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# Subsidiarity and Solidarity: Lenses for Assessing the Appropriate Locus for Environmental Regulation and Enforcement

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ARTICLE

**SUBSIDIARITY AND SOLIDARITY:  
LENSES FOR ASSESSING THE APPROPRIATE  
LOCUS FOR ENVIRONMENTAL REGULATION  
AND ENFORCEMENT**

JEROME M. ORGAN\*

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## I. INTRODUCTION

This article will use the principles of subsidiarity, solidarity and the common good to analyze the extent to which some specific aspects of the environmental statutory and regulatory regimes in the United States are “rightly ordered.” Specifically, this article will look at aspects of two different environmental regulatory systems—the Resource Conservation and Recovery Act<sup>1</sup> (RCRA) and the Comprehensive Environmental Response Compensation and Liability Act<sup>2</sup> (CERCLA)—to evaluate whether principles of subsidiarity, solidarity and the common good suggest that the locus of regulation and enforcement makes sense as presently structured.

Section II begins with an outline of subsidiarity, solidarity and the common good and evaluates these principles in contrast to considerations of economics and political science, which are more frequently used within secular discussions of the need for, and appropriate locus of, environmental regulation.<sup>3</sup> Section III then analyzes how these principles apply to RCRA and CERCLA: first, the section suggests that RCRA is largely “rightly ordered” in terms of being a regulatory system in which regulation is designed and promulgated at the federal level, implemented and enforced at the state level, and considered by individual businesses when deciding upon manufacturing processes that may (or may not) generate hazardous wastes subject to regulation;<sup>4</sup> second, the section suggests that in contrast to RCRA, CERCLA is a regulatory system inappropriately ordered toward federal control (at least in part) when state or local control might be more appropriate.<sup>5</sup> In conclusion, Section IV contains a brief discussion of how the principles of subsidiarity, solidarity and the common good might provide a useful methodology for evaluating other environmental regulatory regimes.<sup>6</sup>

## II. UNDERSTANDING SUBSIDIARITY, SOLIDARITY AND THE COMMON GOOD

In *Quadragesimo Anno*, Pope Pius XI set forth the principle of subsidiarity by stating:

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1. 42 U.S.C.A. §§ 6901–6922k (West 2008).
  2. 42 U.S.C.A. §§ 9601–9675 (West 2008).
  3. See *infra* notes 7–19 and accompanying text.
  4. See *infra* notes 20–65 and accompanying text.
  5. See *infra* notes 66–98 and accompanying text.
  6. See *infra* note 98 and accompanying text.

Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. *For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.*<sup>7</sup>

Because subsidiarity suggests that social activity should help the “members of the body social,” the principle of subsidiarity is not so much a foundational principle of Catholic Social Thought on its own as it is an instrumental principle designed to promote one of the foundational principles of Catholic Social Thought: the common good.<sup>8</sup> The principle of subsidiarity posits that the common good is best served when decision-making regarding actions and activities is delegated to the local entity—to the smallest organization—best able to make the decision.<sup>9</sup>

The range of entities contemplated by Catholic Social Thought is instructive because Catholic Social Thought encompasses both private actors as well as public actors—from individuals and associations (businesses or communal associations) to local governments, state governments and the federal government. The United States Conference of Catholic Bishops in *Economic Justice for All* perhaps best described the relationship between these groups:

The primary norm for determining the scope and limits of governmental intervention is the “principle of subsidiarity” . . . . This principle states that, in order to protect basic justice, government should undertake only those initiatives which exceed the capacities of individuals or private groups acting independently. Government should not replace or destroy smaller communities and individual initiative. Rather it should help them contribute more effectively to social well-being and supplement their activity when the demands of justice exceed their capacities. This does not mean, however, that the government that governs least, governs best. Rather it defines good government intervention as that which truly “helps” other social groups contribute to the common

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7. Pius XI, *Quadragesimo Anno*, ¶ 79 (May 15, 1931), available at [http://www.vatican.va/holy\\_father/pius\\_xi/encyclicals/documents/hf\\_p-xi\\_enc\\_19310515\\_quadragesimo-anno\\_en.html](http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html) (emphasis added).

8. Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, ¶ 188 (Apr. 2, 2004), available at [http://www.vatican.va/roman\\_curia/pontifical\\_councils/justpeace/documents/rc\\_pc\\_justpeace\\_doc\\_20060526\\_compendio-dott-soc\\_en.html#INTRODUCTION](http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html#INTRODUCTION) [hereinafter *Compendium*] (“In any case, the common good correctly understood, the demands of which will never in any way be contrary to the defence and promotion of the primacy of the person and the way this is expressed in society, must remain the criteria for making decisions concerning the application of the principle of subsidiarity.”).

9. *Id.* ¶ 186.

good by directing, urging, restraining, and regulating economic activity as “the occasion requires and necessity demands.”<sup>10</sup>

Because the principle of subsidiarity is ordered toward promoting the common good, questions of solidarity also must be considered when determining the best level of decision-making.<sup>11</sup> Solidarity is defined as:

[N]ot a feeling of vague compassion or shallow distress at the misfortunes of so many people, both near and far. On the contrary, it is a firm and persevering determination to commit oneself to the common good; that is to say, to the good of all and of each individual, because we are all really responsible for all.<sup>12</sup>

Taken together, the principles of subsidiarity and solidarity direct that the best level of decision-making depends on each level’s ability to serve the common good. Thus, if the decisions of individuals or private groups are ordered toward the common good or the “good of all” rather than merely toward self-interest, then the principles of solidarity and subsidiarity suggest that it is appropriate to leave decision-making regarding economic activity in the hands of individuals and private groups (without interference from government regulation). If, on the other hand, the decisions of individuals or private groups are not ordered toward the common good but are ordered toward self-interest, then some governmental regulation may be necessary to restrain economic activity that may be harmful to the common good.<sup>13</sup>

The introduction of government regulation invites the question of the level at which government regulation should take place: local, state or federal? An analysis similar to the test to determine the need for government regulation should direct the determination of the appropriate locus of decision-making and regulation. If the local governmental unit is capable of engaging in efficient, cost-effective regulatory activities—and is likely to order its decision-making toward the common good (not just the good of all members of the local community, but to the “good of all”)—then it should be entrusted with regulatory authority. If the local government either is not equipped to engage in the regulatory activity or is not likely to order its decision-making toward the common good, then the state government may be better situated to be the locus of regulatory authority. Finally, if the state government either is not equipped to engage in the regulatory activity or is not likely to order its decision-making toward the good of all (including

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10. Office for Social Justice St. Paul and Minneapolis, *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy*, ¶ 124 (1986), [http://www.osjspm.org/economic\\_justice\\_for\\_all](http://www.osjspm.org/economic_justice_for_all).

11. *Compendium*, *supra* note 8, ¶ 356.

12. Ioannes Paulus PP. II, *Sollicitudo Rei Socialis [On Social Concerns]*, ¶ 38 (Dec. 30, 1987), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_30121987\\_sollicitudo-rei-socialis\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis_en.html).

13. See *Compendium*, *supra* note 8, ¶¶ 351, 354.

those outside the state), then the federal government may be better situated to be the locus of regulatory authority.

Notably, this set of principles aligns well with some of the economic literature relating to the system of environmental regulation that has developed in the United States. One of the primary economic justifications for environmental regulation is that the economic self-interest of individuals or groups of people acting in concert (through a business, for example) will generally result in inadequate attention to environmental concerns because these individuals and businesses fail to act on the principle of solidarity—they fail to make decisions based on the “good of all,” focusing instead on their own good.<sup>14</sup>

While economic concerns justify some types of environmental regulation to promote the common good, the economic analysis does not help much in determining the appropriate locus for such regulation, whether it is the local, state or federal level. Within the United States constitutional structure, the concept of federalism frequently provides the touchstone for discussing at what governmental level environmental regulation should reside—some authority is provided to the federal government, while some authority is reserved to the states—but this does not inherently suggest a preference for regulation at the “lowest, appropriate” level of government in a manner truly consistent with the concept of subsidiarity.<sup>15</sup> Further, the political and legal analysis of the appropriate locus of regulation may be very nuanced in accounting for a variety of concepts such as human and

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14. Individuals and businesses enjoy the economic benefits of their decisions regarding their actions or activities, but frequently distribute the economic costs over other actors and entities—imposing external costs on others that are not internalized in the individual’s or business’s decision-making. The most famous description of this in an environmental context is *The Tragedy of the Commons*, in which Garrett Hardin describes how decision-makers in a “commons” will make individually rational but collectively irrational decisions because of the lack of pricing with respect to collectively owned resources. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968); see also Henry N. Butler and Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 *YALE J. ON REG.* 23, 29 (1996).

15. See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 *COLUM. L. REV.* 331, 403–407 (1994) (noting that the federalism structure within the U.S. Constitution allocates authority between the federal government and the states, but also recognizing that this dual sovereignty system between states and the federal government does not necessarily describe a preference for local decision-making (even though more recent commentators have begun to assert such a preference)); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 *MICH. L. REV.* 570, 571 n.5 (1995) (describing different conceptions of federalism—one of which recognizes shared power among different levels of government and one of which exhibits a preference for decentralized decision-making); Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balances in the Interjurisdictional Gray Area*, 66 *MD. L. REV.* 503, 519–20, 623–24 (2007) (discussing the dual sovereignty reflected in various provisions of the U.S. Constitution and noting that “new” federalism reflects a preference for local decision-making, but that subsidiarity adds a gloss relating to the capacity of the local unit to engage appropriately in addressing whatever the specific situation happens to be).

financial resource capacity, interjurisdictional competition,<sup>16</sup> public choice theory (and other theories of regulation)<sup>17</sup> and regulatory capture,<sup>18</sup> each of which may speak to the extent to which a given governmental entity is more or less equipped than other governmental entities to accomplish the purpose behind a statutory or regulatory regime. Nonetheless, the political and legal analysis through the “federalism” lens never quite encompasses the common good in the same way as Catholic Social Thought.<sup>19</sup>

### III. ANALYZING RCRA AND CERCLA THROUGH THE LENSES OF SUBSIDIARITY, SOLIDARITY AND THE COMMON GOOD

The analytical structure of the principles of subsidiarity and solidarity can be applied to RCRA and CERCLA to determine if these statutory structures are “rightly ordered” in how they address the problems associated with the management, treatment, disposal and remediation of hazardous wastes and hazardous substances. Both statutes present interesting analytical challenges.

RCRA and CERCLA first need to be understood in context. RCRA was enacted in 1976<sup>20</sup> to address prospectively the management of “solid waste”<sup>21</sup> and “hazardous wastes.”<sup>22</sup> CERCLA was enacted in 1980.<sup>23</sup> Both

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16. See Richard B. Stewart, *Pyramids of Sacrifice?: Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1210–20 (1977) (identifying a concern about a “race to the bottom” as one of several justifications for the movement toward centralized, federal environmental regulation); but see Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (challenging the “race to the bottom” rationale as a continuing justification for centralized, federal environmental regulation); see also Esty, *supra* note 15, at 600–08 (describing both analyses and providing some critique of Revesz’s analysis).

17. See Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845 (1999) (analyzing how public choice theory has reinforced a centralized, federal approach to environmental regulation); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1 (1998) (evaluating public choice theory, neopluralist theory, public interest theory and civic republican theory through the lens of the administrative process).

18. See David B. Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CAL. L. REV. 917, 927 nn.29–30 (2001) (describing two different theories of the concept of regulatory capture and discussing the design of administrative structures to minimize capture).

19. Although it could be said that the federalism reflected in our constitutional structure was conceived by our founding fathers to be directed toward “the common good,” this probably should be understood to be a narrower understanding of “the common good” than that reflected in Catholic Social Thought—focused more on individual liberty for the sake of individual liberty rather than focusing on the individual’s responsibility to promote the “flourishing of all individuals.”

20. Resource Conservation and Recovery Act of 1976 (RCRA), Pub. L. No. 94–580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C.A. §§ 6901–6992k (West 2008)).

21. 42 U.S.C. § 6903(27) (2000). “The term ‘solid waste’ means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, . . . but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or

statutory schemes were enacted in response to increasing concern about widespread contamination of the environment from the wastes resulting from a wide array of industrial processes.<sup>24</sup>

RCRA is primarily forward-looking. In enacting RCRA, Congress developed a "cradle-to-grave" regulatory regime for managing wastes prospectively that distinguished between "solid waste," which required less regulation (largely left to the states),<sup>25</sup> and "hazardous waste," which required greater regulation (largely initiated by the federal government) due to the greater risk associated with its mismanagement.<sup>26</sup> With respect to hazardous wastes, RCRA developed management standards for the facilities that generate hazardous wastes,<sup>27</sup> transporters of hazardous waste,<sup>28</sup> and facilities that treat, store or otherwise dispose<sup>29</sup> of hazardous wastes.

CERCLA is primarily backward-looking.<sup>30</sup> CERCLA embraces a "polluter pays" philosophy designed to make sure that those parties respon-

industrial discharges which are point sources subject to permits under section 1342 of Title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954." *Id.* The term is further defined in 40 C.F.R. § 261.2 (2008).

22. 42 U.S.C. § 6903(5). "The term 'hazardous waste' means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness, or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." *Id.* The term is further defined in 40 C.F.R. § 261.3.

23. Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 9767 (codified as amended at 42 U.S.C.A. §§ 9601-9675 (West 2008)).

24. See 42 U.S.C.A. §§ 6901-6902 (West 2008) (describing Congressional findings in RCRA along with Congressional objectives in enacting RCRA); see also Jerome M. Organ, *Superfund and the Settlement Decision: Reflections on the Relationship Between Equity and Efficiency*, 62 GEO. WASH. L. REV. 1043, 1046 n.17 (1994) (describing CERCLA as a response to Love Canal and other significant contamination issues around the country).

25. 42 U.S.C. § 6901(a)(4) (stating that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies"). Part D of RCRA specifically focuses on state responsibility for solid waste management. 42 U.S.C.A. §§ 6941-6949 (West 2008). In the Hazardous and Solid Waste Amendments of 1984, however, Congress responded to concerns about inadequate standards for municipal solid waste disposal facilities by directing the Environmental Protection Agency (EPA) to develop standards for such facilities. Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, §101, 98 Stat. 3221, 3224-25 (amending 42 U.S.C. § 6901); H.R. REP. NO. 98-1133, at 80 (Conf. Rep.), reprinted in 1984 U.S.C.A.N. 5649, 5651. See also Jonathan P. Meyers, Note, *Confronting the Garbage Crisis: Increased Federal Involvement as a Means of Addressing Municipal Solid Waste Disposal*, 79 GEO. L.J. 567, 569-73 (1991) (discussing the problems with inadequate state regulation of municipal solid waste disposal).

While RCRA is primarily a forward-looking statute, some components of RCRA, the corrective action requirements and the underground storage tank provisions, do integrate a retroactive perspective directed toward cleaning up historical (or current) contamination. See *infra* note 94.

26. 42 U.S.C.A. §§ 6921-6939e (West 2008); 40 C.F.R. pt. 261 (2008).

27. 42 U.S.C. § 6922 (2000); 40 C.F.R. §§ 262.10-262.108 (2008).

28. 42 U.S.C. § 6923 (2000); 40 C.F.R. §§ 263.10-263.31 (2008).

29. 42 U.S.C. § 6924 (2000); 40 C.F.R. §§ 264.10-264.1202 (2008).

30. Organ, *supra* note 24, at 1046 n.19 (discussing the retroactive emphasis of CERCLA). While CERCLA is predominantly a retroactive statute, the spill reporting obligations set forth in



sible for causing historical contamination bear the burden of cleaning up the contamination.<sup>31</sup> To do this, CERCLA imposes strict liability<sup>32</sup> on “potentially responsible parties” (PRPs)—those who generated hazardous substances disposed of at a facility, or transported hazardous substances<sup>33</sup> to a facility from which there is a release or threatened release of hazardous substances, along with the current owner and operator of the facility and anyone who owned or operated the facility during the time when hazardous substances were placed or released.<sup>34</sup>

### A. Application to RCRA

This section begins with a discussion of whether the principles of subsidiarity, solidarity and the common good require governmental intervention to regulate hazardous waste management. Next, this section focuses on

42 U.S.C. § 6903 (2000), in 40 C.F.R. pt. 355, apps. A, B (2008) (for extremely hazardous substances), and in 40 C.F.R. § 302.4 tbl. 302.4 (2008) (for CERCLA hazardous substances) are also prospective in nature.

31. Congress enacted a statute designed to compel those parties responsible for disposal of hazardous substances to internalize the full cost of the disposal, some of which had been shifted to the public through historical disposal practices that contaminated the environment and created a health risk. S. REP. No. 848, 96th Cong., 2d Sess. 33 (1980). “By holding the factually responsible person liable, [CERCLA] encourages that person—whether a generator, transporter or disposer of hazardous substances—to eliminate as many risks as possible.” *Id.*

32. Organ, *supra* note 24, at 1046 n.20 (discussing the strict liability nature of CERCLA).

33. A “hazardous substance” is defined as:

[A]ny substance designated pursuant to section 1321(b)(2)(A) of Title 33 [the Federal Water Pollution Control Act], (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act . . . , (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act, and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

42 U.S.C.A. § 9601(14) (West 2008). EPA regulations list over seven hundred hazardous substances. 40 C.F.R. § 302.4 tbl.302.4 (2008). Though a substance may not be considered a hazardous waste under RCRA, it may be considered a hazardous substance under CERCLA. *Louisiana-Pacific Corp. v. Asarco, Inc.*, 6 F.3d 1332, 1337–40 (9th Cir. 1993) (holding that Beville Amendment mining wastes, which are not hazardous wastes under RCRA, can be hazardous substances under CERCLA if their components otherwise satisfy one of the definitions of a hazardous substance under CERCLA), *withdrawn and superseded*, 24 F.3d 1565 (9th Cir. 1994) (the superseding opinion recognizes that the Beville Amendment exempts a certain waste from RCRA regulation and holds that while the Beville Amendment exception applies to a single subsection of CERCLA, the waste in question continues to be regulated as a hazardous substance by CERCLA); *U.S. v. Conservation Chem. Co.*, 619 F. Supp. 162, 222 (W.D. Mo. 1985) (indicating that “the mere fact that . . . mining waste may not be a hazardous waste under RCRA does not mean that it cannot be a ‘hazardous substance’ under CERCLA”).

34. 42 U.S.C.A. § 9607 (West 2008). Although the set of parties subject to liability under CERCLA is generally known as the Potentially Responsible Parties (PRPs), this is a stunning misnomer because “potentially generally” means “almost always.”

the extent to which the principles of subsidiarity and solidarity suggest that local, state or federal regulation seems more appropriate for the management of hazardous wastes. Finally, the section evaluates the regulatory regime of RCRA<sup>35</sup> through the lenses of subsidiarity and solidarity.

### *1. Justification for Regulation*

From the perspective of principles of subsidiarity and solidarity, the first question to address is whether governmental regulation is necessary for the subject area in question. Regarding RCRA, the question is whether individuals and businesses dealing with hazardous wastes can be trusted to manage the waste in a manner consistent with the principles of solidarity and of promoting the common good such that regulation should not be necessary. The track record of many individuals and businesses around the country suggests that they cannot be trusted to manage these wastes in a manner consistent with principles of solidarity and promoting the common good.<sup>36</sup> Thus, applying principles of subsidiarity and solidarity, some type of regulation makes sense. Having established that government intervention is necessary, the next question is at which level of government should regulation be implemented—the local, state or federal.

### *2. Assessing the Appropriate Locus of Regulation*

#### *a. Regulation at the Local Level*

With respect to the prospective activities of individuals and businesses using hazardous materials and generating hazardous wastes, would local governments be capable of engaging in the regulatory activity in an efficient, cost-effective manner while ordering decision-making toward the common good?

The local community faces a couple of problems in regulating hazardous wastes. Given the complex nature of industrial processes that use hazardous materials and generate hazardous wastes, and the abundance of wastes that are generated, local communities likely are not well-equipped to develop workable standards for regulating risks to protect their own residents, let alone those outside their community.<sup>37</sup>

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35. 42 U.S.C.A. §§ 6901–6992k (West 2008).

36. See Esty, *supra* note 15, at 600–03 (discussing the evolution of the federal environmental regulatory regime in the 1960s and 1970s in response to the failure of states to manage environmental issues adequately); Stewart, *supra* note 16 (discussing justifications for federal environmental regulation in the 1970s); Organ, *supra* note 24 (discussing Congressional justification for enacting RCRA and CERCLA).

37. The regulations for “hazardous wastes” in the Code of Federal Regulations take up hundreds of pages. It is hard to comprehend individual communities having the resources to comply with this massive set of regulations. It should be fairly clear that municipalities generally lack the capacity to develop a complete and thorough regulatory structure for managing solid and hazardous wastes, especially given the example of municipal landfills and the environmental problems associated with them that prompted Congress to direct the EPA to promulgate regulations in the

Moreover, the local community may not reliably look after the interests of those outside the community. Assuming the local government would like to protect its citizens from risks associated with exposure to hazardous wastes,<sup>38</sup> it might appear that the interests of residents of the local community would be largely congruent with the interests of those outside the community: any regulatory efforts designed to protect local residents such as storage requirements, labeling requirements, etc., would also likely protect those outside the community.<sup>39</sup> However, there is one major exception that presents a problem—regulations may prohibit or discourage treatment, storage or disposal of hazardous wastes within the local community.<sup>40</sup> Such regulations would protect local residents but would do so by shifting the risks associated with transport, treatment, storage and disposal of hazardous wastes to others outside the community.

Thus, not only are local communities not equipped to develop complex regulatory regimes given limited resources, but local regulation may be inconsistent with principles of solidarity in some circumstances given that regulations completely prohibiting the treatment, storage and disposal of hazardous waste within a given community would serve the self-interest of that community at the expense of those outside the community. Principles of subsidiarity and solidarity therefore suggest that the common good requires regulation at a higher level of government—either with the state or federal government.

#### *b. Regulation at the State or Federal Level*

Would state governments be capable of engaging in regulating hazardous waste in an efficient, cost-effective manner—and be likely to order decision-making toward the common good (not just the good of all members

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Hazardous and Solid Waste Amendments of 1984. See Hazardous and Solid Waste Amendments of 1984, *supra* note 25. Nonetheless, some local communities have stepped in with regulatory efforts. See George F. Gramling, III & William L. Earl, *Cleaning Up After Federal and State Pollution Programs: Local Government Hazardous Waste Regulation*, 17 *STETSON L. REV.* 639 (1988) (discussing a couple of local regulatory regimes, though the limited number of examples referenced in the article shows that such programs are exceptional).

38. This assumes, for the moment, that we are not in a situation like that reflected in Henrik Ibsen's *An Enemy of the People*, in which the local government and community are more focused on economic gain than on environmental risks associated with a given industrial activity. HENRIK IBSEN, *AN ENEMY OF THE PEOPLE* (Robert Farquharson Sharp trans.) (1882), available at <http://www.gutenberg.org/etext/2446>.

39. For example, if a community were to pass regulations mandating the safe storage of hazardous wastes, such storage obligations would be beneficial for the local community as well as the broader community. Similarly, labeling requirements would give notice of risks or hazards not only to local residents, but also to the residents of surrounding communities through which materials might be shipped.

40. See Kirsten Engel, *Reconsidering the National Market in Solid Waste: Trade-Offs in Equity, Efficiency, Environmental Protection, and State Autonomy*, 73 *N.C. L. REV.* 1481, 1495–1500 (1995) (discussing Supreme Court cases dealing with state prohibitions on importation of solid waste, discriminatory state surcharges and flow control laws).

of the state community)—or would regulation at the federal level ultimately be preferable?

From the standpoint of resources needed to develop a complex regulatory regime, most state governments may have the capacity to develop regulations efficiently and cost-effectively that adequately address the risks associated with hazardous waste management. State governments certainly would be better situated in terms of resources than local governments. Would the common good be served, however, by having fifty states investing time and energy in developing their own regulatory regimes to manage hazardous wastes? Though state governments may have much greater capacity to develop legislative and regulatory regimes for managing hazardous wastes than local governments, having state governments develop the legislative and regulatory regimes presents several potential problems such that principles of subsidiarity and solidarity suggest the common good probably would be better served by federal regulation.

First, with fifty states trying to develop legislation and regulations, there likely would be some redundancy and duplication of effort as fifty different legislatures and agencies evaluate various industries and promulgate regulations to address hazardous waste management as it relates to various industrial processes and types of hazardous wastes.<sup>41</sup> This potential redundancy and duplication of effort in developing standards and regulations suggest that federal regulation makes more sense than state regulation.

Second, while each of the fifty states has greater resources than local governments, the states nonetheless are burdened by limited resources that will require states to prioritize their efforts to develop regulatory regimes targeting various industries and types of hazardous wastes. Moreover, states have existing resource commitments that constrain development of new regulatory regimes to the extent that such new regimes might require reallocation of resources from existing commitments or new resources. This likely will result in incomplete legislation and regulation in many, if not all, states as legislatures and regulatory agencies focus on industries and hazardous wastes that appear to pose the greatest threats—leaving other industries and wastes possibly unregulated for some time.<sup>42</sup> Although the

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41. See Stewart, *supra* note 16, at 1212; Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and is it "to the Bottom"?*, 48 HASTINGS L.J. 271, 287-88 (1998).

42. For example, CERCLA excludes petroleum products from the definition of hazardous substances. See *supra* note 33. RCRA focuses on solid and hazardous wastes. See *supra* notes 21-22. Thus, neither CERCLA nor RCRA initially provided a viable means for regulating contamination from underground storage tanks containing petroleum products. Nonetheless, the states failed to take the initiative to develop regulatory programs that encompassed these tanks, leaving it to Congress to mandate the development of a federal regulatory regime for underground storage tanks. The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, Title VI, 98 Stat. 3221 (1984), amended by Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, Title II, 100 Stat. 1613 (1986). Similarly, the fact that Congress felt compelled to direct the EPA to develop criteria for state solid waste landfills that receive household hazardous waste further manifests the idea that the states have not taken sufficient initiative to protect the

problem of limited resources also impacts the federal government, the federal government's greater resources (and greater comfort functioning with a budget deficit)<sup>43</sup> would make the federal government the more appropriate location for regulation.

Third, states might develop inconsistent regulatory regimes, creating a patchwork system of regulations that could significantly impair national commerce in hazardous waste management.<sup>44</sup> For example, if one state requires labeling of one kind and another state requires a different kind of labeling, then generators and transporters of hazardous wastes might face significant costs to comply with these multiple inconsistent systems when commerce or waste crosses state lines.

Fourth, an additional risk associated with state regulation is the "race to the bottom" problem in which states, as entities competing for industrial investment, may be tempted to "under-regulate" to obtain a competitive advantage or remain competitive with other states.<sup>45</sup> Under principles of sub-

common good of their citizens—let alone citizens outside their states. See Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 302, 98 Stat. 3221, 3627–28 (1984) (codified in part at 42 U.S.C. § 6949(a)) (discussed *supra* note 25 and accompanying text).

43. Some states, such as Missouri, have a state constitutional mandate regarding the implementation of a balanced budget that largely precludes deficit spending by the state. See Donald B. Tobin, *The Balanced Budget Amendment: Will Judges Become Accountants? A Look at State Experiences*, 12 J.L. & POL. 153, 155 (1996) (stating that forty-eight states have some type of balanced-budget provision).

44. See Stewart, *supra* note 16, at 1211–12; Engel, *supra* note 41, at 287–88. Indeed, concern for inconsistent automobile emission regulations from different states prompted Congress to enact section 209 of the Clean Air Act, preempting all state regulation of vehicle emissions with the exception of California's vehicle emissions regulations (which Congress then allowed other states to adopt in section 177). 42 U.S.C.A. §§ 7507, 7543 (West 2008).

45. The "race to the bottom" rationale is premised on the theory that individually rational decisions by states might be collectively irrational. If each state opts to regulate at a level lower than it might otherwise be inclined to regulate at because it is concerned with the competitive disadvantage it will face when compared with other states who have a less robust regulatory structure, the states will collectively opt for a lower level of regulation (and less protection "for all") than would be expected if states were acting in the absence of these competitive pressures.

There is extensive literature on the validity of the "race to the bottom" premise. Richard Stewart initially posited the "race to the bottom" rationale, Stewart, *supra* note 16, which was largely accepted by scholars and commentators until Richard L. Revesz challenged the theory in his seminal article, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, *supra* note 16 (finding the "race to the bottom" argument unsupported and federal intervention inappropriate). A number of scholars have opined on both sides of this issue. Compare James E. Krier, *On the Topology of Uniform Environmental Standards in a Federal System—and Why it Matters*, 54 MD. L. REV. 1226, 1236–37 (1995) (supporting Revesz's critique of the "race to the bottom" rationale for federal regulation), with Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of United States v. Lopez, 94 MICH. L. REV. 752, 781 n.88 (1995), and William W. Buzbee, *Remembering Repose: Voluntary Contamination Cleanup Approvals, Incentives, and the Costs of Interminable Liability*, 80 MINN. L. REV. 35, 110–15 (1995), and Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1533 n.64 (1995).

A number of states have demonstrated that the "race to the bottom" problem may be less of a concern than it may seem—given that some states have implemented regulatory regimes that clearly are more rigorous than national standards or standards of surrounding states. A recent

subsidiarity and solidarity, a “race to the bottom” incentive would function such that the “common good” is clearly not well-served.

Fifth, states are not inherently less likely to act out of self-interest than local governments, individuals or businesses. For example, states may be inclined to engage in regulation excluding certain activities that impose significant risk, such as excluding the treatment, storage or disposal of hazardous wastes within state boundaries—something that would result in external costs for other states that may end up hosting a disproportionate number of hazardous waste disposal sites.<sup>46</sup> The incentive toward serving the self-interest of the states is likely to be contrary to serving the common good.

All of these reasons suggest that Congress and the federal Environmental Protection Agency (EPA) are better situated than local or state governments as the locus of legislation and regulation of hazardous wastes,<sup>47</sup> given the federal government’s greater resources and the greater inclination Congress and the EPA have to legislate and regulate for the “good of all,” rather than for the good of some parochial interests.<sup>48</sup>

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example of this is the regulation of greenhouse gas emissions. See Jamison Colburn, *Solidarity and Subsidiarity in a Changing Climate: Green Building as Legal and Moral Obligations*, 5 U. ST. THOMAS. L.J. 232 (2008). The fact that some states now operate in a manner contrary to what would be expected in a “race to the bottom” analysis, however, does not negate the reality that states were failing to aggressively address environmental regulation in the late 1960s and early 1970s—or even the 1980s, when Congress intervened by enacting a slew of federal environmental regulatory regimes. There is no dispute that in the 1960s, 1970s and 1980s the states were not engaged in a “race to regulate” the environment that could be understood to serve the “common good.” See *supra* note 42 and accompanying text (discussing absence of state regulation of underground storage tanks, prompting federal regulation in the 1980s).

46. See Engel, *supra* note 40.

47. See *supra* note 42 and accompanying text (highlighting that even with respect to solid waste landfills and underground storage tanks, Congress and the EPA felt it necessary to take the initiative to develop federal criteria (for landfills) and a federal regulatory regime (for underground storage tanks)).

48. Nonetheless, federal regulation is not a panacea. Legislation and regulation at the federal government level presents some problems that may impair the federal government’s ability to function in a manner truly directed toward serving the common good. For example, the federal government may be slightly more subject to regulatory capture than state or local governments. The flip-side of the economic efficiency that comes with centralized federal regulation is the increased possibility of regulatory capture resulting from the centralized decision-making context. Conducting negotiations regarding legislation or regulation in fifty different states would make it difficult and expensive for any industrial group to develop sufficient relationships in each of those states to have a significant voice in how the legislative scheme or regulatory regime gets promulgated and implemented. At the federal level, however, an industrial group (particularly industrial groups with a more national presence) may have a greater voice than local entities, which will have to work through the challenges of “collective action” in order to have a more meaningful voice at the national level. For a discussion on regulatory capture, see Steve P. Calandrillo, *Responsible Regulation: A Sensible Cost-Benefit, Risk Versus Risk Approach to Federal Health and Safety Regulation*, 81 B.U. L. REV. 957, 975–76 (2001) (citing George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971)).

### 3. *Evaluating the RCRA Regulatory Regime Using Principles of Subsidiarity*

While implementation of RCRA at the federal level conforms to the principles of subsidiarity and solidarity, to what extent does the actual implementation of RCRA in fact integrate the principles of subsidiarity? While Congress and the EPA have developed a system of national standards for regulating generators of hazardous wastes,<sup>49</sup> transporters,<sup>50</sup> and treatment, storage and disposal facilities,<sup>51</sup> there are two significant respects in which RCRA reflects principles of subsidiarity: the regulation of wastes rather than manufacturing processes, and allowing state implementations of RCRA.

#### *a. Regulation of Businesses as Generators, Not as Manufacturers*

Congress enacted a regulatory regime in RCRA that focuses on “wastes”—by-products of the manufacturing process—rather than on the manufacturing process that generates the wastes.<sup>52</sup> Though RCRA was enacted when much of the regulatory mindset could be described as a “command and control” philosophy, the regulatory regime Congress and the EPA adopted does not dictate to industries or individual companies how to manufacture their products.<sup>53</sup> Rather, the regulatory regime promotes cost internalization by informing companies of the specific obligations with which they need to comply if they generate hazardous wastes.<sup>54</sup> The regulated entities are left with the decision of which manufacturing processes to employ and the extent to which those processes generate hazardous wastes.<sup>55</sup> Thus, companies are able to assess costs and determine for themselves whether adopting a different manufacturing process (which may generate less hazardous waste) is, in fact, more cost effective given the consequences of the alternative manufacturing process.<sup>56</sup>

Thus, although Congress and the EPA established at the federal level the standards by which generators of hazardous waste need to manage the transportation, treatment, storage and disposal of hazardous wastes—a system for promoting cost-internalization by those generating hazardous

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49. 42 U.S.C. § 6922 (2000); 40 C.F.R. §§ 262.10–262.108 (2008).

50. 42 U.S.C. § 6923 (2000); 40 C.F.R. §§ 263.10–263.31 (2008).

51. 42 U.S.C. § 6924 (2000); 40 C.F.R. §§ 264.10–264.1202 (2008).

52. J. Steven Whisler et al., *Turning Gold into “Solid Waste”: RCRA’s Intrusion into the Industrial Process*, 23 ARIZ. ST. L.J. 555, 562 (1991) (quoting legislative history to highlight Congress’s intent to have the EPA refrain from intruding into the manufacturing process).

53. *Id.*

54. See *Background and Theory of Hazardous Waste Control*, 99 HARV. L. REV. 1465, 1478 (1986).

55. See *supra* note 52 and accompanying text.

56. For example, the alternative manufacturing process may be more costly in terms of raw materials, capital equipment or reduced quality of the product.

wastes—Congress and the EPA embraced the principle of subsidiarity by leaving in the hands of those businesses generating the hazardous wastes the decision-making responsibility for choosing whether to employ manufacturing processes that result in the generation of hazardous wastes.

*b. State Implementation of the RCRA Regulatory Regime*

While Congress and the EPA developed the RCRA regulatory regime, Congress specifically recognized that there could be value in having the states implement and manage the RCRA regulatory regime.<sup>57</sup> RCRA's statutory enactment provides individual states with the ability to claim responsibility for implementing and managing the RCRA regulatory regime within each state's borders if they enact a legislative and regulatory structure that is consistent with the RCRA federal regulatory regime.<sup>58</sup> Whether Congress was motivated by the desire to minimize federal implementation costs or by principles of subsidiarity in having states take over responsibility for managing the RCRA regulatory regime, the reality is that Congress did enact a statutory regime that delegates some responsibility to the state level. Thus, Congress integrated principles of subsidiarity in the implementation regime it created for RCRA.

Through limitations of the delegation of power to the state level, Congress addressed some of the problems of state regulations while allowing the benefits of state regulation to be realized. The requirement that states conform to the federal regime negates some of the risks of a "race to the bottom" problem and counters incentives of exclusionary regulation that shifts risks of hazardous waste management to those outside of a given state. The delegation of power gives the states—those closer to the local risks associated with hazardous waste management—the opportunity to manage how the RCRA regulatory regime is implemented within their borders. This has resulted over the last few decades in the empowerment of states to be responsible for environmental regulation; states have increasingly developed experienced personnel to address and manage environmental regulation and have become more proactive in developing their own regulatory regimes.<sup>59</sup>

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57. 42 U.S.C. § 6926 (2000) (providing a mechanism for states to administer and enforce hazardous waste program under RCRA); 42 U.S.C.A. § 6991c (West 2008) (providing a mechanism for states to administer and enforce underground storage tank regulations under RCRA).

58. 42 U.S.C. § 6926. As of 2000, over ninety percent of the states had fully or partially approved programs for administering and enforcing RCRA. The Environmental Council of the States (ECOS) maintains a list of approved state programs under RCRA (and other environmental statutes) on its website, ECOS, State Delegation—RCRA, [http://www.ecos.org/section/states/enviro\\_actlist/rcra](http://www.ecos.org/section/states/enviro_actlist/rcra) (last visited Mar. 20, 2008).

59. Between 1986 and 1994, state environmental expenditures increased by fifty percent—from \$8.7 billion to \$13.19 billion, ECOS, Spending, <http://www.ecos.org/section/states/spending> (last visited Mar. 20, 2008), much of it focused on increased staff. States thus have much greater capacity now to manage regulation of hazardous waste than was the case in the 1970s or early 1980s.



Along with the locus of regulation of hazardous wastes, it is equally important to consider the locus of enforcement of hazardous waste regulations. While Congress provided for delegation to the states of the responsibility for implementing RCRA within their borders, it did not hand over complete responsibility for the enforcement of RCRA.<sup>60</sup> Under RCRA, the EPA can take back the delegation of authority to any given state. RCRA has also been interpreted to allow the EPA to “overfile”—to take enforcement action in addition to that taken by a state with delegated authority.<sup>61</sup>

These powers seem inconsistent with the principles of subsidiarity reflected in the state delegation doctrine. To be consistent, there would have to be justifiable reasons why Congress might want to preserve federal enforcement authority to assure that RCRA serves the common good in a way that might not happen if the states had full implementation and enforcement responsibilities. The primary justification for the EPA to retain the opportunity to overfile is the concern about “sweetheart” deals that result in inconsistent enforcement across different states.<sup>62</sup> However, is this really a legitimate concern? If a state has pursued an enforcement approach viewed as unnecessarily lenient—more of a compliance orientation than a punishment orientation—does this really result in a problem in terms of harming the common good?

Except in relatively rare cases (for example, a facility very near a state line), the environmental risks posed by a regulated entity’s inappropriate conduct on its property are not likely to extend beyond the state boundary.<sup>63</sup> Thus, the state accounts for all relevant interests—the environmental harms or risks to the citizens of the state and the economic benefits associated with the regulated entities—and is therefore best situated to make a determination regarding whether and how to pursue enforcement action. While the federal government might be concerned about an enforcement-oriented “race to the bottom” in which states compete to be increasingly lenient in enforcement, this concern seems to be a very tenuous assertion (and can be ameliorated by withdrawing delegation of authority to a state program that the EPA feels is truly deficient).<sup>64</sup>

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60. 42 U.S.C. § 6926(e) (2000) (discussing withdrawal of state authorization); 42 U.S.C. § 6928(a)(2) (2000) (discussing federal enforcement in states with authorized programs).

61. *Compare* Wyckoff Co. v. E.P.A., 796 F.2d 1197 (9th Cir. 1986) (concluding that Congress did not intend to preempt federal regulation entirely in states with authorized programs), *with* Harmon Indus., Inc. v. Browner, 191 F.3d 894 (8th Cir. 1999) (concluding that EPA could not “overfile” in states with authorized programs under RCRA where the state had taken enforcement action).

62. *See* Jerry Organ, *Environmental Federalism Part I: The History of Overfiling Under RCRA, the CWA, and the CAA Prior to Harmon, Smithfield and CLEAN*, 30 ENVTL. L. REP. 10615, 10616 (2000).

63. To the extent that a regulated entity mismanages transportation of hazardous wastes across state lines, it subjects itself to the jurisdiction of each state through which its hazardous waste travels. Thus, the primary context in which enforcement is at issue is a local context.

64. *See* 42 U.S.C. § 6926(e) (2000).

While RCRA imposes some limitations on state enforcement, it also embraces a truly local enforcement option by providing for citizen suits—actions by private individuals when the state or federal government has failed to bring an enforcement action against an alleged violator following notice of the potential citizen suit.<sup>65</sup> Thus, RCRA appears somewhat inconsistent with respect to subsidiarity in terms of enforcement; it recognizes some local control (in the form of citizen suits and state enforcement in states with delegated authority) while retaining enforcement authority for the EPA when the EPA thinks the state has not adequately addressed a matter.

## *B. Application to CERCLA*

This section begins with a discussion of whether the principles of subsidiarity, solidarity and the common good require governmental intervention to address remediation of historical contamination from hazardous substances. Next, this section focuses on the extent to which the principles of subsidiarity and solidarity suggest that local, state or federal regulation seems more appropriate for addressing remediation of historical contamination of hazardous substances. Finally, the section evaluates the regulatory regime of CERCLA<sup>66</sup> through the lenses of subsidiarity and solidarity.

### *1. Justification for Regulation*

In determining whether government intervention is necessary from the perspective of principles of subsidiarity and solidarity, the first question is whether individuals and businesses who have been responsible for contamination resulting from the disposal of hazardous substances can be trusted to remediate the contamination in a manner consistent with the principles of solidarity and of promoting the common good. As the RCRA section concluded, the track record of many individuals and businesses around the country suggests that they cannot be trusted to manage wastes in a manner consistent with principles of solidarity and promoting the common good.<sup>67</sup> Thus, the principles of subsidiarity and solidarity direct some type of regu-

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65. 42 U.S.C. § 6972 (2000).

66. 42 U.S.C.A. §§ 9601–9675 (West 2008).

67. *See supra* note 24 (discussing Congressional justification for enacting RCRA and CERCLA). Businesses and individuals that disposed of hazardous substances on the property of others certainly have not shown an inclination to invest in remediation of the property of others. Even businesses and individuals that disposed of hazardous substances on their own property, however, frequently have not shown great initiative in remediating their contaminated property (as evidenced by the significant inventory of contaminated sites developed through the state responses to the inventory requirements set forth in 42 U.S.C. § 9603 (2000)). Over 46,000 sites were identified as part of the CERCLIS database as of 1995, although roughly 34,000 of them were “archived” (indicating no need for further federal governmental action) as of 1996. *See* EPA, Round 2-4c: Refining CERCLIS, <http://www.epa.gov/superfund/programs/reforms/reforms/2-4c.htm> (last visited Mar. 20, 2008).

lation. As some government intervention is necessary for this area, the next question is at which level of government should regulation be implemented—the local, state or federal government?

## 2. *Assessing the Appropriate Locus of Regulation*

### a. *Regulation at the Local Level*

With respect to the responsibility to respond retroactively to contamination problems caused by individuals and businesses that disposed of hazardous substances, would local governments be capable of engaging in the regulatory activity in an efficient, cost-effective manner—and be likely to order decision-making toward the common good? Like the conclusion reached with RCRA, the complex nature of some of the contamination problems resulting from disposal of hazardous substances—and the reality that these problems have largely gone undetected or unaddressed for many years—makes it appear that local governments are not (or certainly were not) well-equipped to address these problems.<sup>68</sup>

### b. *Regulation at the State or Federal Level*

Would state governments be capable of addressing historical contamination problems resulting from the disposal of hazardous substances in a manner that orders decision-making toward the common good, or is the federal level preferable?

From the standpoint of resources needed to develop a complex regulatory regime, most state governments may have the capacity to develop regulations efficiently and cost-effectively that adequately address the remediation associated with contamination from disposal of hazardous substances. State governments certainly would be better situated for remediation than local governments given the risk of redundancy involved if each city or county had to develop its own system. Further, state governments' orientation toward remediation is likely to be consistent with principles of subsidiarity and solidarity such that the common good might be equally as well served by state efforts as it would be by federal efforts. Would the common good be served, however, by having fifty states investing time and energy in developing their own regulatory regimes to deal with contamination resulting from disposal of hazardous substances, rather than having the federal government develop a regulatory regime?

First, in contrast with RCRA's prospective regulation of hazardous wastes being generated from a wide variety of manufacturing processes, which requires an equally wide array of regulatory strategies, the development of remediation protocols under CERCLA for contamination from hazardous substances only involves the development of one general set of

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68. *See id.*

processes for investigating sites, identifying remediation options, selecting an appropriate remediation plan and implementing the selected remediation option.<sup>69</sup> This regulatory regime is less likely to result in *unnecessary* redundancy and duplication of effort. There might be some efficiencies from having the federal government define one general process applicable to all states, but the "process" described above involves far less complexity than appears with RCRA's regulation of the wide array of hazardous wastes generated from myriad manufacturing processes. The fifty states will also have far fewer redundancy inefficiencies than would be the case with thousands of cities or counties developing their own regimes.

Second, while each of the fifty states has greater resources than local governments, the states nonetheless are burdened by limited resources,<sup>70</sup> which will require states to prioritize their efforts to focus on some contamination sites before others. The federal government, however, would also have to prioritize to best use limited resources, and, given the risk to citizens of the states, arguably the states are better situated than the federal government to figure out which sites within their state boundaries present the highest priority for remediation.

Third, while states might decide to impose different remediation standards for similar types of contamination problems, it is not at all clear that having uniform national standards for remediation is truly necessary. While businesses with multiple manufacturing facilities in multiple states might be very interested in having one set of uniform regulations applicable to all of their manufacturing facilities, with respect to cleaning up historical contamination there is not necessarily any efficiency associated with uniform remediation standards across differing states.

Fourth, as with RCRA, the "race to the bottom" problem could impact state regulation of contaminated sites as states may be tempted to "under-regulate" to obtain a competitive advantage or to remain competitive with other states.<sup>71</sup> Under principles of subsidiarity and solidarity, even with some capacity and efficiency factors favoring state regulation, the "race to the bottom" dilemma will function such that the common good may not be well-served in the absence of some federal regulatory intervention.<sup>72</sup> The

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69. Unlike the RCRA situation, in which states would need to develop standards for a wide variety of entities subject to regulation as generators, the regulatory regime for dealing with contaminated sites is largely uniform in nature and embraces basic principles of problem-solving—investigate the scope of the problem, evaluate options for addressing the problem and then select and implement a remediation plan from among the identified options. *See infra* notes 80–89 and accompanying text (describing the investigation and remediation process set forth in CERCLA and the National Contingency Plan).

70. *See supra* note 43.

71. *See supra* note 45 and accompanying text.

72. This would be a situation in which individually rational decisions by states might be collectively irrational. If each state opts to require remediation at a less stringent level than it might otherwise be inclined to impose because it is concerned about the competitive disadvantage it will face compared with other states that have a less robust remediation structure, then the states

regulatory advantages conferred by states, however, may not be any greater than corporate income tax benefits or other common forms of corporate welfare.

In sum, these reasons suggest that Congress and the EPA are not necessarily better situated than state governments as the locus of legislation and regulations addressing the remediation of contamination caused by the disposal of hazardous substances, although the relative lack of state initiative on these matters prior to the enactment of CERCLA (and even subsequent to the enactment of CERCLA), as well as “race to the bottom” concerns, would suggest that some federal-level intervention, such as CERCLA, may have been appropriate.

### 3. *Evaluating the CERCLA Regulatory Regime Using Principles of Subsidiarity and Solidarity*

The next question concerns the extent to which CERCLA and the regulatory regime developed by the EPA embrace principles of subsidiarity and solidarity directed toward promoting the common good.

#### a. *Evaluation of CERCLA with Respect to NPL Sites*

CERCLA’s enactment called for the creation of an inventory of sites where hazardous substances had been disposed<sup>73</sup> and a prioritization of those sites such that those most in need of remediation would be placed on the National Priorities List (NPL).<sup>74</sup> NPL sites came to be known as “Superfund” sites<sup>75</sup> because CERCLA authorized the generation of reve-

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collectively will opt for a less stringent level of remediation (and less protection “for all”) than would be expected if states were acting in the absence of these competitive pressures. The states certainly were not aggressively addressing environmental remediation in the late 1970s and early 1980s when Congress intervened with the enactments of RCRA and CERCLA and then with the amendments to RCRA (Hazardous and Solid Waste Amendments of 1984) which brought in regulation of underground storage tanks and required federal criteria for solid waste landfills receiving household hazardous waste. *See supra* notes 25, 42 and accompanying text.

73. 42 U.S.C. § 9603 (2000). There were over 25,000 potentially hazardous waste sites developed in the initial response to the CERCLA notification provision according to the EPA. *See Superfund: Looking Back, Looking Ahead*, 13 E.P.A. J. 12, 17 (1987). More recent estimates place the number of sites in excess of 45,000. *See supra* note 45.

74. 42 U.S.C.A. § 9605(a)(8)(B) (West 2008) contains the reference to a list of national priority sites that ultimately became the National Priorities List (NPL) in the Code of Federal Regulations. *See* 40 C.F.R. § 300.5 (2008). The NPL presently contains 1,245 sites, with 324 deleted from the list and 61 sites proposed for listing. EPA, National Priorities List (NPL): NPL Site Totals by Status and Milestone, <http://www.epa.gov/superfund/sites/query/queryhtml/npltotal.htm> (NPL data last updated Mar. 19, 2008).

75. Congress provided for the creation of the “Hazardous Substance Superfund” (Superfund) within the EPA’s implementation of CERCLA. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, § 221, 94 Stat. 2767, 2801–802 (codified as amended at 26 U.S.C. § 9507 (2000)).

Congress created the Superfund to pay for a variety of costs associated with implementing CERCLA. *See* 42 U.S.C. § 9611 (2000). The Superfund initially was funded by various taxes, including taxes on chemical feedstocks, Comprehensive Environmental Response, Compensation,

nues from taxes on the chemical and petroleum industries, which were to be placed into a fund to pay for the costs of cleaning up these “Superfund” sites, until such time as the government could recover its costs from PRPs through cost recovery actions.<sup>76</sup> Thus, the most notable universe of CERCLA sites is the set of Superfund sites—those sites placed on the NPL based on an evaluation of the risk presented by the sites.<sup>77</sup> Between one thousand and two thousand sites have been added to the NPL over the last three decades, while tens of thousands of other sites remain outside the NPL process.<sup>78</sup> Notably, the EPA is supposed to consult with states in making listing decisions for placement on the NPL, so to some extent CERCLA gave states a voice in identifying sites for priority remediation.<sup>79</sup>

With respect to those sites that make it onto the NPL, CERCLA contemplates a remediation process driven by the federal government, not by the owner or operator of the site and not by the state government.<sup>80</sup> At

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and Liability Act § 211(a), 94 Stat. at 2798–99 (codified as amended at 26 U.S.C. § 4661 (2000)), taxes on crude oil and petroleum products, § 211(a), 94 Stat. at 2797–98 (codified as amended at 26 U.S.C. § 4611 (2000)), taxes on imported chemical derivatives, § 515(a), 94 Stat. at 1767 (codified as amended at 26 U.S.C. § 4671 (2000)), and a corporate environmental income tax, Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, § 516(a), 100 Stat. 1613, 1770 (amended 1988) (codified as amended at 26 U.S.C. § 59A (2000)); *see also* 26 U.S.C. § 9507(b)(1) (2000).

In addition, the Superfund receives all recoveries from PRPs, all penalties paid by PRPs, all punitive damages recovered under section 107(c)(3) of CERCLA, and “all moneys recovered or collected under section 311(b)(6)(B) of the Clean Water Act.” *See* 26 U.S.C. § 9507(b)(2)–(5) (1988).

After initially appropriating \$1.6 billion dollars to the Superfund when it enacted CERCLA in 1980, Congress appropriated \$8.5 billion in 1986 for the five-year reauthorization period. *See* Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, § 111, 100 Stat. 1613, 1642–46 (codified at 42 U.S.C. § 9611 (2000)); H.R. REP. No. 962, at 318, 321 (1986) (Conf. Rep.), as reprinted in 1986 U.S.C.C.A.N. 3276, 3411, 3414 (1986). In 1990, when Congress reauthorized CERCLA through September 30, 1994, it also extended the Superfund through December 31, 1995, expecting to raise approximately \$5 billion in taxes through 1995. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11231, 104 Stat. 1388.

Congress did not reauthorize the Superfund taxes after 1995, and the Superfund Trust Fund ran out of money in 2004. Since 1995, the Superfund program has increasingly relied on general fund appropriations as the trust fund balance dwindled. Virginia Natural Resources Leadership Institute, Superfund and Brownfield Reclamation: Revitalizing and Reusing Contaminated Lands, <http://www.virginia.edu/ien/vnrli/docs/briefs/superfund%202006.pdf> (last visited Mar. 21, 2008).

76. *See* 42 U.S.C.A. § 9607 (West 2008). *See* Organ, *supra* note 24, at 1047–53 (describing CERCLA’s liability and cost-recovery regime).

77. The risk at sites was assessed using the Hazard Ranking System. Hazard Ranking System, 55 Fed. Reg. 51532 (Dec. 14, 1990) (codified at 40 C.F.R. pt. 300). A description of the Hazard Ranking System can be found on the EPA’s website. EPA, Superfund: Introduction to the Hazard Ranking System (HRS), [http://www.epa.gov/superfund/programs/npl\\_hrs/hrsint.htm](http://www.epa.gov/superfund/programs/npl_hrs/hrsint.htm) (last visited Mar. 21, 2008).

78. *See supra* note 67 and accompanying text.

79. The EPA issued a memorandum in 1996 regarding “Coordination with the States on National Priority List Decisions.” Memorandum from Elliot P. Laws, Assistant Administrator, EPA Office of Solid Waste and Emergency Response (Nov. 14, 1996), <http://www.epa.gov/superfund/sites/npl/hrsres/policy/govlet.pdf>.

80. *See* 42 U.S.C.A. § 9605 (West 2008). The NCP regulations are set forth at 40 C.F.R. pt. 300.

Congress's direction, the EPA promulgated a "national contingency plan" (NCP) setting forth a detailed process for assessing the actual risks at a site (Remedial Investigation and Feasibility Study),<sup>81</sup> evaluating potential remedial options and selecting from among those options (Record of Decision),<sup>82</sup> and implementing the remedial plan (Remedial Design and Remedial Action).<sup>83</sup>

Following the Superfund Amendments and Reauthorization Act in 1986,<sup>84</sup> Congress set forth specific standards for remedy selection preferring compliance with all applicable, relevant and appropriate requirements<sup>85</sup> and preferring permanent remedies.<sup>86</sup> While the Superfund process allowed for states to participate in decision-making and serve as the lead agency,<sup>87</sup> the EPA generally maintained final decision-making authority.<sup>88</sup> Although the process also called for community relations plans to

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81. 40 C.F.R. § 300.430(d) (2008) (describing the Remedial Investigation and Feasibility Study (RI/FS) stage). During the remedial investigation (RI) stage, information "necessary to adequately characterize the site for the purpose of developing and evaluating effective remedial alternatives" is collected. § 300.430(d)(1), (e). The feasibility study (FS) is designed to "ensure that appropriate remedial alternatives are developed and evaluated such that relevant information concerning the remedial action options can be presented to a decision-maker and an appropriate remedy selected." § 300.430(e)(1). When screening the remedial alternatives, the short- and long-term aspects of the alternatives' effectiveness, implementability, and costs are considered. *See* § 300.430(e)(7). The EPA screens and evaluates the alternatives based on nine criteria: (1) protecting human health and the environment; (2) complying with applicable, relevant, and appropriate requirements (ARARs); (3) long-term effectiveness and permanence; (4) reduction of toxicity, mobility, or volume through treatment; (5) short-term effectiveness; (6) implementability; (7) cost; (8) state acceptance; and (9) local acceptance. § 300.430 (e)(9).

82. 40 C.F.R. § 300.430(f) (2008). The selection of an appropriate remedy requires application of the criteria set forth in *supra* note 81. Those alternatives that satisfy the first two "threshold" criteria are assessed based on the next five "balancing" criteria, with the final two criteria used as modifying factors. § 300.430(f)(1)(i). The selection involves a two-step process. § 300.430(f)(1)(ii). "First, the lead agency, in conjunction with the support agency, identifies a preferred alternative and presents it to the public" for review and comment. § 300.430(f)(1)(ii). Second, the lead agency reviews the public comments and consults with the state (or support agency) "to determine if the alternative remains the most appropriate remedial action for the site or site problem." § 300.430(f)(1)(ii). In support of its selection, the agency records "all facts, analyses of facts, and site-specific policy determinations considered . . ." § 300.430(f)(5).

83. 40 C.F.R. § 300.435 (2008). During the Remedial Design and Remedial Action (RD/RA) stage the actual design of the selected remedy is developed and then implemented. *Id.* § 300.435(a).

84. Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C.A. §§ 9601-9675 (West 2008) and scattered sections of Titles 10, 16, 29, and 33 U.S.C.).

85. 42 U.S.C. § 9621(d)(1)-(2) (2000).

86. 42 U.S.C. § 9621(b)(1) ("Remedial actions in which treatment which permanently and significantly reduces the volume, toxicity or mobility of the hazardous substances, pollutants, . . . are to be preferred over remedial actions not involving such treatment.").

87. 42 U.S.C. § 9621(f). Section 9621(f)(1) provides that "[t]he President shall promulgate regulations providing for substantial and meaningful involvement by each State in initiation, development, and selection of remedial actions to be undertaken in that State." States are authorized to serve as lead agency in investigating and remediating sites. 40 C.F.R. § 300.515(a) (2008).

88. The regulations make it clear that the federal government will have the ultimate say in remedy-selection. *See* 40 C.F.R. § 300.515(e)(2) (providing that state concurrence in a Record of

allow dissemination of relevant information to the local community, the EPA generally retained final decision-making authority.<sup>89</sup>

Thus, even if the relevant landowners, the local community and a state—those most directly, and to some extent exclusively, impacted by a contamination problem—felt that a reduced scope of remediation was appropriate because the investment in additional remediation far exceeded the value of further reduction in risks, the EPA generally is bound by the provisions of the NCP to mandate a more extensive (and more expensive) remedial option.<sup>90</sup> Given that virtually all of the risks associated with Superfund sites are local in nature and could be well understood by the landowners and the local and state governments, it is hard to reconcile the Superfund process with the principle of subsidiarity and solidarity, i.e., given that these sites generally do not present an interstate “lack of solidarity” concern because the risk of harm is localized.<sup>91</sup>

*b. Evaluation of CERCLA with Respect to Non-NPL Sites*

With respect to non-Superfund sites, the federal government generally is not directly involved in the remediation decisions, which generally are left to the property owners in conjunction with local or state government.<sup>92</sup> Thus, at first blush, CERCLA would appear to function more consistently

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Decision is not a prerequisite to EPA's selection of a remedy, and providing that a state may not proceed with a remedy at a state-lead site that is fund-financed without the concurrence of the EPA, although acknowledging that in state-lead sites that are not financed under Superfund, the state may select a remedy without the approval of the EPA).

89. See 40 C.F.R. § 300.155 (2008) (discussing public information and community relations generally), § 300.415(n) (2008) (discussing community relations plans in relation to removal actions), § 300.430(c) (2008) (discussing community relations in the context of the RI/FS process), § 300.435(c) (2008) (discussing community relations in the context of the RD/RA process); *but see supra* note 88 and accompanying text (discussing final decision-making authority).

90. A landowner may be interested in a faster and cheaper remediation process and the neighboring landowners and the community also may want a faster remediation process and may be willing to accept the marginally greater risks (or look at alternatives to remediation—such as institutional controls—for addressing such risks). Regardless, the EPA has little flexibility in the remedy-selection process following the enactment of SARA. EPA has embarked on a variety of Superfund reforms over the last decade or so that try to address in some ways the need to be more conscious of cost concerns and the concerns of the local communities. See EPA, Office of Emergency and Remedial Support, *The Role of Cost in the Superfund Remedy Selection Process* (Sept. 1996), [http://www.epa.gov/superfund/policy/cost\\_dir/cost\\_dir.pdf](http://www.epa.gov/superfund/policy/cost_dir/cost_dir.pdf); EPA, *Superfund Reforms: Reforms By Type - Cleanups*, <http://www.epa.gov/superfund/programs/reforms/types/cleanup.htm> (last visited Mar. 21, 2008) (listing of the reforms focused on the remedy-selection process).

91. In a 1995 report entitled “How to Rescue Superfund: Bringing Common Sense to the Process,” the Heritage Foundation highlighted that Superfund involves local problems and that decision-making regarding such problems should be left with local authorities rather than the federal government. John Shanahan, Heritage Foundation, *HOW TO RESCUE SUPERFUND: BRINGING COMMON SENSE TO THE PROCESS* (July 31, 1995), <http://www.heritage.org/Research/Energy-andEnvironment/bg1047.cfm>.

92. 40 C.F.R. § 300.515(e)(2) specifically notes that with respect to non-NPL sites (non-fund-financed sites) at which the state is the lead agency, the state need not get EPA approval of remedy selection decisions.



with principles of subsidiarity and solidarity with regard to non-NPL sites. Nonetheless, given the liability framework of CERCLA, in which non-governmental entities can recover from PRPs only the necessary costs of remediation *that are consistent with the NCP*, the NCP casts a long shadow even over remediation at non-NPL sites.<sup>93</sup> If a landowner or other party engaged in remediation wants to be able to recover remediation costs from PRPs, the party has to conduct the investigation and remediation in a manner consistent with the NCP, which means that even at non-NPL sites the investigation and remediation must be done as if it were a NPL site at which the federal remediation standards are determinative.<sup>94</sup>

*c. Evaluation of CERCLA with Respect to Brownfields Reform*

Over time, Congress, the EPA and the states came to realize that a significant number of contaminated, largely urban industrial sites that were not on the NPL were lying fallow and under-utilized because of historical contamination and the significant potential cost of cleanup.<sup>95</sup> In response to these concerns, the EPA developed a variety of reforms,<sup>96</sup> and Congress ultimately took action in 2002 with the enactment of the Small Business

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93. Under 42 U.S.C.A. § 9607(a)(4)(B) (West 2008) PRPs shall be liable for “any other necessary costs of response incurred by any other person consistent with the national contingency plan.”

94. While the federal standards apply, the EPA generally will not have any direct involvement in the remedy selection process—rather the landowner together with the state likely will be standing in the shoes of the EPA and trying to make the remedy selection decision in a manner consistent with the NCP. Notably, RCRA has two different programs that are somewhat comparable to CERCLA in that they address remediation of historical contamination. These two programs are the Corrective Action program, which focuses on investigating and remediating solid waste management units at permitted treatment, storage and disposal facilities, 42 U.S.C. § 6924(u), (v) (2000); 42 U.S.C. § 6928(h) (2000), and the Underground Storage Tank program, which focuses on investigating and remediating leaking underground storage tanks. 42 U.S.C.A. § 6991d (West 2008), 40 C.F.R. §§ 280.60–280.67 (2008). The Corrective Action program is much more consistent with principles of subsidiarity than CERCLA in that the EPA offers much more flexibility with remedy selection under RCRA and is much more deferential to state decisions regarding remedy selection than is the case under CERCLA. *See, e.g.*, 40 C.F.R. § 258.57 (2008) (states with delegated authority make remedy selection determinations on corrective action at municipal solid waste facilities). For a discussion of corrective action in RCRA and CERCLA, see Timothy O. Schimpf, *Unleash RCRA! Letting Loose the Corrective Action Process of RCRA Can Change the World*, 29 WM. & MARY ENVTL. L. & POL’Y REV. 481 (2005) and Richard G. Stoil, *The New RCRA Cleanup Regime: Comparisons and Contrasts with CERCLA*, 44 Sw. L.J. 1299, 1310–12 (1991). The remedy selection process with respect to remediation at sites with leaking underground storage tanks similarly reflects greater consistency with principles of subsidiarity in that the remediation standards afford much greater flexibility than under CERCLA with much greater deference to state decisions. *See generally* 40 C.F.R. §§ 280.60–280.67.

95. *See* Mark Reisch, ISSUE BRIEF FOR CONGRESS: SUPERFUND AND BROWNFIELDS IN THE 107TH CONGRESS (June 5, 2002), [http://digital.library.unt.edu/govdocs/crs/data/2002/upl-meta-crs-3123/IB10078\\_2002Jun05.pdf](http://digital.library.unt.edu/govdocs/crs/data/2002/upl-meta-crs-3123/IB10078_2002Jun05.pdf).

96. For a summary of EPA initiatives relating to Brownfields and the revitalization of such properties, see EPA, Brownfields and Land Revitalization: Brownfields Liability, <http://www.epa.gov/brownfields/liab.htm> (last visited Mar. 21, 2008).

Liability Relief and Brownfields Revitalization Act (Brownfields Act).<sup>97</sup> With the enactment of the Brownfields Act, Congress reallocated to the states much greater authority (and limited the authority of the EPA) with respect to remedy-selection decisions and enforcement actions at non-NPL sites that qualify for Brownfields status. This change allowed greater use of institutional controls to address risk rather than always requiring remediation.<sup>98</sup>

#### IV. CONCLUSION

For the reasons noted above, RCRA's structure of having the federal government develop the regulatory regime for the prospective generation, transportation, treatment, storage and disposal of hazardous wastes would appear to be consistent with the principles of subsidiarity and solidarity ordered toward the common good. There is efficiency in having the federal government develop the regulatory standards for this area (without the resource constraints, redundancy and inconsistency of having fifty states develop the standards and without the potential "race to the bottom" or exclusionary regulation problems). RCRA's design is also largely consistent with the principles of subsidiarity, solidarity and the common good in that RCRA does not intrude into the manufacturing decisions of generators of hazardous wastes by mandating certain manufacturing processes, and RCRA authorizes the delegation of the regulatory regime to the vast majority of states that choose to enact state legislative and regulatory regimes consistent with RCRA. The one sense in which RCRA is perhaps inconsistent with principles of subsidiarity and solidarity relates to the EPA's authority to "overfile"—to take enforcement action even when a state with delegated authority already has taken enforcement action.

While RCRA regulates an interstate hazardous waste market that truly is national in scope such that a uniform federal regulatory regime makes sense, CERCLA regulates a national problem (historical contamination) that has a largely local impact. Nonetheless, having a federal regulatory regime in place to facilitate remediation of some of the most seriously contaminated sites (those on the NPL) may be consistent with the principles of subsidiarity and solidarity ordered toward the common good given the lack of initiative the states had shown in trying to address these problems. The regime implemented under CERCLA, however, while encouraging the fed-

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97. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002).

98. 42 U.S.C.A. § 9601(39) (West 2008) (defining "Brownfield site"). For a short summary of the Brownfields Act, see EPA, Brownfields and Land Revitalization: Summary of the Small Business Liability Relief and Brownfields Revitalization Act, <http://www.epa.gov/brownfields/html-doc/2869sum.htm> (last visited Mar. 22, 2008). Institutional controls include deed restrictions and other limitations on the use of property that can minimize risk, for example, by precluding the property from residential use. *Id.*

eral government to collaborate with states and facilitating states to “take the lead” in some investigations at NPL sites, leaves most significant remedy-selection and enforcement decisions in the hands of the EPA. Even with non-NPL sites, where states have greater authority to investigate and take enforcement action, the liability structure of CERCLA largely minimizes the actual authority of local government or states to make remedy-selection decisions that are inconsistent with the mandates of the NCP. Only with the recent reforms related to Brownfields have Congress and the EPA begun to take more concrete action to delegate to states and local actors greater authority over remedy-selection and enforcement in a manner more consistent with the principles of subsidiarity, solidarity and the common good.

Now more than three decades into the era of Environmental Law, there has been a significant reallocation of resources at the federal, state and local level to issues of environmental regulation. With this increase in resources—both financial and human—states have developed an increased capacity to manage environmental concerns for which the federal government felt obliged to take the initiative in the 1970s and 1980s (due to the absence of significant state action). The increased state capability can be seen in the implementation of RCRA and CERCLA. For example, a significant number of states have delegated authority under RCRA and are taking the lead with respect to Brownfields under CERCLA. While this improvement does not mean there will not be a need for federal initiatives as we identify future areas of environmental regulation, it does suggest that states will have a greater capacity to be the appropriate locus of regulation for a variety of environmental issues as we move into the twenty-first century. Thus, as the system of environmental regulation evolves, Congress, state legislatures, and state and federal administrative agencies should pay attention to the principles of subsidiarity, solidarity and the common good in assessing whether the local, state or federal government is the appropriate location for both the development and implementation of the next generation of environmental laws and regulations.