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## Control of Motor Vehicle Emissions: State or Federal Responsibility?

The National Emission Standards Act<sup>1</sup> directs the Secretary of Health, Education, and Welfare (HEW) to prescribe standards for emissions from new motor vehicles and engines.<sup>2</sup> Section 208 of the Act<sup>3</sup> clearly indicates the intent of Congress that the standards issued by the Secretary were to be the sole and exclusive controls on new automobile emissions. Section 208(a) provides:

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this subchapter. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.<sup>4</sup>

Section 208 is expressly limited to *new* motor vehicles. A new motor vehicle is defined as "a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser."<sup>5</sup> An "ultimate purchaser" is then defined as the "first person who . . . purchases such new motor vehicle . . . for purposes other than resale."<sup>6</sup> Thus, once an automobile is sold to an ultimate purchaser and registered by a state, legally it becomes a used car and is no longer exclusively subject to federal control under Section 208. The Act, therefore, does not purport to establish standards which would interfere with intrastate operations but regulates only interstate activities.

The National Emission Standards Act, like other federal pollution control legislation,<sup>7</sup> is based constitutionally on the powers granted to Congress by

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1. 42 U.S.C. §§ 1857f-1-1857l (Supp. V, 1970) (enacted as Title II of the Air Quality Act of 1967).

2. *Id.* § 1857f-1.

3. *Id.* § 1857f-6(a).

4. *Id.*

5. *Id.* § 1857f-7(3).

6. *Id.* § 1857f-7(5).

7. See Clean Air Act, 42 U.S.C. §§ 1857-81, as amended (Supp. V, 1970); Federal Water Pollution Control Act, 33 U.S.C. §§ 466-94, as amended (Supp. V, 1970).

the commerce clause.<sup>8</sup> Although Congress has often exercised police powers through the commerce clause,<sup>9</sup> the language of Section 208 presents an unusual move by Congress to preempt by legislation state activities in an entire area regardless of whether the federal government has in reality occupied that area. This article, therefore, will discuss the effect Section 208 has on efforts to abate motor vehicular pollution and will examine the alternate avenues remaining which the states can pursue to control automobile emissions.

To place these issues in proper perspective, a threefold analysis based on the development of federal programs in the field of motor vehicle emission control will be employed to determine: (1) whether the states would have the basic authority to control automobile emissions in the absence of any federal action; (2) whether the states could act concurrently with the federal government; and (3) whether through congressional action state programs could and should be completely supplanted.

#### *State and Federal Authority to Act*

Interstate commerce, which is subject to congressional regulation, includes all movement of persons or things across state lines whether for profit or not.<sup>10</sup> The fact, therefore, that automobiles are normally operated in more than one state as well as sold in interstate commerce makes them potential subjects of congressional controls. The emissions from automobiles are likewise subject to the power granted to Congress by the commerce clause since the movement of air "pollutants across state lines constitutes interstate commerce."<sup>11</sup>

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For a general discussion of these particular pollution control acts and their relation to the commerce clause, see Edelman, *Federal Air and Water Control: The Application of the Commerce Power to Abate Interstate and Intrastate Pollution*, 33 GEO. WASH. L. REV. 1067 (1965).

8. U.S. CONST. art. I, § 8, cl. 3.

9. See, e.g., Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-51 (Supp. V, 1970); Boiler Inspection Acts, 45 U.S.C. §§ 22-34 (1964); Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. §§ 1671-96 (Supp. V, 1970); National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381, 1391-1409, 1421-25 (Supp. V, 1970); Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451-68 (Supp. V, 1970).

10. See *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1855). In a later case the Supreme Court stated: "Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities." *County of Mobile v. Kimball*, 102 U.S. 691, 702 (1880). See also *Edwards v. California*, 314 U.S. 160, 172 (1941); *United States v. Hill*, 248 U.S. 420, 423-24 (1919).

11. *United States v. Bishop Processing Co.*, 287 F. Supp. 624, 629 (1968), *aff'd*, 423 F.2d 469 (4th Cir.), *cert. denied*, 398 U.S. 904 (1970). The *Bishop* decision repre-

"The movement of motor vehicles over the highways is attended by constant and serious dangers to the public . . ." <sup>12</sup> One of those "serious dangers is air pollution from motor vehicle emissions which account for over 60 percent of all air pollution in the United States."<sup>13</sup> Although the states may exercise their police powers to protect the health, safety, and comfort of their citizens, "[t]he reasonableness of the State's action is always subject to inquiry in so far as it affects interstate commerce, and . . . is likewise subordinate to the will of Congress."<sup>14</sup> One of the qualifications the Constitution places on the states' right to protect their citizenry is that they cannot control those matters which "admit only of one uniform system, [or] plan of regulation."<sup>15</sup> However, where "local necessities" require varying regulation, the states share the power to regulate with the federal government.<sup>16</sup> Air pollution problems differ markedly from one area to another because of varying meteorological and geographical conditions, sources of pollution emissions, and social and governmental factors. Consequently, such problems require local solutions.<sup>17</sup>

The Supreme Court has held that "in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected"<sup>18</sup> and in certain cases, state actions may legitimately amount to a material interference with interstate commerce.<sup>19</sup> The states have the basic

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sents the first significant federal court interpretation of the Air Quality Act of 1967. Although dealing specifically with air pollution from stationary manufacturing processes, this decision would likewise be so interpreted concerning automobile emissions.

12. *Hendrick v. Maryland*, 235 U.S. 610, 622 (1915). See also *Kane v. New Jersey*, 242 U.S. 160, 167 (1916).

13. U.S. DEP'T OF COMMERCE, *THE AUTOMOBILE & AIR POLLUTION: A PROGRAM FOR PROGRESS, PART I*, at 10, 11 (1967). Motor vehicles account for about 91 percent of all carbon monoxide, 63 percent of the unburned hydrocarbons, 48 percent of oxides of nitrogen, eight percent of the particulates and four percent of sulphur oxides. STAFF OF SENATE COMM. ON COMMERCE, 91ST CONG., 1ST SESS., *THE SEARCH FOR A LOW-EMISSION VEHICLE* 2 n.12 (1969). Carbon monoxide combines with hemoglobin in the blood and displaces oxygen causing impairment of psychomotor performance. Hydrocarbons interact with oxides of nitrogen in sunlight producing smog, eye irritation, and damage to vegetation. Oxides of nitrogen contribute to photochemical reactions and cause pulmonary damage. U.S. DEP'T OF COMMERCE, *THE AUTOMOBILE & AIR POLLUTION: A PROGRAM FOR PROGRESS, PART II*, at 2-5 (1967).

14. *Hendrick v. Maryland*, 235 U.S. 610, 622-23 (1915).

15. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851).

16. *Id.*

17. FIRST REPORT OF THE SECRETARY OF HEALTH, EDUCATION AND WELFARE, *PROGRESS IN THE PREVENTION AND CONTROL OF AIR POLLUTION*, S. DOC. NO. 92, 90th Cong., 2d Sess. 5-7 (1968).

18. *Eichholz v. Commission*, 306 U.S. 268, 274 (1938), citing *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851).

19. "Where traffic control and the use of highways are involved and where there is no conflicting federal regulation, great leeway is allowed local authorities, even though the local regulation materially interferes with interstate commerce." *Railway Express*

authority to enact legislation to control motor vehicle emissions in the absence of federal action even though such legislation would have some effect on cars traveling in interstate commerce. State regulations, however, would have to be limited to only cars sold or registered in the state since an attempt to control the emissions of all motor vehicles operated in the state would constitute an unreasonable burden on interstate commerce.<sup>20</sup>

Prior to 1965, the federal government had taken no action to control motor vehicle emissions.<sup>21</sup> If action was to be taken in this area it was up to the states, but only one state, California, had authorized motor vehicle emission standards.<sup>22</sup> In 1965, a second title was added to the Clean Air Act of 1963 directing the Secretary of HEW to establish emission standards for new motor vehicles.<sup>23</sup> The statute made no mention of whether the federal action was to preempt or supplement the actions of states in the area of automobile emission control. The intent of Congress appears to have been that national standards were preferred to the exclusion of state controls because "[t]he high rate of mobility of automobiles suggests that anything short of nationwide control would scarcely be adequate to cope with the motor vehicle pollution problem."<sup>24</sup> Pursuant to the 1965 Act, regulations were established on March 30, 1966 for crankcase and exhaust emissions for 1968 model year cars.<sup>25</sup> After considering technological feasibility and economic costs, as required by the Act,<sup>26</sup> standards were prescribed for only hydrocarbon and carbon monoxide emissions.<sup>27</sup>

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Agency, Inc. v. New York, 336 U.S. 106, 111 (1949). See also *Atchison T. & S.F. Ry. v. Public Util. Comm'n*, 346 U.S. 346, 355 (1954); *Buck v. California*, 343 U.S. 99 (1952).

20. In *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), state regulations requiring special mudflaps for vehicles on state highways that differed from those authorized in other states were held invalid as an unreasonable burden on interstate commerce.

21. The basic air pollution control statute in effect in 1965 was the Clean Air Act of 1963, 42 U.S.C. § 1857, as amended (Supp. V, 1970), which was concerned only with general air quality, not sources of pollution.

22. California adopted its Motor Vehicle Pollution Control Act in 1960. Ch. 23, § I (1961) Cal. Stats. 346. That Act was repealed in 1967 by the Mulford-Carrell Air Resources Act, CAL. HEALTH & SAFETY CODE §§ 39000-39570 (West Supp. 1967), which authorized more extensive motor vehicle emission controls. For a detailed discussion of California's motor vehicle pollution control legislation see Kennedy & Weekes, *Control of Automobile Emissions—California Experience and the Federal Legislation*, 33 LAW & CONTEMP. PROB. 297 (1968).

23. 42 U.S.C. § 1857f-1 (Supp. V, 1970).

24. H.R. REP. NO. 899, 89th Cong., 1st Sess. 5 (1965).

25. 45 C.F.R. Part 85 (1970).

26. "The Secretary shall by regulation, giving appropriate consideration to technological feasibility and economic costs, prescribe . . . standards, applicable to the emission of any kind of substance, from any class or classes of new motor vehicles or new motor vehicle engines. . . ." 42 U.S.C. § 1857f-1(a) (Supp. V, 1970).

27. For a more complete list of the components of automobile emissions and their effect, see note 13, *supra*.

While the abatement of air pollution caused by motor vehicles is a legitimate area in which the states may act, such state action cannot prevent Congress from exercising its constitutional powers. For Congress to regulate commerce "among the states" its power "must be exercised within the territorial jurisdiction of the several states."<sup>28</sup> Under the necessary and proper clause<sup>29</sup> Congress can interfere with exclusively intrastate activities to carry out its general powers,<sup>30</sup> and can act even though the matter acted upon is the proper subject of a state's police power.<sup>31</sup>

Regardless of the action by Congress providing for establishment of national emission standards for automobiles, the states were not automatically foreclosed from pursuing their own standards, although the enactment raised the question of preemption. Normally, federal preemption is upheld if there is evidence that concurrent jurisdiction within the state would interfere with a federal program.<sup>32</sup> However, the only way a state program could actually conflict with federal motor vehicle emission standards would be for the state to require that less stringent controls be met. However, this would be completely unrealistic since such controls would increase rather than abate air pollution. Congressional enactments are not held to preempt state statutes designed to protect public health and safety unless the intent to do so is clearly indicated.<sup>33</sup> Although Congress clearly favored national motor vehicle emission standards, the legislative history of the 1965 Act is vague on the subject of whether such standards were to be exclusive.<sup>34</sup>

Between 1965 and 1967 the question of preemption in the area of automobile emission standards was never litigated. Any question that existed because of the 1965 Act was resolved by Congress with the enactment in 1967 of the National Emission Standards Act<sup>35</sup> which contained the Section

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28. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).

29. U.S. CONST. art. I, § 8, cl. 18.

30. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

31. *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146, 156 (1919). "It is no objection to the exercise of the power of Congress that it is attended by the same incidents which attend the exercise of the police power of a State." *FPC v. Pipeline Co.*, 315 U.S. 575, 582 (1941).

32. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

33. *Brotherhood of Locomotive Engineers v. Chicago R.I. & R.R.*, 382 U.S. 423 (1966); *Auto Workers v. Wisconsin Bd.*, 336 U.S. 245, 253 (1948); *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1946); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). "[I]t is well-settled that where the state's police power is involved, preemption will not be presumed." *Chrysler Corp. v. Tofany*, 419 F.2d 499, 511 (2d Cir. 1969), quoting *Chrysler Corp. v. Rhodes*, 416 F.2d 319, 324 n.8 (1st Cir. 1969).

34. The 1965 Motor Vehicle Air Pollution Control Act "contains no explicit statements concerning the preemption of state laws on this subject, and no statements concerning this problem were made on either the House or Senate floor when the bill was debated." H.R. REP. No. 728, 90th Cong., 1st Sess. 20 (1967).

35. 42 U.S.C. §§ 1857f-1-1857l (Supp. V, 1970).

208 preemption provision. A carefully worded exception to Section 208 permitted only California to apply for a waiver.<sup>36</sup> This waiver would permit California to issue its own standards, consistent with national regulations, after showing that "extraordinary conditions" compelled adoption of more stringent standards.

The argument has been set forth that the preemption provided for in Section 208 is not absolute in that states might have the authority to regulate emissions for which no federal standard has been established.<sup>37</sup> This argument is based on the contention that "neither Congress nor the HEW Secretary desired a total absence of standards governing these pollutants; they desired merely to prevent the duplication of federal standards by state standards."<sup>38</sup> This position ignores the fact that federal preemption was intended to prevent the promulgation of state standards which would conflict with

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36. The Secretary shall, after notice and opportunity for public hearing, waive application of this section to any state which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, unless he finds that such State does not require standards more stringent than applicable Federal standards to meet compelling and extraordinary conditions or that such State standards and accompanying enforcement procedures are not consistent with Section 202(a) of this title.

42 U.S.C. § 1857f-6(a) (Supp. V, 1970). Section 202(a) of the Act, provides:

The Secretary shall by regulation, giving appropriate consideration to technological feasibility and economic costs, prescribe as soon as practicable standards, applicable to the emission of any kind of substance, from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause or contribute to, or are likely to cause or to contribute to, air pollution which endangers the health or welfare of any persons, and such standards shall apply to such vehicles or engines whether they are designed as complete systems or incorporate other devices to prevent or control such pollution.

*Id.* § 1857f-1(a).

The Colorado legislature agreed to S.J. Res. 26 on March 10, 1970, which cited "extraordinary circumstances" and requested that the Secretary of HEW waive the preemption provision with regard to the state. The Resolution merely ignored the fact that Colorado did not have state standards other than for crankcase emission prior to March 30, 1966, which is necessary to qualify for a waiver. The Colorado request was denied by the Secretary of HEW in a letter to the Secretary of the Colorado Senate dated June 11, 1970.

Crankcase emissions are those gases which escape from the cylinder between the sealing surfaces of the piston and cylinder wall into the crankcase. They account for about 25 percent of the hydrocarbon emissions from uncontrolled automobiles. THE AUTOMOBILE & AIR POLLUTION, PART II, *supra* note 13, at 30. The requirement that states have enacted before March 30, 1966, emission standards other than for crankcase emissions was included in the preemption provision because regulations covering crankcase emissions have been in general use throughout the country since 1963. S. REP. NO. 403, 90th Cong., 1st Sess. 33 (1967).

37. Currie, *Motor Vehicle Air Pollution: State Authority and Federal Pre-emption*, 68 MICH. L. REV. 1083, 1096-97 (1970).

38. *Id.* at 1096.

each other as well as with the federal standards.<sup>39</sup> Since the Secretary of HEW is directed to give "appropriate consideration to technological feasibility and economic costs"<sup>40</sup> in prescribing standards, he *does* desire a "total absence of standards" until technical and economic problems can be overcome.<sup>41</sup> There is nothing in the legislative history of the National Emission Standards Act which indicates anything other than the intent of Congress to preempt all state activities relating to the emissions of new motor vehicles.<sup>42</sup>

The action of Congress was conclusive with regard to the question of preemption since federal enactments will supersede laws enacted under a state's police power when there is a conflict between valid state and federal statutes.<sup>43</sup> In *United States v. Bishop Processing Co.*<sup>44</sup> a rendering plant in Maryland which was releasing obnoxious odors into Delaware contended that Congress was without the authority to enact the Air Quality Act of 1967 regulating air pollution. The district court determined that judicial review of the congressional finding that air pollution affects commerce is limited to the questions of "whether Congress had a rational basis" for such finding, "and if it had such a basis, whether the means selected to eliminate the evil are reasonable and appropriate."<sup>45</sup> The decision in *Bishop* held that Congress had a rational basis for finding that air pollution affects commerce because: (1) malodorous pollution, even though invisible, affects business conditions and clearly interferes with interstate commerce, and (2) Congress

39. "[I]t would be more desirable to have national standards rather than for each state to have a variation in standards and requirements which could result in chaos in so far as manufacturers, dealers, and users are concerned." H.R. REP. No. 728, 90th Cong., 1st Sess. 20 (1967), quoting H.R. REP. No. 899, 89th Cong., 1st Sess. 6 (1965).

40. 42 U.S.C. § 1857f-1 (Supp. V, 1970). See note 36, *supra*.

41. "More effective standards can be established only as the technology is developed to adequately cope with automotive emissions." FIRST REPORT OF THE SECRETARY OF HEALTH, EDUCATION AND WELFARE, PROGRESS IN THE PREVENTION AND CONTROL OF AIR POLLUTION, S. DOC. No. 92, 90th Cong., 2d Sess. 19 (1967).

42. The "legislative history" of a statute consists of the official committee reports accompanying the act along with that debate on the floor of the House and Senate which is necessary to aid in the construction or interpretation of the act. It does not include statements made at hearings where anyone may testify and say anything concerning the particular subject under consideration. *But see* Currie, *supra* note 37, at 1096-97.

43. "The United States is asserting its sovereign power to regulate commerce. . . . There is no question that this power is superior to that of the states to provide for the welfare and necessities of their inhabitants." *Sanitary Dist. v. United States*, 266 U.S. 405, 425, 426 (1924). See also *Bus Employees v. Wisconsin Bd.*, 340 U.S. 383 (1951); *Testa v. Katt*, 330 U.S. 386, 391 (1947); *Hill v. Florida*, 325 U.S. 538 (1944); *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942).

44. 287 F. Supp. 624 (1968), *aff'd*, 423 F.2d 469 (4th Cir.), *cert. denied*, 398 U.S. 904 (1970).

45. *Id.* at 630-31.



has the power to regulate all interstate activities, no matter how insignificant.<sup>46</sup>

### *The Questionable Federal Role*

Congress has always recognized the varying nature of air pollution problems and the need for state cooperation to combat them. Although the federal role in pollution control programs has continually increased, there has always been a reliance on state action except in the area of motor vehicle emission control. The "Findings" of the Clean Air Act of 1963<sup>47</sup> stated that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments."<sup>48</sup> Identical language was used in the "Findings" of the Air Quality Act of 1967<sup>49</sup> which contained the National Emission Standards Act and the preemptive Section 208.

In both air and water pollution abatement programs provision is made for the states to develop standards and submit them to the federal government for approval.<sup>50</sup> Only if the states fail to act or if their action is inadequate can the federal government promulgate its own standards. Such state participation was not provided for in the development of automobile emission standards. The decision by Congress to preempt state activities in the area of automobile emissions was prompted by the fear that the development of numerous conflicting state standards might be an unreasonable burden on motor vehicle manufacturers.<sup>51</sup> Such fears were justified since at the time the preemption provision was being considered by Congress in 1967, eighteen states had legislation pending which would have authorized regulation of motor vehicle emissions.<sup>52</sup>

Although the enactment of Section 208 foreclosed the possibility of conflicting or burdensome state standards, it was inconsistent with the declared intent of Congress to cooperate with and encourage the states in the development of pollution abatement programs. Similarly, Section 208 was not responsive to the charge that air pollution is a local problem which

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46. *Id.* at 632.

47. 42 U.S.C. § 1857 (1964), *as amended*, (Supp. V, 1970).

48. *Id.* § 1857(a)(3) (1964).

49. *Id.* § 1857(a)(3) (Supp. V, 1970).

50. Federal Water Pollution Control Act, 33 U.S.C. § 466g(c) (1964); Clean Air Act, 42 U.S.C. § 1857d(c) (Supp. V, 1970).

51. S. REP. No. 403, 90th Cong., 1st Sess. 33 (1967).

52. These eighteen states were: Arizona, California (which already had emission standards in effect), Connecticut, Illinois, Kansas, Massachusetts, Missouri, Montana, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, West Virginia, Wisconsin, Wyoming. *Hearings on Problems and Progress Associated with Control of Automobile Exhaust Emissions Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 90th Cong., 1st Sess. pt. 1, at 395-99 (1967).

varies from place to place and requires tailored, not blanket, solutions. The Senate Public Works Committee, which added the preemption provision to the National Emission Standards Act,<sup>53</sup> admitted that “[o]ther regions of the Nation may develop air pollution situations related to automobile emissions which will require standards different from those applicable nationally.”<sup>54</sup> Nevertheless, the Committee was content to make the preemption section absolute and limit the right to apply for a waiver to only California thereby requiring that any change be made through the cumbersome legislative process and subjected to political considerations.

The action of Congress in controlling motor vehicle emissions becomes even more curious when compared with the National Traffic and Motor Vehicle Safety Act of 1966.<sup>55</sup> That Act directs the Secretary of Transportation to establish federal motor vehicle safety standards.<sup>56</sup> It forbids the states to establish “with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.”<sup>57</sup> States, therefore, may establish requirements for pieces of equipment for which there is no federal standard or for a different aspect of a piece of equipment for which there is a federal standard.<sup>58</sup> This stands in stark contrast to the policy set out in the National Emission Standards Act which prohibits state action regardless of whether or not the Secretary of HEW has acted.

The model State Air Pollution Control Act<sup>59</sup> developed by the Council of State Governments contains a provision<sup>60</sup> which would be the state counterpart of a federal position such as that provided in the National Traffic and Motor Vehicle Safety Act. The model code does not limit state automobile emission standards to used cars but would prevent the states from promulgating standards for equipment or features already covered by federal standards.

A basic distinction can be drawn, however, between the adoption and enforcement of nationwide safety standards and uniform emission regulations.

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53. The bill proposed by the Johnson administration, which eventually became the 1967 Air Quality Act, contained no preemption provision. S. 780, 90th Cong., 1st Sess. (1967).

54. S. REP. NO. 403, 90th Cong., 1st Sess. 3 (1967).

55. 15 U.S.C. §§ 1381, 1391-1409, 1421-25 (Supp. V, 1970).

56. *Id.* § 1392(a).

57. *Id.* § 1392(d).

58. This limited and narrow construction of the preemption provision of the National Traffic and Motor Vehicle Safety Act has been upheld by the Second Circuit in *Chrysler Corp. v. Tofany*, 419 F.2d 499 (1969).

59. COUNCIL ON STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION, STATE AIR POLLUTION CONTROL ACT (1967).

60. *Id.* § 16(a).

It is extremely difficult to devise testing procedures which can be used to determine whether a particular vehicle has an acceptable level of emissions. The level of emissions varies as the car is operated under different conditions while safety appliances such as seatbelts, headrests, padded interiors, and collapsible steering columns remain constant at all times. The actual emission standards which list the permissible amounts of pollutants are meaningless unless proper test procedures can be devised to detect what levels actually exist.<sup>61</sup>

The difficulties encountered in accurately testing motor vehicles have been compounded by a provision in the 1967 National Emission Standards Act which permits the testing of only prototype engines and vehicles.<sup>62</sup> Such samples are submitted by the manufacturer and there is no guarantee that the vehicles actually produced for sale will conform to the standards met by the finely tuned prototype.<sup>63</sup> Legislation which has been passed by the House of Representatives and the Senate would correct that defect by requiring testing of cars on the assembly lines.<sup>64</sup>

The importance of the testing procedures is evidenced by the fact that in 1966 when the original emissions standards were published in the *Federal*

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61. For a detailed discussion of the role testing procedures play in the enforcement of motor vehicle emission standards, see *Hearings on Air Pollution Control and Solid Waste Recycling Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st Sess. pt. 1, at 308-12 (1970) (testimony of Dr. John T. Middleton, Commissioner, National Air Pollution Control Administration).

62. (a) Upon application of the manufacturer, the Secretary shall test, or require to be tested, in such manner as he deems appropriate, any new motor vehicle or new motor vehicle engine submitted by such manufacturer to determine whether such vehicle or engine conforms with the regulations under section 1857f-1 of this title. If such vehicle or engine conforms to such regulations the Secretary shall issue a certificate of conformity, upon such terms, and for such period not less than one year, as he may prescribe.

(b) Any new motor vehicle or any motor vehicle engine sold by such manufacturer which is in all material respects substantially the same construction as the test vehicle or engine for which a certificate has been issued under subsection (a) of this section, shall for the purposes of this chapter be deemed to be in conformity with the regulations issued under section 1857f-1 of this title.

42 U.S.C. § 1857f-5 (Supp. V, 1970). For a detailed discussion of the interpretation of this section by HEW, see *Hearings on S.3229, S.3466, S.3546 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 2d Sess. 167-69 (1970).

63. See *Hearings on Air Pollution Control and Solid Waste Recycling*, *supra* note 61, at 309.

64. H.R. 17,255, 91st Cong., 2d Sess. (1970). Different versions of H.R. 17,255 have passed the House and the Senate. Section 206 of the House-passed bill, and Section 207 of the bill passed by the Senate, provide for testing of individual cars. See note 76, *infra*.

*Register*,<sup>65</sup> the actual standards for emissions occupied  $\frac{1}{6}$  page of a nine page rule, while the other  $\frac{8}{6}$  pages were devoted to testing procedures. A further illustration of the role testing procedures play is the announcement by the National Air Pollution Control Administration that 1970 model year cars which were thought to be meeting the appropriate standards were found actually to be entirely inadequate when more accurate test procedures were employed.<sup>66</sup> Consequently, the more accurate procedures have been put forth as proposed rules in the hope that 1972 cars will conform with standards intended for 1970 automobiles.<sup>67</sup>

If the states are given a role in controlling motor vehicle emissions, consideration must be given to the testing procedures as well as the actual standards. A heavy burden could be placed on automobile manufacturers if they were required to test their cars in accordance with varying test procedures to conform with varying standards. At the same time, the fact that the federal test procedures were in effect for two years before it was determined that they were inadequate and corrective action was taken does not lend support to the contention that the federal government is capable of controlling emissions for the states.

The inclusion in the National Emission Standards Act of a provision similar to that in the National Traffic and Motor Vehicle Safety Act would be responsive to some of the criticism of action taken under the Emission Act.<sup>68</sup> To date no federal standards have been promulgated for emissions of nitrogen oxides which are the chief element in the photochemical smog which plagues so many cities.<sup>69</sup> With existing technology the control of nitrogen oxides is inconsistent with the control of hydrocarbons and carbon monoxide<sup>70</sup> and no federal standards for nitrogen oxide emissions will be promulgated until 1973.<sup>71</sup> In the meantime, California, the only state allowed to promulgate

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65. 31 Fed. Reg. 5170 (1966). These regulations are codified in Part 85 of 45 C.F.R. (1970).

66. The announcement was made July 14, 1970, at a press conference held by Dr. John T. Middleton, Commissioner, National Air Pollution Control Administration. See *Wall Street Journal*, July 15, 1970, at 2, col. 4.

67. 35 Fed. Reg. 11,336 (1970).

68. See letter from Richard B. Ogilvie, Governor of Illinois, to Representative Abner Mikva, 116 CONG. REC. H5377 (daily ed. June 10, 1970).

69. STAFF OF SENATE COMM. ON COMMERCE, 91ST CONG., 1ST SESS., *THE SEARCH FOR A LOW-EMISSION VEHICLE* 6-7 (1970).

70. Carbon monoxide and hydrocarbons are generated by incomplete combustion of fuel in the automobile engine while nitrogen oxides result from high temperatures associated with more thorough combustion. A reduction in the level of one normally means an increase in the other. See U.S. DEP'T OF COMMERCE, *THE AUTOMOBILE & AIR POLLUTION: A PROGRAM FOR PROGRESS, PART II*, at 20 (1967).

71. 35 Fed. Reg. 2791 (1970).

its own standards, has had limits on nitrogen oxides<sup>72</sup> while other states are prevented from acting by Section 208.

Legislation has been introduced in the 91st Congress to repeal Section 208.<sup>73</sup> Although no action has been taken on that particular legislation, an unsuccessful attempt was made on the floor of the House of Representatives<sup>74</sup> to attach an amendment repealing the preemption to the pending 1970 Clean Air Act Amendments.<sup>75</sup> However, the Senate has passed a separate version of the same bill entitled the "National Air Quality Standards Act of 1970."<sup>76</sup> Section 210 of that bill authorizes every state to promulgate its own emission standards for new automobiles "where such State demonstrates, after public hearings, to the satisfaction of the Secretary [of HEW] that more restrictive emission standards for vehicles or engines are required to implement national ambient air quality standards for any air quality control region within such state."<sup>77</sup>

### *State Regulation*

Even though Congress has decided to prevent states from regulating new motor vehicles, there are two major areas in which states can act to reduce automobile emissions. First, the National Emission Standards Act permits, and its legislative history encourages, states to enact regulations for automobiles produced prior to 1968.<sup>78</sup> These uncontrolled cars are responsible for a significant amount of automotive air pollution.<sup>79</sup> Such state controls would not be inconsistent with the purpose of the Act which seeks to prevent the imposition of harsh burdens on automobile manufacturers. Used cars

72. For a resume of California motor vehicle emission standards, see THIRD REPORT OF THE SECRETARY OF HEALTH, EDUCATION AND WELFARE, PROGRESS IN THE PREVENTION AND CONTROL OF AIR POLLUTION, S. DOC. NO. 64, 91st Cong., 2d Sess. 33 (1970).

73. H.R. 16,013, 91st Cong., 2d Sess. (1970).

74. 116 CONG. REC. H5375-81 (daily ed. June 10, 1970).

75. H.R. 17,255, 91st Cong., 2d Sess. (1970).

76. *Id.* This bill has been sent to a conference committee to resolve the differences between the House and Senate versions.

77. *Id.* § 210.

78. Section 202(a), 42 U.S.C. § 1857f-1 (Supp. V, 1970), of the National Emission Standards Act specifically provides that the Secretary of HEW can regulate only "new" motor vehicles. The Senate Report on the Act, S. REP. NO. 403, 90th Cong., 1st Sess. (1967), states that "any significant advance in control of used vehicles would result in a corresponding reduction in air pollution . . . . [This is an area] in which the States and local governments can be most effective." *Id.* at 34.

79. In 1967, the last year new motor vehicles were not subject to federal regulations, over 96,000 cars were registered in the United States. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 548 (1969). Since 1968, new cars have been produced at the rate of about 10,000,000 per year, *Hearings on Air Pollution Control and Solid Waste Recycling, supra* note 61, at 308. For a comparison of the exhaust emissions of unregulated and regulated cars, see U.S. DEP'T OF COMMERCE, THE AUTOMOBILE & AIR POLLUTION, PART I, at 20 (1967).

are no longer the manufacturer's responsibility and since there are no federal standards for these cars, there is nothing with which state standards could conflict. Second, the Act also allocates to the states the vital role of insuring that automobile pollution control devices are effectively maintained.<sup>80</sup> In fact, the Act provides for federal financial assistance to the states to aid in the development of "meaningful motor vehicle testing programs."<sup>81</sup> Since the states have failed to assume this responsibility, the 1970 Clean Air Act Amendments which have been passed by the House of Representatives<sup>82</sup> authorize the Secretary of HEW to require states to implement automobile inspection programs if this is deemed necessary in order to conform to national air quality standards.<sup>83</sup> In inspecting vehicles the states presumably can require that the vehicles conform to any standard the state establishes<sup>84</sup> since technically only used cars, which the states have the authority to regulate,<sup>85</sup> will be inspected.

Even with Section 208 in force, states may be able to surmount its restrictions. The definition in the Act of a new motor vehicle<sup>86</sup> may permit the indirect regulation of new vehicles by technically classifying them as used vehicles immediately after titling by the ultimate purchaser. Citing *Cloverleaf v. Patterson*<sup>87</sup> as precedent, Mr. Sidney Edelman, Office of the General Counsel of the Department of HEW, testified before the Senate Public Works Committee<sup>88</sup> that a state legitimately could prohibit the operation of an automobile within that state which did not meet the state standards but did conform with federal requirements. Although his comments

80. 42 U.S.C. § 1857f-6b (Supp. V, 1970). The House Interstate and Foreign Commerce Committee pointed out that under the Act the states' responsibility would be to "assume responsibility for inspection of pollution control systems as an integral part of safety inspection programs." H.R. REP. NO. 403, 90th Cong., 1st Sess. 35 (1967).

81. 42 U.S.C. § 1857f-6b (Supp. V, 1970).

82. H.R. 17,255 § 4(a)(1), 91st Cong., 2d Sess. (1970).

83. Since the states presently have the authority to regulate used cars and inspect all automobiles, they are not powerless to control motor vehicle emissions in conjunction with meeting ambient air quality standards promulgated pursuant to the Air Quality Act of 1967, 42 U.S.C. § 1857d(c) (Supp. V, 1970). *But see* Currie, *Motor Vehicle Air Pollution: State Authority and Federal Pre-emption*, 68 MICH. L. REV. 1083, 1087 & n.21 (1970).

84. It has been argued that states could only inspect to insure compliance with federal standards. *Id.* at 1093-94.

85. *See* notes 5, 6 and accompanying text *supra*.

86. *Id.*

87. 315 U.S. 148, 162 (1951). The Court held in *Cloverleaf* that even though "the entire process of manufacture [of renovated butter] is subject to federal supervision . . . the power of the States over the subject of the manufacture and sale of process and renovated butter within their respective limits was to be unrestricted . . ." *Id.* at 154, 162.

88. *Hearings on Problems and Progress Associated with Control of Automobile Exhaust Emissions*, *supra* note 52, at 116.

concerned federal standards promulgated under the 1965 Act which had no explicit preemption section, they are nevertheless applicable to the situation under the 1967 Act since both Mr. Edelman and HEW contended that the 1965 Act was sufficient to preempt state standards. The emphasis placed on the states' authority to regulate automobiles which have been transferred to the ultimate purchaser, along with the fact that Congress itself drew the distinct technical line between new and used vehicles, would apparently offset the argument that state control based on the technical classification of a car as "used" would be prohibited on the basis that a state may not do indirectly what it cannot do directly in the area of interstate commerce.<sup>89</sup>

### Conclusion

Congress was acting within its constitutional authority in preventing the states from adopting or enforcing standards for motor vehicle emissions. Such action, however, is not consistent with the existing allocation of pollution control activities between the states and the federal government. Serious questions can be raised as to whether the program authorized by Congress is the most effective means of combating air pollution caused by motor vehicles. Those reservations are buttressed by the limited and inadequate actions taken by the Secretary of HEW under the National Emission Standards Act.

A more effective program might provide for the promulgation of minimum national standards and test procedures while allowing the states to adopt such additional standards as are appropriate for local conditions. The state requirements could be submitted to the Secretary of HEW for approval before becoming effective to insure that they would be consistent with programs in other states and not inflict an unreasonable burden on automobile manufacturers. This would be consistent with the sections providing for state cooperation in other air and water pollution control programs while allowing the states to play an effective role in establishing motor vehicle emission standards without impinging on congressional authority of impairing interstate commerce.

S. Allan Adelman

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89. *But see Kennedy & Weekes, Control of Automobile Emissions—California Experience and the Federal Legislation*, 33 *LAW & CONTEMP. PROB.* 297, 313 (1968); Currie, *supra* note 83, at 1092.