Denver Law Review

Volume 54 | Issue 2 Article 17

February 2021

Federalism and Environmental Law

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FEDERALISM AND ENVIRONMENTAL LAW

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The topic "Federalism and Environmental Law" assigned to me is not limited to the public lands defined in section 10 of the Public Land Law Review Commission's Organic Act (P.L. 88-606).[1] I am glad not to be so limited because the problems created by this topic apply to all lands and all people in the United States.

The terms "federal," and "federalism," and "federal government" seem to have taken on an increasingly negative connotation in recent years. The pervasion of federal influence into the daily lives of so many people must be a large part of the reason for this. By requirements like seat belts and school busing, through radio and TV commercials for federal agencies, and by innumerable other activities, every person, in business or private life, is affected intimately each day by federal programs.

The burden imposed by government regulations is of very great concern to business. In a survey taken last year, 60% of the 2,274 responding small businesses ranked government regulations as one of their three most urgent problems. All industries surveyed, except transportation and communications, ranked government regulations as the most urgent small business problem. Direct federal expenditures for regulating business are expected to increase from $2.9 billion in fiscal year 1976 to $3.5 billion in fiscal year 1977 and to $3.8 billion by the end of fiscal year 1978.[2]

Much of this increased federal regulation has, of course, been brought about by environmental controls. Between 1970 and 1976, annual federal outlays for pollution control, grants, and studies increased from $2.8 billion to $6.9 billion per year.[3] Most of this increase, of course, has been in expenditures by the Environmental Protection Agency. Annual expenditures by industry for federally required pollution abatement will increase from

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[1] Public Land Law Review Commission Act, § 10, 43 U.S.C. § 1400 (1970).

[2] INDUSTRY WEEK, Feb. 14, 1977, at 17.

[3] COUNCIL ON ENVIRONMENTAL QUALITY, THE SIXTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 480-84 (1975).

$11.3 billion in 1971[4] to an estimated $34.5 billion in 1983.[5] The Environmental Protection Agency has increased the number of its employees to more than 10,000 today since its creation seven years ago and has requested a 2,500-employee increase for fiscal year 1978.[6]

That federal environmental controls are a dominant influence on our business and private lives is clear. The more interesting questions are: How did we get into this position and what are the effects of federal controls? In considering the question of how federal control has become so dominant, a scholarly presentation would include a fascinating discussion on the sources of federal authority. It would discuss federal authority over navigable waters which extend upstream into dry washes. It would discuss the limits (if any) of the commerce power and whether the federal government has a police power. (This is academic, of course, because with the commerce power expanded by the courts, who needs the police power?) One would also expect a discussion of the restrictions on these powers, including improper delegation, equal protection, the taking issue, and due process. None of those subjects will be discussed in this presentation.

As much writing, discussion, and litigation as there has been on these subjects, it is somewhat surprising that these questions are seldom raised as each new federal environmental program is introduced into a state or local community. These questions may be raised by industry or property owners after a program has been geared up through the state machinery and put into effect, but they are seldom raised when Congress, EPA, or another federal agency approaches a state, dangling the green carrot to assist the state in "cooperating" with the new federal program.

The devices used to induce states to adopt federal programs would be worth a study in itself. The federal government has utilized nearly every weakness present in state and local governments to induce the adoption of federal environmental programs. These weaknesses include the need for money, a desire for local

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[4] COUNCIL ON ENVIRONMENTAL QUALITY, THE FOURTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 93 (1973).

[5] COUNCIL ON ENVIRONMENTAL QUALITY, THE SIXTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 534 (1975).

[6] 7 ENVIR. REP. (BNA) 1395, 1406 (1977).

governmental autonomy, state bureaucracies desiring to expand their staffs and authorities, and the motherhood-apple pie political appeal of environmental protection pervading all other reasons.

Although, from the nature of the governmental activity involved in environmental protection, one would expect that the direct forces of the federal commerce power or the police power (if there is any) would be applied to induce state cooperation, it is curious to observe that another governmental power is utilized indirectly, much more widely, and much more effectively. That is the power to tax and to create money. Federal environmental grants returning tax money to the states with strings (or shackles) attached are a most powerful force in inducing state adoption of these programs. The grants usually are made available in two forms. First, as provided for in the Solid Waste Disposal Act[7] and under section 208 of the Federal Water Pollution Control Act,[8] funds are granted to conduct studies, to set up planning and control systems, to hire personnel, and to obtain the necessary state legislation. Many of these funds are made available to the staffs of regional government organizations within the states, many of which have acquired characteristics of federal agency subagencies.

When the personnel are hired, the studies are completed, and the program is established, the system exists, lacking only the legislative authority to implement it. This situation, of course, removes a state legislature from the more tenable position of refusing to create a new office or a new program, and places it in the more difficult position of having to abolish an existing office and program.

Adding to the irresistibility of the federal environmental programs are the grant-sharing funds made available to states if they implement the program. This makes the financial bullet somewhat less difficult to bite for the initial passage of the state legislation. The issue can be made into one of losing federal funds if the legislation is not passed. But then, typically, the federal funds are phased out after several years and the state is left on its own

[7] 42 U.S.C.A. §§ 6941-6949 (1977).
[8] 33 U.S.C. § 1288 (Supp. IV 1974).

to either finance or repeal the program. It is, of course, a maxim of government that it is incomparably more difficult to repeal legislation than it is to enact it, particularly environmental legislation. There is the further difficulty that an additional bureaucracy has been established, personnel have been hired, and a system is operating. It is an extremely unusual case in which a legislative body would repeal legislation under these circumstances.

The compounding of those federal programs which do provide for continuing funding has a secondary result which is quite effective. As states come to depend upon continuing funding, the threat of decreasing or eliminating those existing programs becomes a very effective method to induce the adoption of and compliance with new programs.

Another positive inducement for states to accept federal environmental programs is the strong desire to manage their own affairs. It is found frequently in air and water quality and waste disposal statutes that the state may conduct the program if approved by the Environmental Protection Agency. If the state program is not approved, EPA will carry out the program in the state. This presents state legislatures with another dilemna. It is not politically healthy to open oneself to the charge of abrogating state authority and responsibility to a federal agency. There is also the concern that EPA restrictions will be greater than those which EPA would approve if the state prepared and carried out its own program.

Finally, there is the method of encouraging state compliance by threatening to withhold permits under other environmental programs. This method is used in section 208 of the Federal Water Pollution Control Act[9] to induce states to develop a statewide water management program. The failure to do so can result in the denial of state authority to administer local pollutant-discharge programs.[10]

With EPA's arsenal of gentle persuasion available to apply federal environmental programs to state and local matters, it becomes unnecessary to utilize the more brutal federal constitutional powers to accomplish the same goals.

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[9] *Id.*

[10] 33 U.S.C. § 1342 (c)(3) (Supp. IV 1974).

There may be a trend commencing for states to swallow their pride of autonomy and to tell EPA that, if the program is to be enforced, EPA will have to do it. This has occurred in Arizona, at least in this session of its legislature, with respect to implementing the Safe Drinking Water Act,[11] and the automobile emission testing program was threatened with the same fate. I understand that a similar disposition was made of legislation in New Mexico this year. This, of course, is not welcomed by EPA because, even with 10,000 employees, there is a limit to the number of EPA personnel available to administer specific state programs. Also, EPA prefers to have any public dissatisfaction with the enforcement of programs directed toward the state rather than toward EPA.

Although federal regulation has been the source of considerable complaint and concern, there has not been any quantitative determination of what the effects of individual regulations, or the cumulative effects of the entire federal regulatory system, are on business and industry. However, studies to provide some indication of those effects are presently underway. The National Science Foundation last year commenced studies of the benefits and detriments of governmental regulations on the copper wire, ground beef, and consumer financing services industries. But, if these studies are ever completed, it will likely be years from now.

Another study on the effect of federal regulation of the iron and steel industry is being conducted by the Council on Wage and Price Stability. The first phase of that study, completed last December, consisted of a catalog identifying federal regulations which apply to this industry.[12] The effect of those identified programs will be the subject of a later study. The initial study, however, provided some interesting insights. First, the study was limited to the direct manufacturing process and did not include mining or the manufacture of steel products. The study found that this portion of the iron and steel industry is regulated by at least twenty-seven different federal agencies.

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[11] H.R. 2152, 33d Ariz. Leg., 1st Sess. (1977), was not reported out of the House Health Committee; this bill would have implemented the EPA Safe Drinking Water Act in Arizona.

[12] COUNCIL ON WAGE AND PRICE STABILITY, CATALOG OF FEDERAL REGULATIONS AFFECTING THE IRON AND STEEL INDUSTRY (1976).

The Council also found that in 1975 there were 7,305 final rules and regulations and 3,042 proposals for new rules or amendments published in the Federal Register. Although it was not determined which of these would affect the steel industry, the study identified a total of more than 10,000 changes or potential changes, within one year, in the rules of which businessmen had to keep themselves informed. The Council expressed its concern as follows:

> The result of his understandable confusion and frustration with them is a high level of uncertainty. He [the businessman] barely grasps what he must do today; he can only imagine what he will be asked to do tomorrow.
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> . . . .
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> We are currently entering a period of several years when industry will face near simultaneous compliance with a host of new health, safety and environmental standards promulgated separately in past years. The consequences of this timing coincidence are not known, because it is a question that has never been addressed. It has never been addressed because government has never felt inclined to examine the totality of its actions from the perspective of those directly affected.[13]

Compounding the problem of the multiplicity of regulations is the nature and philosophy of many federal agencies in drawing up and enforcing the regulations. A prime example of this problem is found in the Environmental Protection Agency. Instead of being an objective administrator of the law, it is not incorrect to say that the Environmental Protection Agency is a zealous and dedicated advocate of environmental protection. This is acknowledged in one of EPA's own publications, THE CHALLENGE OF THE ENVIRONMENT: A PRIMER ON EPA'S STATUTORY AUTHORITY: "It [EPA] is an independent regulatory agency that has no obligation to promote agriculture, commerce or industry. It has only one mission—to protect and enhance the environment."[14] An example of EPA's advocacy is indicated by a Chicago law firm's recent charge that the Environmental Protection Agency lobbied in at least four state legislatures for the passage of legislation to restrict the use of nonreturnable drink containers.[15] In this instance, EPA

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[13] *Id.* at VI.

[14] U.S. ENVIRONMENTAL PROTECTION AGENCY, THE CHALLENGE OF THE ENVIRONMENT: A PRIMER ON EPA'S STATUTORY AUTHORITY 1 (1972).

[15] 7 ENVIR. REP. (BNA) 1604-05 (1977).

was faced with a statutory prohibition against lobbying in this area. However, lobbying by EPA in state legislatures is inappropriate at any time.

One of the programs which appears to be particularly effective in extending federal controls to states is the one by which EPA employees are assigned to work on a temporary basis in state agencies. Recently I met with an EPA employee temporarily assigned as the director of a state agency who had drafted state environmental legislation which would be ultimately administered by EPA. This employee was actively lobbying, while on EPA's payroll, for the passage of this bill in the state legislature. Participation by a federal employee in a state legislative process seems to be inherently wrong.

Former President Ford made a pledge when he took office to reduce the federal bureaucracy and regulations. Although there is no reason to believe that best efforts were not made to carry out this pledge, federal regulatory actions increased during his term. On February 2, 1977, President Carter made a similar pledge during his fireside chat. General statements of goals of this nature are always easy to make and easy to break when specific programs are addressed. The March 29, 1977, edition of the *Wall Street Journal* reported that the President's environmental proposals expected to be released next week will include the following proposals for increased regulations:

1. Additional restrictions on off-road vehicles.
2. Limiting use of inland and coastal wetlands.
3. Ending coal strip mining on private agricultural lands.
4. Restricting coal mining in other areas.
5. Expanding the Endangered Species program.
6. Increasing the size of the Redwood National Park to prevent timber harvesting.
7. Strengthen auto pollution rules.
8. Create new wilderness areas.
9. Increase environmental standards for water development projects.

10. Increase environmental requirements for off-shore oil and gas development.[16]

Not much encouragement is provided by such a list proposing increasing federal regulations. Until such listings are reversed to identify programs proposing deregulation and until those programs are carried out, prospects for a rationally balanced federal system of environmental law are not bright.

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[16] Wall St. Journal, Mar. 29, 1977 at 3, col. 2.