note 172 *supra*. This amendment is important because the reserved rights doctrine is specifically concerned with both surface, *see* United States v. Winters, 207 U.S. 564, 576-77 (1908), and subsurface waters, *see* Cappaert v. United States, 426 U.S. 128, 142 (1976). As the Court stated in *Cappaert*: "Federal water rights are not dependent upon state law or state procedures. . . ." 426 U.S. at 145.

states is highly questionable. The language of section 503 was sufficiently imprecise to deny to the states the safeguards that PEPA purportedly established.

The Scope of Congress' Power to Regulate Commerce. The power of Congress under the commerce clause is substantial:

> Congress has the power to regulate not only acts which taken *alone* would have substantial economic effect on interstate commerce, such as a steel industry work stoppage, but also acts which might reasonably be deemed nationally significant in their *aggregate* economic effect; the triviality of an *individual* act's impact is irrelevant so long as the *class* of such acts might reasonably be deemed to have substantial national consequences.[182]

Congressional regulation of commerce is not limited by economic considerations: Congress may impose "*protective conditions* on the privilege of engaging in an activity that affects interstate commerce or utilizes the channels or instrumentalities of such commerce."[183] Consequently, if an activity impacts upon commerce, even in a trivial, nonessential way, Congress has the power to exercise a regulatory presence in the field.[184]

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182. L. TRIBE, *supra* note 169, § 5-5, at 236-37 (emphasis in original).

183. *Id.* § 5-6, at 238 (emphasis in original).

184. Language in many seminal Supreme Court decisions indicates an expansive interpretation of the clause. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), where Chief Justice Marshall observed: "[The commerce power] is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . [T]he power over commerce . . . is vested in congress as absolutely as it would be in a single government. . . ." *Id.* at 196-97. Nevertheless, the *Gibbons* Court tended to take a restrained view of the scope of Congress' commerce power: "The completely internal commerce of a state . . . may be considered as reserved for the state itself." *Id.* at 195; *see* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 318 (1851). *See generally* L. TRIBE, *supra* note 169, § 5-4, at 232-36.

In NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), the Court revamped its prior understanding of the scope of the commerce power by finding that Congress' commerce power extended to those activities which affected commerce in "a close and intimate fashion." *Id.* at 32. This understanding was further expanded in Wickard v. Filburn, 317 U.S. 111 (1942), the modern landmark case dealing with the commerce power. In *Wickard*, the Court held that the commerce power applied to intrastate activities that have a substantial impact upon interstate commerce. *Id.* at 129. *See also* United States v. Haley, 358 U.S. 644 (1959); Beckman v. Mall, 317 U.S. 597 (1942).

This point was reemphasized in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), where the Court noted: "The power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce." *Id.* at 258. In effect, the commerce power was found to reach not only activities that have a substantial impact upon commerce but also activites that must be regulated as a necessary incident of federal regulation of interstate commerce. For example, in United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942), the Court stated:

> The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. . . . It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress.

Thus, in the context of energy and natural resource regulation, the immediate question is whether energy projects that are intrastate activities have a substantial impact or effect upon interstate commerce or the federal regulation thereof. In this area, the Court has generally exercised considerable restraint. Congress' exercise of its commerce power has been affirmed whenever the Court has found that (1) Congress had a rational basis for determining that certain intrastate activities affected the flow of commerce among the several states, and (2) the means selected by Congress were reasonably adapted to that goal.[185]

In view of the clear constitutional warnings that were sounded regarding PEPA,[186] it is somewhat surprising that the drafters failed to specify with any particularity why PEPA was needed or desirable.[187] The proponents apparently reasoned that state and local interference with federal objectives was per se sufficient to invoke the commerce power.[188] The broad approach of PEPA can be contrasted with the Natural Gas Policy Act of 1978, wherein Congress reasoned that the existence of the unregulated intrastate natural gas market interfered with the regulated interstate market.[189] There was no correlative showing with respect to PEPA.

It is unclear how far the Supreme Court would go in upholding the general exercise of the commerce power over the licensing and construction of energy facilities. An argument can be made that state and local decisionmaking that inhibits the construction of energy facilities interferes with current areas of legitimate federal regulation and concern, such as foreign commerce and production of energy for interstate sale and distribution.[190] This argument, however, was not made by the

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Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.

Id. at 119.

185. Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964). *Accord,* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253 (1964); United States v. Sacco, 491 F.2d 995, 999 (9th Cir. 1974); United States v. Harris, 460 F.2d 1041, 1043-49 (5th Cir.), *cert. denied,* 409 U.S. 877 (1972); United States v. Lopez, 459 F.2d 949, 952-53 (5th Cir.), *cert. denied sub nom.* Llerena v. United States, 409 U.S. 878 (1972).

186. *See* 125 CONG. REC. S13,920 (remarks of Sen. Hart), S13,927 and S13,958 (remarks of Sen. Weicker) (daily ed. Oct. 3, 1979).

187. Congress did imply, in the general purposes and findings provisions of PEPA, that expediting the consideration of energy projects would benefit certain national interests. PEPA, *supra* note 14, § 101. A finding that a certain program would advance certain national interests is, however, different from a finding that national interests are being adversely affected by the absence of a coordinated policy for energy project consideration by federal and nonfederal interests. And while either finding would support some degree of congressional intrusion into areas of legitimate and traditional state interests, the latter situation presents a more appropriate case for a greater degree of congressional intrusion. *See* L. TRIBE, *supra* note 169, §§ 5-4, 5-5, at 232-37; note 189 *infra.*

188. *See* S. REP. NO. 96-331, 96th Cong., 1st Sess. 18-19 (1979).

189. *See* H.R. REP. NO. 95-496, 95th Cong., 1st Sess. 93-95 (1977), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 8247, 8382-85; S. REP. NO. 95-436, 95th Cong., 1st Sess. 8-25 (1977), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7855, 7856-73.

190. *Cf.* Houston, E. & W. Tex. Ry. v. United States, 234 U.S. 342, 352 (1914) (if Congress

proponents of PEPA. PEPA raised the anomalous situation where the stated reasons for enacting the legislation may have been inadequate, but adequate grounds did exist. Given the magnitude of the federal intrusion into areas that traditionally have been the sole province of state and local decisionmakers, a clearer exposition of the need for federal regulation should be provided. Expansive applications of the commerce power ought not to be based upon findings Congress could have made but did not.[191] Nor should a broad restriction of traditional federal-state relations be predicated upon pro forma statements of the need to achieve certain goals.[192] Moreover, since an expansive application of the commerce power raises significant and difficult constitutional issues, a more precise and accurate statement of Congress' rationale for invoking the commerce power would afford the courts the opportunity to avoid deciding potentially unnecessary constitutional issues.[193] Nevertheless, it should not be doubted that there exists authority in Congress to enact "fast track" legislation modeled on PEPA by recourse to the commerce power.[194]

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could not prescribe "the final and dominant rule" it "would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field"); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 316 (1851) ("The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used."). Moreover, the financing of energy projects could easily be seen as an inseparable and integral part of the interstate commerce in business and industrial financing, and hence create the necessary nexus for congressional action. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 784-85 (1975).

191. *Cf.* United States v. Bass, 404 U.S. 336 (1971). "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance . . . . [T]he requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* at 349. *But cf.* Northern Natural Gas Co. v. State Corp. Comm'n, 372 U.S. 84, 90-93 (1963), where the court held that state "ratable take" orders interfered with the jurisdiction of the Federal Power Commission and were consequently preempted. This holding effectively cast in doubt the legality of all state regulation of natural gas production and gathering even though Congress had specifically exempted those activities from coverage under the Natural Gas Act. Meyers, *Federal Preemption and State Conservation in Northern Natural Gas*, 77 HARV. L. REV. 689, 689 (1964).

192. *See* PEPA, supra note 14, § 101. *But see* McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232 (1980), where the Court, without addressing the issue of congressional intent, applied a very expansive jurisdiction formula for claims arising under § 1 of the Sherman Act. Of course, the Sherman Act itself is largely a congressional authorization to the federal courts to develop federal common law in the area of monopolistic and anticompetitive practices. *See generally* L. SULLIVAN, ANTITRUST 13-17 (1977); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 5-9 (1955). An extension of Sherman Act decisions into areas raising sensitive issues of federalism should not be presumed. In other words, congressional silence and acquiescence in the field of antitrust may justify full extension of the commerce power to implement the Sherman Act; however, decisions explicating the reach of the Sherman Act cannot be blindly applied to legislation purporting, without a clear statement of intent, to rearrange a settled expectation of the proper equilibrium of federal-state power in the field of energy and resource development and management.

193. Ashwander v. TVA, 297 U.S. 288, 341, 346-48 (1936) (Brandeis, J., concurring) (judicial decisionmaking should be structured, so far as principle allows, to avoid ultimate determinations of constitutional questions).

194. *See* Perez v. United States, 402 U.S. 146, 154 (1971) ("where the . . . class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class"); FPC v. Union Electric Co., 381 U.S. 90, 94 (1965).

The Power to Preempt State and Local Law. Assuming that the commerce power can be used to justify "fast track" legislation modeled on PEPA, the question still remains whether state regulation may coexist with federal regulation in a particular area. This issue is of particular concern here because the major question presented by PEPA is whether Congress may override or preempt state and local police powers relative to energy project approval. The preemptive sanction used in PEPA was both selective and general. It was selective in that it empowered the EMB to assume a major decisionmaking role when agency delay hindered or threatened to hinder compliance with project decision schedules established by the EMB.[195] It was general in that it broadly empowered the EMB to: (1) establish binding project decision schedules for state and local decisionmakers;[196] (2) authorize state and local decisionmakers to adopt streamlining procedures;[197] and (3) waive state and local substantive rules that fell within the grandfather window.[198] Hence, crucial to the operation of legislation modeled on PEPA is the determination of the scope of the preemption power.[199] Preemption of state law by federal fiat is not lightly presumed.[200] When a state's exercise of its police power is challenged under the supremacy clause, a federal court begins "with the assumption that the historic police powers of the States were not to be superseded by the

195. PEPA, *supra* note 14, § 315.
196. *Id.* § 305.
197. *Id.* § 313.
198. *Id.* § 316. *See generally* text & notes 81-92 *supra.*
199. Under several other bills before the Congress, the failure of state and local entities to comply with project decision schedules would have resulted in the forced waiver of that procedure by the EMB and the President. *See* S. 1516, 96th Cong., 1st Sess. § 316(a), (b) (1979) *reprinted in* 125 CONG. REC. S9422-29 (daily ed. July 13, 1979). PEPA was more discreet; it purported to preempt not state law, but state decisionmaking. *See* PEPA, *supra* note 14, § 315. The effective interpretation of state law in case of delay was to be made by the EMB. Nonetheless, the preemption would be just as effective. The type of decisionmakers would have a material impact upon the resolution of the case. It cannot be expected that federal decisionmakers, with their institutional interests and proclivities, would react to decisional input in the same fashion as state decisionmakers, with their own interests and proclivities. *See* Stewart, *supra* note 144, at 1210-22 (discussing competing considerations regarding localized or centralized decisionmaking). An even more fundamental difficulty lies in the fact that, aside from diversity jurisdiction under article III, the Constitution delegates no general power to the Federal government to decide state law issues for the states. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). *See* Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 497-504 (1954); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954). Federal decisions applying state law occur only where there has been a valid incorporation and, aside from the diversity and other "party" clauses of article III, where the federal government is protecting or affirming substantive federal interests. *See* HART & WECHSLER, *supra* note 113, at 491-94, 768. This occurs only where Congress has the substantive power to enact the rule of decision governing the case. The rule of decision may be independently stated, *e.g.*, Herget v. Central Nat'l Bank and Trust Co., 324 U.S. 4, 5-6 (1943), or may be implied from congressional silence or acquiescence, *e.g.*, Holmberg v. Armbrecht, 327 U.S. 392, 397 (1945). Nevertheless, the rule of decision is a product of Congress' power to formulate federal legislative standards, and it is only within these confines that federal officials may legitimately operate. *See* text & notes 106-24 *supra.*
200. *See* Goldstein v. California, 412 U.S. 546, 562-66 (1973).

Federal Act unless that was the clear and manifest purpose of Congress."[201]

Judicial interpretation of the preemption doctrine is hardly a model of consistency. Although the Supreme Court has stated that a finding of federal preemption necessitates clear evidence that Congress sought to exclude the field from state control,[202] the very nature of a doctrine predicated upon an assessment of unstated intent defies principled containment.[203] The preemption doctrine operates in fields where express congressional statements to preempt state law are often nonexistent, and concurrent regulation by state and federal jurisdictions is not impossible or necessarily injurious to federal interests. These circumstances make preemption an amorphous, yet potent, legal doctrine.[204] Simply put, it is one thing to strike down state statutes that are mutually inconsistent with federal statutes; it is a much more ambitious exercise of federal power to strike down a state statute that simply intrudes into a sphere of federal interests.

In the main, federal courts appear to be sensitive to these concerns and have not proceeded lightly to a finding of federal preemption. Indeed, in the field of energy management and development, federal preemption has generally proceeded only where preemption is manifestly necessary to achieve the legitimate aims of the federal program[205] or

201. Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Express preemption occurs when Congress has expressly stated, either in a federal statute or in the relevant legislative history, that federal regulation was intended to be exclusive. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 644 (1973).

Federal preemption may also arise by implication where, for example, the federal regulatory scheme is pervasive or the federal interest is dominant. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

Finally, even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict in this sense may be found in at least two circumstances. First, conflict preemption will occur "where compliance with both federal and state regulations is a physical impossibility." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963). Second, a conflict will be found where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1146-47 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).

202. *See* Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

203. Jones v. Rath Packing Co., 430 U.S. 519, 543 (1977) (Rehnquist, J., concurring and dissenting). It is important to further note that regulations implementing federal statutes may affect a preemption of state law. *See* Paul v. United States, 371 U.S. 245, 250-55 (1963).

204. It has by no means been conceded that the overlay of state and local decisionmakers is counterproductive to the development of energy projects. *Cf.* 125 CONG. REC. S13,875-77 (daily ed. Oct. 2, 1979) (setting forth studies conducted by the Library of Congress which found the cause of project delay and abandonment not to be centered in the regulatory process). Hence, even if the expeditious construction of energy projects is a valid national goal, it has yet to be empirically established that the state and local regulatory presence is inhibiting the achievement of that goal.

205. *See* First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152, 164-67 (1946) (construction and operation of dam on navigable stream need not comply with state law). *See also* FPC v. Louisiana Power & Light Co., 406 U.S. 621, 633-35 (1972) (conflicts between gas produc-

where the subject to be regulated is so unique as to warrant unified decisionmaking responsibility.[206]

Congress' treatment of the issue of preemption, as it affected the EMB was, ironically, anomalous. Certainly most, if not all, of the public debate involving the proposed creation of the EMB centered around the question of preemption and its effect upon state-federal relations. Yet, PEPA itself was strangely silent on the question. There were, however, several provisions that would have been essentially meaningless unless the drafters intended to exercise actually or conditionally the preemptive power.[207] The entire scheme was directed toward legitimating a final, federal decisionmaking authority over energy projects. Such authority was obtained by superimposing on various state and local agencies the superstructure of a centralized, unified, in effect one-stop, decisionmaking apparatus.

Indeed, the tenor of congressional debate over PEPA centered on the issue of federal preemption of a meaningful state and local regulatory presence. Wanting preemption and providing for a preemptive power are, however, two different issues. If Congress adopts a statute modeled on PEPA it should provide further clarification of the preemption issue. There is little to be served by leaving the delicate questions raised by preemption to a between-the-lines reading of the statute by the judiciary. Where, as here, we deal with an issue of traditional state jurisdiction and concern, direct congressional attention and specificity should be accorded the states as a matter of proper dealings between sovereign entities.[208]

The present trend of increasing government involvement in eco-

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ing states and gas consuming states produces competing and unresolvable multistate requirements and makes a uniform federal regulation necessary); FPC v. Union Elec. Co., 381 U.S. 90, 94 (1965) (interstate transmission of electricity is subject to the exercise of the commerce power); Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432 (Supp. III 1979) (imposing federal control over pricing of natural gas for resale on the interstate and intrastate markets).

206. In Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972), the court compiled an extensive chronology of federal treatment of nuclear power to indicate the unique attitude of the federal government toward this particular source of energy. *Id.* at 1147-52. The inherent dangers of nuclear power have been recounted in numerous judicial opinions and certainly create a strong impetus toward centralized, uniform treatment such as would be afforded by a finding of federal preemption. *See, e.g.*, New York v. Nuclear Regulatory Comm'n, 550 F.2d 745, 749-50 (2d Cir. 1977); Scientists' Inst. for Pub. Information, Inc. v. AEC, 481 F.2d 1079, 1098 (D.C. Cir. 1973).

207. For example, the power of the EMB to exercise a decisionmaking role in lieu of state and local entities under § 315 of PEPA was essentially meaningless unless the power of the displaced entity has been preempted. Section 501 provided the EMB with authority to issue a certificate which constituted "conclusive evidence" that all actions and approvals necessary to the completion and operation of the project had been granted. Section 501, however, did not by its terms apply to decisionmaking completed by the EMB. Rather, the section applied to situations where the EMB had been notified by agencies with authority to grant such approval or perform such actions. Unless the EMB was required to notify itself, a preemptive power under § 315 must be implied.

208. *See* text & notes 217-18 *infra*.

nomic planning would seem to support the creation of a centralized, coherent system of decisionmaking for priority energy projects. Real war, or the moral equivalent of war, may occasion a speedy reordering of social and political priorities. Energy is central to our economic security and well-being as a nation. Consequently, creation of a centralized authority, reasonably designed to advance the aims of energy sufficiency and economic viability may constitute the type of practical claim that often leads courts to find and affirm congressional intent to preempt local law under the federal statutory scheme.[209]

Commerce clause preemption does, however, pose some problems primarily related to scope. As a regulatory measure, commerce clause preemption is broad, nondiscriminatory, and complete. It provides for a federal presence where federal intervention is needed, as well as where it is not.[210] Preemption allows for regulation that is uniform, rather than regulation that is situation sensitive. As such, it often results in a loss of capacity for creative experimentation and tends to lead to the type of regulatory insensitivity that fans the flames of federal-state hostility. Indeed, it is the pervasiveness of commerce clause preemption that raises the question of inherent constraints on centralized decisionmaking that is discussed in Part III of this Article.[211]

C. *The Spending Power*

"The Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States."[212] The spending power is a broad, largely unrestricted grant of authority to Congress to spend money for purposes deemed appropriate by Congress.[213] Since the spending power is not constrained by specific limitations, the power may be used to induce compliance in fields not otherwise open to a federal regulatory presence.[214]

PEPA, however, potentially presents the spending power in a new

209. *See* L. TRIBE, *supra* note 169, § 6-24, at 378. "State action may also be preempted as interfering with federal regulation if it encourages conduct whose absence would aid in the effectuation of the federal scheme as interpreted and applied." *Id.*

210. *See* Stewart, *supra* note 144, at 1222-24; text & notes 363-67 *infra.*

211. See text & notes 326-434 *infra.*

212. U.S. CONST. art. I, § 8, cl. 1.

213. *See* L. TRIBE, *supra* note 169, § 5-10, at 250.

214. *See* Mills & Woodson, *Energy Policy: A Test for Federalism*, 18 ARIZ. L. REV. 405 (1976).

> "Buying compliance," as in the Emergency Highway Energy Conservation Act, is the most significant such exercise of the spending power. Conditions imposed on grants, contracts, and other expenditures by the federal government ensure state cooperation with stipulations which Congress could not otherwise constitutionally impose. Courts recognize no legal restrictions on such conditions so long as there is no abridgement of due process. The states, of course, are free to ignore federal policy thus imposed simply by rejecting conditional grants; once money has been accepted on conditions, however, the conditions must be satisfied.

Id. at 410 (footnotes omitted).

light for it raises the question of whether Congress can preempt a state law that interferes with a federal expenditure. This question is especially relevant in the field of energy development due to the magnitude of investment required to develop sources of energy for residential, commercial, and industrial use and the need for or desire of the federal government to contribute federal funds to the undertaking. Congress has passed legislation that will provide on an unprecedented scale direct financial assistance and underwriting for energy projects.[215] Hence, it is appropriate to inquire whether Congress can use its monetary presence to achieve related objectives, such as the avoidance of delay in making an energy project operational.

Although Congress can buy compliance for federal programs by conditioning the federal expenditure on state acceptance of federal conditions, Congress cannot use its spending power to force state acceptance of the program and its conditions. This conclusion seems to derive from the decision in *United States v. Butler*.[216] In *Butler*, the Court found that the Constitution allowed Congress to spend only for the general welfare; to hold otherwise would eviscerate the very concept of delegated powers.[217]

The distinction necessarily drawn by *Butler*—between direct coercion, which is invalid, and indirect inducement by buying compliance, which is valid—is legitimated by viewing the problem as involving the reconciliation of sovereign sensibilities. The gentle nudge of mutual accommodation is more compatible with the ideal of concurrent government than the use of unilateral dictate. Of course, in reality it is a mistake to treat the power to spend as noncoercive since it is tied inextricably to the power to tax. In many instances, as a practical matter, the offer of federal assistance cannot be refused. Consequently, the concept that the spending power is not independently coercive is correct, but only just barely so. The concept is correct because a general congressional power to regulate for the general welfare is inconsistent with the model of co-sovereignty expressed by our continued adherence

215. The recently enacted Energy Security Act provides federal subsidies and guarantees for projects that seek to develop a synthetic fuels industry in America. Energy Security Act of 1980, Pub. L. No. 96-294 §§ 131-135, 94 Stat. 654-62 (to be codified at 42 U.S.C.A. §§ 8731-8735 (Supp. 1980)). The Act allocates, during its first phase, $20 billion for design and construction of a pilot synthetic fuels program. Upon completion of the first phase, an additional $68 billion may be authorized by Congress for financial assistance by the Synthetic Fuels Corporation for the commercial development of synthetic fuel projects. *See* EN. USERS REP. (BNA), July 3, 1980, at 3-4. This program of federal financial assistance was undertaken upon the assumption that PEPA would be enacted. It will be interesting to examine the success of government financial assistance programs to build a new synthetic fuels industry in the absence of a means of reducing the delays and uncertainties posed by the requirement to obtain approvals and permits at every stage of the project.

216. 297 U.S. 1 (1936).

217. *Id.* at 64-66.

to the values of federalism. Yet the spending power cannot be viewed as simply the captive of state predilections. Coercion by force and coercion by economic inducement are different only in degree, and not in kind.[218]

Although the drafters of PEPA did not attempt to tie federally funded energy projects to the "fast track" procedures contained in PEPA, Congress would be well advised to consider such an approach. Interference with and supplantation of state and local decisionmaking functions would certainly be more palatable were they the result of inducement rather than coercion. Moreover, if the "fast track" program were linked to federal funding of an energy project instead of generalized standards poorly attuned to specific projects, state and local authorities would undoubtedly be more receptive to considering the merits of "fast tracking" particular projects. Finally, a meaningful state role in project approval would be maintained, since the state would have to specifically agree to "fast tracking" the particular project as a condition precedent to receiving federal funds for the project.

D. *The War Powers*

Perhaps the most enigmatic of the powers possessed by Congress are the war powers.[219] As noted by Professor Tribe:

> The Supreme Court has held that these war powers, in conjunction with the necessary and proper clause, grant Congress authority to take actions in wartime which would be unconstitutional in peacetime. Such congressional action may both assume responsibilities ordinarily left to the states and restrict the scope of private rights.[220]

While the war powers have provided implicit justification for congressional action in situations short of actual war,[221] they are obviously

218. As recently as 1976, federal assistance constituted over 20% of many states' budgets. U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE LEGISLATURES AND FEDERAL GRANTS, INFORMATION BULL. NO. 1, 76-4, at 1 (1976). The amount of federal assistance is beginning to cause concern within the states. *See* Shapp v. Sloan, 480 Pa. 449, 476, 391 A.2d 595, 609 (1978) (upholding the refusal of the Pennsylvania legislature to appropriate a portion of a block grant from the Law Enforcement Assistance Association that would have funded a special prosecutor within the executive branch), *appeal dismissed sub nom.* Thornburgh v. Casey, 440 U.S. 942 (1979). *See generally* Comment, *Federal Interference with Checks and Balances in State Government: A Constitutional Limit on the Spending Power*, 128 U. PA. L. REV. 402 (1979).

219. U.S. CONST. art. I, § 8, cl. 10-16.

220. L. TRIBE, *supra* note 169, § 5-16, at 276.

221. For example, the wartime authority of the War Production Board—the model for the Energy Mobilization Board—was largely predicated upon the so-called Priorities Statute. Act of June 28, 1940, ch. 440, 54 Stat. 676, *as amended by* Act of Mar. 27, 1942, 56 Stat. 177; Act of Dec. 22, 1944, 58 Stat. 827; Act of Aug. 7, 1946, 60 Stat. 868 (expired March 31, 1947). The Priorities Statute authorized the assignment of priorities to Army and Navy contracts over deliveries for private account or for export, and further provided for the compulsory allocation of materials to insure contract fulfillment. The Priorities Statute was enacted prior to the congressional declaration of war with Japan; yet its constitutionality was not questioned. *See generally* O'Brian & Fleishman, *The War Production Board Administrative Policies and Procedures*, 13 GEO. WASH. L.

constrained by the common sense notion that they are designed for a limited purpose—the waging of war. Hence, while the war powers certainly include actions necessary to prepare for war,[222] they cannot be read as justifying any and all congressional responses to situations that inimically affect the national interest. The war powers were not intended to transform this nation into a modern day Sparta; common sense and a feel for history provide implicit limitations upon the scope of authority Congress may exercise under these delegated powers.

Even if the war powers are not talismanic provisions, are they of no assistance to Congress in providing sufficient energy to fuel this nation's national defense? Professor Tribe has observed, in a slightly different context, that the issue is largely one of relativity.[223] Similarly, the sweep and scope of Congress war powers must be seen as continuously ebbing and flowing depending upon society's needs and expectations. Congress' power to requisition to provide for the national defense meant one thing in the eighteenth century when the implements of war were individualized; it surely amounts to something else in the twentieth century when a technologically oriented, highly interdependent society seeks to provide the wherewithal to maintain the national defense. As society becomes more interdependent, responding in an individualistic fashion to discrete problems and needs becomes more difficult.[224] In effect, providing for the national defense now requires, as it perhaps did not require two hundred years ago, a greater intrusion into those sectors of society more attenuated from traditional involvement in the war effort.[225] How then does a highly developed society avoid becoming Spartan and retain its aspirations of becoming Athenian, and how does society avoid use of the war power so as to not only "swallow up all other powers of Congress but largely obliterate the Ninth and Tenth amendments as well"?[226] This is an area where hard and fast rules have little utility. In the end, the establishment of a

REV. 1 (1944); Note, *American Economic Mobilization: A Study in the Mechanism of War*, 55 HARV. L. REV. 427 (1942).

222. *See* note 221 *supra*.

223. L. TRIBE, *supra* note 169, § 4-6, at 174.

> [D]oes the President's right to repel sudden attacks embrace a right to respond without congressional approval to sudden attacks upon our allies? There is no evidence that the Framers contemplated any such presidential power. But if they bestowed martial authority upon the President grudgingly, they did so in proportion to the military needs of their day. In the 18th century, a direct attack upon the United States was probably the only contingency that truly demanded instantaneous action; in the 20th, an attack on a strategically important ally might require similar dispatch. Conceivably, then, the Constitution might be read as allowing executively initiated military action, without congressional consent, in the event of a surprise attack upon an important ally.

Id. (footnotes omitted).

224. *See generally* J. BURKE, CONNECTIONS 4, 289-91 (1979).

225. *See* Note, *supra* note 221, at 535-36.

226. Woods v. Miller Co., 333 U.S. 138, 144 (1948).

tolerable equilibrium between the needs of national defense and the expectations of peace cannot be achieved by legal rule, but only by the desire and willingness to exercise both institutional and legal constraint, that is, to use those powers of the Constitution that are largely unfettered only when necessary and not as a matter of course. What is necessary will as always depend upon the circumstances of the moment, coupled with the notion that peacetime use of the war powers in nontraditional areas—but areas to which a reasonable argument for application can now be made—should be allowed only where other, less intrusive means cannot achieve the same goals. Hence, if Congress is able to achieve its statutory purposes through the use of established delegated powers, such as the spending power or the property power, recourse to the war powers should be avoided not because the war powers are inapplicable, but because Congress should reserve its most awesome powers for truly exigent circumstances. Of course, these alternatives may prove more onerous to Congress and may require the alteration or modification of federal goals. Yet, unless we are disposed to cease reading the Constitution as a whole document, it appears to be a process that we must accept.

Insofar as "fast track" legislation is concerned, the control of energy in peacetime has not to date been thought to be war related any more than food production, education, or public safety.[227] It would appear that any peacetime invocation of the war powers should, for the reasons stated, bear a heavy presumption of inappropriateness. The traditional congressional *ipse dixit* should not be indulged where legislation is general in its application and not specifically designed to aid in military preparedness.[228] On this basis, any claim by "fast track" legislation modeled after PEPA upon the war powers would be overextended; the drafters of PEPA did not limit the legislation to projects directly related to national defense, nor did they articulate a reasonable justification for relying upon the war powers instead of other delegated powers.

E. *The Article IV Property Power*

"The Congress shall have Power to dispose of and make all need-

227. Many of the goals sought to be achieved by PEPA bear only an attenuated relation to the traditional notion of military prowess, although the legislation did certainly address the larger issue of America's superpower status. The legislative history does, however, contain expressions of the interrelation between energy development and military preparedness. *See* 125 CONG. REC. S13,858 (daily ed. Oct. 2, 1979) (remarks of Sen. Jackson).

228. Thus, Congress' efforts to establish a program specifically and solely directed to military needs, such as the creation of a fuel oil stockpile for the military, should be distinguished from efforts whose military application is general and indirect, such as encouraging development of domestic sources of energy.

ful Rules and Regulations respecting the Territory or other Property of the United States. . . ."[229] Federal land holdings in the intermountain region of the West run from a low of 36% of Colorado to a high of 86% of Nevada.[230] These federal land holdings are not only large, but valuable, in terms of both mineral and nonmineral fuels.[231] Any plan to develop a coherent energy policy must consider the fundamental role that federal land holdings will play in that policy. More importantly, Congress' power over federal lands may provide the federal government with an alternative means by which the goals and purposes of "fast track" legislation may be achieved outside the rubric of the commerce power and thus without the political and structural limitations of the commerce power described in Part III of this Article.[232]

The property clause is a somewhat amorphous provision. While it delegates to the federal government the power to act as a landowner, it does not specify what the relation is to be between the federal government and the state in which the land is located.[233] The problem is aggravated by the fact that the proper relation between the article I property clause[234] and the article IV property clause, and consequently the scope of congressional power to legislate with respect to article IV lands, is uncertain.[235]

In *Kleppe v. New Mexico*,[236] the Supreme Court moved to clarify the relation between the federal government as landowner and the states. In 1971, Congress enacted the Wild Free-Roaming Horses and Burros Act which protects all unbranded and unclaimed horses and burros on public land.[237] A federal district court found the Act unconstitutional, holding that the Act conflicted with the traditional doctrines concerning wild animals[238] and was in excess of Congress' power under

229. U.S. CONST. art. IV, § 3, cl. 2. Article I of the Constitution also contains a property clause, see note 137 *supra*, which gives Congress a power of "exclusive legislation" over certain federal property such as the District of Columbia, forts, and arsenals. Federal lands used for the production of energy are, for all practical purposes, not within the coverage of the article I property clause, falling instead under article IV as part of the public domain. Of the 761 million acres of federal land, approximately 700 million are public domain lands. U.S. DEP'T OF INTERIOR, BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS, Table 7, at 10 (1975). For a discussion of the scope of the article I property power, see note 261 *infra*.

230. *See generally* PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND 23 (1970).

231. *See id.* at 91-103, 121-55, 187-95.

232. See text & notes 326-434 *infra*.

233. In large part, the uncertainty surrounding the propriety of the federal government acting as a landowner is the result of a pervasive federal policy, in effect during the period of westward migration and settlement, of disposing of federal land. *See* M. CLAWSON & B. HELD, THE FEDERAL LANDS: THEIR USE AND MANAGEMENT 16-36 (1956).

234. U.S. CONST. art. I, § 8, cl. 17, set forth in note 137 *supra*. See note 261 *infra*.

235. *See* note 261 *infra*.

236. 426 U.S. 529 (1976).

237. 16 U.S.C. §§ 1331-1340 (1976 & Supp. III 1979).

238. New Mexico v. Morton, 406 F. Supp. 1237, 1238-39 (D.N.M. 1975).

the article IV property clause.[239]

The Supreme Court reversed.[240] The Court observed that in passing the Act Congress clearly intended to protect a resource necessary " 'for achievement of an ecological balance on the public lands.' "[241] The question before the Court was whether this determination could be sustained under the property clause as a needful regulation respecting the public lands.[242]

The New Mexico Livestock Board argued that Congress' power under the property clause was limited to: (1) the power to dispose of and make incidental rules regarding the use of federal property; and (2) the power to protect federal property.[243] The Board argued that these powers were not broad enough to support legislation protecting wild animals that live on federal property.[244] The Court rejected the narrow reading of the property clause tendered by the Board. According to the Court, Congress exercises the power of both a proprietor and a legislature over the public domain.[245] This power includes the authority to regulate and protect wildlife living on the public domain.[246]

The Board also advanced the argument that approval of the Act as a valid exercise of Congress' power under the property clause would sanction an impermissible intrusion on the sovereignty, legislative authority, and police power of the state; as such, it would wrongly infringe upon the state's traditional trustee powers over wild animals.[247] The Board's position would give Congress power to act only after obtaining state consent. The Court found that the Board's argument confused Congress' derivative legislative powers, which were not involved in the case, with its powers under the article IV property clause. The acquisition by Congress of partial or exclusive jurisdiction over lands

239. *Id.*
240. 426 U.S. at 535.
241. *Id.* (quoting H.R. REP. No. 92-681, 92d Cong., 1st Sess. 5 (1971)).
242. *Id.* at 536.
243. *Id.* at 536-37.
244. *Id.* Animals which are by nature wild were traditionally thought of as belonging to the state, which held such animals in common trust for all the citizens of the state. *See* Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230). Today, the status of wild animals is far less clear. Expanding notions of federal power, coupled with broadening views regarding the preservation of indigenous species and natural habitats have replaced the certainty of the past with a confusing mixture of competing claims and competing interests over wildlife. See notes 158, 170 *supra*. *Cf.* Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1882 (1976 & Supp. III 1979) (declaring that fish off the coast of the United States constitute a valuable and renewable natural resource and that it is Congress' intent to take action to conserve and manage the fishery resources off the coasts of the United States).
245. 426 U.S. at 540. It has been noted by several commentators that the Court avoided a more narrow, yet easily available ruling. *E.g.*, Barry, *Reclamation of Strip-Mined Federal Lands: Preemptive Capability of Federal Standards Over State Control*, 18 ARIZ. L. REV. 385, 398 n.63 (1976); Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283, 357 (1976).
246. 426 U.S. at 541.
247. *Id.*

within the state, by the state's consent or cession, does not implicate the property clause.[248] The Court observed:

> Absent consent or cession a state undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the property clause. . . . And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the supremacy clause.[249]

The result, on the one hand, is that federal regulation is not necessarily exclusive. The state is free to enforce its criminal and civil laws on federal lands. But, on the other hand, to the extent that state law conflicts with federal law, it must recede.[250] In essence, the Court read a preemption power into the article IV property clause. Unfortunately, the Court did not attempt to reconcile the basic theme of preemption—dominant sovereignty—with some earlier statements of Congress' power over article IV property.[251] The ultimate scope of Congress' article IV power is a question that remains open.[252]

One should note the important effect an expansive reading of the article IV property clause will have upon federal land management and state sovereignty in connection with large-scale energy projects. Energy projects on federal land are certainly freer of state control after *Kleppe*, and energy projects on state land that affect federal interests on federal land may be subject to some degree of federal control under the expansive reading given the property clause in *Kleppe*. The Court in *Kleppe* interpreted several earlier decisions as establishing a federal power to interdict activities conducted outside federal lands that proximately affect congressionally defined purposes for which the federal land is used.[253] While the discussion in *Kleppe* regarding the right of

248. *Id.* at 542-43.

249. *Id.*

250. *Id.* at 543.

251. Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845); Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836). Under the rationale of both cases, the United States held title to land under article IV in trust for the new states that were to be created from the territories. Mayor of New Orleans v. United States, 35 U.S. at 736-37; Pollard v. Hagan, 44 U.S. at 221. This trusteeship theory is difficult to reconcile with the Court's broad reading of article IV in *Kleppe*.

252. One approach the Court could adopt would be to apply an analysis similar to that expressed in National League of Cities v. Usery, 426 U.S. 833 (1976), with respect to the commerce power. On the other hand, the federal government may have a stronger hand under the property clause because federal administration of federal property does not directly affect the state. *But see* note 251 *supra*. Nonetheless, there remains the larger view of federalism as a "cooperative endeavor," which may impose some constraints upon federal actions. See text & notes 272-325 *infra*. Finally, should state efforts to reclaim ownership and title to the public domain prove successful under the so-called "Sagebrush Rebellion," this consideration would be mooted. NEV. REV. STAT. §§ 321.596-321.599 (1979) (declaring that Nevada has both a moral and legal claim to public land retained by the federal government within Nevada's borders).

253. 426 U.S. at 538-41. For example, coal mining on federal lands necessitates the construction of facilities to transform the coal into a viable form of energy either through gasification, steam electric generation, or conversion into liquid petroleum products. Since these transforma-

the federal government to control activities off the federal lands was dicta, and perhaps unnecessarily broad,[254] the inclusion of such sentiments surely points to an expansive, rather than restrictive, reading of the clause.

It is important to keep in mind that the *Kleppe* Court referred to the power vested in the federal government under the property clause as that of a landowner and legislature.[255] Hence, while control over federal land is initially diffused, it is subject to reorganization and redirection by the federal government. Since the federal government is a landowner, it is subject to legal constraints imposed upon landowners by the state and its lawful subdivisions. Since the federal government holds the land in a sovereign capacity, it is not the typical landowner. For example, in *Ventura County v. Gulf Oil Corp.*,[256] the Ninth Circuit held that a county's attempt to restrict the oil exploration efforts of a federal licensee operating on federal lands was in violation of the federal government's rights under *Kleppe*.[257] The government, as legislature-landowner, had by enactment of the Mineral Leasing Act of 1920 provided the means by which oil exploration on federal lands could be conducted.[258] While the Mineral Leasing Act provided that no provision of the Act could conflict with state law, this deference to state authority did not extend to local ordinances that conflicted with a congressionally approved use of federal lands.[259]

The exact limits of Congress' power over federal property cannot be delineated. *Kleppe* and *Ventura County* appear to recognize a nearly unfettered power in Congress to decide the uses to which federal land can be put. Left unanswered at the moment is the extent to which a use of federal land, sanctioned by the federal government, can impose burdens upon the exercise of rights and privileges that are creations of state and local government. For example, could Congress specifically

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tion facilities are essential if federal lands are to be put to their "highest and best use," it is possible to argue that these transformation facilities affect federal lands and hence come within Congress' power under the article IV property clause. The *Kleppe* Court, however, did stop short of deciding the extent to which the property clause would allow for federal regulation of private land. *Id.* at 546-47.

254. *See* Engdahl, *supra* note 245, at 349-58.

255. *See* text & note 245 *supra*.

256. 601 F.2d 1080 (9th Cir. 1979) *aff'd*, 100 S. Ct. 1593 (1980).

257. *Id.* at 1083. The issue before the Ninth Circuit in *Ventura County* was the validity of county zoning ordinances as applied to the activities of a federal licensee, Gulf Oil Corporation, upon federal land within the county. *Id.* at 1082. In 1974, the federal government, pursuant to the Mineral Lands Leasing Act of 1920, leased 120 acres within the Los Padres National Forest in Ventura County for purposes of oil exploration and development. *Id.* Between 1974 and 1976, Gulf Oil received an assignment of this lease and obtained permits from federal and state agencies authorizing drilling activities. *Id.* Throughout this period, the leased property was zoned open space by the county. Exploration and extraction activities were prohibited on the property unless an open space use permit was obtained from the county. *Id.*

258. *Id.* at 1083-84.

259. *Id.* at 1085-86.

provide that an energy facility built on federal land has rights to use surface water and ground water that are senior to the rights of prior appropriators acquired under state law? While PEPA purported to preserve state control over water resources within the state, that protection was of uncertain scope and duration.[260] Consequently, the correct answer to the hypothetical question is unclear, not only because there exists tremendous leeway in the precedents in this area, but also because the proper resolution of the issues raises highly sensitive political questions.[261]

Notwithstanding the legal uncertainties and political difficulties attendant to the use of federal lands for the construction of energy facilities, limiting the effect of "fast track" legislation to energy projects built on federal lands may be a desirable alternative to the approach of PEPA. Federal actions affecting federal lands are not as intrusive upon state and local decisionmaking. State regulation of federal lands, to the extent it exists, currently exists by grace, not of right.[262] Moreover, the political consequences of regulation are somewhat reduced when the federal goverment limits its regulatory presence to self governance. In addition, federal handling of its own land does not raise the federalism issue to the same extent as where Congress, through the use of the commerce power, seeks to deprive a state of power to act within its *traditional* spheres of influence and sovereignty.

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260. See text & notes 166-81 *supra*.

261. The extent of federal power over federal property under the article IV property clause, see text at note 229 *supra*, may also be constrained by the fact that it is phrased more loosely than the article I property clause, see note 137 *supra*. The article I property power has traditionally been construed as conferring exclusive governmental sovereignty upon the United States with regard to all matters in the "District" and other "places" covered by the article I clause. *See* S.R.A., Inc. v. Minnesota, 327 U.S. 558, 562 (1946). A modern corollary to the traditional rule has been that the states may exercise jurisdiction over article I property at the express sufferance of the United States. *See generally* Engdahl, *supra* note 245, at 377-79. Hence, it might be argued that the jurisdiction and authority of the United States under the article IV property clause was not intended to be exclusive, but rather was merely a temporary grant of jurisdiction over the territories while they were preparing for admission to the Union. See notes 251-52 *supra*. In this sense, the article IV property clause was simply an express affirmation of the inherent power over the Northwest Territories exercised by the Congress under the Articles of Confederation. As the territories were admitted into the Union on an "equal footing" with the original states, jurisdiction over the territories that formerly reposed in the federal government would be transferred to the state, subject to the federal government's need for buildings, forts, etc., which were placed under national suzerainty pursuant to the article I property clause. Engdahl, *supra* note 245, at 292-300. The argument has historical support, as disposal of federal land for private settlement was the norm until the twentieth century. M. CLAWSON & B. HELD, supra note 233, at 16-36. Nevertheless, there has been no recent unequivocal acceptance of the trusteeship-equal footing thesis by the courts. Indeed, both legislation and judicial opinions have been largely inconsistent with any theory of transitory federal ownership. *See* Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1782 (1976 & Supp. III 1979).

262. *See* text & notes 249-55 *supra*.

PART III. THE SPIRIT OF FEDERALISM

A. *Introduction*

Rules regulating the discovery, exploitation, sale, and use of energy are caught in a quagmire of competing sovereignties—national, state, and local; legislative, administrative, and judicial. Determining the proper source and scope of the power to control and allocate the risks and benefits of energy is perhaps the key challenge for the coming decade. It is in terms of this challenge that the value and validity of "fast track" legislation will ultimately be decided.

The basic model of interaction between competing sovereigns on the American stage is federalism. Federalism has been descriptively defined as the "vertical distribution of power between the national government and the states."[263] Federalism may also be viewed as a normative concept that attempts to prescribe the proper scope of power exercisable by the national government, the states, or both. A meaningful, prescriptive formula, however, has not been devised. Federalism seems to constitute the proper, though indefinable, equilibrium between the centripetal tendencies of the national government and the centrifugal tendencies of the states. At its root, federalism is a balance of power concept.[264]

Essential to a proper appreciation of federalism is the discernment of the critical attitude that one will have when making the allocation of power between the state and federal governments. As Professor Gunther has provocatively stated:

> What are the values, historical and contemporary, of federalism? Can it be said that federalism increases liberty, encourages diversity, promotes creative experimentation and responsive self-government? Or is it a legalistic obstruction, a harmful brake on governmental responses to pressing social issues, a shield for selfish vested interests? Is federalism a theme that constitutional law must grapple with simply because it is there, in the Constitution? Is the prime challenge it poses that of minimizing the obstacles that the complexities of federalism put in the way of meeting modern needs? Or does federalism embody more appealing values that deserve some of the imaginative

263. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 400 (9th ed. 1975).

264. *See* Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019 (1977).

> We must stand in awe and admiration of the design of the Framers and of the success of the Supreme Court in fleshing it out—preventing one state from getting in the way of others and endowing the central government with power to act on a national basis when Congress finds this to be warranted, but leaving to the states the final decision on the bulk of day-to-day matters that can best be decided by those who are closest to them. While I expect we shall be forced to pursue the centripetal path of the last century, we should not rush along it too fast or too far; the question whether action by the national government is needed should always be asked.

Id. at 1034.

enthusiasm with which modern constitutional law embraces the promotion of such values as equality and freedom of speech?[265]

Simply put, is the proper interpretation of the concept of federalism determined by a literal reading of the Constitution or by a spirit of cooperation designed to best address the problems of our time? The question is important because its resolution will determine the final arbiter of the sociopolitical conundrums that are attendant to the energy issue. The distinguishing points of the centripetal-centrifugal dialogue are between perceived self-interest, whether national, regional, or local, and the basically political decision whether we as a people place our faith in local government or in national government to formulate the energy policies that will so directly affect our health, wealth, security, and general welfare.[266]

B. *Cooperative Federalism—The Traditional Approach*

"Fast track" legislation modeled on PEPA would impact state and local governments in three ways. First, such legislation would intrude upon and potentially eviscerate state and local approval processes relative to energy development.[267] Second, such legislation would cast a large shadow over traditional areas of substantive state and local concern such as water availability.[268] Third, the approval of "priority energy projects" would make the approval of nonpriority energy projects more difficult.[269]

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265. G. GUNTHER, *supra* note 263, at 82-83.

266. *See* Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 439 (1954). The question obviously cuts deep into basic issues of how governments ought to function and how they can best function. If one conceives of the job of governing as a job of affirmative direction of social affairs, with responsibility, in Professor Fuller's expressive phrase, of "planning for determinate ends," then a federal organization will necessarily appear inefficient. To make large-scale organization manageable there must be decentralization in any case, but the guiding geniuses of a central command would naturally prefer to have the lines of authority run straight from them to the remotest of their delegates. If, on the other hand, one thinks of private activity as the prime motive power of social life, the test of efficiency is different. The job of government appears then as a job of providing a favorable framework for collaborative living—as a job, in other words, of planning for such "indeterminate ends" as establishing justice, insuring domestic tranquility, providing for the common defense, promoting the general welfare, and securing the blessings of liberty to the members of the society and their posterity.

Id. at 490 (footnote omitted).

267. *See* text & notes 272-322 *infra*.

268. *See* text & notes 166-81 *supra*.

269. Nonpriority energy projects might find it difficult to comply with environmental standards without the exemptions from substantive requirements provided by PEPA. See text & notes 59-92 *supra*. These environmental standards include ambient air quality standards and the prevention of significant deterioration programs under the Clean Air Act. *See* Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. III 1979). *See generally* Raffle, *Prevention of Significant Deterioration and Nonattainment Under the Clean Air Act—A Comprehensive Review*, ENVIR. REP. MONOGRAPH No. 27 (BNA 1979); Parish, *Enforcement and Litigation Under the Clean Air Act Amendments of 1977*, 12 NAT. RESOURCES LAW. 435 (1979). The same concerns will be present in connection with other environmental quality legislation currently in effect. *See* Federal Water Pollution Con-

In the field of energy and resource development, Congress has traditionally preferred the use of the carrot of cooperation rather than the stick of coercion.[270] This approach has resulted in an ebb and flow of federal power *vis-à-vis* the states; the federal government has demanded from the states just so much as necessary to advance federal interests while at the same time evidencing a strong reaffirmation of state decisionmaking.[271] As a concomitant of this approach, the ultimate scope of Congress' coercive powers has rarely been tested.

Before addressing the constitutional limits of Congress' coercive powers, it is helpful to explore several traditional areas of federal-state conflict and accommodation.

Cooperative Federalism—State Permit Procedures. A nettling problem in the federalist legal system of the United States is the question whether the government of delegated powers—the federal government—must submit to the permit processes of the government of retained powers—the states—before engaging in activities authorized by the law of the former. The problem presents the following dilemma: federal submission to state permit procedures gives rise to the inference that federal interests are inferior and thus subject to state interests.[272] On the other hand, exemption of federal programs from state control will frustrate the uniform application of law within the state. To limit state permit procedures to nonfederal lands could also trivialize the process since, in some states, federal land holdings predominate both in terms of acreage and resource value.[273]

This problem was recently raised in *California v. United States*.[274] Pursuant to specific congressional authorization,[275] the New Mellones Dam was constructed and operated under the Reclamation Act of

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trol Act, 33 U.S.C. §§ 1311-1317 (1976 & Supp. III 1979) (providing for effluent standards). *See generally* W. RODGERS, *supra* note 145, §§ 4.11-4.15, at 451-88.

270. For example, by a series of Acts in 1866, 1870, and 1877, Congress provided that federal land grants would not carry with them water rights. Rather, water rights would be controlled by the state in which the lands were situated. The relevant portions of the Acts are codified at 43 U.S.C. §§ 321, 661 (1976). *See* Moses, *The Federal Reserved Rights Doctrine—From 1866 through Eagle County*, 8 NAT. RESOURCES LAW. 221, 228-29 (1976).

Some intrusion into state law was occasioned by the federal reserved rights doctrine. See text & notes 293-305 *infra*. However, while the scope of the reservation of water rights was determined by federal law, only unappropriated water was subject to the reservation. Direct conflict with the states was averted since the states were allowed to determine what was and was not unappropriated water within the authority granted by the 1866, 1870, and 1877 Acts of Congress. *See* 1 CLARK, *supra* note 131, § 51.5, at 293-95; note 5 *supra*.

271. See text & notes 272-305 *infra*.

272. This discussion does not include situations where deference to state procedures is occasioned by notions of comity or policy. The question here focuses upon the issue whether deference to state authority is mandated by the Constitution.

273. *See* text & note 230 *supra*.

274. 438 U.S. 645 (1978).

275. *Id.* at 651-52.

1902.[276] That Act established a program for federal construction and operation of reclamation projects to irrigate arid western lands.[277] Pursuant to section 8 of the Act, the Bureau of Reclamation applied to the California State Resources Control Board for a permit to appropriate water that would be impounded by the dam.[278] The application was approved, but the permit was granted subject to a number of conditions. The most important of these conditions prohibited full impoundment of the water until the Bureau was able to show a specific plan for its use. In effect, California tied the acquisition of water rights to the presentation of a plan, acceptable to the state, for the distribution of water acquired by the federal government.[279]

The United States sought a declaratory judgment in the district court to the effect that the United States may impound whatever unappropriated water is necessary for a federal reclamation project without complying with state law.[280] The district court held that, as a matter of comity, the United States must apply to the state for an appropriation permit, but that the state must issue the permit without condition if there is sufficient unappropriated water.[281] The Court of Appeals for the Ninth Circuit reached the same result but predicated its decision upon section 8 of the Reclamation Act, rather than the principle of comity.[282]

The Supreme Court was presented with the issue of whether the state could condition its allocation of water to a federal reclamation project.[283] The Court reversed the decision of the lower court and held that the state did have such a power.[284] The Court's decision, for all its exaltation of cooperative state-federal relations, turned essentially upon an analysis of congressional intent to sever water rights from the public domain and consign to the states legislative control over water.[285] The

276. *Id.*
277. *Id.* at 649-51.
278. *Id.* at 652.
279. *Id.* at 652-53.
280. *Id.* at 647.
281. 403 F. Supp. 874, 902 (E.D. Cal. 1975).
282. 558 F.2d 1347, 1351 (9th Cir. 1977).
283. 438 U.S. at 647.
284. *Id.*
285. The introductory comments on state-federal relations are nonetheless quite important, for although they are generalized, they are expressive of the attitude that the Court found ought to underlie federal-state relations:

> Principles of comity and federalism, which the District Court and the Court of Appeals referred to and which have received considerable attention in our decisions, are as a legal matter based on the Constitution of the United States, statutes enacted by Congress, and judge-made law. But the situations invoking the application of these principles have contributed importantly to their formation. Just as it has been truly said that

approach of the Court was essentially one of deference to Congress[286] and carried with it the implicit signal that if Congress disagreed with the Court's interpretation of "cooperative federalism," it had the prerogative to readdress the relation between the federal government and the states insofar as federal lands and federal instrumentalities were concerned.[287] On the other hand, somewhat inconsistently, the Court asserted that "each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters."[288] Thus, even though *California v. United States* involved on its face a determination of Congress' intent with respect to the exercise of the spending power,[289] the case has wider implications. First, the decision did not resolve the uncertainties about the role Congress may assert with respect to federal lands and federal interests within a state. With respect to federal lands, it is unclear whether Congress' power is constrained by the "full jurisdiction" concept,[290] by implied constitutional con-

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the life of the law is not logic but experience, see O. Holmes, The Common Law 1 (1881), so may it be said that the life of the law is not political philosophy but experience.

. . . .

If the term "cooperative federalism" had been in vogue in 1902, the Reclamation Act of that year would surely have qualified as a leading example of it. In that Act, Congress set forth on a massive program to construct and operate dams, reservoirs, and canals for the reclamation of the arid lands in 17 Western States. Reflective of the "cooperative federalism" which the Act embodied in § 8, whose exact meaning and scope are the critical inquiries in this case: [The Court here quotes from the relevant portions of § 8.]

Id. at 648, 650-51. The Court then noted a side benefit of cooperative federalism:

Perhaps because of the cooperative nature of the legislation, and the fact that Congress in the Act merely authorized the expenditure of funds in states whose citizens were generally anxious to have them expended, there has not been a great deal of litigation involving the meaning of its language. Indeed, so far as we can tell, the first case to come to this Court involving the Act at all was Ickes v. Fox . . . and the first case to require construction of § 8 of the Act was United States v. Gerlach Live Stock Co.. . . , decided nearly half a century after the enactment of the 1902 statute.

Id. at 651 (citations omitted).

286. This approach was in conformity with several other decisions of the 1977 Term. *E.g.*, TVA v. Hill, 437 U.S. 153, 194-95 (1978); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 557-58 (1978). In both cases, the Court was intent upon requiring Congress to state clearly its purpose in enacting legislation. This was accomplished by the Court's refusal to construe statutory language expansively to ameliorate the harsh results of a particular application of the legislation to a particular case. Thus, for example, in *TVA v. Hill*, the Court interpreted the Endangered Species Act, 16 U.S.C. §§ 1531-1543, 1538-1540, 1542 (1976 & Supp. III 1979), as requiring an injunction prohibiting completion of a dam that would have destroyed the habitat of an endangered species, even though Congress had appropriated money specifically for the completion of the dam. 437 U.S. at 172-73. *But cf.* Friends of the Earth v. Armstrong, 485 F.2d 1, 8-9 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974) (Colorado River Storage Project Act, 43 U.S.C. § 620-620(o) (1976), which prohibited encroachment of impounded Colorado River water into the Rainbow Bridge National Monument, was impliedly repealed by subsequent appropriation Acts of Congress).

287. 438 U.S. at 677-78.

288. *Id.* at 663. The Court stated that "each State 'may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State.'" *Id.* (quoting Kansas v. Colorado, 206 U.S. 46, 94 (1907)).

289. *Id.* at 650-51.

290. See text & notes 261, 288 *supra*.

straints upon Congress' authority *vis-à-vis* the states,[291] or by Congress' own prior actions, which may now be reversed if Congress so wishes.

Second, although the lofty view of federalism articulated at the beginning of the opinion is largely ignored when the Court addresses the issue of statutory interpretation, the disappearance is itself illusory. The theme of federalism provides a backdrop against which competing and conflicting interpretations drawn from the authorities may be evaluated and adopted. Here, the process works indirectly through the most important factor in dispute resolution—the attitude and perspective of the decisionmaker.[292]

Cooperative Federalism—Federal Reserved Rights. Another example of federal-state cooperation, that also evidences a persistent lack of clarity, is the scope of federal reserved rights to water in connection with federal withdrawals of land.[293] It is the question of the scope of the reservation that highlights the potential federal-state conflict. Since

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291. See text & notes 326-434 *infra*.

292. See note 144 *supra*.

293. The doctrine of federal reserved rights originated in Winters v. United States, 207 U.S. 564 (1908), where the question before the Court was whether the withdrawal of land attendant to the establishment of the Fort Balknap reservation in Montana had "reserved" for the Indian inhabitants water rights to the Milk River for the purpose of agriculture on the reservation. *Id.* at 575-76. Because of the centrality of water to making the reservation habitable, the Court construed the treaty creating the Balknap reservation in favor of the Indians. *Id.* at 576-77. Left undecided was the scope of the reservation of water rights—a point which has bedeviled courts and commentators since the reserved rights doctrine was articulated. There is little dispute today that the federal government can reserve waters on federal land and exempt them from appropriation under state law. Some commentators treat the reserved water doctrine as originally encompassing the idea that the Indian tribes owned the water rights unto themselves when the Indian reservations were created. Under this theory, the United States did not reserve the water rights, the Indians did. *E.g.*, Veeder, *Indian Prior and Paramount Rights to the Use of Water*, 16 ROCKY MTN. MIN. L. INST. 631, 640-43 (1971). Although the analysis is conceptually intriguing, the extension of the federal reserved rights doctrine to non-Indian federal land basically undercuts the modern vitality of the theory of Indian reserved rights. *See* Cappaert v. United States, 426 U.S. 128, 138 (1976); Arizona v. California, 373 U.S. 546, 597-98 (1963). Most commentators appear to treat the federal reserved rights doctrine as arising from the article IV property power. Thus, Edward W. Clyde recently wrote:

> It is equally clear that the federal government, under its power to control federal property, can withdraw unappropriated water from private appropriation under state law and reserve the water for the Indians. This appears to be the primary basis for most of the decisions, and where a reservation is thus made, the priority, as noted above, is the date the reservation was created.

Clyde, *Special Considerations Involving Indian Rights*, 8 NAT. RESOURCES LAW. 237, 244 (1975). The Court has given the reserved rights doctrine a slightly larger foundation:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in the unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

Cappaert v. United States, 426 U.S. 128, 138 (1976).

the amount of water reserved is not quantified, it is difficult to estimate the impact of the reservation upon other users of the water.[294] Depending upon the size of the water rights reservation, there may be an overappropriation or underappropriation of available water. Such indecision plays havoc with a water law doctrine predicated upon priority preferences for beneficial users of available water.[295]

Recently, the Supreme Court provided some clarification with respect to the reserved rights doctrine.[296] In *United States v. New Mexico*,[297] the Court held that the scope of the reservation is limited to the original purpose for which the withdrawal was made.[298] Additional purposes to which the withdrawn land is subsequently put do not relate back to the original withdrawal for the purpose of testing the priority of government entitlements to water.[299]

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294. Related to this problem is the question of priorities. It is generally understood that the federal reserved water doctrine applies only to "unappropriated" waters within the state; the rights of prior appropriators are unaffected and remain senior to federal reserved water rights. While the early creation of many federal water reservations has tended, as a practical matter, to give the federal government a priority to water superior to that of many present users, the question of priorities remains important insofar as the acquisition or change of existing water rights is concerned. *See* Note, *Federal Acquisition of Non-Reserved Water Rights After "New Mexico"*, 31 STAN. L. REV. 885, 898 (1979). *See generally* White, *Problems Under State Water Law: Changes in Existing Water Rights*, 8 NAT. RESOURCES LAW. 359 (1975).

295. An example of this uncertainty is Cappaert v. United States, 426 U.S. 128 (1976). In 1952, a presidential proclamation withdrew 40 acres of land near Death Valley National Monument pursuant to the Act for the Preservation of American Antiquities. The land includes Devil's Hole, an underground pool which is the sole habitat of a unique species of fish called pupfish. *Id.* at 132. In 1968, the Cappaerts, pursuant to a permit from the state of Nevada, began pumping large quantities of water for irrigation from the hydrological formation that supplies Devil's Hole. As the water level in the pool declined, so did the pupfish population. *Id.* at 132-34. The United States sought and obtained an injunction in the district court requiring the Cappaerts to limit pumping and thereby maintain the pool at the level necessary to support the pupfish population. The Supreme Court affirmed, reasoning that the federal government's intent to preserve Devil's Hole, as expressed in the presidential proclamation, necessarily encompassed an intent to reserve sufficient water to maintain the pool in its 1952 condition. *Id.* at 141. Thus, it was found that the United States held a reserved water right, with a priority as of 1952, to sufficient groundwater to protect the pupfish. Any conflicting state permit which did not vest water rights as of 1952 was ineffective as against the federal government. *Id.* at 139-40, nn. 5 & 6. In effect, *Cappaert* stands for the proposition that whenever the federal government withdraws lands from private settlement, it impliedly reserves a quantity of water—whether surface or groundwater—sufficient to fulfill the purposes for which the withdrawal has been made.

296. From *Winters* on, questions persisted as to how much is too much and how little is too little. *See* Meyers, *Federal Ground Water Rights: A Note on Cappaert v. United States*, 13 LAND AND WATER L. REV. 377, 385 (1978). The indecision was nicely illustrated in several pre-*Cappaert* decisions. *Compare* United States v. Ahtanum Irrigation Dist., 236 F.2d 321, 327 (9th Cir. 1956) (setting aside an agreement made by the Bureau of Indian Affairs that allocated 75% of the flow of Ahtanum Creek to off-reservation whites; the court observed that the reservation of water rights was not merely for present but for future use) *with* United States v. Walker River Irrigation Dist., 104 F.2d 334, 340 (9th Cir. 1939) ("[t]he area of irrigable land . . . is not necessarily the criterion for measuring the amount of water reserved. . . . The extent to which the use of the stream might be necessary could only be demonstrated by experience."). *See generally* Moses, *The Federal Reserved Rights Doctrine—From 1866 Through Eagle County*, 8 NAT. RESOURCES LAW. 221, 231-32 (1975).

297. 438 U.S. 696 (1978).

298. *Id.* at 700.

299. *Id.* at 713. As in *California v. United States*, the majority's interpretation of congressional intent was bitterly criticized. A student commentator argued that "[t]he Court's suggestion that federal agencies must acquire non-reserved water under state law shows a nearly complete rever-

Since much of the water of the arid west—where most federal land is located—is overappropriated,[300] a refusal to relate federal rights back to an era of underappropriation suggests that the Court might have dealt a death blow to the reserved rights doctrine. Such is not the case. Rather, since the scope of the original purpose may be broadly construed, meaningful state control of water on federal lands may be more apparent than real.[301] The Court did not state that Congress could not expand the purposes to which reserved water could be put, or that such an expanded purpose could not relate back to the date of the original withdrawal.[302] The Court held only that Congress had not, by the Multiple-Use Sustained Yield Act, intended to accomplish either task.[303] In refusing to construe the Act as evidencing congressional in-

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sal of an attitude that dominated the Court for much of the last 30 years." Note, *supra* note 294, at 877 n.7. See Note, *United States v. New Mexico: Purposes That Hold No Water*, 22 ARIZ. L. REV. 19 (1980).

300. *See generally* Dewsnup, *Assembling Water Rights for a New Use: Needed Reforms in the Law*, 17 ROCKY MTN. MIN. L. INST. 613 (1972); Kneese & Brown, *Water Demands for Energy Development*, 8 NAT. RESOURCES LAW. 309 (1975); McIntire, *The Disparity Between State Water Rights Records and Actual Water Use Patterns*, 5 LAND & WATER L. REV. 23 (1970). Interestingly, and perhaps a harbinger of things to come, the federal government has recently concluded that available supplies of water do exist in the western United States for large-scale energy projects. U.S. DEPT. OF THE INTERIOR, UNITED STATES GEOLOGICAL SURVEY, SYNTHETIC FUELS DEVELOPMENT: EARTH-SCIENCE CONSIDERATIONS 30 (1979) (for purposes of oil shale and coal resources, local water supplies appear to be insufficient in only a few areas); GENERAL ACCOUNTING OFFICE, WATER SUPPLY SHOULD NOT BE AN OBSTACLE TO MEETING ENERGY DEVELOPMENT GOALS (1980).

301. *See* United States v. District Court *ex rel.* Water Division No. 5, 401 U.S. 527 (1971), where the Court observed that naval petroleum and oil shale reserves were created with future development of the resources in mind; hence, development would require water to accomplish the federal purpose for which the reservations were made. *Id.* at 529. The Court implicitly acknowledged that mineral withdrawals carried with them a reservation of water rights, as to unappropriated water on the date of the withdrawal, sufficient to develop those mineral resources. *See also* United States v. New Mexico, 438 U.S. 696, 705-11 (1978) (one of the purposes for withdrawal of forested lands from the public domain was to secure a permanent supply of timber; hence, withdrawal created reserved rights to unappropriated waters sufficient to fulfill that purpose).

Moreover, the federal government possesses the power to acquire, through eminent domain, even vested, appropriated water rights. *See* note 180 *supra*. This power is basically unconstrained, although it is limited by the need to provide market value compensation to those whose water rights have been taken. 4 CLARK, *supra* note 131, § 301, at 12-53. The reservation doctrine thus possesses utility in that it allows "taking" without compensation. As succinctly stated by Professor Trelease:

> The only difference resulting from reliance on the reservation doctrine instead of on a more basic federal power is that in some cases where the water is taken from persons who have previously put it to use the United States need not pay for the taking. The reservation doctrine is a financial doctrine and nothing more.

TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW 147m (Nat'l Water Comm'n Legal Study No. 5, 1971).

302. The Court stated: "While we conclude that the Multiple-Use Sustained Yield Act of 1960 was intended to broaden the purposes for which national forests had previously been administered, we agree that Congress did not intend to thereby expand the reserved rights of the United States." 438 U.S. at 713.

303. *Id.* at 713-15. This point was apparently conceded by the United States. *See id.* at 713 n.21. Rather, the government was seeking the earliest possible priority. It argued that the creation of the Gila National Forest in 1897 authorized the reservation of water for secondary purposes, *i.e.*, recreational, aesthetic, and wildlife preservation, in addition to the primary purposes of timber preservation and enhancement of water supply. Hence, the government argued, the Multiple-Use Sustained Yield Act only confirmed what always existed as a proper use of the national forest

tent to expand the reserved rights doctrine, the Court again served notice that any congressional intent to usurp traditional state prerogatives must be clearly stated before it will be judicially recognized.[304] Again, however, as in *California v. United States*,[305] which was decided the same day as *United States v. New Mexico*, the power of Congress to usurp state police power was not specifically addressed; the Court held only that congressional intent to displace state law was not clearly evidenced.[306]

Cooperative Federalism—Federal Instrumentalities. The extent to which Congress may define the relation between federal and state governments with respect to the permit issue is further exemplified by *Hancock v. Train*[307] and *EPA v. California*.[308] In both cases, the Supreme Court held that federal agencies and instrumentalities were effectively exempt from state permit processes.[309] Although the Court recognized that the decisions would interfere with state governmental functioning under the Clean Air Act and the Federal Water Pollution Control Act, the Court substantiated its decisions by construing the supremacy clause as prohibiting state regulation of federal activities in the absence of "clear and unambiguous" congressional approval of state regulation.[310] Thus, while the Acts in question specifically delegated to the states the right to develop environmental pollution control strategies for adoption and implementation,[311] they were altogether silent on the question whether procedural requirements adopted by the states to achieve the substantive objectives of the Acts could be extended to federal instrumentalities.[312] Since Congress was obliged to speak directly

for which water reservations could be made. *Id.* It was this interpretation of the Act that specifically formed the basis of the Court's holding. *See id.* at 714-15. Consequently, Congress could state that it did intend by the Act to confirm the use of reserved water for secondary purposes. More directly, Congress could purport to interpret the Organic Administration Act, 16 U.S.C. §§ 473-78, 479-82 (1976), to include uses that would allow for a large federal appropriation of water. The effect of such a congressional stance in the face of the Court's specific finding that Congress did not intend such uses, 438 U.S. at 715, is unclear. *See id.* at 722 (Powell, J., dissenting) (finding that the Organic Administration Act included among its purposes the protection of wildlife in the National Forest).

304. *See* note 286 *supra.*

305. 438 U.S. 645 (1978).

306. 438 U.S. at 717.

307. 426 U.S. 167 (1976).

308. 426 U.S. 200 (1976).

309. Hancock v. Train, 426 U.S. at 179; EPA v. California, 426 U.S. at 214.

310. Hancock v. Train, 426 U.S. at 179; EPA v. California, 426 U.S. at 214. Congress immediately closed the gap in regulation. 42 U.S.C. § 7418 (Supp. III 1979) and 33 U.S.C. § 1323 (1976 & Supp. III 1979), revising the Clean Air and Clean Water Acts respectively to subject federal instrumentalities to both procedural licensing procedures and substantive state environmental requirements.

311. W. RODGERS, *supra* note 145, § 3.2, at 217, § 3.8, at 254-59, § 4.9, at 428-32, § 4.11, at 451-53.

312. Hancock v. Train, 426 U.S. at 179; EPA v. California, 426 U.S. at 211. *See generally* Walston, *State Control of Federal Pollution: Taking The Stick Away From The States*, 6 ECOLOGY

if it wished to require federal agencies to submit to state law, the failure of the Acts to so specify eliminated state supervision.

The Court's decisions in *Hancock* and *EPA* relied upon an early landmark decision, *McCulloch v. Maryland*.[313] In *McCulloch*, the Court upheld the constitutionality of the congressional charter issued to the Second Bank of the United States.[314] Although *McCulloch* is primarily seen as enhancing, by the Court's expansive interpretation of the necessary and proper clause, the scope of powers delegated to the United States, it also articulated a theme of federal immunity to state regulation which is of importance here. Maryland had attempted to affix a stamp tax upon bank notes issued by the Baltimore branch of the Bank. The decision invalidated the tax as an impermissible constraint upon federal instrumentalities.[315] The Court reasoned that the effectuation of national interests would be unduly fettered if each state possessed a veto power over matters of common interest and design.[316] The expansive reading of congressional power for which *McCulloch* is primarily cited would be rendered nugatory if Congress did not also have the power to protect federal interests from local parochialism and interference.

To the extent the *McCulloch* immunity doctrine has been considered, attention has generally focused upon the question whether Congress has spoken with sufficient clarity to justify state regulation.[317] The early tendency was to refuse to interpret congressional silence as an implicit authorization for state regulation. As noted by Professor Tribe, "[i]f Congress does not authorize state taxation or regulation of federal instrumentalities, the *possibility* of interference with substantive federal policy is sufficient to raise a presumption of immunity."[318] Thus, in the absence of clear congressional authorization, federal instrumentalities are exempt from state regulation, either substantive or procedural. This factor also adds a dimension to the theme of "cooperative federalism." In *McCulloch*, *Hancock*, and *EPA*, the Court did not hold that state regulation is authorized or proscribed by constitutional constraints. Rather, state regulation of federal instrumentalities must be the result of an affirmative congressional directive to work with the states toward the mutual achievement of common, shared goals.[319]

L.Q. 429 (1977); Comment, *Local Control of Pollution from Federal Facilities*, 11 SAN DIEGO L. REV. 972 (1974).

313. 17 U.S. (4 Wheat.) 316 (1819).
314. *Id.* at 436.
315. *Id.* at 428-31.
316. *Id.* at 429-35.
317. *See, e.g.*, Hancock v. Train, 426 U.S. at 198.
318. L. TRIBE, *supra* note 169, § 6-28, at 392 (emphasis added).
319. *See* note 310 *supra*.

The mere fact that the federal government has asserted a federal presence in the field is not determinative of congressional intent. For example, the federal government could have built and maintained the nation's railroad system under the commerce power. Similarly, the federal government could have created a central bank on the European model, and similar to the Federal Reserve system. In each case a federal presence was established. Yet, this would not explain the Supreme Court's denial of immunity to federally chartered railroads[320] and the granting of immunity to federally chartered banks.[321] Rather, if any test can be discerned at all, it appears to center upon the actual relation that exists or is developed between the federally designated entity and the federal government, coupled with the centrality of the entity to the execution of the federal policies.[322] Such a test provides great leeway to the federal courts to fine tune state and federal regulatory efforts to the felt necessities of the situation.

Some Thoughts on Congress' Power Vis-à-Vis the States. Questions involving the proper relation between the states and the federal government obviously are more complex than this short discussion on permit processes, reserved water rights, and federal instrumentalities might suggest. Nevertheless, the cases do evidence a rough sense of accommodation. Invariably, the solution tendered by the Court has been to temporize—to play with the equilibrium of federalism in a fashion that seems to accentuate the theme of centralism or decentralism, much as that suggested by Professor Hart.[323]

Unfortunately, the search for balance has largely failed to provide either balance or consistency. Judicial suggestions of broad congressional powers are almost unfailingly followed by suggested limitations upon that power. Judicial enhancement of state power is invariably discussed in the context of congressional intent. Thus, discussion of the relation between the federal government and the states is often reduced to speculation over whether the Court will view the problem as one of federal power, in which case the exercise of the power is generally ap-

320. *See* Thomson v. Union Pac. R.R., 76 U.S. (9 Wall.) 579, 588-92 (1870).

321. *See* Conference of Fed. Sav. and Loan Ass'ns v. Stein, 604 F.2d 1256, 1260 (9th Cir. 1979) (federal savings and loan associations immune from state-imposed anti-redlining practices); Glendale Fed. Sav. and Loan Ass'n v. Fox, 459 F. Supp. 903, 907 (C.D. Cal. 1978) (savings and loan association immune from state regulation of "due on sale" clauses contained in loan instruments). Indeed, the existence of a federal charter is not dispositive. *See* City of Boston v. Harris, 461 F. Supp. 1201, 1202-03 (D. Mass. 1978) (subsidized federal housing project exempt from local rent control ordinance).

322. *See* Department of Employment v. United States, 385 U.S. 335, 359-60 (1966) (American Red Cross is a federal instrumentality immune from state taxation because "both the President and the Congress have recognized and acted in reliance upon the Red Cross' status virtually as an arm of the Government").

323. *See* note 266 *supra.*

proved, or one of congressional intent, in which case the Court seems inclined to follow a policy of narrow statutory construction which constrains the scope of application of a statute to its literal terms unless a contrary reading is manifestly required by the Congress.

The lack of judicial direction in adjudicating these difficult issues of federalism is significant. It evidences an unwillingness on the part of the Court to strike an independent stance and a judicial inclination to defer ultimate decisionmaking responsibility to other government agencies. This observation is important insofar as one is concerned with determining the likelihood that the Court will sustain the type, level, and degree of intrusion into state governmental affairs that is envisioned by "fast track" legislation. Based upon the decided cases, and the attitude toward state-federal relations they exhibit, one should have little difficulty in concluding that legislation modeled on PEPA would be determined to be a valid exercise of congressional power.[324] Indeed, were it not for the recent decision of *National League of Cities v. Usery*,[325] the proposition that PEPA represents a constitutionally permissible intrusion into the affairs of state governments would be wellnigh unassailable.

C. *Inherent Constraints Upon Unilateral Determinations of Federalism by Congress*

The determination of the proper relation between the federal government and the states is initially a question for Congress to decide. Under the constitutional system of government that has developed in this country, it is, in the end, for the Court to say whether Congress has

324. As noted throughout this Article, the scope of federal intrusion will be coextensive with the constitutional power invoked. Hence, a preemption analysis based upon the article IV property power would be no less effective than commerce clause preemption, except that article IV preemption would be limited to circumstances where the designated priority energy facility was built on or substantially affected federal land holdings. *See* text & note 253 *supra*. Similarly, federal instrumentalities preemption would be constrained by the need to limit the scope of preemption to the activities of the particular instrumentality. It is assumed that it would be perceived as "good" were this nation effectively able to meet its energy needs with the least amount of intrusion upon traditional state prerogatives. Of course, reliance upon discrete forms of preemption involves a tradeoff. The form of preemption used may be too constrained. For example, reliance upon the article IV property power may result in a centralizing of energy development in the Rocky Mountain region of the West and an overemphasis upon energy projects that are land intensive, such as coal mining and oil shale development. Other forms of energy, such as solar, geothermal, biomass conversion, and nuclear, may be underemphasized because they are not so readily amenable to federal lands siting or use. Federal entity preemption possesses the disadvantages of requiring close federal involvement, acceptance of delays occasioned by the need for case-by-case review, and a focusing of the nation's energy future into certain limited technologies. See notes 363-67 *infra*. Some of these disadvantages can be ameliorated through conscientious and thorough rulemaking, and others may upon reflection be seen as advantages. See notes 204 *supra* & 363-67 *infra*. Hence, the approach of PEPA, which attacked administrative and judicially induced delay by the introduction of "speedy trial" rights for energy projects, might go too far in attempting to ameliorate perceived past abuses which are in fact benefits.

325. 426 U.S. 833 (1976).

defined that relationship in a fashion that does not violate the Constitution.[326] Since the federal government is a government of delegated powers, the case where Congress has intruded upon state sovereignty in the absence of the establishment of a nexus between the congressional act and the Constitution may seem easy.[327]

On the other hand, the delegated powers are ambiguously phrased and expansively interpreted.[328] The very potential to exercise a broad power over matters traditionally of local concern has given rise to a constitutional corollary that forbids Congress from exercising its delegated powers in a fashion that reduces the states *pro tanto* to mere ministerial functionaries.[329]

The basic features of the constitutional corollary that requires the preservation of states as effective decisionmaking entities were stated in *National League of Cities v. Usery*.[330] In *Usery*, the Court invalidated the 1974 amendments to the Fair Labor Standards Act, which extended the federal minimum wage and maximum hour provisions to virtually every state and municipal employee.[331] Professor Tribe's discussion of *Usery* is incisive and to the point:

> In reaching its inclusion, the Court sharply distinguished federal regulation of private persons and businesses "necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside" from similar regulation "directed not to private

326. Nevertheless, as discussed in Part II of this Article, the Court has consistently afforded Congress wide discretion in setting the balance of federalism.

327. For example, congressional establishment of a uniform system of probate binding upon the states would be difficult to justify. The absence of specific authority points significantly to a lack of authority. *See* Markham v. Allen, 326 U.S. 490, 494 (1946). *See generally* HART & WECHSLER, *supra* note 113, at 1184-85.

328. *See* note 184 *supra*. Thus, a responsive argument to that set forth in note 327 *supra* which would justify congressional action over probates could be sketched as follows. Under Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-59 (1964), Congress may exercise its commerce power where it has a rational basis to find that the regulated activity affects commerce and the means of regulation selected by Congress are reasonable and appropriate. Many probate proceedings involve interstate matters, require the establishment of ancillary probates, and consequently constitute an activity that affects interstate commerce. *See* L. TRIBE, *supra* note 169, §§ 5-5, 5-6, at 236-39. Finally, while many probate proceedings are wholly intrastate, that itself is immaterial since in the aggregate, such probates might reasonably be deemed to have a substantial national effect. *See* McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 241 (1980); United States v. Rock Royal Cooperative, Inc., 307 U.S. 533, 569 (1939).

329. See text & notes 330-43 *infra*.

330. 426 U.S. 833 (1976). The *Usery* decision was anticipated in a series of Supreme Court decisions where the Court immunized state activities from federal judicial review. *E.g.*, Brush v. Commissioner, 300 U.S. 352, 371 (1936) (municipal water distribution is traditional governmental function; hence, such activities are cloaked with governmental immunity under the eleventh amendment). Similarly, in a series of cases involving federal regulaton of state governmental activites, the Court articulated a set of principles which, while not prohibiting federal regulation of state governmental activities, placed federal regulation under a more rigorous standard of review than federal regulation of the private sector. *See* L. TRIBE, *supra* note 169, § 5-20, at 304-06; Elrod v. Burns, 427 U.S. 347, 375 (1976) (Burger, C.J., dissenting) (*Usery* was intended to "arrest the downgrading of states to a role comparable to the departments of France, governed entirely out of the national capital").

331. 426 U.S. at 840.

> citizens, but to the States as States." Although the Court conceded that the regulations at issue were "undoubtedly within the scope of the Commerce Clause," it found that wage and hour determinations with respect to "functions . . . which [state and local] governments are created to providing [involving] services . . . which the States have traditionally afforded their citizens," were matters "essential to [the] separate and independent existence" of the states and hence beyond the reach of congressional power under the commerce clause.[332]

The aftermath of *Usery* is one of uncertainty.[333] The Court's decision, at a minimum, expresses a theme of state integrity which the federal government cannot subvert, even when the federal government is acting within the scope of delegated powers found in the Constitution. What the theme of state integrity consists of and the extent to which the federal government may legislate with respect to the states is, however, unclear. The scholarly interpretations of *Usery* have ranged from the eclectic to the subdued.[334] The *Usery* case is less a decision from which discernible rules of law can be drawn than a case which expresses a

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332. L. TRIBE, *supra* note 169, § 5-22, at 308 (footnotes omitted).

333. The problem is twofold. First, the deciding vote in *Usery* was cast by Justice Blackmun, who concurred in a separate opinion, wherein he adopted a balancing approach that focused upon the relative interests of the state and federal government in controlling the matter to be regulated. 426 U.S. at 856 (Blackmun, J., concurring). Thus, in contrast to the plurality opinion, which carved out an area of absolute state immunity from commerce clause regulation, Justice Blackmun would allow federal regulation of traditional state activities if "the federal interest is demonstrably greater" than the state's and the regulation is "essential" to the protection of federal interests. *Id.* Second, the determination of what constitutes "traditional state activities" is far from clear. See notes 330 *supra* & 337 *infra*. As a consequence, the approach the Court might adopt in new cases of federal intrusion into state regulatory activities depends upon an accurate forecasting of how Justice Blackmun would apply his balancing test, coupled with a correct determination of whether the state activity subject to federal regulation was traditional or nontraditional. *See generally* Kilberg & Fort, *National League of Cities v. Usery: Its Meaning and Impact*, 45 GEO. WASH. L. REV. 613 (1977) (collecting cases). These issues are presently before a federal court in Oklahoma v. Federal Energy Regulatory Comm'n, No. 78-01251-T (W.D. Okla., filed 1978). The action involves challenges by several gas producing states to certain provisions of the Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432 (Supp. III 1979). Similar tenth amendment challenges are pending against the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 (Supp. III 1979). For example, in Virginia Surface Mining & Reclamation Ass'n v. Andrus, 10 ENVT'L L. REP. 20,128 (1980), the district court held that provisions of the Act restricting steep-slope coal mining violated the tenth amendment. Although the court found that the Act represented a rationally based exercise of Congress' commerce power, the court believed that the Act impermissibly displaced the states as decisionmakers in areas of traditional state competence, particularly land use regulation. *Id.* at 20,130-32. On March 17, 1980, the *Virginia Surface Mining* decision was stayed pending appeal before the Supreme Court. 14 ENVIR. REP. DEC. 1149 (BNA 1980). The *Virginia Surface Mining* decision has been followed by a district court in Indiana, Indiana v. Andrus, No. IP 78-500-C (S.D. Ind. 1980), and rejected by a district court in Iowa, Star Coal Co. v. Andrus, 14 ENVIR. REP. DEC. 1325 (BNA 1980). The *Indiana v. Andrus* decision has also been stayed pending appeal before the Supreme Court. 14 ENVIR. REP. DEC. 1785 (BNA 1980).

334. *Compare* Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1076 (1977) (Congress cannot hinder attempts by states or localities to meet their citizens' legitimate expectations of basic government services) *with* Kilberg & Fort, *supra* note 333, at 617-630 (discussing the impact of *Usery* upon various federal employment laws). Additional valuable perspectives on *Usery* include Barber, *National League of Cities v. Usery: New Meaning for the Tenth Amendment*, 1976 SUP. CT.

way of looking at specific problems endemic to a federal system of government. *Usery* is expressive not only of the Court's regard for the basic postulate of federalism, which is the recognition of a meaningful equilibrium between central and local governments, but also of a decided state orientation in close cases. In essence, *Usery* holds that neither governmental entity may go so far as to unduly impair the essence of the other as a functioning entity.[335] Such a broad postulate does not easily lend itself to formulation of general rules; rather, *Usery* bespeaks of a sensitivity to the values of local government. As a functional analysis of *Usery*, the above view may prove of little aid in predicting how a particular problem will be finally resolved. It does, however, provide some insight into the concerns a court may have when it is forced to confront the legality of federal regulation of state activities.

Yet, the very idea of striking a balance between state and federal functions involves the making of a judgment that the interests of one political entity with respect to a particular problem are to be preferred to the interests of another. Hence, we face the problem whether federal interests in the expeditious approval and licensing of energy projects will be allowed to outweigh local concerns regarding the risks and costs associated with those projects. Certainly those commentators who have noted the deficiency in the Court's reliance upon the theme of state sovereignty as an identifiable, protected interest are correct: to speak in terms of "governmental powers and forms"[336] is to speak nonsense in literal terms. But langauge that is technically deficient can nonetheless be interpreted to support the result reached by the Court.

Drawing any line between permissible and impermissible conduct is troublesome. One is generally able to posit examples that approximate the area of division and show an unappealing application of the rule in that case. Such problems are the inevitable consequence of making decisions. Nevertheless, decisions are still made and respected because we recognize not only the utility of final decisions but also the utility of decisions that properly decide the bulk of cases in the area. Thus, the use of the term "essential services" in *Usery* as defining the line between permissible and impermissible congressional action is literally deficient, if one properly demands literalism of the Court. Yet,

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REV. 161; Heldt, *The Tenth Amendment Iceberg*, 30 HASTINGS L.J. 1763 (1979); Ripple & Kenyon, *State Sovereignty—A Polished but Slippery Crown*, 54 NOTRE DAME LAW. 745 (1979).

335. In the modern era, any constraint on government power in state-federal conflicts will invariably operate to expand state options and limit the national sovereign. Of course, the state function must have a reasonable claim of validity. *See* Elrod v. Burns, 427 U.S. 347, 366-67 (1976) (spoils system not an essential governmental function).

336. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1168 (1977).

emphasizing literalism is itself of minimal value for it invariably does little more than cause a misconception as to what was really intended. Rather, the impreciseness of the language is often cured by the imagery the user conveys.[337] Thus, the term "essential services" as used in *Usery* need not be read in the literal sense as meaning the necessities of life of a political society. Essential services could be interpreted as expressing a general commitment to decentralized power, to preservation in a branch of government of real power to act in a governmental capacity. The term can thus convey the imagery of a government able to perform real government services. It serves to modify the scope of the principle of state discretion, not in concrete terms, but in terms that suggest a concern for other values.[338] It is important to observe that *Usery* conveys imagery and attitudes, not legalisms or ultimate truths; it implies a right of local choice. It is just as important to understand that imagery and attitudes will be inherently imprecise and ambiguous and that the choices made may be ill-considered or even wrong.

We thus come to the ultimate question: What impact will the attitudes toward proper state-federal relations that were expressed in *Usery* have upon the determination of the constitutionality of "fast track" legislation?

D. *Federal-State Relativism*

The Court in *Usery* was concerned with the role and position of the states relative to the federal government. Consequently, the question of governmental control over a specific area of concern is less important than is the measurement of the impact of that control upon the respective position of the states relative to the federal government. For example, sovereignty is often popularly conceived of as power over

337. A similar approach helps to ameliorate the problems of literalness when we deal with the distinctions drawn by the Court between governmental (traditional) and proprietary (nontraditional) state functions. A literal examination and application of the tests produces little consistency. *Compare* South Carolina v. United States, 199 U.S. 437, 463 (1905) (operation of liquor store is nontraditional governmental function) *with* Frost v. Corporation Comm'n, 278 U.S. 515, 519-21 (1920) (regulation of cotton ginning is traditional governmental function); Brush v. Commissioner, 300 U.S. 352, 370-71 (1936) (municipal distribution of water is a traditional governmental function) *with* Parden v. Terminal Ry. of the Ala. State Docks Dep't, 377 U.S. 184, 185-87 (1964) (state operation of railroad is a nontraditional governmental function), *discussed in* Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 284-85 (1973). It should be noted that many statements in *Usery* (*see, e.g.*, essential governmental functions, 426 U.S. at 839; essential governmental services, *id.* at 850; activities of the states as states, *id.* at 842) are clearly consistent with a governmental-proprietary frame of reference. *See* Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203, 1220 n.86, 1245 n.202 (1978).

338. *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but *consist with the letter and spirit of the Constitution*, are Constitutional.

Id. at 421 (emphasis added).

space, generally phrased in terms of land.[339] Hence, federal intrusion into state control over state land could be expected to raise much greater difficulty than federal intrusion into state control over privately owned land or federal lands. Again, it must be remembered that such a distinction, based upon ownership interests in land, is not predicated upon the value of the land or different characteristics of the land, but rather is drawn to protect the position of the state governments. Allowing nonconsensual involvement of the federal government in the traditionally protected area of state land holdings would suggest that the state government existed at the sufferance and will of the central government.[340] Thus, although plausible arguments could be made that the distinction between state lands and privately owned lands is intellectually illogical, the distinction remains sound for it conforms to our settled expectations as to how decisionmaking responsibility ought to be allocated between distant and local governments.

This notion of settled expectations is important because it illuminates why the justification for a decision like *Usery* is so easy to conceive yet difficult to convey. From any perspective, it is impossible to demonstrate that government from Washington, D.C. is qualitatively or necessarily better or worse than government from the state capital or county seat.[341] Consequently, a settled expectation as to the proper allocation of decisionmaking responsibility is inherently different from a settled expectation that constitutes a value-laden preference for societal goods or societal status that can be reduced to basic jurisprudential principles much as Professor Rawls has attempted.[342]

The decision to vest certain decisionmaking responsibilities in Washington, as opposed to the state capital was basically the result of historical accident rather than conscious design. In securing the "more perfect union" there were some inevitable tradeoffs. One such tradeoff was the decision to share decisionmaking responsibility between state and federal government. As a compromise, the decision was less than perfect, perhaps less than logical, but it did have one value—it worked. Consequently, when called upon to examine the basis of that compromise, the Court should understandably be reluctant to tinker with

339. McDonald v. Mabee, 243 U.S. 90, 91 (1917). "The foundation of jurisdiction is physical power. . . ." *Id.*

340. If the state cannot control its own land, it can hardly make claim to sovereignty. States are not reluctant to exercise their prerogative with respect to state land. *See* TEX. RES. CODE ANN. tit. 3, § 102.004 (Vernon 1978) (prohibiting forced pooling of Texas state lands). Texas, in a fashion similar to that evidenced by several states with respect to water, see notes 146 & 166 *supra*, limits the interstate sale of natural gas produced from state lands. TEX. RES. CODE ANN. tit. 3, § 52.293 (Vernon 1978).

341. There will, of course, be different institutional considerations depending upon the perspective. *See* Stewart, *supra* note 144, at 1225-32.

342. *See generally* J. RAWLS, A THEORY OF JUSTICE (1971).

something that seems to work even though it may not understand why or how it works. As expectations settled that a degree of sovereignty should remain diffused between competing but cooperative sovereigns, those expectations assumed an independent significance.[343] While the scope and extent of those expectations cannot be described with any accuracy, that does not mean that they are valueless. Such expectations possess value in that they define, however imprecisely, our societal view of how government ought to be structured for the purpose of discharging whatever functions society assigns government.

E. *The Impact of "Fast Track" Legislation Upon "Essential" State Services*

Without attempting to ascribe values to certain governmental functions, it is profitable to examine what the consequences will be for state and local governments should "fast track" legislation modeled on PEPA be adopted and aggressively implemented. The direct consequences of such a course of conduct have been alluded to throughout

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343. This settled expectation of diffused, independently accountable decisionmaking influences the determination of the validity of a particular congressional constraint upon state governmental activities in yet another way:

> The Supreme Court pays particularly close heed to statutory language and legislative history in judging the reach of laws enacted under the commerce clause. A law will not be held to affect all the activities Congress in theory can control unless statutory language or legislative history constitutes a *clear statement* that Congress intended to exercise its commerce power in full.
>
> The Supreme Court has invoked the clear statement requirement most notably where a judgment that a federal statute reached to the outer limits of the commerce power would be obviously inconsistent with state institutional interests. Thus, in a series of cases, the Court has narrowly interpreted federal laws criminally punishing "conduct readily denounced as criminal by the States" on the ground that, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." Similarly, in *Employees v. Department of Public Health and Welfare of Missouri*, a majority of the Supreme Court refused to read the 1966 amendments to the Fair Labor Standards Act of 1938 as granting state employees covered by the amendments a federal cause of action against state governments in federal district courts. Such a cause of action would have been inconsistent with eleventh amendment principles of state sovereign immunity from citizen suits in federal tribunals, and the Court "found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen of that State or another State to sue the State in federal courts."

L. TRIBE, *supra* note 169, § 5-8, at 243 (footnotes omitted). It is currently being argued that the clear statement requirement necessitates both a principled statement by Congress and significant, creditable evidence that the congressional findings accord with common experience. *See* Brief of Amicus Curiae in Support of Plaintiffs, Opposing Defendants' Motion to Dismiss, and for Summary Judgment at 16, Oklahoma v. Federal Energy Regulatory Comm'n, No. 78-0 1251-T (W.D. Okla. 1978), discussed in note 333 *supra*. In either case, the clear statement requirement puts significant constraints upon a Congress able to agree upon generalized ends but not upon the means required to achieve those ends. Specific requirements that Congress express an intent to override state immunity pose difficult problems for elected officials responsible to a local constituency. In the context of PEPA, it is interesting to note that the notion of a broad federal power to override state law was so clearly against the sense of the Senate that it was not even proposed. 125 CONG. REC. S13,968 (daily ed. Oct. 3, 1979) (remarks of Sen. Stevens). Attempts to specifically provide for federal waiver of state law were rejected in committee. S. REP. NO. 96-331, 96th Cong., 1st Sess. 17 (1979).

this paper. To recapitulate, the direct consequences of "fast track" legislation modeled on PEPA would consist of the imposition of federal controls over basic state and local decisionmaking relative to the site selection, approval, and licensing of designated priority energy projects. Thus, local decisionmakers would be subject to project decision schedules implemented by the EMB,[344] and local decisionmaking powers would be subject to preemption should the local decisionmakers fail to comply with the letter and spirit of the EMB's schedules.[345]

These federal constraints upon nonfederal decisionmaking would have a significant effect in establishing environmental, business, and lifestyle priorities in the community. For example, construction of a priority energy project would not only affect the attainment or preservation of clean air and clean water in the community by the direct contribution of pollutants from the facility, but would also displace other businesses, activities, and lifestyles that would have been created if the prior energy facility had not been constructed.[346] There is, moreover, only a limited amount of air and water that may be used as a receptacle for pollutants. When the levels of saturation have been reached, no further pollution is allowed unless a suitable tradeoff can be achieved. Growth and tradeoffs are not, however, directly proportional: as growth continues, obtaining a tradeoff becomes more difficult and thereby more costly.[347] A consequence of all this is the introduction of a theory of prior appropriation of the air and water for the purposes of waste disposal into our system of environmental and energy law.[348]

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344. *See* text & notes 26-58 *supra.*

345. *See* text & notes 106-24 *supra.*

346. *See* EN. USERS REP. (BNA), Oct. 25, 1979, at 18 ("A newly constructed coal liquification plant could cost a community between $29.4 million and $140 million in housing and services for employees. . . ."). *See generally* Watson, *Measuring and Mitigating Socio-Environmental Impacts of Constructing Energy Projects: An Emerging Regulatory Issue*, 10 NAT. RESOURCES LAW. 393 (1978).

347. *See* 10 ENVIR. REP. 2149 (BNA 1980) (discussing problems with the proposed EPA "offset" policy).

348. The Amendments [1977 Clean Air Act Amendments] will also, in the very near future, make air a limited, valuable commodity, to be bought and sold in a new market yet to be defined. Drafts of the revised policy for "dirty air" areas state: "The reviewing authority should provide a registry to record the person or entity that has the right to use the banked emission reductions, and to record any transfers of, or liens on, this right." Other EPA explanatory materials refer to systems of "air rights" and "offset markets." Connery, *The Effects of the Clean Air Act Amendments of 1977 on Mining and Energy Developments and Operations*, 24 ROCKY MTN. MIN. L. INST. 1, 3 (1978). *See* 41 Fed. Reg. 55,525 (1976), where the EPA described the offset policy established under the Clean Air Act, whereby a polluter may in effect obtain the right to pollute by purchase, that is, by reducing its own or other pollution and then using the reduction as an "offset" or "tradeoff" against its own pollution. The "tradeoff policy" prohibited the "banking" of emission requirements and also established a reference point (baseline) from which tradeoff credits would be computed. *Id.* at 55,528. *See also* R. STEWART & J. KRIER, *supra* note 91, at 495-96.

Hence, the priority of claims becomes more important because, as the old bromide goes, "first in time, first in right."

Under legislation modeled on PEPA, projects that receive priority energy project designation would be subject to an expedited approval and licensing process.[349] Thus, they would obtain a time preference over nonpriority projects. More importantly, priority energy projects would be grandfathered and thus exempt from substantive requirements adopted during the timespan of the grandfather window[350] and potentially exempt from existing federal requirements.[351] Yet, while the priority energy project would be exempt from substantive requirements imposed during the grandfather window or duly waived, its pollutants would go into the matrix of qualitative factors that would determine whether other projects might be constructed.[352]

Thus, if environmental laws are to be kept at even their current level of effectiveness, obtaining approval for nonpriority[353] and subsequent priority projects would become more difficult. Faced with these responsibilities, the likely political response would be either to weaken environmental protections, if energy project "fast tracking" is truly desired by the federal government, or to allow "fast track" legislation to die from nonuse due to the inability to satisfy environmental quality standards.

In many respects, the problem of appropriation of air and water resources for waste disposal have been foreshadowed by the problems posed by interstate pollution. Under the Clean Air Act, for example, problems have arisen over the identification of the source of pollution and the responsibilty for and consequences of pollution that crosses state boundaries.[354] Unfortunately, the issue of interstate pollution has

349. *See* text & notes 28-58 *supra.*
350. *See* text & notes 81-92 *supra.*
351. *See* text & notes 62-80 *supra.*
352. *See* text & note 348 *supra.*
353. This results since nonpriority energy projects are subject to the retrofit requirements if PSD (prevention of significant deterioration) increments are used up. 43 Fed. Reg. 26,381 (1978). Under the grandfather clause of PEPA, however, priority energy projects are arguably exempt, although there remains some question whether the retrofit provisions would be treated as "new" provisions within the contemplation of the grandfather clause.
354. *See* R. STEWART & J. KRIER, *supra* note 91, at 498-99; Lutz, Transboundary Management of Air Quality in the U.S.—A Study Prepared for the Environment Directorate Organization for Economic Cooperation and Development (1979) (unpublished manuscript on file with the *Arizona Law Review*). As noted in a student comment:

> [S]tate plans do not adequately address interstate air pollution problems in downwind states.
>
> States may petition the EPA Administrator for action against sources in other states that violate the petitioning state's standards. . . . Pennsylvania has requested the EPA to study the adverse air quality impacts on Pennsylvania caused by Ohio and West Virginia power plant SO_2 emissions. . . . EPA has not yet issued regulations to implement this provision.

Comment, *Forcing Technology: The Clean Air Act Experience*, 88 YALE L.J. 1713, 1732 (1979). Litigation is also pending involving a challenge to upwind pollution in New England. New En-

produced more questions than resolutions.[355] The problems of pollution source identification and the shifting of the pollution burden to others would be intensified both by the dichotomy which legislation modeled on PEPA would establish between priority and nonpriority projects and by the absence of any transjurisdictional controls. Pollution from priority energy projects would pose problems of identification.[356] Although federal power would be augmented by vesting in the EMB the ultimate control over allocation of available "air" and "water" for pollution discharge, that power would not be used to resolve resulting pollution and pollution related problems. Under PEPA, the EMB would not be required to examine, or to control, the larger impacts of "priority energy project" designation upon the ability of the site state or the upwind or downstream states to protect their environment or to create a desirable mix of industrial, commercial, and business entities.

These potential results are somewhat ironic, since in the debate over PEPA both the states and members of Congress expressed concern about the impact of "priority energy projects" upon finite water quantity resources. Indeed, this concern prompted an attempt to write specific protections into PEPA to provide for local control.[357] Yet, at the same time, the impact of such projects upon finite air and water quality resources was ignored. Designation of a facility as a priority energy project would adversely affect the attainment of primary and secondary national ambient air quality standards, lead to deterioration of air quality in presently "clean" areas, and aggravate the siting of new facilities because the cost and achievability of tradeoffs would fall disproportionately upon non-priority energy projects. In short, under "fast track" legislation modeled on PEPA the ability to license new facilities would effectively pass to the federal government. Moreover, since PEPA looks to the building of new facilities, a consequence of the passage of such legislation would be to push investors and builders away from the modification of existing plants, which may not qualify for pri-

gland Legal Foundation v. Costle, 475 F. Supp. 425 (D. Conn. 1979), *appeal docketed*, No. 76-6202 (2d Cir. May 20, 1980).

355. Professors Stewart and Krier pose the question whether the 1977 Clean Air Act Amendments will resolve the problems of interstate pollution. They note that while the amendments seek to deal more explicitly with the problems of interstate pollution, they are seriously flawed. First, they fail to consider increased emissions due to increased automobile traffic or small stationary sources generated by nonindustrial patterns of development. Second, the amendments fail to state how the burden of achieving abatement is to be allocated among the involved states. Finally, enforcement mechanisms for implementing the amendments' approach to the problem of interstate pollution are poorly defined. R. STEWART & J. KRIER, *supra* note 91, at 998-99.

356. *But see* Latin, Tannehill & White, *Remote Sensing Evidence and Environmental Law*, 64 CAL. L. REV. 1300, 1320-24 (1976). The problems of pollution identification and quantification are extensively analyzed by Lutz, *supra* note 354.

357. *See* text & notes 166-81 *supra*.

ority energy project status, toward new projects.[358] Passage of "fast track" legislation modeled on PEPA would also influence the value attributable to the creation of "transferable pollution rights".[359] The value of these transfer rights would be dissipated whenever priority energy projects soaked up so much of the available "offset" as to make further development impossible.[360] Under such constraints, it is difficult to imagine that political pressure to ease environmental standards so as to create some local options, however illusory, would be resistible. In the long run, energy mobilization might not only emasculate state control over energy and natural resource development[361] but also eviscerate substantive environmental standards that were adopted in the 1970's. The limited flexibility left to the states after the passage of the Clean Air Act Amendments of 1977 would probably be lost; federal "fast tracking" of and consequent control over energy projects would probably lead to increases in the geographic scope of nonattainment areas and reduction in the ability of states to maintain system flexibility in those "clean" areas in which they retain some control.[362]

A statutory scheme modeled on PEPA would also have a direct impact upon the mix of technologies that would be available to resolve the energy problem over the short term. Under federal policy, the primary focus has been upon conventional technologies that will provide

358. Modifications of existing major fuel burning installations are unlikely to result in a sufficiently significant reduction of dependence on imported energy so as to warrant designation as priority energy projects. Although PEPA did not set minimum standards, the tenor of the goals, purposes, and strictures of the legislation evidenced a clear intent not to trivialize the process by considering proposals which would have a de minimis impact. Hence, adoption of PEPA-based legislation would probably discourage the construction of the small oil refinery, coal mine, or pipeline in favor of the mammoth project. Coal conversion facilities, given priority status by PEPA, *supra* note 14, § 302(e), are an exception.

359. *See* R. STEWART & J. KRIER, *supra* note 91, at 495. This influence would be offset to some extent by the fact that EPA's emission offset policy does not apply to facilities emitting under 100 tons of pollutants per year. *See* Parish, *supra* note 169, at 460-62. Hence, implementation of the "offset" policy in nonattainment areas, where the cost of offsets is high or the achievability of pollutant reduction is low, will tend to favor construction of sources emitting small amounts of pollution. *See* Lutz, *supra* note 354, § 54. Of course, other methods of review and compliance such as PSD or NSPS's (new source performance standards) may be applicable. *Id.* § 55 *supra.*

360. See note 348 *supra.*

361. Compare PEPA's approach with that of the Clean Air Act. Since the states are charged with formulating SIP's (state implementation plans), and since § 110(a)(2)(E) of the Clean Air Act now requires that SIP's include within their control scheme the effects of interstate pollution (42 U.S.C. § 7410(a)(2)(E) (Supp. III 1979)), each state in theory retains some degree of flexibility to determine whether it wishes to adopt a "no growth" or "growth" policy. *See* Quarles, *Federal Regulation of New Industrial Plants*, ENVIR. REP. MONOGRAPH No. 28, at 17 (BNA 1979). This flexibility would be lacking under legislation modeled on PEPA since responsibility for implementation of the scheme would be vested solely in the EMB. There were no provisions in PEPA setting forth a definitive, meaningful state decisionmaking role. Whatever state roles might exist would exist at the sufferance of the EMB.

362. The prime means of state control is the ability to redesignate a geographic area as a Class III area. Class III areas permit the greatest degree of pollution consistent with primary and secondary NAAQ's (National Ambient Air Quality Standards). 42 U.S.C. §§ 7470-7491 (Supp. III 1979); R. STEWART & J. KRIER, *supra* note 91, at 479-82.

in-kind substitutes for the fuels now consumed.[363] Thus, for example, the federal government has emphasized the development of synthetic liquid fuels and synthetic natural gas at the expense of dispersed, decentralized, and small-scale technologies.[364] States and their local subdivisions have often looked to just the opposite mix of technologies.[365] PEPA, in many respects, represented an attempted resolution of the philosophical impasse over the mix of energy technologies that should receive legal, financial, and political priority and assistance, ultimately "over the kind of energy future and society we will create for the 21st century."[366] Simply put, to the extent an adopted "fast track" program provides an economic, regulatory, and legal advantage to priority designated projects, it can be expected that projects so designated will come to form the dominant energy technologies for the future. Since the granting of "fast track" designation would lie in the hands of the federal government, it can likewise be expected that control over the mix would be in federal hands and would reflect federal policies.[367]

Notwithstanding the above observations, it does not appear that legislation modeled on PEPA, insofar as it would impact upon the ability of states to exercise control over their economic vitality and environmental quality, would violate the constitutional standards set forth in *Usery*.[368] The state police power, as it affects the environment, energy development, or natural resource management, is not in any way sacrosanct. Federal interference with these functions is not manifestly different from federal interference with weights and measures.[369] The

363. *See* CALIFORNIA ENERGY COMMISSION, PROPOSED 1979 BIENNIAL REPORT 5 (Committee Draft 1979) (copy on file with the *Arizona Law Review*).

364. *Id.* at 18. The views expressed in the Committee Draft found confirmation in the Energy Security Act of 1980, Pub. L. No. 96-294, 94 Stat. 611 (to be codified at 42 U.S.C.A. §§ 8701-8795 (Supp. 1980)).

365. *Id.* at 11.

> The drive to "nationalize" energy policy represents a particular loss to California. The State has traditionally been in the forefront of emerging trends, including trends in energy, and has taken major steps toward the creation of a climate in which alternative energy strategies and policies would be possible (e.g., the State's 55 percent solar tax credit; incentives for cogeneration, geothermal, and biomass; City of Davis conservation ordinances; San Diego and Santa Barbara solar ordinances). California's large and diverse energy resources make it peculiarly capable of successfully implementing an alternative energy policy. Moreover, California has managed to develop this alternative potential while maintaining and enforcing some of the most stringent environmental standards in the country.

Id.

366. *Id.* at 5.

367. *Id.* at 13.

> As the drive to centralize energy policy accelerates, the consequences are bound to expand far beyond the institutional loss of decision-making authority at the State and local levels. Because centralized policy deals best with centralized technologies, the assumption of decision-making authority at the Federal level will have profound consequences for the energy options that are selected and given financial support.

Id.

368. See text & notes 330-32 *supra*.

369. Jones v. Rath Packing Co., 430 U.S. 519, 532 (1976) (federal labeling requirements pre-

fact that both have traditionally been subject to state regulation does not mean that federal regulation is precluded. Indeed, commerce clause regulation has historically proceeded upon the assumption that the environment, energy production, and natural resources are subject to intensive and, where necessary, exclusive federal regulation.[370]

In the end, arguments predicated upon either federally imposed waivers of state substantive laws under a grandfather provision or singular economic and social impacts upon a particular state will prove unpersuasive when the attempt is made to link such concerns with the theme of federalism espoused in *Usery*. Legislation modeled on PEPA would not under its waiver provisions directly impact upon the decisionmaking process itself or upon the ability of the state to exercise general governmental functions.[371] Such legislation would affect and limit what can be decided, but this would be true of any preemption situation. As a consequence, it is likely that the court would find that such express determinations of selective preemption, even where accomplished by implementing regulations,[372] do fall within Congress' delegated commerce power.

Although the more substantive consequences of legislation modeled on PEPA—the substantive law preemption and the concomitant economic and social consequences—would not raise constitutional infirmities, the procedural consequences would do so. These procedural consequences include promulgation by the EMB of project decision schedules,[373] procedural streamlining of state and local decisionmaking processes,[374] and supplantation by the EMB of state and local decisionmaking when the project decision schedules are not met.[375]

The question whether a jurisdiction can be compelled to follow procedural rules imposed by another jurisdiction finds no direct answer in our legal precedent.[376] In the field of conflict of laws, the extrajuris-

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empt more stringent requirements of state law). A significant difference does exist, however, if federal control over state-owned resources is attempted. See notes 169 & 340 *supra*. This difference is largely hypothetical, however, because it is difficult, though not impossible, to envision the attempted use of state lands or state resources for an energy project without having previously obtained state consent to the project.

370. *See* note 205 *supra*.

371. Nor would PEPA impact upon those "essential state functions" delineated in *Usery*. *See* 426 U.S. at 851.

372. See note 203 *supra*.

373. See text & notes 43-58 *supra*.

374. See text & notes 93-105 *supra*.

375. See text & notes 106-24 *supra*.

376. Although the question of Congress' power to prescribe procedural rules for state and local tribunals has not been directly addressed by the federal courts, the courts have commented upon the relation between state sovereignty, insofar as it encompasses the right to prescribe internal rules of procedure for state tribunals, and the constitutional commands of the fourteenth amendment. In each instance, absent a showing of discrimination against a particular person or class of persons, the courts have recognized that the system and mode of decisionmaking adopted by the state is immune from constitutional scrutiny. For example, in Missouri v. Lewis, 101 U.S.

dictional application of procedural laws and requirements has not been required.[377] Each forum has been allowed to apply those procedural rules indigenous to that forum and with which it is most familiar.[378] It

22 (1879), the Court rejected the contention that the establishment of a separate system of courts for several counties and cities in Missouri violated the equal protection clause. The Court observed: "It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject matter, and amount, and the finality and effect of their decisions, provided it does not encroach upon the proper jurisdiction of the United States. . . ." *Id.* at 30. *Accord*, Salsburg v. Maryland, 346 U.S. 545, 552 (1954). *See also* New York State Ass'n of Trial Lawyers v. Rockefeller, 267 F. Supp. 148, 151 (S.D.N.Y. 1967) (rejecting assertion that a federal question or constitutional violation under the fourteenth amendment was presented by court delay caused by unequal distribution of judges and judicial business among the counties of the State of New York).

Even in Oregon v. Mitchell, 400 U.S. 112 (1970), where four members of the Court were prepared to accept some federal intrusion into an area of decisionmaking traditionally reserved to the state—voter qualification requirements for state and local elections—the justices did so only upon the understanding that Congress had acted pursuant to powers conferred by § 5 of the fourteenth amendment. *Id.* at 135-44 (Douglas, J., dissenting); *id.* at 240 (Brennan, White & Marshall, JJ., dissenting). The breadth of Congress' powers under § 5 of the fourteenth amendment is immense and largely uncharted. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (under § 5, Congress can compel states to provide back pay to victims of state discrimination notwithstanding the eleventh amendment); National League of Cities v. Usery, 426 U.S. 833, 852 n.17 (1976) ("We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power . . . or § 5. . . ."). Judicial decisions interpreting § 5 would rarely provide support for federal intrusion into state decisionmaking under some other constitutional provision, and would normally suggest greater restraint in non-section 5 cases. Hence, if Congress could not be said to have sufficient authority to affect the mode and manner of state decisionmaking under § 5, it would inferentially lack such power under other, less precise and less intrusive delegated powers.

377. *See* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 55 (2d ed. 1980).

378. Most scholars who have considered this issue have concluded that the substance-procedure distinction is founded upon the relative difficulty faced by the forum in applying foreign substantive or procedural law. For example, Professor Weintraub has observed:

> Basic to any functional analysis of conflicts problems is a redefinition of the classic categories of "substance" and "procedure." The first question must be, why should we label a rule as "procedural" and apply the rule of the forum without further inquiry? What factors justify such a shortcut in a functional analysis? The proper standard is one that balances the difficulty to the forum in finding and applying the foreign rule against the likelihood that the outcome will be affected. If it would be very difficult for local judges and lawyers to adjust to the application of the forum's rule and if it is unlikely that the outcome will be affected by the application of the forum's rule, the forum's rule is properly labeled as "procedural" for conflict of laws purposes and the forum rule is correctly applied without further analysis. If, on the other hand, the foreign rule in issue is not especially difficult to find and apply and if there is any probability that the rule may affect the outcome, the rule should be considered as "substantive" and subjected to further conflicts analysis.

R. WEINTRAUB, *supra* note 377, at 55-56. *See also* R. LEFLAR, AMERICAN CONFLICTS LAW 239-41 (3d ed. 1977).

This type of analysis properly calls upon courts to approach the substance-procedure question with a recognition that the substance-procedure characterization is simply the end point of their analysis—the label affixed to the analytical result as opposed to the analysis.

This functional analysis does not, however, assist us in evaluating the constitutionality of legislation modeled on PEPA. While PEPA did functionally distinguish between waivers of substantive as opposed to procedural requirements, the powers given to the EMB to directly affect the decisionmaking process all looked to those adjudicatory mechanisms by which decisions are rendered. Those adjudicatory mechanisms such as calendar priorities and order of proof are far removed from even the quasi-substantive and quasi-procedural issues, such as "burdens of proof," which have bedeviled courts as to their proper characterization in the field of conflict of laws. Questions involving calendar control, order of proof, and the like strike at the very heart of the process for "enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them," and hence are "procedural" if that term

is true that there is only a fine line between procedural rules that are not applied extrajurisdictionally and substantive rules that are.[379] Many final results have been orchestrated through the facile characterization of a rule as procedural or substantive to fit the situation.[380] Nevertheless, the distinction has remained clear: procedural rules are solely of concern to the forum.

The Supreme Court has not required, in the field of conflict of laws, that the forum use the procedural rules of another jurisdiction.[381] This precedent, however, does not provide any insight into the constitutionality of PEPA or its progeny. Questions involving the relationship between the Constitution and choice of law have generally focused upon what the forum may do, not what it must do. The chief culprit in this area has been the statute of limitations. The Supreme Court, generally eschewing a substance-procedure analysis, has distinguished between courts seeking to extend a claim by applying the longer statute of limitation of the forum[382] and courts seeking to prevent litigation by applying the shorter statute of limitation of the forum..[383] The former practice has been more rigorously scrutinized than the latter. In neither situation, however, has the Court emphasized the substance-procedure distinction or treated the impact upon the forum of being required to apply nonforum law as controlling.[384]

The theme that jurisdictions retain the power to apply their own procedural rules, even where they are required to apply the substantive

has any meaning. Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941). *See also* G. STURMBERG, CONFLICT OF LAWS 133 (3d ed. 1963). "[P]rocedural rules should be classified as those which concern methods of presenting to a court the operative facts upon which legal relations depend; substantive rules, those which concern the legal effect of those facts after they have been established." *Id.*

Thus, conflict of laws theory proves, in the end, to be of little assistance. The substance-procedure dichotomy, which so animates choice of law discussions, prove upon deeper reflection to turn on considerations such as the difficulty of finding the foreign law and the likelihood that the rule will affect the outcome of the decision on the merits, which are not applicable here for the reasons noted.

379. Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 344-45 (1933).

380. R. WEINTRAUB, *supra* note 377, at 49-51.

381. *See* Pacific Employees Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 501 (1939). "[T]he very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Id.* Where the Court has compelled a state to follow certain procedures, it has only been where specific constitutional protections so demanded. *See* Hughes v. Fetter, 341 U.S. 609, 611-12 (1951) (full faith and credit); B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 283-84 (1963). *See also* note 391 *infra*.

382. *See* Home Ins. Co. v. Dick, 281 U.S. 397, 409 (1930).

383. *See* Wells v. Simonds Abrasive Co., 345 U.S. 514, 516-17 (1953).

384. Instead, analysis has centered on a determination of whether the relationship between the litigants and the forum justifies the application of forum law. *See* Fischer, *Shaffer v. Heitner: Some Thoughts on its Impact on the Doctrines of Choice of Law and Preclusion by Judgment*, 30 CASE W. RES. L. REV. 74, 89-97, 110-117 (1979).

rules of another jurisdiction, is common.[385] *Erie Railroad Co. v. Tompkins*,[386] as applied to federal courts, and *Dice v. Akron, Canton & Youngstown Railroad Co.*,[387] as applied to state courts, both recognize, in principle, the distinction between procedural and substantive rules.[388] Although the reason for the distinction has never been clearly articulated by the Court, the distinction seems to turn upon the centrality of the rule to the outcome of the case.[389] Certain aspects of the process of adjudication that require uniformity or appear to have little intrinsic relation to the actual disposition on the merits escape the admonition that the decisionmaker follow the rule of another jurisdiction. Where a rule is determined, however, to be central or intrinsic to the proper resolution of the case, the decisionmaker may be compelled to apply the rule of another jurisdiction even where that rule is clearly procedural.[390]

Notwithstanding the above explanations and comments, a general theme runs throughout: in regulating the adjudicatory process, decisionmakers are invariably allowed to apply their own rules. Once we move beyond the hybrid substance-procedure rules, such as statutes of limitation, burdens of proof, or the constitutionalized adjudicatory process issues,[391] one is struck by the consistency with which courts have been allowed to follow their own procedural rules when obliged to apply the substantive rules of another jurisdiction to the decision on the merits.[392]

This consistency cannot be explained by mere reference to notions of difficulty of discovery or centrality. Rather, the consistency of the approach, coupled with the nature of the exceptions, seems to express a sense of appropriateness, a recognition of how far one ought to intrude into the internal operations of another entity. It expresses an idea which on the surface might appear to be anomalous but in reality is quite wise: complete divestment of power is often less of an intrusion upon the sovereignty of a jurisdiction than piecemeal tampering with

385. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 122-143 (1971).
386. 304 U.S. 64 (1938).
387. 342 U.S. 359 (1952).
388. *See* Erie Railroad Co. v. Tompkins, 304 U.S. at 78-80; Dice v. Akron, Canton & Youngstown Railroad Co., 342 U.S. at 363.
389. Sedler, *The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws*, 37 N.Y.U. L. REV. 813, 822 (1962). "[T]he court [in conflicts and diversity cases] should use as a model as much of the law of the reference point as will materially affect the outcome." *Id.*
390. Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring).
391. Jackson v. Denno, 378 U.S. 368, 391 (1964) (trial court must hold hearing to determine "voluntariness" of the confession prior to the submission of the confession to the jury). A somewhat similar theme of constitutionalized adjudicatory process may explain those confusing FELA cases wherein the Supreme Court has required jury resolution of certain issues even though state practice is to the contrary. See text & notes 100-05 *supra*. *Cf.* Testa v. Katt, 330 U.S. 386, 394 (1947) (state may not invoke procedures that discriminate against federal causes of actions).
392. *See* R. WEINTRAUB, *supra* note 377, at 48-67.

that entity's internal governmental operations. Where divestment is complete, the routes to responsibility and accountability are clear. Where divestment is partial or incomplete, the path is less clear. Indeed, it is just these observations that underlie the recently aborted litigation involving the EPA's authority to compel various types of implementation and enforcement actions by the states.

The actions involved transportation control plans [TCP's] developed by EPA under the Clean Air Act for several states that had failed to submit adequate plans of their own.[393] The TCP's had been adopted in the form of regulations.[394] The critical problem in the eyes of those courts that considered the matter on the merits was the matter in which the programs were imposed.[395] The state's failure to carry out any of the programs would not only allow the EPA to step in and implement the program under the Clean Air Act,[396] but would also subject each noncomplying state to direct enforcement actions under the Act.[397] In other words, the state itself would be in violation of the law and the EPA could bring an action to compel compliance by the state.

The case was mooted for the Supreme Court when the government informed the Court that as to certain challenged regulations, repeal was imminent and as to other challenged regulations, significant modifications were planned that would ameliorate the statutory and constitutional objections.[398] Hence, the constitutional objection to the coercive impact upon the states of the EPA regulations escaped Supreme Court review.[399]

The lower courts had split on the question of the constitutionality of the regulations.[400] Perhaps the clearest expression of the reasons for

393. *See generally* District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *cert. dismissed sub nom.*, Costle v. District of Columbia, 431 U.S. 99 (1977), *on remand*, 10 ENVIR. REV. DEC. 2022 (BNA 1977); Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *cert. dismissed*, 431 U.S. 99 (1977), *on remand*, 11 ENVIR. REP. DEC. 1161 (BNA 1977); Pennsylvania v. EPA, 500 F.2d 246 (3d Cir. 1974).

394. In general, the TCP regulations required the states to:

1. Develop an inspection and maintenance program for vehicles registered in affected Air Quality Control Regions (*i.e.*, where air quality standards have not been met) and to submit to the EPA, by fixed deadlines, both a schedule of compliance and the operative regulations by which the program was to be run.
2. Develop various retrofit programs for several classes of older vehicles in order to minimize certain types of emissions.
3. Designate and enforce preferential bus and car pool lanes.
4. Develop a program to monitor actual emissions as affected by the foregoing programs.
5. Develop certain other programs which varied from state to state.

See 38 Fed. Reg. 30,626-27 (1973).

395. See 40 C.F.R. § 52.23 (1979) for the implementing procedures.

396. 42 U.S.C. § 1857c-8(a)(2) (1976) (current version at 42 U.S.C. § 7413(a)(2) (Supp. III 1979)).

397. *Id.* § 1857c-8(a)(1) (current version at 42 U.S.C. § 7413(a)(1) (Supp. III 1979)).

398. EPA v. Brown, 431 U.S. 99, 103 (1977).

399. *Id.* at 104.

400. *Compare* District of Columbia v. Train, 521 F.2d 971, 986-87 (D.C. Cir. 1975), *cert. dis-*

the conflict is found in a footnote to *District of Columbia v. Train*,[401] where the court observed:

> We do not agree with the statement in *Pennsylvania v. EPA*. . . , that direct federal enforcement of the retrofit and inspection programs would not "represent less of an intrusion upon state sovereignty." . . . The principle at work here is not that the states have an interest in keeping the federal government from regulating vehicles owned by their citizens but rather that they are to be protected from federal compulsion to exercise state governmental functions in an area where they choose to remain inactive. Since the federal government acts under its commerce power when it enforces its own regulations against vehicle owners, direct federal regulation by definition involves no intrusion on state sovereignty whatsoever.[402]

Another reason for finding that the regulations exceeded the delegated powers of the federal government was expressed in *Brown v. EPA*.[403] In *Brown*, the court stated that to uphold the regulations would require the expenditure of state funds to implement a federal regulation and would eviscerate the distinction between the commerce power and the spending power.[404] This latter theme was picked up by the court in *Friends of the Earth v. Carey*,[405] where the court upheld federally mandated state enforcement of TCP's that initially had been adopted by the states as part of their state implementation plans. Where the state had "voluntarily" adopted the TCP, enforcement could be mandated.[406] In effect, "voluntary adoption" was the functional equivalent of "purchased compliance."[407]

Enactment of legislation modeled on PEPA would present many of the constitutional difficulties avoided by the Supreme Court in the TCP litigation. Moreover, the ambiguities that ultimately mooted the TCP cases were not present in PEPA.[408] PEPA specifically provided for federal involvement in state and local decisionmaking processes.[409]

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missed sub nom. Costle v. District of Columbia, 431 U.S. 99 (1977) *with* Pennsylvania v. EPA, 500 F.2d 246, 263 (3d Cir. 1974).

401. 521 F.2d 971 (D.C. Cir. 1975), *cert. dismissed sub nom.* Costle v. District of Columbia, 431 U.S. 99 (1977).

402. 521 F.2d at 994 n.27 (citations omitted).

403. 521 F.2d 827, 839-40 (9th Cir. 1975), *cert. dismissed*, 431 U.S. 99 (1977).

404. 521 F.2d at 839-40.

405. 535 F.2d 165, 179-80 (2d Cir. 1976), *cert. denied*, 434 U.S. 902 (1977).

406. 535 F.2d at 168-70.

407. This again emphasizes the benefits that arise when federal coercion is muted by cloaking the program under the spending power. See text & notes 212-18 *supra*.

408. Indeed, the question of mootness was never really an issue save for the fact that the Supreme Court did not wish to have to address a most sensitive issue before it had to. The government's second thoughts, coupled with the Solicitor General's concession, provided the Court with an easy means for judgment deferral. 431 U.S. at 101. This tactic was not necessarily followed by the lower courts on remand. *Compare* Brown v. EPA, 11 ENVIR. REP. DEC. 1161, 1163 (BNA 1977) (EPA not authorized to require state enforcement of EPA-drafted TCP's) *with* District of Columbia v. Costle, 10 ENVIR. REP. DEC. 2022, 2024 (BNA 1977) (issues moot).

409. *See* text & notes 43-58 *supra*.

Federal enforcement actions to compel compliance with the project decision schedules were specifically authorized as well as federal usurpation of the decisionmaking process.[410]

A statutory scheme modeled on PEPA would face its greatest test in those areas where it provided for federal enforcement actions to compel compliance with project decision schedules and where procedures were imposed upon the state and local decisionmaking process. It is in these areas that the concerns voiced by the courts in *Train* and *Brown*, regarding direct federal intrusion into the state decisionmaking process, would be most pertinent. It is the fact that the federal government is telling the state how to proceed that pushes the constitutional question to the forefront.[411] Direct federal interference with the how of state and local decisionmaking necessarily impairs the essence of the states as functioning entities. If the federal government is able not only to set goals, but also to compel the states to implement those goals, and to tell them how to do so, the states become functionally equivalent to federal administrative bodies. While states have been shorn of their ability to interfere with federally implemented programs,[412] they have not, as yet, been shorn of their freedom of nonparticipation. Should they, however, lose this prerogative of sovereignty, they would retain few, if any, incidents of sovereignty or independence. The recognition of the power of the federal government to compel state participation in federal regulatory schemes would reduce state governments to mere ministerial functionaries.

These arguments, however, would not affect the EMB's power to usurp state decisionmaking. PEPA, for all intents and purposes, contained an effective preemption of state law and incorporation of state law as the federal rule of decision.[413] Such practices have consistently been upheld by the Court[414] and would likely be followed here to save a statutory scheme modeled on PEPA from constitutional infirmity. Again, the situation appears anomalous if one evaluates the problem from the perspective of the state's substantive decisionmaking prerogatives. That perspective, however, is misleading, for the true evaluation of the impact upon state power turns upon whether the state retains the freedom to avoid involvement. Seen in this light, it is really the superficially less intrusive federal requirements that present the real danger to the sovereign independence of the states.

410. *See* text & notes 93-124 *supra*.
411. *See* discussion at text & notes 401-07 *supra*.
412. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819) (declaring that states cannot exercise their taxing power where to do so would create the potential to destroy a federal instrumentality).
413. *See* text & notes 106-24 *supra*.
414. *See* HART & WECHSLER, *supra* note 113, at 491-94 (collecting cases).

Notwithstanding the arguments offered against the constitutionality of legislation modeled on PEPA, insofar as it would intrude into the mode and manner of state and local decisionmaking, there is language in *Usery* and in PEPA that would provide an escape mechanism.[415] The *Usery* Court implicitly recognized that emergency situations might justify a less stringent review of governmental activity and might allow the temporary toleration of conduct that, were it exercised in a non-emergency situation, would otherwise be proscribed.[416] What constitutes an emergency, for purposes of this issue has, however, not been defined by the Court. Generally, the short duration of the challenged legislation has itself tended to dissuade intensive constitutional scrutiny.[417]

PEPA possessed a sunset provision that would have terminated authority under the Act eight years after enactment.[418] Moreover, both the bill and its legislative history were replete with statements looking to the emergency nature of the energy problem as defined by America's dependence upon foreign sources of energy, particularly foreign

415. PEPA, *supra* note 14, § 101(b) (declaring the Act to be necessary to protect national security).

416. National League of Cities v. Usery, 426 U.S. 833, 853 (1976). *See* Home Building & Loan Ass'n. v. Blaisdell, 290 U.S. 398, 425-26 (1934); L. TRIBE, *supra* note 169, § 5-16, at 277. Professor Tribe commented:

> In retrospect, the Supreme Court's tolerance of the war-time excesses of Congress seems wrong, but in retrospect it is also clear that the Court saw no reasonable alternative to deference. This is the paradox of the war powers: because they are exercised in emergency, they are the constitutional grants of authority that the Supreme Court is least likely to limit—out of deference to superior legislative factfinding, out of prudent awareness of the limits of judicial power, and out of simple unfamiliarity with the issues raised.

Id. The Court in *Usery* was very careful to distinguish its previous decision in Fry v. United States, 421 U.S. 542 (1975). The Court stated:

> We think our holding today quite consistent with Fry. The enactment at issue there was occasioned by an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall. The means selected were carefully drafted so as not to interefere with the States' freedom beyond a very limited, specific period of time. The effect of the across-the-board freeze authorized by that Act, moreover, displaced no state choices as to how governmental operations should be structured, nor did it force the States to remake such choices themselves. Instead, it merely required that the wage scales and employment relationships which the States themselves had chosen be maintained during the period of the emergency. Finally, the Economic Stabilization Act operated to reduce the pressures upon state budgets rather than increase them. These factors distinguish the statute in Fry from the provisions at issue here. The limits imposed upon the commerce power when Congress seeks to apply it to the States are not so inflexible as to preclude temporary enactments tailored to combat a national emergency.

426 U.S. at 853.

417. *See* note 423 *infra.*

418. *See* PEPA, *supra* note 14, § 205. PEPA EXPLANATORY STATEMENT, *supra* note 20, at 52, stated:

> Under Section 205, the Board's authority to designate Priority Energy Projects will expire eight years after the date of enactment. After that date, the Board will retain its authority to expedite agency decisions and actions with respect to Priority Energy Projects which are designated prior to this date until initial commercial operation of the Project.

sources of petroleum products.[419]

The basic question federal courts may ultimately be forced to face is whether "fast track" legislation can truly be considered an emergency measure designed to provide a remedy for an emergency situation. The Court in *Fry v. United States*[420] was exceedingly tolerant in treating the federal government's concern over a six percent inflation rate as justifying emergency legislation.[421] Of course, that legislation, the Economic Stabilization Act, as implemented by Presidential decree, initially provided for only a ninety-day wage and price freeze.[422] PEPA, on the other hand, was to last forty times longer.[423] Although it would be a mistake to assume that a specific time period separates the emergency situation from the nonemergency problem, the extreme difference in duration periods for statutory operation would make the *Fry* rationale difficult to apply. Moreover, PEPA was not a measure designed to maintain the status quo or reduce the disclocations to be caused by future peril—a quality that most emergency legislation possesses.[424] PEPA was designed to achieve substantive goals in its own right. If "fast track" legislation based on PEPA were enacted and successfully implemented, this country would witness the construction of new energy facilities at a vastly accelerated pace. After expiration of

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419. *See* PEPA, *supra* note 14, § 101. In S. REP. No. 96-331, 96th Cong., 1st Sess. 18 (1979), it is disclosed that:

> Regulatory delays which slow down the development of energy projects which could reduce the nation's dependence upon imported oil do more than merely increase the cost of energy to the public. They also undermine the nation's economic and military security by increasing our vulnerability to oil embargoes and cartel-inspired price increases.

420. 421 U.S. 542 (1975).

421. *See* Fortune, *Book Review*, 12 HARV. J. LEGIS. 281, 285-88 (1975) for a discussion of the need and effectiveness of the economic stabilization program. *See also* R. KAGAN, REGULATORY JUSTICE (1978).

422. *See* Exec. Order No. 11,615, Aug. 15, 1971, 36 Fed. Reg. 15,727 (1971).

423. *See* text & note 418 *supra*. The duration of a "perceived" emergency situation is important in determining the constitutionality of legislation designed to meet it. Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F. Supp. 737, 754 (D.D.C. 1971). In *Connally*, the court found support for its decision that the Economic Stabilization Act of 1970 was a constitutional delegation of power from Congress to the President in the durational shortness of the delegation:

> It is also material, though not dispositive, to note the limited time frame established by Congress for the stabilization authority delegated to the President. The Act as enacted on August 15, 1970 expired February 28, 1971, establishing a lifespan of about six months. Two subsequent extensions provided even shorter durations. When the current expiration date of April 30, 1972, was set on May 18, 1971, Congress rejected the administration request for a two-year extension. Thus, in the words of the Government's memorandum, Congress established a "close control." It conjoined flexibility in the President to act promptly with an obligation in Congress to undertake an affirmative review without prolonged delay, without the option of acquiescence by inaction.

Id. at 754 (footnotes omitted). Close congressional control over the EMB is limited to EMB recommendations to waive federal substantive law. *See* text & notes 62-80 *supra*. Congress would not exercise any "close control" over the relation between the EMB and the states.

424. *E.g.*, Economic Stabilization Act, 12 U.S.C. § 1904 (1976 & Supp. III 1979); Emergency Petroleum Allocation Act, 15 U.S.C. §§ 751-760h (1976), *as amended by* Energy Conservation Act, 42 U.S.C. §§ 6201-6422 (1976 & Supp. III 1979).

the "fast track" authority, those facilities would not disappear; they would still be here—and would no doubt require new emergency legislation of one type or another.[425]

Few events short of war, or the effects of war, constitute true national emergencies such as to justify extraordinary federal actions that interfere with the traditional norm of federalism. Although courts, as a general rule, ought not to second guess the federal government as to whether an emergency situation exists, neither should they deviate from their historic role as the guardians of the Constitution merely because of a nominal congressional determination that an emergency exists.

Outside of clearly accepted definitions of national emergency, such as armed insurrection or invasion, the courts ought to be wary of peacetime invocation of emergency situations as justifications for congressional activity.[426] At a minimum, invocation of emergency powers in atypical situations should not provide independent justification for congressional action unless the existence of an emergency is clearly evidenced and the measures selected to deal with the emergency are reasonably related and limited to the alleviation of the emergency.[427] Indeed, this very notion is implicit in the Court's statement in *Wilson v. New*[428] that "although an emergency may not call into life a power which has never lived, nevertheless an emergency may afford a reason for the exercise of a living power already enjoyed."[429] The above statement clearly intends no expansion of congressional power simply because an emergency situation exists; Congress' power remains unchanged in that it can be exercised whether or not an emergency exists. Yet, Congress may not wish to exercise its power unless certain events or conditions arise. Consequently, Congress may provide that a particular piece of legislation remain dormant unless and until certain events such as emergencies occur. In this sense, the existence of an emergency neither adds to nor detracts from Congress' power; the concept of "emergency" simply serves as a means by which the timeliness of the exercise of power can be ascertained. The "emergency" is

425. One can readily anticipate legislation to protect priority energy projects from the threat of competition should the real price of energy decrease due either to increased supply or reduced demand. *See* note 215 *supra*. Either situation could pose problems for capital intensive industries consructed in a period of high inflation and high construction costs. The Chrysler Corporation legislation, Act of Jan. 2, 1980, Pub. L. No. 96-183, 93 Stat. 1319 (1980), guaranteeing Chrysler Corporation $1.5 billion in federal loan guarantees while the corporation arranges for private commitments to finance its operations, may pose a disturbing legacy to those who will have to resolve the problems caused by a blind willingness to prefer energy production over energy management.

426. *See* note 416 *supra*.

427. *See* note 343 *supra*.

428. 243 U.S. 332 (1917).

429. *Id.* at 348.

merely an event or condition to which a congressional power is applied. The recognition of the "emergency" constitutes a trip wire that brings the delegated power into play.

As applied to "fast track" legislation, the notion of an emergency situation should not influence the courts in assessing whether Congress has exercised its delegated powers within their defined limits. Notions of an emergency may create congressional desire to enact "fast track" legislation; but whether that legislation is a valid exercise of that power is a totally different issue.

This point has been implicitly accepted in many of the Supreme Court decisions that are relied upon when the question of the relation between emergency situations and delegated powers arises. For example, in *Woods v. Miller Co.*,[430] which upheld post-war rent control, the Court noted the substantial causal nexus between the legislative measures and the recent war effort: "Congress was invoking its war power to cope with a current condition of which the war was a direct and immediate cause."[431] If Congress has the power to wage war, it must surely have the power to remedy the immediate consequences of that effort.[432] Hence, *Woods* represents the application of a delegated power to a problem created by the lawful exercise of that power. Legislation, which arose as a result of the 1973 oil embargo, providing for federal regulation of the allocation and pricing of petroleum products[433] is a current application of the clear federal authority to regulate those aspects of the petroleum industry that impact upon interstate commerce.[434] Neither instance supports any stretching of the commerce power because of the existence of an emergency situation. Rather, both cases represent a straightforward exercise of delegated powers, within recognized and accepted limits, to situations suggesting a federal remedy.

PART IV. ENERGY MOBILIZATION—SOME PRACTICAL CONCERNS

Although PEPA raised significant constitutional difficulties, they would, in the end, be avoidable should Congress so wish. The difficulties with PEPA lay in the attempt to dictate to the states and their legal subdivisions the means by which those entities should discharge their

430. 333 U.S. 138 (1948).
431. *Id.* at 144.
432. Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 507 (1871).
433. Emergency Petroleum Allocation Act, 15 U.S.C. §§ 751-760h (1976), *as amended by* Energy Conservation Act, 42 U.S.C. § 6201-6422 (1976 & Supp. III 1979). *See generally* Note, *National Energy Goals and FEA's Mandatory Crude Oil Allocation Program*, 61 VA. L. REV. 903 (1975).
434. *See* text & notes 182-94 *supra.*

prescribed functions.[435] As discussed above, however, this problem could be avoided if Congress preempted the entire field of energy project licensing and excluded state involvement altogether.[436] That proponents of PEPA chose not to seek preemption reflects either the absence within Congress of the political consensus necessary for achieving federal hegemony insofar as energy project permitting and licensing is concerned,[437] or the belief that effective decisionmaking at the nonfederal level is a social benefit.[438]

PEPA reflected congressional attempts to keep to the middle ground between total preemption and the status quo. PEPA evidenced congressional willingness to retain effective nonfederal decisionmaking[439] and, at the same time, to bring that decisionmaking under federal control by compelling its exercise within predetermined time constraints and imposed conditions.[440] In effect, PEPA attempted to coerce cooperation from nonfederal decisionmakers.

It is unlikely that such an attempt at coerced cooperation would ultimately prove successful. First, it is doubtful that the threat of total federal preemption influences nonfederal decisionmakers to adopt approaches that are consistent with specified federal goals.[441] Second, since PEPA preserved the right of nonfederal decisionmakers to reject a project on the merits,[442] adoption of legislation modeled on PEPA might result in increased delays relative to energy project permitting and licensing. A decisionmaker, faced with doubts about the value or net benefits of a proposed energy project and a fast approaching decision deadline, might simply reject the project rather than allow the EMB to usurp decisionmaking authority. Although the decision to reject a project would be binding upon the EMB,[443] it would be reviewable by the state judicial system and might ultimately be reversed.

435. While PEPA did not allow the EMB to directly prescribe procedures for nonfederal agencies, it did allow for significant indirect constraints upon the manner and mode of nonfederal decisionmaking. PEPA, *supra* note 14, § 313. These indirect constraints were to be created by project decision schedules imposed by the EMB upon nonfederal agencies, *id.* § 305, and by the intrusive presence of the EMB in nonfederal decisionmaking, *id.* § 315. See text & notes 43-124 *supra.*

436. See text & notes 195-211 *supra.*

437. *See* text & note 10 *supra.*

438. The values of decentralized decisionmaking are described in *Stewart, supra* note 144, at 1210-22. See note 204 *supra.*

439. *See* PEPA, *supra* note 14, §§ 307(b), 315(a), 316(j)(2).

440. See text & notes 43-124 *supra.*

441. There are no empirical studies which support or disprove this contention. Furthermore, it is doubtful whether a suitable technique exists for ascertaining whether and to what extent nonfederal decisionmakers respond to threats to their continued effectiveness posed by the prospect of potential federal preemption. Yet, such potential threats seem too distant, too removed, and too buried by the day-to-day press of agency business to have a meaningful impact.

442. *See* text & note 439 *supra. See also* 125 CONG. REC. S13,901 (daily ed. Oct. 2, 1979) (remarks of Sen. Domenici, minority floor manager for PEPA).

443. *See* PEPA, *supra* note 14, § 315(a).

Nevertheless, the process would involve significant delay. That delay would result in large part from the threat to nonfederal decisionmakers posed by a PEPA-based scheme.

Of course, all this might be avoided by discussions between the EMB and the involved nonfederal decisionmakers looking to an extension of time within which to render a decision on the project.[444] The ability of the EMB and involved agencies to successfully negotiate their differences over deadline constraints would determine the ultimate workability of a PEPA-based scheme. It can be envisioned that these decisions, far removed from the initial EMB decision to adopt a project decision schedule,[445] would involve detailed attention to the technology involved in the project, the concerns of citizens that siting the project in a particular area might have adverse economic, social, environmental, and aesthetic results, the value of the project to the meeting of national goals, the appropriate size of the project given current resources and technology, and the demands the project might place upon the related fields of resource development and resource waste disposal.[446] It can also be envisioned that the tenor of negotiations would vary depending upon the type of project involved; an oil shale demonstration project would raise concerns different from a coal fueled, mine mouth, steam fired, electrical generating facility.

These considerations raise several questions concerning the value of a PEPA-based scheme. For instance, is it valuable to enact legislation that emphasizes coerced involuntary cooperation where the ultimate success of the legislation requires voluntary cooperation between the EMB and involved agencies? Second, is it wise to prescribe generic legislation that covers all non-nuclear types of energy projects,[447] where differences between energy projects are more numerous than their similarities and call for varied approaches rather than a unified, single form of project expediting?

These questions point out the most significant flaw of PEPA: its emphasis is all wrong. Expedition of energy projects through the maze of agency regulation created at all levels of government cannot be achieved by legal *dixit*. Cooperation is needed; yet, cooperation by its very nature cannot be compelled. Unfortunately, this is the approach PEPA took. Although the EMB was directed to take into consideration

444. *See id.* § 305(h).

445. *See id.* § 302. See text & notes 28-42 *supra*.

446. These considerations are essentially the same as PEPA prescribed for determination of the initial project decision schedule. PEPA, *supra* note 14, § 302. The difference is that, at this later point in time, one can expect that negotiation will be more personal, more detailed, and more project specific than the somewhat routinized procedures that PEPA portended for the initial project decision schedule.

447. *E.g.*, PEPA, *supra* note 14, § 102(4).

the proposed decision timetables, the financial resources, and the other capabilities of nonfederal agencies in promulgating the decision schedules,[448] it was neither controlled by nor accountable to the states.[449] Moreover, the process leading to promulgation of the decision schedule did not differentiate between the types of projects involved. Under PEPA, the "fast track" process could be initiated as easily for an oil pipeline as for a coal slurry pipeline, or as easily for a small hydroelectric facility as for the conversion of an electrical generating facility from natural gas to coal. This approach is totally inconsistent with the needs of a decisionmaking system that is asked to approve or reject projects that have a significant effect upon the economy and environment of discrete geographic areas.[450]

Significant improvements in PEPA could be achieved with no real loss in PEPA's emphasis. First, rather than providing for generic "fast tracking," the "fast track" process should be more narrowly specified by incorporating expediting provisions into the substantive legislation affecting each industry. For example, Congress recently passed major legislation to encourage creation of a synthetic fuels industry in the United States.[451] Two years ago, Congress enacted legislation to encourage utilities to convert their generating facilities to coal.[452] Each of these enactments represents a situation where project expediting, if undertaken, would be accomplished in the context of expected sensitivity to the specific problems raised by the project.[453] There are no apparent disadvantages to the establishment of a scaled down version of an en-

448. *Id.* § 305(g).

449. *Id.* § 303(a) provided only for nonvoting participation on the EMB by representatives of the state in which any portion of the priority energy project was to be located.

450. See text & notes 363-67 *supra*. *Cf.* Proposed 1979 Biennial Report: California Energy Commission (Committee Draft, Dec. 1979).

> [D]isplacing oil, particularly in the transportation sector (which now consumes the bulk of our liquid, petroleum fuels), will require a gradual shift to synthetic fuels, derived primarily from coal. To allow this to occur, massive capital formation will be required to augment and gradually displace the existing oil refining capacity with an equally large synthetic fuel conversion industry. The economics of transportation and conversion will simply favor locating synthetic conversion facilities near the basic feedstock (e.g., siting methanol plants near coal fields in Montana or Wyoming), and transporting the synthetic fuels via pipeline or rail. In other words, unless California refiners make major capital investments to retrofit existing refineries to process the State's heavy oil resources, the focus of economic growth could shift from California's refining industry to out-of-state synthetic plants.

Id. at 16.

451. Energy Security Act of 1980, Pub. L. No. 96-294, 94 Stat. 611 (to be codified at 42 U.S.C.A. §§ 8701-8795 (Supp. 1980)). See discussion at note 215 *supra*.

452. Power Plant and Industrial Fuel Use Act, 42 U.S.C. §§ 8301-8483 (Supp. III 1979) (encouraging industry to switch to coal use in times of natural gas or oil shortage).

453. For example, utility coal conversions may raise problems relating to the purchase of "offsets" and "tradeoffs," because the utility powerplants subject to conversion are located in nonattainment areas, *see* notes 348 & 359 *supra*, that are not associated with other energy projects. *See generally* 10 CFR § 502.5(a) (1980) (describing the EPA variance policy with respect to utility power plant coal conversions).

ergy mobilization board for each energy industry. It is mistaken to expect that a single board, no matter how competently staffed, would have the expertise or time to review thoroughly all expediting proposals from all non-nuclear fields of the energy industry. On the other hand, where Congress has provided for specific project expediting, the approach has been successful.[454]

Second, expediting proposals that seek to compel cooperation by rule of law ignore the dynamics of human interaction. It is true that cooperation can be induced by threats, but such cooperation is only grudgingly given and is often not given at all.[455] Successful cooperation demands that each party have an incentive to reach a mutually advantageous goal. Consequently, in the absence of total federal preemption, energy projects will not be built unless the siting of the project in a state is advantageous to the state. Thus, the goal of project expediting legislation should be to facilitate project decisionmaking where both federal and nonfederal interests agree, at least initially, that the project is advantageous.

Where federal and nonfederal interests have reached some initial consensus that the energy project is advantageous, interagency cooperation can be facilitated by prescribing effective management techniques for the coordination of federal and nonfederal decisionmaking associated with major energy and natural resource development projects.[456] Interagency cooperation can be achieved by providing a mechanism for allocating decisionmaking responsibilities among the involved agen-

454. Under title V of the Public Utility Regulatory Policies Act, 16 U.S.C. §§ 2601-2645 (Supp. III 1979), an expediting program for west-to-east crude oil pipelines was enacted. Title V provided for time schedules for actions by the project proponents and federal decisionmakers, expedition of actions by federal decisionmakers on federal permits and authorizations, congressional approval of waiver of federal laws identified by the President, and time limits for seeking judicial review of acts by federal officials as well as priority in the federal courts for hearing such actions. With respect to state involvement, title V provided opportunities for state and local officials to comment on certain proposed federal actions and for the use of state information and decisions regarding environmental impacts. In a report prepared by the Comptroller General, it was stated that the legislation had significantly assisted in coordinating federal decisionmaking. COMPTROLLER'S REPORT, *supra* note 9, at 10-12. Difficulties in approving projects were still encouraged, however, due to the absence of provisions to coordinate federal-state decisionmaking. *Id.* at 21-36.

455. Such conduct is properly characterized as compliance rather than cooperation, for example, when a robber instructs an individual at the point of a gun to remove money from a cash register. Cooperation can, of course, be encouraged. *See* Energy Security Act of 1980, Pub. L. No. 96-294, § 127(f), 94 Stat. 650 (to be codified at 42 U.S.C.A. § 8727(f)(1) (Supp. 1980)) (requiring the Synthetic Fuels Corporation to give priority consideration for financial assistance to any project with would be located in a state which indicates an intention to expedite all regulatory, licensing, and related government agency activities related to the project).

456. An abiding inclination by the American public to depend upon judicial resolution of social conflict has tended to cause dispute resolution to be structured within a legal framework. While this reliance upon legal standards has provided us with judicial safeguards probably unparalleled in the world today, legal standards do not necessarily translate into efficient or effective modes of decisionmaking. *See* Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 811 (1974).

cies.[457] Federal-state cooperation can be achieved through cooperative agreements that provide for a sharing of authority and responsibility between federal and nonfederal interests.[458] Although neither proposal is a panacea, each addresses the fundamental need of a federal system of government to seek ways of reducing potential points of system conflict by inducing competing entities to resolve disputes through compromise and mutual accommodation.

It is a truism worth stating that regulation is neither good nor bad; within defined limits it serves numerous socially useful purposes.[459] The task, as always, is to regulate with precision and with an awareness of the consequences the type of regulation prescribed will have on those to be regulated and on society as a whole. Regulators do not appear to be insensitive to these demands. Already, regulatory agencies have made significant strides toward improving the regulatory processes.[460] It should not be forgotten that these advances have oc-

457. *See* Environmental Protection Agency's Consolidated Permit Program, 45 Fed. Reg. 33,290 (1980) (to be codified at 40 CFR parts 122-25). EPA's Consolidated Permit Program Regulations establish permit program requirements governing the Hazardous Waste Management Program under the Resource Conservation and Recovery Act; the Underground Injection Control Permit Program under the Safe Drinking Water Act; the National Pollutant Discharge Elimination System Permit Program under the Clean Water Act, and the Prevention of Significant Deterioration Program under the Clean Air Act. The rule is divided into the following three major parts: part 122, establishing program definitions and basic program requirements; part 123, establishing requirements for state programs; and part 124, setting forth the procedures to be followed in making permit decisions under the various programs.

The rule contains a single form for applying for permits under the consolidated permit program. This consolidated form is expected to consist of a single part to collect general information from all applicants, followed by program-specific parts to collect information needed to issue permits under each program.

The State of Colorado is in the process of developing a joint review process which would coordinate agency decisionmaking at the federal, state, and local levels along effective system management lines. The Colorado Joint Review Process Manual was released in draft form in the Spring of 1980. A final version is expected in the Fall of 1980.

458. Cooperative agreements between federal and nonfederal agencies are becoming increasingly popular as means of achieving a meaningful cooperative attitude between cosovereigns. An interesting example of state-federal cooperation is the cooperative agreement between the state of Wyoming and the Department of the Interior regarding departmental adoption and implementation of coal mining operation regulations under the Coal Leasing Amendments Act, 30 U.S.C. §§ 181-209 (1976 & Supp. III 1979), and Wyoming's desire to reclaim land within its boundaries. *See* 42 Fed. Reg. 3642 (1977). Cooperative agreements have also been entered into by the Department of the Interior and the states of New Mexico, 42 Fed. Reg. 18,065 (1977); North Dakota, 42 Fed. Reg. 18,071 (1977); Utah, 42 Fed. Reg. 18,068 (1977); and Montana, 42 Fed. Reg. 18,862 (1977). The cooperative agreements set forth above are in the process of being revised pursuant to the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1273(c) (Supp. III 1979). Final rules, which became effective June 11, 1979 regarding such cooperative agreements (30 CFR § 211.77 (1979)), have been jointly approved by the Department of the Interior (Office of Surface Mining Reclamation and Enforcement and the Geological Survey) and the State of Montana. 44 Fed. Reg. 33,655 (1979). Proposed rules in line with the above agreements can be found in 44 Fed. Reg. 54,493 (1979) with respect to a proposed cooperative agreement between the Interior Department and the state of North Dakota. PEPA did encourage the use of cooperative agreements. *See* text & note 23 *supra*.

459. *See generally* Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22 (1971).

460. *See* text & notes 457-58 *supra*.

curred independently of "fast track" legislation and could be impaired by the approach suggested by PEPA.

The 1970's certainly witnessed a tremendous explosion of governmental concern for the environment and public health and welfare.[461] This concern had an immediate impact upon energy projects because of the relationship between energy projects, the environment, and public health and welfare. It seemed a first order of business to write the statutory protections; implementation, enforcement, and assessment were left for later. The 1980's should witness significant governmental attention to these initially passed-over concerns of implementation, enforcement, and assessment. The process of assessment is already proceeding, led by the very agencies often most maligned for interfering with energy and resource development. There is little to be gained by blunting this trend toward self-assessment, regulatory improvement of procedures, and interagency coordination. It is unlikely that Congress, over the short term, can do much to aid the process except on a particularlized, individualized basis where total federal preemption is desired to ensure construction of the project.[462] The techniques that need to be developed are those of effective management. This is a field where Congress has little expertise and where little advantage is to be gained by prescribing management techniques by statute.

CONCLUSION

When the Ninety-Seventh Congress convenes in January, 1981, and addresses the topic of energy project expediting, it is hoped that Congress will turn away from a statutory scheme that seeks to compel cooperation and turn toward one that seeks to induce cooperation. This goal may be achieved by Congress in several ways. First, Congress should turn away from predicating project-expediting legislation on the commerce and war powers, in favor of use of the spending power or the property power. Use of the spending power would allow each state to make the initial decision whether it felt a project was advantageous. If the state decided it was, it could then buy into the program. Besides avoiding *Usery* problems, tying project expedition to the

461. *See, e.g.*, Federal Environmental Pesticide Control Act, 7 U.S.C. §§ 135-136y (1976 & Supp. III 1979); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979); Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. §§ 1401-1444 (1976 & Supp. III 1979); Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-10 (1976 & Supp. III 1979); Clean Air Act, 42 U.S.C. §§ 7401-7626 (Supp. III 1979).

462. For example, Congress cleared the way for the Alaska Oil Pipeline by enacting the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1651 (Supp. III 1979) (directing the Secretary of the Interior and other federal officers to take all necessary action to issue, administer, and enforce rights of ways, permits, and other authorizations needed to construct the pipeline, and exempting the pipeline from strict compliance with the National Environmental Policy Act).

spending power is likely to result in more precise and more sensitive decisionmaking relative to the expediting process. Use of the property power would tend to internalize much of the decisionmaking relative to energy project permitting and licensing. Since, however, significant political controversy surrounds the status of federal lands where energy projects are likely to be sited, the preferable course would be to rely upon methods that depend on express consent, such as the spending power.

Second, Congress should avoid generic legislation that seeks to provide across-the-board expediting for all non-nuclear energy projects. Rather, Congress should tie expediting legislation to specific substantive legislation designed to deal with the type of energy facility for which project expediting is desired.

Third, Congress should avoid attempting to prescribe in legal formulas procedures designed to coordinate and facilitate agency decisionmaking. Legal rules and principles have certain defined limits. It is better left to those charged with administering regulatory programs the responsibility to design procedures that are efficient, workable, and utilitarian when implemented.

Fourth, Congress should press the use of devices that facilitate voluntary cooperation. Cooperative agreements, compacts, and interagency understanding should be encouraged, for example, by providing financial assistance to agencies that use coordinated procedures.

Finally, Congress should resist the temptation to do nothing. Although Congress may not, in absence of total preemption, be able to take much affirmative action to expedite energy project permitting and licensing, failure to act could have unfortunate repercussions if such inaction is viewed as congressional approval of the status quo. The business of government is often appearance, not performance. It is important that Congress signify that it is concerned with the problem of regulatory overkill. Adopting legislation along the lines suggested in this Article, that is, legislation that seeks to encourage intergovernmental cooperation, would demonstrate congressional concern and would provide a real opportunity for achievement of the goals of expediting legislation without significant cost to legislation designed to protect the environment and the public health and welfare and without significant interference with our federal system of government.