

ENERGY EMERGENCIES: CONSTITUTIONAL CONSTRAINTS ON STATE EFFORTS TO CONTROL OIL SUPPLIES AND PRICES

Earle H. O'Donnell*
Laurel W. Glassman**

I. INTRODUCTION

President Reagan, in vetoing a bill in 1982 which would have re-enacted standby oil allocation and price control authority for use in the event of a future oil supply interruption, emphasized a cardinal principle of this Administration's energy policy: "What I do not have, do not want and do not need is general power to reimpose on all Americans another web of price controls and mandatory allocations."¹ Since then, the Reagan Administration has consistently stressed its free-market approach to oil emergencies, asserting:

The energy emergency response policy of the Federal Government is to rely on the market to price and distribute petroleum supplies during disruptions. This policy is based on the principal that markets, which are most efficient and effective in allocating resources during "normal" times, will also serve as the best allocator during supply disruptions, even severe disruptions.²

Because the role of the federal government envisioned by the Reagan Administration in any future energy emergency will be substantially less pervasive than in the past,³ government intervention, if it occurs at all, will be far more likely to be dictated by the States.⁴ Indeed, a Senate bill offered on July 25, 1983, which among other things would expressly pre-empt state laws and regulations providing for oil allocation and price controls, tacitly acknowledges the considerable power possessed by the States to control oil during emergencies.⁵ This article will provide an overview of state energy emergency statutes and contingency plans which would impact upon the flow of crude oil and refined petroleum products within the United States during a future energy supply interruption. It will also address the issue of the extent to which the States can regulate the distribution and price of oil in the absence of express federal pre-emption of the area; in this latter connection, the paper will focus on state action as it might affect distribution of oil from the Strategic Petroleum Reserve.

*Partner, Sutherland, Asbill & Brennan, Washington, D.C.

**Associate, Sutherland, Asbill & Brennan, Washington, D.C.

¹Veto Message Concerning S. 1503, "Standby Petroleum Allocation Act of 1982," March 20, 1982, 128 Cong. Rec. S2513-14 (daily ed. March 22, 1982).

²DOE/EP-0074, *Strategic Petroleum Reserve Drawdown and Distribution Report* (December 1, 1982) at 3.

³*E.g.*, during the period 1973 through 1981, when the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 15 U.S.C. § 751-760h (1976 & Supp. V. 1981), was in effect.

⁴The States are, according to one author, "now more in control of their energy futures than they have been in the past . . . [S]tates have the right to regulate energy in interstate commerce in the absence of a preempting federal statute. [Recent Supreme Court cases] imply that this right may outweigh contrary federal interests in avoiding burdens on interstate commerce." Tanzman, *Commerce Clause Limitations on State Regulation and Taxation of the Energy Industry*, 13 Loy. U. Chi. L.J. 277, 296 (1982) [hereinafter cited as Tanzman].

⁵S. 1678, 98th Cong., 1st Sess. (1983) ("Energy Emergency Preparedness Act Amendments of 1983").

II. OVERVIEW OF STATE AUTHORITIES TO DEAL WITH ENERGY EMERGENCIES

A. *State Energy Emergency Statutes*⁶

As of the middle of 1982, 41 States had enacted statutes providing their governors with energy emergency powers. While the statutes vary considerably in scope and applicability, they usually confer broad authority on the state governors to take extraordinary actions in response to a declared emergency. A majority of the statutes (30) permit state governors to take any action they deem necessary to respond to the emergency. Under these statutes, governors are authorized to establish oil allocation programs (including priorities), impose rationing mechanisms, implement price controls, regulate oil consumption, and mandate conservation measures.

Among the specific authorities which governors are accorded and which relate directly to oil allocation are: (1) authority to establish a fuel set-aside program (17 States); (2) authority to establish curtailment priorities (18 States); and authority to establish statewide motor fuel rationing plans (2 States). Eleven States have statutes which are typically worded to require the "fair and equitable allocation of energy resources in a manner designed to avoid undue hardship." Some statutes require equitable distribution of energy supplies among geographic areas.

Most of the statutes are not directed solely to crude oil and petroleum products. Rather, they cover *all* energy resources. In addition, the statutes are not limited to authorizing allocation and price controls; they generally authorize state governors to approach an energy emergency from many different angles. Thus, for example, a governor may have authority not only to promulgate allocation and price regulations, but also to impose direct demand restraint measures, establish energy conservation programs, and suspend pollution control standards.

B. *Specific Examples of State Energy Emergency Statutes*

1. California

Under California law, the Governor is empowered to proclaim a "state of emergency,"⁷ defined, in pertinent part, as:

the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the state caused by such conditions as . . . sudden and severe energy shortage . . .⁸

Once the state of emergency has been declared, the Governor is authorized to issue orders⁹ to mitigate the effects of the emergency¹⁰ and coordinate the "State

⁶The information contained in this section is taken from a survey conducted by the authors during the first half of 1983, as well as from American Petroleum Institute, *Special Report: State Energy Emergency Statutes* (April 15, 1982). For additional information, see National Governors Association, *Energy Emergency Preparedness, A Survey of State-by-State Authority and Response Mechanisms* (May 1983), and E. Colglazier, Jr. and D. Deese, *Energy and Security in the 1980s*, 8 Am. Rev. Energy 415, 443-446 (1983).

⁷Cal. Gov't Code, tit. 2, § 8625 (West 1970).

⁸*Id.* § 8558(b).

⁹*Id.* § 8567.

¹⁰*Id.* § 8570.

Emergency Plan."¹¹ In addition to this broad authority to respond to emergencies generally, the Governor also has specific authority to redirect petroleum products.¹²

2. Illinois

Unlike a majority of States, Illinois has not enacted legislation specific to energy emergencies. Illinois has, however, passed disaster legislation, in which the term "disaster" is defined to include "critical shortages of essential fuels and energy."¹³ This statute authorizes the Governor of the State to "utilize all available resources of the State government as reasonably necessary to cope with the disaster emergency . . ."¹⁴ and to "control, restrict, and regulate by rationing, freezing, use of quotas, prohibitions on shipments, price-fixing, allocation or other means, the use, sale or distribution of . . . fuel . . ."¹⁵ Thus, the Governor has broad emergency powers, *inter alia*, to allocate and set prices on oil and impose end-use restrictions on the use of petroleum.

3. Michigan

Michigan has enacted specific legislation governing energy emergencies.¹⁶ The Governor of the State has authority to declare an energy emergency, which the statute defines as "a condition of danger to the health, safety, or welfare of the citizens of this state due to an impending or present energy shortage,"¹⁷ for a period of 90 days. During such an emergency, the Governor has broad powers to take necessary action in response to the situation, including, *inter alia*, the power to:

(a) Order specific restrictions on the use and sale of energy resources. Restrictions imposed by the governor under this subdivision may include:

- ... (ii) Restrictions on the hours and days during which public, commercial, industrial, and school buildings may be open.
- ... (iii) Restrictions on the conditions under which energy resources may be sold to consumers.
- ... (iv) Restrictions on the use of privately owned vehicles or a reduction in speed limits.

(b) Direct an energy resource supplier to provide an energy resource to a health facility; school; public utility; public transit authority; fire or police station or vehicle; newspaper or television or radio station for the purpose of relaying emergency instructions or other emergency message; food producer, processor, retailer, or wholesaler; and to any other person or facility which provides essential services for the health, safety and welfare of the residents of this state.

...¹⁸

4. New York

In 1976, New York enacted a comprehensive "energy law"¹⁹ which created a

¹¹*Id.* § 8569.

¹²California Special Rule No. 6

¹³Ill. Stat. Ann., Ch. 1217, § 1104(b) (1982).

¹⁴*Id.* § 1108(a)(2).

¹⁵*Id.* § 1108(a)(12).

¹⁶Mich. Stat. Ann., tit. 3, § 31001(1) *et seq.* (Callaghan 1982).

¹⁷*Id.* § 3.1011 (11)(c).

¹⁸*Id.* § 3.1011(14).

¹⁹N.Y. Energy Law, Art. 1, § 1-101 (McKinney 1982).

state energy office headed by a commissioner appointed by the Governor.²⁰ The energy emergency provision of the energy law provides, in pertinent part:

1. Upon a finding and declaration by the Governor that there exists or impends an energy or fuel supply emergency, which declaration shall state the Governor's reasons for such finding, the Commission shall be authorized . . . to: (a) Allocate available supplies of energy or energy resources among areas, users, persons or categories of persons or users. In allowing available supplies, the Commissioner shall give priority to energy and energy resource uses essential to public health and safety, and shall thereafter attempt to allocate the remaining supply equitably and in a manner designed to avoid undue hardship; (b) Impose restrictions on any wasteful, inefficient, or non-essential use of energy or energy resources, and upon the promotion of such uses.²¹

Thus, the commissioner of New York's state energy office has broad power to allocate crude oil and refined petroleum products according to a priority scheme, and to impose mandatory restrictions on end-uses of oil. In addition, the commissioner is required by statute to promulgate rules and regulations establishing up to a 3% fuel set-aside system for liquid fossil fuels.²²

5. Ohio

Ohio has created its own department of energy, which is empowered by statute to promulgate a fuel allocation plan "designed for the purpose of avoiding foreseeable energy emergencies, protecting the public health and safety, and preventing unnecessary or avoidable damage to property if an energy emergency occurs . . ."²³ The fuel allocation plan, if promulgated, must "establish priorities among types or categories of users of fuel and among the uses of fuels" in order to "encourage energy conservation and restrict nonessential or wasteful uses of energy."²⁴ In addition, the Ohio energy department is required to adopt rules:

defining various foreseen types and levels of energy emergency conditions for critical shortages or interruptions in the supply of . . . individual petroleum fuels and specify appropriate measures to be taken at each level or for each type of energy emergency as necessary to protect the public health or safety, or prevent unnecessary or avoidable damage to property. The rules may prescribe different measures for each different type or level of declared energy emergency, and for any type or level shall empower the governor to:

- (2) Restrict or curtail public or private transportation, or require or encourage the use of car pools or mass transit systems;
- (3) Order, during a declared energy emergency, any . . . petroleum fuel producer, refiner, wholesale distributor, or retail dealer to sell . . . petroleum fuel in order to alleviate hardship . . .;
- (4) Order, during a declared energy emergency, other energy conservation or emergency production or distribution measures to be taken in order to alleviate hardship . . .²⁵

²⁰ The power conferred on the commissioner by the New York statute does not otherwise limit the powers of the Governor: "Nothing contained in this chapter shall be construed to limit, curtail, abolish or terminate any function or powers of the Governor which he had prior to the effective date thereof." *Id.* § 5-121.

²¹*Id.* § 5-117.

²²*Id.* § 10-105.

²³ Ohio Rev. Code Ann., tit. 15, § 1551.08(a) (Page 1979).

²⁴*Id.*

²⁵*Id.* § 1551.09(a).

The Governor of Ohio is empowered to declare a 30-day energy emergency when he finds that

the health, safety, or welfare of the residents . . . is so imminently and substantially threatened by an energy shortage that immediate action of state government is necessary to prevent loss of life, protect the public health or safety, and prevent unnecessary or avoidable damage to property.²⁶

Thus, Ohio law is broad enough to encompass the mandatory allocation of petroleum, fuel set-asides, and demand restraint measures, as determined by the State's energy department.

C. State Energy Emergency Contingency Plans²⁷

Thirty-six states have published a final or draft emergency contingency plan. Most of these plans were developed in response to the Emergency Energy Conservation Act of 1979 ("EECA").²⁸ The EECA empowered the President, *inter alia*, to establish "monthly emergency conservation targets for any . . . energy source"²⁹ either on a nationwide or a state-by-state basis after the declaration of a severe energy supply interruption. Once an energy conservation target was set for a State, the statute required the governor of the State to formulate an emergency conservation plan designed to meet or exceed the emergency conservation target.³⁰ Each state plan was required to "provide for emergency reduction in the public and private use"³¹ of the energy source for which a conservation target had been set. Although the EECA expired on July 1, 1983, most States have one or more statutes conferring sufficient authority on their respective governors to implement some or all of the measures contained in their emergency contingency plans.³²

While no two state draft plans prepared in conjunction with the former EECA mandate are alike, most of the plans generally rely on voluntary conservation efforts and public information dissemination regarding the energy emergency (26 States), and otherwise focus on motor fuel use and travel. Thirteen States have a phased

²⁶*Id.* § 1551.09(b).

²⁷The information contained in this section was obtained from a comprehensive survey conducted by the authors during the first half of 1983 and from *Special Report: State Emergency Energy Contingency Plans* (April 15, 1982), at 5, prepared by The American Petroleum Institute. All States were asked by the authors to respond to the survey. Forty-seven States responded. Of these, 28 had final plans; 8 had draft plans; 7 were in the process of developing or reviewing a draft; and 4 States had no plan.

²⁸42 U.S.C. §§ 8501-8541 (Supp. V 1981).

²⁹42 U.S.C. § 8511(a)(1) (Supp. V 1981).

³⁰42 U.S.C. § 8512(a)(1)(A) (Supp. V 1981).

³¹42 U.S.C. § 8512(b)(1) (Supp. V 1981).

³²The EECA provided that Sections I through IV, pertaining, *inter alia*, to the emergency energy conservation program and automobile fuel purchase measures, "including any actions taken thereunder, shall cease to have effect on July 1, 1983." 42 U.S.C. § 8541(c)(1) (Supp. V 1981). Thus, state contingency plans which constituted "actions" taken under Section I also ceased to have effect on July 1, 1983, if not based on independent state authority; practically speaking, even after expiration of the substantive provisions of the EECA, most state energy emergency statutes permit state governors to implement similar emergency conservation plans designed to meet or exceed state-established emergency conservation targets.

response plan in which various provisions will be triggered depending on the extent of the shortage.³³

D. Specific Examples of State Energy Emergency Contingency Plans

1. California

California's energy emergency contingency plan is a "mixed strategy" which "calls for an escalating government role as a physical shortage becomes more severe."³⁴ Should crude oil supplies fall 5% below expected demand levels, California's plan would respond with increased monitoring of stocks and dissemination of public information, as well as appeals for voluntary fuel switching and voluntary use of private stocks. In addition, local governments would be asked to begin queue management, including use of minimum gasoline purchase and odd-even gasoline purchase restrictions.

If California's crude oil supplies were to drop to 10% below anticipated demand levels, indicating a "serious" shortage, the State would continue its stepped-up information and monitoring activities. Additionally, the State would initiate hardship relief rebates through augmentation of the Low-Income Home Energy Assistance Program and, if available, federal block grant rebates. In a serious shortage, California would also activate a state set-aside, and would contemplate lifting sulfur restrictions and enforcing a 50 mph speed limit. In addition, the State would favor mitigation of "price spikes" through drawdown of oil stockpiles and the implementation of revenue recycling. In a severe shortage, involving a 25% drop in crude oil supplies below expected demand, the plan calls for increased use of the state set-aside to protect public emergency and health services, the agricultural and manufacturing sectors, and trucking. In such a situation, California anticipates that federal petroleum price and allocation controls would be a necessity and would be

³³ Most States expect to respond to an energy shortage by implementing one or more of the following:

State Fuel Set-Aside — (16 States: Arkansas, California, Delaware, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, North Dakota, Ohio, Pennsylvania, New York, Texas and West Virginia);

Odd-Even Purchase of Gasoline — (14 States: Alabama, Illinois, Maine, Michigan, Montana, Nevada, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, North Dakota and Texas);

Minimum Fuel Purchase — (13 States: Alabama, Illinois, Kentucky, Maine, Maryland, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Pennsylvania and Texas);

Speed Limit Enforcement and/or Reduction — (11 States: Alabama, Illinois, Kentucky, Maine, Michigan, Nevada, North Carolina, North Dakota, Oregon, Pennsylvania and Texas);

Building Temperature Restrictions — (10 States: Alabama, California, Maine, Maryland, Massachusetts, Mississippi, Montana, Nebraska, Ohio and Oregon);

Ridesharing — (8 States: Illinois, Maine, Maryland, Nevada, New Mexico, North Dakota, Oregon and Texas);

Fuel Switching — (7 States: California, Delaware, Maine, Massachusetts, Minnesota, Mississippi and New York);

Work/School Restrictions — (6 States: Alabama, Mississippi, Nebraska, New Mexico, North Carolina and Pennsylvania);

Driverless Days — (3 States: Alabama, Illinois and Pennsylvania);

Increasing Prices — (2 States: Oregon and Pennsylvania);

Limiting Deliveries — (1 State: Minnesota);

Prioritizing — (11 States: Arizona, California, Delaware, Hawaii, Kentucky, Maine, Michigan, Minnesota, Nebraska, New Mexico and Oregon).

Additionally, 9 state plans (Connecticut, Iowa, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska and Ohio) focus on emergency conservation of a variety of energy sources instead of relying solely on motor fuel conservation.

³⁴ California Energy Shortage Contingency Plan, Part II, at II-4 (January 1983).

implemented, thereby limiting the role that California would play during the course of the emergency.

2. Illinois

The focus of Illinois' energy emergency contingency plan is on transportation conservation measures, ranging from carless days and a three-day motor gasoline purchase plan to speed limit enforcement and ride-sharing. The plan also contemplates reduced automobile use and staggered work hours for state employees, and calls for increased dissemination of public information.³⁵

3. Michigan

Michigan has developed an extensive plan for responding to motor gasoline shortages.³⁶ The plan offers a variety of supply management and demand restraint measures which could be selected to address a serious gasoline shortage. Most of the measures would be imposed on a mandatory basis. The State has an express preference for demand restraint measures because such measures "interfere least with market distribution of gasoline."³⁷ Among the supply management measures are a state set-aside of 3% for motor gasoline, odd-even gasoline purchase restrictions, and a priority end-user plan, establishing two levels of priority users (the first priority, including police, fire, and emergency medical services, would be entitled to 100% of current requirements; the second priority, including agricultural services, energy suppliers, mass transportation, and other public services, would receive an unspecified percentage less than 100% of current requirements). Demand management measures would include, among other things, a public information program, carpooling and vanpooling, and enforcement of a 55 mph speed limit.

4. New York

New York does not have an energy emergency contingency plan as such on its books, although it has generated comprehensive long-range energy planning reports. The State does have various ongoing programs, however, including energy conservation, speed limit enforcement, public information, and mass transit programs. Should an energy shortage occur, compressed workweek, odd-even and/or minimum motor fuel purchase programs, and a fuel set-aside program, could be implemented.

5. Ohio

Ohio has adopted emergency rules for various types of fuel shortages. With regard to petroleum shortages, the rules establish seven "priority uses," including public emergency, health, and transportation services, farm food production, and commercial carriers of essential fuel and food requirements. The rules allow mandatory allocation of transportation fuels to meet the requirements of the

³⁵*Illinois Emergency Energy Conservation Management Plan* (February 27, 1981).

³⁶*Michigan Gasoline Shortage Response Plan* (December, 1981).

³⁷*Id.* at 1.

priority uses in full.³⁸ In addition, the rules permit odd-even and minimum fuel purchase restrictions, depending on the severity of the shortage.³⁹

E. Impact of State Authority to Allocate the Supply and Control the Price of Oil in an Emergency

As the preceding section illustrates, 30 States have enacted legislation providing, *inter alia*, for broad oil control authority, including allocation, rationing, and conservation authority during an energy emergency. Moreover, a substantial number of States have developed draft contingency plans which provide the actual mechanisms for controlling oil under such circumstances. Any energy emergency of sufficient magnitude to trigger a Presidential finding, under Section 161(d) of the Energy Policy and Conservation Act ("EPCA"),⁴⁰ that a severe energy supply interruption exists, would probably allow action at the state level to bring state oil control authorities and conservation plans into play. Should such an emergency occur, there is nothing to indicate that the response to the emergency at the state level would be anything but varied — with some States probably controlling the flow of oil to assure supplies to "priority" users and others relying primarily on market forces. Thus, the flow of crude oil and refined petroleum products domestically will be affected by individual state controls; however, it is impossible to predict in advance of an energy emergency how substantial the impact of such state controls will be.⁴¹

III. SUPREMACY AND COMMERCE CLAUSE ISSUES RELATING TO STATE EFFORTS TO CONTROL OIL IN AN EMERGENCY

The two main sources of constitutional constraints on state action in this area are the Supremacy Clause and the Commerce Clause. Of the two, we believe that the Commerce Clause is likely to pose a more serious restraint on state action.

A. Supremacy Clause Issues

With the expiration of the Emergency Petroleum Allocation Act of 1973 ("EPAA")⁴² on September 30, 1981, and the sustaining of President Reagan's veto of the Standby Petroleum Allocation Act of 1982 ("SPAA"),⁴³ the federal government is no longer in the business of regulating the allocation and pricing of oil, subject only

³⁸Emergency Rules for Fuel Shortages, *Transportation Fuels Emergency*. Rules 1551:2-19-01, 02 (January 7, 1983).

³⁹*Id.* Rule 1551:2-19-06.

⁴⁰42 U.S.C. § 6241(d) (1976).

⁴¹The spectre of 50 different state responses to a future energy emergency has, according to a recent report, apparently triggered a Department of Energy ("DOE") study of state energy emergency authorities: "DOE is trying to determine whether the federal government should do something about the many, varying energy emergency regulations adopted by states in recent months" in view of public comments calling "for some form of federal coordination and pre-emption of state regulations to prevent interference with interstate activities without recourse to the courts." *Inside Energy/with Federal Lands* (January 24, 1983), at 3. A recent General Accounting Office Report has also focused on this problem, noting that because "the role of State and local regulatory programs is left unclear," the possibility exists "for a spate of litigation at the beginning of a crisis concerning the scope of Federal preemption of State and local regulatory activities." General Accounting Office, *Analysis of Department of Justice Memorandum Concerning President's Statutory Authorities in Oil Crisis*, B-210236 (March 4, 1983), at 5.

⁴²Pub. L. No. 93-159, 15 U.S.C. §§ 751-790h (1976 & Supp. V 1981) (expired).

⁴³S. 1503, 97th Cong., 1st Sess. (1981).

to quite narrow exceptions. Nor does it seem likely that this Administration would willingly administer such a program in a future emergency. One consequence of this "hands off" approach is that broad federal legislation no longer exists, as was the case when the EPAA was in effect,⁴⁴ expressly prohibiting the States from implementing oil control programs to the extent such programs would be in conflict with a federal program.

Given the Administration's firm view that free market mechanisms should be allowed to allocate energy resources during an emergency and, on the other hand, various state statutes and conservation plans which rely on state government intervention in the marketplace during an emergency, an important constitutional issue arises under the Supremacy Clause of the United States Constitution⁴⁵ concerning the extent to which States can regulate oil absent express federal pre-emption of such activity.⁴⁶ While acknowledging the difficulty of resolving this issue outside the context of a specific emergency and specific state responses thereto, we believe that a Supremacy Clause challenge to the energy emergency response mechanisms currently being contemplated by the States would be difficult to sustain.

In cases where pre-emption of an area has not been explicitly ordained by Congress, courts engage in a now-familiar process of attempting to discover congressional intention to pre-empt.⁴⁷ Such intention usually must be inferred from a review of the purpose and nature of the federal regulation and the interaction of the state regulation with the federal regulation. The judicial standards applied in determining whether Congress intended to pre-empt the field (as established by

⁴⁴15 U.S.C. § 755(b) (1976). The Defense Production Act, 50 U.S.C. App. §§ 2061-2169 (1976) provides limited authority, *inter alia*, to allocate oil in the civilian market to promote the national defense. In addition, § 251 of the Energy Policy and Conservation Act, 42 U.S.C. § 6271, authorizes the President to allocate and establish prices for oil as necessary to meet the international oil-sharing obligations of the United States under the International Energy Program. Neither of these statutes expressly pre-empts state oil control authority. For a fuller description of these statutes, see O'Donnell and Glassman, *After the EPAA: What Oil Allocation and Pricing Authorities Remain?* 2 Energy L. J. 33 (1981) [hereinafter cited as O'Donnell and Glassman].

⁴⁵U.S. Const. art. VI, cl. 2.

⁴⁶This issue was directly confronted by the Office of Legal Counsel of the Department of Justice in a *Memorandum of Law*, at 72-73 (prepared in response to a directive contained in Section 3 of the Energy Emergency Preparedness Act of 1982, Pub. L. No. 97-229, 42 U.S.C. §§ 6281-6282 (Supp. 1982), submitted by the President to Congress):

Since the scope and effect of both federal and state regulation in the event of an emergency will depend largely on the circumstances of that emergency and the choices made by the appropriate state and federal officials in response to that emergency, a determination whether particular state laws or regulations conflict with federal directives in all likelihood cannot be made unless and until an emergency exists and those authorities are exercised.

Particularly if the state statute is "an exercise of 'historic police power of the states,'" which would include most state energy emergency laws and regulations, the Supreme Court has refused to find preemption "unless that was the 'clear and manifest purpose of Congress.'" *Florida Avocado Growers, supra*, 373 U.S. at 146, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The congressional mandate must be "unambiguous," *Florida Avocado Growers, supra*, 373 U.S. at 147, and "compelling." *New York Telephone Co. v. New York Labor Department*, 440 U.S. 519, 540 (1979).

In the absence of a relatively direct conflict between state and federal directives, we believe the statutory authorities available to the President to deal with an energy emergency probably would not be interpreted to contain an "unambiguous" and "compelling" mandate to preempt state energy emergency provisions.

⁴⁷See, e.g., *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). But see Note, *Pre-Emption as a Preferential Ground: A New Canon of Construction*, 12 Stan. L. Rev. 208 (1959). For a comprehensive, if less recent, review of the development of the pre-emption doctrine, see Note, *The Pre-emption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 Colum. L. Rev. 623 (1975). See generally Note, *Environmental Law: A Reevaluation of Federal Pre-emption and the Commerce Clause*, 7 Fordham Urb. L. J. 649 (1979).

Supreme Court cases over the last twenty years) are high — a federal regulation will not be deemed pre-emptive unless “the nature of the regulated subject matter permits no other conclusion, or Congress has unmistakably so ordained.”⁴⁸

In the case of oil controls, congressional intention to pre-empt must be gleaned, first and foremost, from a legislative picture in which comprehensive oil control authority over current and future actions has been allowed to expire; congressional attempts to pass new comprehensive oil control legislation have failed; and other oil control authority pursuant to other currently effective statutes, such as the Defense Production Act of 1950 (“DPA”),⁴⁹ is narrowly confined. This legislative picture provides considerable support for the conclusion that Congress has not intended to pre-empt the States from regulating the flow of oil within their borders.

The expiration of the EPAA, which contained a provision expressly pre-empting conflicting state oil allocation programs,⁵⁰ allows the States far greater latitude to control the distribution and consumption of oil. This flexibility was preserved by the Senate’s action in Congress sustaining President Reagan’s veto of the SPAA, which would have provided the Executive Branch with authority to reimplement oil controls as comprehensive as those authorized by the EPAA during an emergency. The SPAA as passed by Congress contained a provision which “preempts any provision of any law or regulation adopted or promulgated by a State or any political subdivision thereof to the extent that such law or regulation provides for the pricing or allocation of any petroleum product.”⁵¹ Inclusion of this pre-emption provision in the SPAA would appear to demonstrate Congress’ recognition that some form of affirmative pre-emption may be necessary to preclude state regulation of oil.

The legislative history of the SPAA provides further support for this conclusion. In the Conference Report to the SPAA, the Senate and House conferees discussed

⁴⁸*Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981); *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981). One of the most frequently recited formulas for determining whether state authority has been pre-empted appears in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1946):

The question in each case is what the purpose of Congress was. Such a purpose may be evidenced in several ways. [1.] The scheme of federal regulations may be so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it [2.] Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject [3.] Or the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose [4.] Or the state policy may produce a result inconsistent with the objective of the federal statute.

Of course, there are numerous cases in which pervasive and complex regulations promulgated under federal law do not demonstrate a congressional intent to completely occupy a particular field. *Accord*, e.g., *New York Department of Social Services v. Dublino*, 413 U.S. 405 (1973). There are also many cases in which Congress has not completely foreclosed state legislation in a particular area but where, nevertheless, a particular state law is pre-empted because it conflicts with a federal law. *Accord*, e.g., *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). And, there are instances in which a state law which is not inconsistent with a federal scheme must fall because of the pervasiveness of the federal scheme. *Accord*, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519, *reh’g denied*, 431 U.S. 925 (1977). In addition, the mere fact that a state law promotes a valid state interest will not protect it from a Supremacy Clause attack if the state law frustrates the full effectiveness of the federal law. *Accord*, e.g., *Perez v. Campbell*, 402 U.S. 637 (1971).

⁴⁹See note 44 *supra*.

⁵⁰EPAA, § 6(b), 15 U.S.C. § 755(b) (expired).

⁵¹S. 1503, 97th Cong., 2d Sess. § 280(a)(1982). Both the original Senate bill and the House amendment thereto had included similar provisions.

the parameters of the pre-emption provision at considerable length.⁵² Therein, the conferees expressly stated that the pre-emption provision would *not* affect petroleum-related state laws "that promote energy conservation, or restrain demand for petroleum products at the retail level," including "odd-even management programs, minimum purchase requirements, car-less day and parking restrictions, fuel switching requirements, car pooling programs, and speed limits."⁵³ The Conference Report thus demonstrates that Congress considered state regulation of oil by means of certain demand restraint and energy conservation measures — many of which figure prominently in current state energy emergency contingency plans described above — to be acceptable regardless of the existence of a substantial federal presence in the area.

Finally, as mentioned above, the Energy Emergency Preparedness Act Amendments of 1983, which was introduced in July, 1983, contains its own pre-emption provision barring state oil allocation and price controls. The bill appears to be yet another acknowledgement of the authority of the States to regulate oil during emergencies in the absence of comprehensive federal oil controls.

Even absent such illuminating legislative history, case law supports the conclusion that a Supremacy Clause challenge to state regulation of oil during emergencies would not meet with success. In *Mobil Oil Corp. v. Tully*, a case with an unusually complex procedural history,⁵⁴ the issue was whether an anti-passthrough provision of a New York State gross receipts tax on oil companies, limited to their revenues derived from their activities within the State, was pre-empted by the EPAA on the grounds that the anti-passthrough provision operated as a price control measure which conflicted with the price control scheme established by the EPAA. The District Court agreed that the provision was pre-empted, and enjoined its enforcement. The Temporary Emergency Court of Appeals ("TECA") affirmed the judgment.

TECA made two significant pronouncements. First, it determined that the EPAA not only pre-empted the New York statute as to petroleum products whose distribution and prices were regulated at that time by the EPAA, but also as to petroleum products which had been "decontrolled." TECA reasoned that, despite exemption of such products from the price and allocation regulations, "the federal slate has not been wiped clean,"⁵⁵ because the President retained authority to reimpose controls.

Any attempt by New York State to affect the structure of prices charged by the oil companies pursuant to federal regulation is barred by conflict with the federal scheme. The EPCA⁵⁶ expires by its terms on September 30, 1981. 15 U.S.C. § 760g. In the meantime, the goals to control the impact of OPEC determinations regarding production and prices are viable. At the present time price decontrol has been determined by the President to be the best method to achieve an enunciated goal. The state statute under attack here is an instrument of price control in conflict with the objectives of the program.⁵⁷

⁵² Conf. Rep. No. 97-313, 97th Cong., 2d Sess. 21-23 (1982).

⁵³ *Id.* at 22.

⁵⁴ 499 F. Supp. 888 (N.D.N.Y. 1980), *appeal referred to Temporary Emergency Court of Appeals*, 639 F.2d 912 (2d Cir. 1981), *cert. denied sub nom. Tully v. New England Petroleum Corp.*, 452 U.S. 967 (1981), *aff'd*, 653 F.2d 497 (TECA, 1981), *vacated and remanded sub nom. Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982), *motion to amend judgment denied nom. Mobil Oil Co. v. Tully*, 689 F.2d 186 (TECA, 1982).

⁵⁵ 653 F.2d at 500.

⁵⁶ Pub. L. No. 94-163, 15 U.S.C. § 760a(c)(1) (1976). This statute amended the EPAA to give the President discretion to exempt crude oil, residual fuel oil, or any refined petroleum product from EPAA price and allocation controls.

⁵⁷ 653 F.2d at 502.

Second, and more importantly for purposes of the issues addressed in this article, the Court went on to offer that:

[w]hen the statute expires in September 1981 it will signal the end of federal concern in this area. Until that time the state statute is in conflict with the federal statute and regulations.⁵⁸

The Supreme Court, noting that "[t]he expiration date for the federal statute has come and gone," thereby eliminating "the only barrier to the enforcement of the anti-passthrough provision,"⁵⁹ set aside the District Court's injunction of the provision and remanded the case to TECA for consideration of the issue whether "any federal interest" would prevent New York from now enforcing the statute so as to prevent the passthrough of taxes which were paid or accrued prior to expiration of the EPAA.⁶⁰ Importantly, the Supreme Court stated that, with the expiration of the EPAA, "the operation of the passthrough prohibition is not blocked by conflicting federal law."⁶¹

Thus, both TECA and the Supreme Court appear to be in agreement that termination of the EPAA oil control program leaves the field open to the States to implement their own such programs without running afoul of the Supremacy Clause.⁶² Hence, the likeliest state regulations to fall under a Supremacy Clause challenge would be those in actual conflict with future allocation regulations implemented under, *e.g.*, EPCA or the DPA.⁶³ State regulations which do not directly conflict with such federal programs but which would conflict only with a general federal policy (such as a general, non-statutory Administration policy favoring free market operation) would likely survive a Supremacy Clause challenge. Accordingly, in our view, the typical measures appearing in state energy emergency contingency plans — motor fuel set asides⁶⁴ allocation of fuel to high priority users,⁶⁵ mandatory demand restraint measures⁶⁶ and gasoline rationing⁶⁷ — would not face federal pre-emption problems in the absence of EPAA-type legislation on the books.⁶⁸

⁵⁸*Id.*

⁵⁹455 U.S. at 247.

⁶⁰*Id.* at 248.

⁶¹*Id.*

⁶²See R. Poling, *Legal Effect of the Expiration of the Emergency Petroleum Allocation Act: Termination of Federal Statutory Pre-Emption of State Law*, Library of Congress Congressional Research Service (May 14, 1981), reprinted in Cong. Rec. (daily ed. Aug. 3, 1981) (statement of Sen. Ford).

⁶³See notes 40 and 44 *supra*.

⁶⁴*E.g.*, in the energy emergency contingency plans of Arkansas, California, Delaware, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Texas and West Virginia.

⁶⁵*E.g.*, in the energy emergency contingency plans of Arizona, California, Delaware, Hawaii, Kentucky, Maine, Michigan, Minnesota, Nebraska, New Mexico and Oregon.

⁶⁶*E.g.*, in the energy emergency contingency plans of Delaware, Illinois, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oregon and Pennsylvania.

⁶⁷*E.g.*, in the energy emergency contingency plans of Florida and New Mexico.

⁶⁸This assumes, of course, no *actual* conflicts were to develop between state energy emergency measures and federal emergency measures placed into effect under EPCA, the DPA, or other federal statutes.

For further support of this conclusion, see Tanzman, *supra* note 4. The author notes that S. 1503, 97th Cong., 1st Sess. (1981), known as the Standby Petroleum Allocation Act, "contained provisions which mandated unregulated oil prices except during specified emergencies upon Presidential declaration, and explicitly pre-empted state control over oil prices." *Id.* at 289-90, n. 63. The author concludes that passage of the bill by Congress suggested congressional recognition "that states have the power to regulate crude oil and refined petroleum product prices" and that veto of S. 1503 "leaves this power intact." *Id.*

B. Commerce Clause Issues

Even if a particular state oil control regulation does not raise pre-emption problems, it may nevertheless be subject to challenge under the Commerce Clause⁶⁹ on the argument that it creates an undue burden on interstate commerce.⁷⁰ *Pike v. Bruce Church, Inc.*⁷¹ provides perhaps the best known formula for evaluating Commerce Clause issues:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.⁷²

The *Bruce Church* balance-of-interest test was recently applied by the Supreme Court with approval in *Arkansas Electric Cooperative Association v. Arkansas Public Service Commission*,⁷³ upholding the Arkansas Commission's jurisdiction over the wholesale electricity rates charged by a customer-owned rural power cooperative. Rejecting the approach of prior cases which found "a point in time and space where the interstate commerce . . . ends and intrastate commerce begins," the Court

⁶⁹U.S. Const. art. I, § 8, cl. 3.

⁷⁰*Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), first established that States may be barred under the Commerce Clause from exercising control over interstate trade even where not otherwise barred on federal pre-emption grounds. See, e.g., *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

⁷¹397 U.S. 137 (1970).

⁷²*Id.* at 142. The Department of Justice has concluded that while "as a general matter state laws or regulations that would allow a state to enhance its petroleum supply to the detriment of other states, for example, by an allocation scheme or export restriction, would have to be carefully scrutinized,"

. . . it may be possible that a state could constitutionally impose some restrictions on the export or allocation of petroleum products to protect the health of its citizens in times of an emergency energy shortage if the restrictions were narrowly tailored to serve legitimate state preservation and conservation purposes.

Memorandum of Law, supra note 46, at 74-75. The Department has noted, however, that any facially discriminatory state statute or regulation would automatically be subject to "the strictest scrutiny." *Memorandum of Law, supra* note 46, at 75.

The Department of Justice has also noted that even state statutes or regulations which do not directly discriminate in favor of in-state consumers or producers may not pass muster under the Commerce Clause:

For example, if the regulation places unreasonable barriers to the flow of goods across state lines [see, e.g., *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976)], imposes price controls or other regulation directly on interstate transactions [see, e.g., *Public Utilities Comm'n v. Atleboro Steam & Electric Co.*, 273 U.S. 83 (1927)], or poses a threat of multiple, inconsistent burdens because of similar, conflicting regulation by other states, it would be vulnerable to a constitutional challenge [see, e.g., *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945)]. State measures designed to deal with energy emergencies that are strictly local in scope and effect and are clearly linked to preservation of the health and safety of the citizens of the state, would probably withstand constitutional scrutiny. A determination whether particular state laws or regulations would be vulnerable to challenge on the ground that they unconstitutionally burden interstate commerce can be made, however, only on a case-by-case basis.

Id. at 76.

⁷³___ U.S. ___, 103 S. Ct. ___, 76 L. Ed. 2d 1 (1983).

"looked [instead] to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in commerce."⁷⁴

Application of the *Bruce Church* test to the energy emergency measures now being contemplated by the States, such as set-asides, demand restraint measures, priority allocation schemes, and motor fuel rationing plans, leads to the conclusion that such measures are not prohibited *per se* under the Commerce Clause, and are likely to overcome any Commerce Clause challenges, if the measures meet a clear local need and are applied in an evenhanded manner. We believe a reviewing court would find that these measures effectuate a legitimate local public interest: in purpose and effect they will reduce energy demand and conserve scarce energy resources during a crisis to promote local safety, health, and welfare. Further, these measures on their face do not necessarily discriminate against or affect interstate commerce directly.⁷⁵ To the extent that they affect oil destined only for intrastate markets, they would likely be viewed as having merely an incidental effect on interstate commerce. A state set-aside which is structured to affect refined petroleum products which are *already* within intrastate markets or immediately destined for such intrastate markets and demand restraint measures such as driverless days or compressed workweeks may directly affect only in-state residents and business concerns. The major issue with most of these plans is the even-handedness of their application. Although the plans are not facially discriminatory, if they are applied in a manner which favors in-state residents or businesses, they may well be held unconstitutional.

With regard to the "nature of the local interest involved" under the *Bruce Church* test, we believe that a reviewing court could well determine the nature of the state interests for the measures discussed above, to be directed toward health and safety considerations rather than economic considerations — *i.e.*, economic protectionism. As noted by the Supreme Court in *Arkansas Electric Cooperative*, the "most serious concern identified in *Bruce Church* [was with regard to] economic protectionism."⁷⁶ Here, however, none of the emergency contingency planning measures currently being contemplated by the States are measures which on their face discriminate

⁷⁴*Id.* at 7, quoting from 314 U.S. at 505. The Court noted that the "modern jurisprudence" of cases like *Bruce Church* "recognizes . . . that there is 'an infinite variety of cases in which regulation of local matters may also operate as a regulation of [interstate] commerce, [and] in which reconciliation of state and national powers to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved.'" *Id.* at 14, quoting from *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 768-69 (1945).

⁷⁵See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), upholding a state statute barring any petroleum producer or refiner from operating a retail service station in the State. The Supreme Court found that the divestiture statute burdened interstate and intrastate businesses equally and erected no barriers to interstate gasoline distributors: "[W]e cannot adopt appellants' novel suggestion that because the economic market for petroleum products is nationwide, no State has the power to regulate the retail marketing of gas . . . [W]e do not find that the Commerce Clause, by its own force, pre-empts the field of retail gas marketing . . . In the absence of a relevant congressional declaration of policy, or a showing of a specific discrimination against, or burdening of, interstate commerce, we cannot conclude that the States are without power to regulate in this area." *Id.* at 128-29.

⁷⁶76 L. Ed. 2d at 17.

against interstate commerce to protect local business concerns or to "hoard" local natural resources.⁷⁷

As to the last aspect of the *Bruce Church* test — whether the state's interests would be promoted as well utilizing different measures which might impact on interstate activities to a lesser extent — any of the current state contingency measures would appear to have the *same* impact on interstate commerce as any of the others because none would alter the number of gallons flowing through a given State.⁷⁸ Each contingency measure represents an attempt not to increase the absolute amount of oil available to a State but rather to redistribute that available oil among potential recipients. Moreover, we believe that a court reviewing a particular state emergency contingency measure in the context of an energy crisis would be reluctant to second-guess the State by finding that some other emergency measure might result in a lesser burden on interstate commerce.⁷⁹

Having now examined current state emergency contingency measures in light of Commerce Clause considerations, it may be useful to briefly explore measures which the States have *not* adopted — but which they conceivably *could* adopt during an energy emergency — to identify emergency measures which may not pass muster under the Commerce Clause.

None of the States have adopted an emergency measure which discriminates against interstate commerce on its face. Were a State to adopt such a measure, the measure would be strictly scrutinized; more than likely, the discrimination would constitute a fatal defect of the measure.⁸⁰

⁷⁷Generally, state efforts directed toward economic protectionism are constitutionally impermissible, while efforts directed toward "conservation and preservation" are not. See *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982). Thus, for example, state statutes giving their residents "a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom" have been consistently struck down by the Supreme Court. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982). *Accord, Hughes v. Oklahoma*, 441 U.S. 332 (1979); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). Cf. *Reeves, Inc. v. Stabe*, 447 U.S. 429 (1980). Of course, "[t]here is no doubt that the states do possess power to allocate and conserve natural resources upon and beneath their lands." *Northern Natural Gas Co. v. State Cooperation Commission of Kansas*, 372 U.S. 84, 93 (1963). When a state exercises such power, however, the issue is whether "the particular means chosen by [the state] to exercise the conceded power" threatens "effectuation of the federal regulatory scheme." *Id.* Accordingly, "not every restriction imposed by a state on the export of its natural resources is necessarily unconstitutional." *Memorandum of Law, supra* note 46, at 75. If a state statute is "narrowly tailored to the conservation and preservation rationale," 73 L.Ed.2d at 1266, it might withstand a Commerce Clause challenge.

⁷⁸This is not to suggest that the ultimate impact of each and every contingency measure on oil available to individual states would be identical. For example, studies have indicated that oil price and allocation controls tend to discourage the influx of high-priced marginal oil supplies to the area governed by such controls, whereas absence of such controls tends to attract marginal supplies. See DOE/PE-0021, *Reducing U.S. Oil Vulnerability: Energy Policy for the 1980's*, (DOE, Ass't Secretary for Policy and Evaluation, November 10, 1980); *Staff Working Paper, The Energy Problem: Costs and Policy Options* (DOE, Office of Oil Policy and Evaluation, May 23, 1980). Thus, the imposition of oil allocation and price controls by a given state could ultimately decrease the flow of oil to that state vis-a-vis other states relying on different types of contingency measures, e.g., motor fuel set-asides, speed limit restrictions or minimum fuel purchase regulations. The Supreme Court has not addressed these types of indirect, ultimate impacts in assessing the merits of Commerce Clause challenges to particular state regulations. E.g., *Commonwealth Edison Company v. Montana*, *infra* note 88 (Supreme Court did not discuss indirect effect on interstate commerce of Montana severance tax, which was to discourage interstate purchases of Montana coal).

⁷⁹See generally *Hunt v. Washington Apple Advertising Comm.*, 432 U.S. 333 (1977); *Cities Services Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179 (1950).

⁸⁰See, e.g., *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

Along these lines, any attempt by a State to, *e.g.*, discriminate in favor of in-state users with regard to oil produced within its borders would most likely violate the Commerce Clause.⁸¹ In a 1981 case, *Tenneco, Inc. v. Sutton*,⁸² a federal district court in Louisiana struck down a state statute which would have given "Louisiana users first priority at obtaining new natural gas that may be found in the state."⁸³ The court found the statute discriminatory on its face, thereby triggering the requirement that the state "make a very strong showing of a legitimate state purpose."⁸⁴ The court found that "[p]resent day fuel costs, dwindling resources, and the desire to protect Louisiana industry and consumers motivated the Louisiana legislature to protect its residents from potential natural gas shortages."⁸⁵ Significantly, however, the court concluded that

regardless of the legislature's intent to protect its own citizens, the actions of the Louisiana legislature cannot be supported as a valid local purpose under the Commerce Clause. *Economic protectionism has long been regarded as an impermissible state goal. A state cannot seek to isolate itself economically by burdening interstate commerce . . . Nor may a state attempt to isolate itself from a problem common to many states by erecting a barrier against movement of interstate trade.*⁸⁶

Further, state attempts to regulate the flow of oil destined for interstate commerce during an energy emergency by means of, *e.g.*, a tax measure, would also be susceptible to a Commerce Clause challenge.⁸⁷ For example, a tax on oil passing into a State on its way to interstate markets, and which discriminated against interstate commerce in favor of local interests, would probably not survive a Commerce Clause challenge in light of the Supreme Court's recent decision in *Maryland v. Louisiana*; in that case, the Court struck down a Louisiana "first use tax"

⁸¹ *Accord*, Tanzman, *supra* note 4, at 292-96. See *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982).

⁸² 530 F. Supp. 411 (M.D. La. 1981).

⁸³ *Id.* at 437.

⁸⁴ *Id.* at 440.

⁸⁵ *Id.*

⁸⁶ *Id.* (emphasis added), citing *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). See *Hicklin v. Orbeck*, 437 U.S. 518, 532 (1978), in which the Supreme Court reasserted that "the Commerce Clause circumscribes a State's ability to prefer its own citizens in the utilization of natural resources found within its borders, but destined for interstate commerce."

⁸⁷ The Supreme Court, beginning with *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199-200 (1824), has developed a separate analytical framework for assessing the constitutionality of state tax laws. Currently, the Court applies a four-part test, first crystallized in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1974), for determining whether a given tax violates the Commerce Clause. In order to survive Commerce Clause scrutiny, the tax must: (1) be applied to an activity with a substantial nexus in the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the State. (Although the Court currently gives lip service to all four parts of the test, its focus is on the second and third parts; it applies a low standard for meeting the first part and appears to have rendered the fourth part of the test meaningless in *Commonwealth Edison v. Montana*, *infra* note 88.) The Court has focused on the "practical effect of a challenged tax," *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443 (1980), and has rejected the notion that a state tax levied on interstate commerce is *per se* invalid because "a State has a significant interest in exacting from interstate commerce its fair share of the cost of state government." *Washington Revenue Dept. v. Association of Washington Stevedoring Co.'s*, 435 U.S. 735, 748 (1978).

imposed on any natural gas imported into the State which was not previously subject to taxation by another State or the United States.⁸⁸

On the other hand, one author has pointed out that states have numerous methods of directing scarce energy supplies to their citizens through regulation without explicitly denying access to out-of-state consumers.⁸⁹ The author cites as one example a state law requiring "each gasoline and home heating oil dealer to maintain a certain level of reserves over their ordinary sales as a condition for a state business license."⁹⁰ Such a law, the author states, would tend to "increas[e] energy supplies for residents without unconstitutional protectionism."⁹¹

The foregoing discussion prompts the conclusion that current state energy emergency contingency measures, at least on their face, do not offend the Commerce Clause. However, a key issue is the manner in which these measures will be applied during an actual oil supply interruption; if such measures — or *ad hoc* measures — are applied in a discriminatory manner Commerce Clause violations are likely to arise.

IV. THE STRATEGIC PETROLEUM RESERVE AND STATE OIL CONTROL AUTHORITY — A SPECIFIC CASE

We turn now to a limited examination of the constitutional implications of state oil control programs on the distribution of petroleum from the Federal Strategic Petroleum Reserve. The examination will be directed to the situation in which the President has ordered drawdown and distribution of oil from the SPR following his declaration of a severe energy supply interruption.⁹²

The SPR was the creation of the Energy Policy and Conservation Act of 1975.⁹³ This statute authorizes development of the SPR and drawdown and distribution of oil in the SPR pursuant to a "Distribution Plan" developed by the Department of Energy ("DOE").⁹⁴ On December 1, 1982, DOE submitted to Congress the currently effective distribution plan, titled "Strategic Petroleum Reserve Drawdown Plan, Amendment No. 4." Under the SPR Drawdown Plan, SPR oil will generally be sold at competitive sales to the highest eligible bidders following the President's order to draw down the SPR.⁹⁵ DOE will then

⁸⁸451 U.S. 725 (1981). The tax primarily affected natural gas produced in the Federal Outer Continental Shelf area which was then piped to processing plants in Louisiana. Because of exemptions from and credits for the tax provided in the tax statute and other Louisiana statutes, in-state consumers of OCS natural gas were not generally burdened by the tax, while out-of-state consumers were required to pay the tax. *Cf. Commonwealth Edison Company v. Montana*, 453 U.S. 609 (1981), where the Supreme Court upheld a Montana severance tax on coal mined in the State, including coal mined on federal land, even though 90% of the coal was shipped out-of-state. Although the tax burden was borne primarily by non-Montana interests, the tax was nevertheless upheld because: 1) the tax was computed at the same rate regardless of the final destination of the coal; and 2) the tax burden was borne according to the amount of coal consumed rather than according to any distinctions between Montana and non-Montana consumers.

⁸⁹Tanzman, *supra* note 4, at 295.

⁹⁰*Id.* at 295, n. 105.

⁹¹*Id.*

⁹²Prior to drawdown and distribution, any state attempts to control oil while it is still physically stored in the SPR would be unlikely in the extreme and would clearly be unconstitutional. *See McCulloch v. Maryland*, 4 Wheat 316 (1819). *See also Rohr Aircraft Corp. v. San Diego County*, 362 U.S. 628 (1960); *Paul v. United States*, 371 U.S. 245 (1963).

⁹³Pub. L. No. 94-163, 42 U.S.C. §§ 6231-6247 (1976).

⁹⁴EPCA, § 161(d), 42 U.S.C. § 6241(b) (1976).

⁹⁵DOE/EP-0073, *Strategic Petroleum Reserve Drawdown Plan* (December 1, 1982), at 5 [hereinafter cited as SPR Drawdown Plan].

be responsible for moving SPR oil to the terminals or other delivery points specified by the [federal] government at schedules agreed to with the purchasers of the oil. At the delivery points, title to the oil will transfer to the recipients, and they will assume responsibility for moving the oil to refineries.⁹⁶

Elsewhere in the SPR Drawdown Plan, DOE states that "[t]he Government's role will end at this point [the point at which transfer of ownership takes place] and the buyers will assume distribution responsibility."⁹⁷

What types of state controls affecting the distribution of SPR oil would be susceptible to challenges under the Supremacy Clause and the Commerce Clause? The answer to this question will probably depend on the nature of the controls, *i.e.*, whether the controls single out SPR oil for special treatment, and the point at which a State attempts to impose its controls, *i.e.*, 1) as the oil travels through pipelines from storage facilities to supporting terminals; 2) as the oil moves either by pipeline, barge, or tanker from the supporting terminals to refineries; or 3) as the oil moves, in refined form, from refineries through the distribution chain.

We believe that any attempt by a State to *single out* SPR oil for regulation or taxation would be highly unlikely, and would, in any case, not survive a constitutional challenge. For example, an effort to regulate or tax SPR oil prior to transfer of title from the federal government would clearly violate the Supremacy Clause.⁹⁸ A similar effort by a State to single out SPR oil for regulation or taxation once title has passed to successful bidders and the oil has begun its journey to refineries could also be attacked, although less surely, on Supremacy Clause grounds. Specifically, it could be argued that DOE's decision not to dictate the course of SPR oil once it enters buyers' hands, and the agency's further statement in the SPR Drawdown Plan that market mechanisms will control the distribution of SPR oil, imply a determination on DOE's part that no state regulation of SPR oil would be appropriate.⁹⁹ Indeed, it

⁹⁶*Id.*

⁹⁷*Id.* at 9 (emphasis added). Thus, the SPR presents a somewhat unique situation. Congress has enacted legislation giving federal regulators full authority to control the distribution of SPR oil arguably to the point at which it has reached the consumer level. See O'Donnell and Glassman, *supra* note 44, at 67. At the same time, however, DOE's pronouncements in the SPR Drawdown Plan — stating, on the one hand, that the Government's role ends at the point of transfer of ownership and, on the other hand, that DOE intends to use the SPR in an energy crisis in "a manner which simulates the operation of the marketplace as closely as possible" (SPR Drawdown Plan, at 12) — are ambiguous as to its intentions with regard to pre-emption of state controls, direct or indirect, over SPR oil.

⁹⁸*Hines v. Davidowitz*, 312 U.S. 52 (1941), quoted approvingly in *Maryland v. Louisiana*, *supra* note 88. The seminal case, of course, is *McCulloch v. Maryland*, 4 Wheat. 316 (1819). See also *Paul v. United States*, 371 U.S. 245 (1963); *Pacific Coast Dairy v. Department of Agriculture*, 318 U.S. 285 (1943). See generally *Public Utilities Commission of California v. U.S.*, 355 U.S. 534 (1958); *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956); *Johnson v. Maryland*, 254 U.S. 51 (1920).

⁹⁹See *Arkansas Electric Cooperative Corporation*, *supra*, note 73, at 10. Accord, *e.g.*, *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 102 S.Ct. 3014 (1982); *Ray v. Atlantic Richfield Co.*, *supra* note 48, at 178, citing *Bethlehem Steel Co. v. New York Labor Relations Board*, 330 U.S. 767, 774 (1967); *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926).

"Where failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," states are not permitted to use their police power to enact such a regulation.

But significantly, a Federal district court, in deciding a case involving an anti-passthrough provision enacted in conjunction with a gross receipts tax on oil companies asserted that:

[the] mere failure to regulate, in and of itself, will rarely constitute an affirmative federal decision that "no such regulation is appropriate or approved" in light of federal policy. Rather, "[t]he pertinent inquiry [is] whether [federal authorities have] addressed and acted upon the question," whether they have given "careful consideration" to factors specified by

could even be argued that the mere fact of delegation of power over the SPR to DOE, even without action by the agency, precludes state regulation of SPR oil because the Energy Policy and Conservation Act, *supra*, implies that Congress intended no regulation of SPR oil except its own.¹⁰⁰ Regardless of the relative merits of a Supremacy Clause challenge, however, such state regulation or taxation would face serious Commerce Clause obstacles. SPR oil en route to refiners would clearly be considered to be in interstate commerce because of its subsequent movement across state lines to the ultimate consumer.¹⁰¹ Accordingly, any regulation or tax singling out SPR oil at this point would in all probability be considered direct discrimination *only* against interstate commerce and hence would be subject to the strictest scrutiny by a reviewing court.¹⁰² Thus, for example, a first-use tax on SPR crude oil imported into a State would probably be unacceptable under *Maryland v. Louisiana*, *supra*. And, it almost goes without saying that any attempt by a State to seize SPR oil as it leaves the federal government's transfer terminals would be an extreme form of "economic protectionism" of the type repeatedly struck down by the Supreme Court.¹⁰³

We turn now to the situation in which a State does not single out SPR oil for regulation or taxation but seeks, rather, to impose its controls on oil regardless of source. Would a facially neutral state emergency oil allocation program mandating statewide allocation of refined petroleum products according to a priority scheme, as currently contemplated in the emergency contingency plans of several States,¹⁰⁴ withstand a constitutional challenge vis-a-vis products refined from SPR oil? We think this question would be answered in the affirmative.

Although formalistic constitutional arguments could be constructed to address this point, practical considerations would probably control the result. Specifically, once crude oil from the SPR is refined, the refined products are indistinguishable from products refined from other sources. If it is concluded — as we argue in the preceding section — that States *do* have authority to impose priority schemes for allocating oil during an emergency to protect, *e.g.*, essential public services and

Congress, and, after balancing the competing interests whether they have determined that no regulation, or limited regulation, is the proper way of achieving federal goals.

Mobil Oil Corp. v. Dubno, 492 F.Supp. 1004, 1010 (D. Conn. 1980), 639 F.2d 919 (2nd Cir.), *cert. denied*, 452 U.S. 967 (1981) [citing *Ray v. Atlantic Richfield Co.*, *supra* note 48, at 174, 177].

The SPR Drawdown Plan statement that "buyers [of SPR oil] will assume distribution responsibility" can also be interpreted as a decision by DOE that buyers, but not the States, are responsible for controlling SPR oil after title passes. Of course, a counter argument could be made that the SPR Drawdown Plan: 1) does not expressly pre-empt state action which would interfere with the distribution of SPR oil; 2) is ambiguous on the issue at best; and 3) DOE's statements on the termination of the federal government's role at the point of transfer of ownership imply that States may step in to fill the regulatory void. The high standards set by the Supreme Court for a finding of pre-emption lend additional support to this latter argument. See *Florida Lime and Avocado Growers v. Paul*, *supra* note 48; *Schwartz v. Texas*, 344 U.S. 199, 202-203 (1953).

¹⁰⁰See *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 774 (1947).

¹⁰¹See *Maryland v. Louisiana*, *supra* note 88, where the Supreme Court opined:

... it is clear to us that the flow of gas from the [Outer Continental Shelf] wells, through processing plants in Louisiana, and through interstate pipelines to the ultimate consumers in over 30 States constitutes interstate commerce. . . . Gas crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey.

451 U.S. at 774-75, citing *California v. Lo Vaca Gathering Co.*, 379 U.S. 366 (1965). *Accord*, *California v. Southland Royalty Co.*, 436 U.S. 519 (1978).

¹⁰²See *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979). Once SPR oil is refined, it can no longer, for obvious practical reasons, be identified for special treatment. Accordingly, we would not anticipate any effort by a State to single out SPR oil for regulation or taxation once it has passed through refineries and is being disseminated throughout the distribution chain.

¹⁰³See note 77 *supra*.

¹⁰⁴See note 65 *supra*.

public health (on the theory that such schemes are within the bounds of legitimate state police powers¹⁰⁵ and are not otherwise pre-empted by a federal allocation scheme or forbidden under the Commerce Clause), then such state priority schemes would not be impermissible merely because they might affect the ultimate distribution of products refined from SPR oil. To conclude otherwise would permit the tail to wag the dog: a State with, *e.g.*, 2% of its refined products originating from SPR oil would be unable to allocate the remaining 98% of its refined products. We do not believe that a reviewing court would be inclined to ban a state oil control plan allocating motor fuel and heating oil to hospitals, fire departments or schools on the theory that such a plan would interfere with the free market distribution of SPR oil¹⁰⁶ — particularly in the absence of more explicit instructions from Congress¹⁰⁷ or from DOE on this point.

V. CONCLUSION

Given the substantial differences in the extent of oil dependence among the States and the obvious differences in each State's use of particular petroleum products, it is reasonable to expect that States will choose different approaches to ameliorate the effects of an oil interruption. These diverse approaches may well provide a more effective response to local needs arising in an oil emergency than a centralized federal plan. Therefore, the prospect of widely differing state plans should not be viewed as a negative result requiring counteraction with federal oil allocation and price controls. Rather, during an oil interruption diverse responses should be allowed subject only to informal Administration action aimed at dissuading the States from taking certain actions (such as implementing oil price and allocation controls and mandatory demand-restraint measures) which would be fundamentally inconsistent with the Administration's market-oriented approach to oil emergencies. At the same time, the Administration should increase the interchange between the federal government and the States in an effort to convince state governments that market mechanisms stand the best chance of mitigating the impacts of a future energy supply interruption.

¹⁰⁵*Cf. Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (state power to regulate use of water during shortage to protect health of its citizens is at heart of state's police power).

¹⁰⁶*Cf. Exxon Corp. v. Governor of Maryland*, *supra* note 75 (judicial rejection of concept that because economic market for oil is nationwide, states are barred from regulating retail gasoline marketing).

¹⁰⁷The purpose of the SPR as set forth in EPCA is to "reduc[e] the impact of disruptions in supplies of petroleum products or to carry out obligations of the United States under the international energy program." 42 U.S.C. § 6231(b) (1976) Elsewhere, EPCA provides that the SPR Plan "shall be designed to assure, to the maximum extent practicable, that the Reserve will minimize the impact of any interruption or reduction in imports of refined petroleum products and residual fuel oil in any region which the Secretary determines is, or is likely to become, dependent upon such imports for a substantial portion of the total energy requirements of such region." 42 U.S.C. § 6234(c)(d) (1976).