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INTRODUCTION -- SOME LEGAL RAMIFICATIONS OF AIR POLLUTION CONTROL AND A REVIEW OF CURRENT CONTROL OF AUTOMOTIVE EMISSIONS

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JET AIRCRAFT SHRINKING THE GLOBE, AUTOMOBILES SPANNING THE CONTINENT, MOLTEN STEEL BEING MOULDED INTO FRAMEWORKS FOR GARGANTUAN BUILDINGS, ELECTRICITY BEING GENERATED THROUGH THE BURNING OF FOSSIL FUELS, RAILROADS AND TRUCKS THUNDERING ACROSS HIGHWAYS TO BRING FOOD TO THE TEEMING CITIES — ALL MAKE FOR THE RHYTHMIC PULSATION OF PROGRESS — silently attended by putrefaction.

> One of the most important problems in medicine today is the low level, but chronic poisoning of our atmosphere by dozens of chemical processes characteristic of an advancing civilization, a poisoning which has its effect only over the course of many years but which nonetheless inexorably cripples and kills.[1]
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> Research indicates that eye irritation and crop damage are related to automobile exhaust. Automobile exhaust is also known to emit substances which have been found in the laboratories to cause cancer. It would be a tragic mistake to be content with the elimination of eye irritation, only to find in a decade, that our populations had been exposed for years to cancer-producing substances in quantities capable of producing disease. Then the time-preventive measures would be too late.[2]

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[1] Farber & Wilson, *Air Contamination: A Respiratory Hazard*, 180 J.A.M.A. 362 (1962).

[2] *Official Annual Report of the Dep't of Public Health of the State of California*, 2 CLEAN AIR Q. No. 1 (Mar. 1968).

The air pollution problem is now, or should be, of concern to the entire country. Most states have air pollution control laws, and in 1967 Congress adopted the Air Quality Act[3] (the latest in a series of federal enactments in the area).

HISTORICAL DEVELOPMENT OF AIR POLLUTION CONTROL LAWS

> Very early in our history special statutes were enacted to give more adequate protection from air contaminants. As early as 1306 the use of "sea-coal" (as distinguished from charcoal) was forbidden on penalty of death. Queen Elizabeth is said to have forbade the burning of coal in London during sessions of Parliament. In 1661 John Evelyn wrote a book on air pollution; his plan was to move all industry to the leeward side of the City of London and plant sweet smelling and aromatic flowers and trees in the city. Blackstone tells of a lead smelter, the fumes from which were a nuisance killing the neighboring farmers' corn.[4]

At common law, smoke was not a nuisance per se. Therefore, in order to demonstrate that the smoke did in fact create a nuisance, it was necessary to establish by competent evidence that the smoke caused injury to persons or property. This would be difficult to prove even today, with all the technological advancements that since have been made, but it was nearly impossible to prove in the 18th, 19th, and early 20th centuries, when physical sciences were still in the embryonic stage of development.

In order to obviate the necessity of proving injury to persons or property, many jurisdictions enacted legislation which provided that the emission of smoke by itself constituted a nuisance.[5] Some jurisdictions held that this was a valid exercise of the state's police power.[6] However, other jurisdictions held that the legislature could not declare to be a nuisance that which in fact was not a nuisance at common law.[7] In the latter jurisdictions, injury was still a necessary element of the offense.

The latest statutes designed to control the emission of contaminants into the atmosphere have ignored the common law doctrine of nuisance entirely. These enactments simply state that it is a public offense to emit smoke or gases of a specific nature into the atmosphere.[8]

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[3] 42 U.S.C.A. §§ 1857-1857(e) (Supp. Feb. 1968).
[4] Kennedy & Porter, *Air Pollution: Its Control and Abatement*, 8 VAND. L. REV. 854 (1955).
[5] *See* New Orleans v. Lambert, 14 La. Ann. 247 (1859); State v. Chicago M. & St. P. Ry., 114 Minn. 122, 130 N.W. 545 (1911).
[6] *See* Harmon v. Chicago, 110 Ill. 400 (1884); New Orleans v. Lambert, 14 La. Ann. 247 (1859).
[7] *E.g.*, State v. Chicago M. & St. P. Ry. Co., 114 Minn. 122, 130 N.W. 545 (1911).
[8] *E.g.*, CAL. HEALTH & SAFETY CODE §§ 24242, 24243, 24253, 24361 (West 1967).

Air Pollution Control Statutes and Due Process

In determining whether air pollution control statutes of any type are violative of the due process clauses of state and federal constitutions, courts will look to the reasonableness of the statute. If the statute does not arbitrarily distinguish between classes of areas or industry, and the means chosen by the legislative body are reasonably calculated to reduce air pollution, it appears that the statute will not violate the requirements of equal protection or due process of law. This apparently is so even if the statute results in great expense to those whose activities are proscribed by the respective statutes.[9] There is dicta to the effect that even if the statutes caused an industry to cease operations entirely, this in itself would not violate due process clauses of the respective constitutions, provided the statute was reasonably calculated to eliminate a particular evil.[10] Whether there is a known method to enable the industry to comply with air pollution control statutes seems immaterial. The remedy in such a case is to appeal not to the judicial, but rather to the legislative branch of the government.

It is not an exaggeration to state that on the basis of a careful examination of the large body of air pollution case law, it can be concluded that the government may exercise the sharp tool of the "police power" to the extent to which it is necessary to abate the public nuisance. In applying its "police power," the government, whether it be federal, state, county, or local air pollution control district, must predicate its action upon the rule of reasonableness.[11]

Definiteness and Certainty of Standards

Any standard established by a statute must be definite, certain and possible of reasonable ascertainment. In attempting to comply with this requirement, many statutes make reference to the "Ringelmann Chart" as a chart of comparative blackness of smoke. This chart has been used by mining engineers for over fifty years and is contained in publications of the United States Bureau of Mines. Its use as a means of defining the standard of compliance to air pollution control statutes has been universally upheld.[12]

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[9] *See* Northwestern Laundry v. Des Moines, 239 U.S. 486 (1916).

[10] *See* Northwestern Laundry v. Des Moines, 239 U.S. 486 (1916); Reinman v. Little Rock, 237 U.S. 171 (1915); Harmon v. Chicago, 110 Ill. 400 (1884).

[11] During the twenty-one year history of the Los Angeles County Air Pollution Control District, which was activated in 1947 under the California Air Pollution Control Act [Cal. Health & Safety Code §§ 24198-24341 (West 1967)], efforts have been made, in the adoption of all rules and regulations, to insure that the technology supporting the rule justified and confirmed its passage.

[12] *See* People v. International Steel Corp., 102 Cal. App. 2d 935, 226 P.2d 587 (1951); Board of Health v. New York Cent. Ry., 10 N.J. 294, 90 A.2d 729 (1952); Board of Health v. New York Cent. Ry., 4 N.J. 293, 72 A.2d 511 (1950); Penn-Dixie Cement Corp. v. City of Kingsport, 189 Tenn. 450, 225 S.W.2d 270 (1949).

PROHIBITING THE BURNING OF AIR POLLUTANT PRODUCING FUELS — DELEGATION OF LEGISLATIVE POWER

There is little doubt as to legal authority to prohibit the burning of air pollutant producing fuels. Statutes of this nature date back to 1306.[13] Without specific reference to particular types of fuel, many statutes have prohibited the discharge of certain degrees of smoke or particular gases. The practical effect of these statutes was to preclude the use of the offending fuel.

The latest prohibitions of the use of certain fuels indicate a growing tendency to replace coal and oil with natural gas. For example, in Los Angeles County, under the now well-known and very controversial Rules 62 and 62.1, adopted by the Board of Supervisors acting as the governing body of the Air Pollution Control District, industry may not use fuel oil having a sulphur content of ½ of one percent by weight, unless natural gas and low-sulphur content fuel oils are not available.[14]

In 1965, the oil interests in the County of Los Angeles challenged the validity of these rules.[15] The Superior Court for Los Angeles County upheld their constitutionality. The court's memorandum decision dealt with both the police power and the delegation of rule-making power to an administrative board.

> The power to control the release of air contaminants clearly encompasses the power to regulate the burning of fuels since no fuel can be burned that does not emit or result in the release in the atmosphere of some kind and quantity of contaminants. The Board has the implied power necessary to the exercise of its express power. (citations omitted).
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> The plaintiffs point out that the Board's authority to adopt rules and regulations is limited by the scope of the Act and it may not, therefore, adopt rules that vary or enlarge the terms of such legislative enactments. (citations omitted). Plaintiffs also point out that Section 11374 of the Government Code, in substance, provides that when a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted by said state agency "is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute."
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> Neither Rule 62 nor 62.1 varies or enlarges the terms of the Act. They are consistent and not in conflict with it. When conditions specified in Section 24262 exist, the Board is empowered to make rules to reduce the amount of air contaminants released within the District. The argument that said rules are beyond

[13] *See* Kennedy & Porter, *supra* note 4.

[14] *See* Rules 62 and 62.1, Rules and Regulations, Air Pollution Control District, County of Los Angeles (adopted March 16, 1961).

[15] G.W.A., Inc. v. Air Pollution Control Dist. of Los Angeles County, Civ. No. 836864 (Super. Ct., County of Los Angeles, Mar. 25, 1966).

the rule-making power delegated to the Board falls before the terms of the Act and the facts of this case.

Constitutionality of the Act

The Air Pollution Control Act is unquestionably a valid exercise of the State's inherent police power. A well recognized function of the police power is to restrain and regulate dangerous practices and to protect the safety, health and general welfare of society. The mere fact that some hardship may thereby be experienced is not controlling, for every exercise of the police power is apt to and often does affect adversely property and interests of somebody. (citations omitted).

The District itself has no police power. It also has no power to declare any act a crime. The State Constitution grants the police power only to cities, counties and townships. (citations omitted). Under the Act, the District is only effectuating and enforcing the police power exercised by the State. The Legislature and not the District has made a violation of the rules of the District a crime.

The Act does not violate Section 1 of Article 3 of the State Constitution (providing for the separation of the powers of government), by delegating legislative power to the District.

The Legislature cannot delegate its power to make a law, but for the proper enforcement of its laws it may make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. (citation omitted). In the case of *Marshall Field & Co. v. Clark*, 143 U.S. 649, 694, the court in referring to whether a legislature could delegate such power stated:

> "To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and, must, therefore be a subject of inquiry and determination outside of the halls of legislation."[16]

The oil interests appealed to the District Court of Appeals,[17] but in January, 1968, they abandoned the appeal.

Control of Automobile Emissions

California Statutory Scheme

In 1967, the California Legislature adopted the Mulford-Carroll Act.[18] The statutory scheme is briefly as follows:

1. The director of public health recommends certain standards of air quality to the Air Resources Board.

2. The Air Resources Board is empowered to:

   a. Divide the state into basins.

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[16] *Id.* Memorandum opinion at 10.
[17] Appeal filed Cal. Dist. Ct. App., March 28, 1966.
[18] Cal. Health & Safety Code §§ 39000-39570 (West Supp. 1967).

b. Adopt standards of air quality which may vary from basin to basin.

c. Adopt standards for the emissions of motor vehicles.

d. Adopt rules and regulations as required to effectuate the purposes of the act.[19]

e. Test and approve motor vehicle pollution control devices.[20]

3. In order to be exempted from the requirement that a certified device be installed on a motor vehicle, there must not only be a finding by the board of supervisors in the county in which the motor vehicle is registered that the installation of such device is not necessary for the preservation of air quality *within that county,* but it would appear that a similar finding with reference to the adjacent counties must be made by the respective boards of supervisors.[21]

FEDERAL LEGISLATION

Preemption. In 1967, Congress enacted the Air Quality Act[22] which specifically sets forth the intention of the Congress to preempt the field of motor vehicle pollution control with respect to new motor vehicles.[23] The State of California, however, will not be preempted from enacting legislation in the area unless, after notice and public hearing, it is shown that California does not, in fact, require more stringent regulations to protect the health and welfare of its citizens.[24]

General statutory scheme. The Department of Health, Education and Welfare was given authority by Congress to adopt standards and promulgate rules and regulations with respect to the installation of devices which would enable automobiles to operate within these standards.[25]

Enforcement procedure. The 1967 Act contemplates enforcement of the automotive emission standards at both the federal and state levels.

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[19] *See* CAL. HEALTH & SAFETY CODE § 39051 (West Supp. 1967).

[20] *See* CAL. HEALTH & SAFETY CODE §§ 39080-39087 (West Supp. 1967). It should be noted that § 39083(d)(2) of the statute refers to § 426.5, CAL. HEALTH & SAFETY CODE. This is an error; the section was repealed. It would appear that it was the intention of the legislature to refer to the standards promulgated by the Air Resources Board.

[21] *See* CAL. HEALTH & SAFETY CODE § 39090(R) (West Supp. 1967).

[22] 42 U.S.C.A. §§ 1857-1857(e) (Supp. Feb. 1968).

[23] Air Quality Act of 1967, § 208, 42 U.S.C.A. § 1857f—6a (Supp. Feb. 1968).

[24] Air Quality Act of 1967, § 208(b), 42 U.S.C.A. § 1857f—6a(b) (Supp. Feb. 1968). Section 208 does not specifically refer to California; however, the House report (H.R. Rep. No. 728, 90th Cong., 1st Sess. 21 (1967)) provides:

> In other words, as passed by the Senate, section 208(b) provides for a waiver of preemption in the case of California, so that California could be permitted to establish (1) more stringent standards applicable to emissions covered by Federal standards, (2) standards applicable to emissions not covered by Federal standards, and (3) enforcement procedures and standards with respect to emissions differing from Federal enforcement procedures and standard [*sic*].

[25] Air Quality Act of 1967, § 202(a), 42 U.S.C.A. § 1857f—1 (Supp. Feb. 1968).

Section 206 provides for testing and certification by the Secretary of Health, Education and Welfare of test vehicles and vehicle engines.[26] A certificate of conformity establishes that the manufacturer's product complies with the standards of the Act. Sections 204 and 205 provide injunctive and criminal sanctions for violations of the motor vehicle emission sections of the Act, to be enforced by the federal government.[27]

The Act also provides for federal assistance to state air pollution control agencies for the development of meaningful uniform motor vehicle emission device inspection and emission testing programs. Grants of up to two-thirds of the cost of the air pollution control aspects of vehicle inspection systems are available.[28]

Regulations of Emissions Emanating From Used Automobiles

Nothing in the Air Quality Act indicates an intention by the federal government to regulate vehicles manufactured prior to model year 1968.

In the case of *Kelly v. Washington*,[29] the Supreme Court stated:

> And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. *There is no constitutional rule which requires Congress to occupy the whole field.*[30] (emphasis added).
> In other words such intent [to occupy the field] is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.[31]

In a number of cases state laws have been upheld, even though Congress had acted extensively in the field.[32] In fields in which the state and federal governments purported to deal with the same subjects for the same purposes, the Supreme Court has relied on a number of tests to determine whether state regulation has been superseded by federal control. In the case of *Pennsylvania v. Nelson*,[33] the Court delineated the following tests:

1. Is the scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for states to supplement it?[34]

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[26] 42 U.S.C.A. § 1857f—5 (Supp Feb. 1968).
[27] 42 U.S.C.A. §§ 1857f—3, 4 (Supp. Feb. 1968).
[28] Air Quality Act of 1967, § 209, 42 U.S.C.A. § 1857f—6b (Supp. Feb. 1968).
[29] 302 U.S. 1 (1937).
[30] *Id.* at 10.
[31] *Id.* at 12.
[32] *See* Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) (air pollution from ships); Kelly v. Washington, 302 U.S. 1 (1937) (safety inspection of tugs); Mintz v. Baldwin, 289 U.S. 346 (1933) (diseased cattle); Atchison, Topeka & Santa Fe Ry. v. Railroad Comm'n, 283 U.S. 380 (1931) (union passenger stations); Savage v. Jones, 225 U.S. 501 (1912) (branding of foods).
[33] 350 U.S. 497 (1956).
[34] *Id.* at 502.

2. Does the federal statute touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject?[35]

3. Would enforcement of the statute present a serious danger of conflict with administration of the federal program?[36]

The answers to all three questions with reference to the control of pollution emanating from *used* motor vehicles must be answered in the negative.[37] The "field" of prescribing the air pollution control devices which must be installed on motor vehicles registered for use in any state (provided the motor vehicles have been manufactured prior to the model year 1968) has been left by the federal government to the several states.

INDIRECT MOTOR VEHICLE POLLUTION CONTROL THROUGH CONTRACT

Despite preemption by the federal government of air pollution emanating from new automobiles, the states perhaps could, by contract, cause the installation of air pollution control devices designed to meet standards more stringent than those prevailing on the federal level.

In *Interstate Consolidated Street Railway Co. v. Massachusetts*,[38] a corporation was incorporated by a statute which provided that the corporation must comply with all existing statutes. In holding that the corporation could not attack the constitutionality of the statute requiring public carriers (of which the corporation was one) to carry school children at a reduced fare, Justice Holmes wrote:

> If the charter, instead of writing out the requirements of Rev. L. 112, § 72, referred specifically to another document expressing them, and purported to incorporate it, of course the charter would have the same effect as if it itself contained the words. If the document was identified, it would not matter what its own nature or effect might be, as the force given to it by reference and incorporation would be derived wholly from the charter. The document, therefore, might as well be an unconstitutional as a constitutional law. (citation omitted). But the contents of a document may be incorporated or adopted by generic as by specific reference, if only the purport of the adopting statute is clear. (citations omitted).[39]

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[35] *Id.* at 504.

[36] *Id.* at 505.

[37] It would appear that if the regulation takes place after production has been completed, for the purposes of imposing higher state standards, the regulation will be upheld. *Cf.* Cloverleaf Co. v. Patterson, 315 U.S. 148 (1941); McDermott v. Wisconsin, 228 U.S. 115 (1909).

[38] 207 U.S. 79 (1907).

[39] *Id.* at 84. The case has been cited and followed on this point. *See* International & Great N. Ry. v. Anderson County, 246 U.S. 424, 433 (1918); Georgia Pub. Serv. Comm'n v. Georgia Power Co., 182 Ga. 706, 186 839, 847 (1936); *In re* Opinion of the Justices, 251 Mass. 569, 147 N.E. 681, 700 (1925); Murphy v. Worcester Consol. St. Ry., 199 Mass. 279, 85 N.E. 507, 509 (1908); Nueces Valley Townsite Co. v. San Antonio, U. & G.R.R., 123 Tex. 167, 67 S.W.2d 215, 219 (1933).

The Ohio Supreme Court has reached this same result.

> The contract itself contained the following provision:
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> "The contractor agrees that he will comply with the provisions of the labor laws of the City of Cleveland and the state of Ohio, particularly as outlined in section 196 of the city charter."
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> * * *
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> [I]n this case, by the terms of the contract itself, the parties thereto specifically bound themselves to observe the regulations covered by the ordinance complained of. Plaintiff in error does not present a situation which avoids the enforcement of the ordinance.[40]

CONCLUSION

The problem of air pollution control is a dynamic one. By the year 2000, the population of this country will be in excess of three-hundred million.[41] If the past is, indeed, prologue, this population explosion will bring with it ever-increasing industrialization and urbanization which, in turn, will be attended by mushrooming problems of air pollution.

We have outlined above some of the major aspects of the legal machinery which may be utilized to meet future problems. We must act now to preserve our most fundamental and precious natural resource — the air we breathe.

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[40] Strange v. Cleveland, 94 Ohio St. 377, 114 N.E. 261, 263 (1916).

[41] U.S. DEP'T OF COMMERCE, CENSUS BUREAU, CURRENT POPULATION REPORTS; POPULATION ESTIMATE — PROJECTION OF POPULATION OF THE UNITED STATES BY AGE AND SEX, 1964 THROUGH 1985 WITH EXTENSION TO THE YEAR 2010. (Ser. P.-25-No. 286, July, 1964).