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Federalism Disserved: the Drive for Deregulation

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FEDERALISM DISSERVED: THE DRIVE FOR DEREGULATION

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The federal government's role in our lives has grown dramatically in the post-World War II era. Most notably in the 1960s, with the "Great Society" programs, and in the 1970s, with the advent of heightened environmental awareness, the federal government has asserted regulatory authority over areas that were previously controlled, if at all, exclusively by state or local governments.[1] The expansion of federal power has not been without its costs to our federal system. Many of the regulatory efforts were directed at the states or required state involvement and administration.[2] Not surprisingly, the cumulative burden of these programs has strained relations between the states and the federal government.[3]

The federal government is now backing away from the regulatory efforts of the prior decades. President Reagan's "new federalism" program is but one indication of the changing mood at both the national and local level.[4] Despite difficulties in implementing the "new federalism" program during President Reagan's first term,

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1. *See generally* Beam, *Washington's Regulation of States and Localities: Origins and Issues*, INTERGOVERNMENTAL PERSP., Summer 1981, at 8 (discussing the growth of regulation that seeks to compel affirmative action on the part of subfederal units of government).

2. *See id.* at 10-12 (discussing the number of programs involving subfederal units of government and the means employed to compel action).

3. Beam notes that "the growing federal regulatory presence has become a major source of concern of intergovernmental policymakers." *Id.* at 12. *See also Fighting Federal Mandates*, N. Y. Times, Aug. 16, 1980, at 20, col. 1.

4. President Reagan hinted at his new federalism proposals when, during his inaugural address, he stated:

> It is my intention to curb the size and influence of the Federal establishment and to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people. All of us need to be reminded that the Federal Government did not create the States; the States created the Federal Government.

Inaugural Address of President Ronald Reagan, 17 WEEKLY COMP. OF PRES. DOC. 2 (Jan. 20, 1981). Specific proposals for the "new federalism" were made in the first State of the Union address:

> The growth of these Federal programs has—in the words of one intergovernmental commission—made the Federal Government "more pervasive, more intrusive, more unmanageable, more ineffective and costly, and above all, more

his administration continued its criticism of federal regulation and its advocacy of returning policymaking prerogatives to the state and local governments.[5] Congress has been the frequent target of this criticism, being accused of insensitivity to local needs and concerns in its attempt to prescribe national regulatory programs.[6]

Closer examination, however, reveals that much of the criticism may be misdirected. Part I of this article examines several case studies that suggest that Congress often has demonstrated respect for state and local interests through the use of various creative statutory devices. Further, the case studies indicate that frequently the implementation of these programs by the executive or their interpretation by the courts has frustrated congressional objectives and strained the fabric of American federalism. We argue that a hostility to regulation motivates those who pay lip service to federalism while they seek to derail laws that take state and local interests into account. Indeed, it may be that the preference of this administration and

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> [un]accountable." Let's solve this problem with a single, bold stroke: the return of some $47 billion in Federal programs to State and local government, together with the means to finance them and a transition period . . .

The State of the Union, 18 WEEKLY COMP. OF PRES. DOC. 80 (Jan. 26, 1982). The philosophy behind the new federalism purportedly is to make programs "less costly and more responsive to genuine need, because [they will] be designed and administered close to the grassroots and the people [they] serve." *Id.* (quotation refers specifically to the proposal that the states take responsibility for food stamps and Aid to Families with Dependent Children).

One commentator noted:

> A number of key assumptions seem to underline the President's New Federalism agenda. These include: (1) "grass roots" governments are best equipped to diagnose and deal with problems; (2) states are willing and able to assume greater responsibility for the administration and financing of social programs; (3) state and local officials will cooperate and collaborate more closely than in the past . . .; (4) the federal government has grown too large, influential, and costly and its operations need to be overhauled and streamlined; and (5) the appropriate roles of different levels of government can be identified and functions can be reassigned in a reasonable systematic manner.

Weissert, *1981: A Threshold Year For Federalism*, INTERGOVERNMENTAL PERSP., Winter 1982, at 4.

5. *See* Walker & Colella, *Federalism in 1983: Mixed Results From Washington*, INTERGOVERNMENTAL PERSP., Winter 1984, at 24. "The biggest federalism story . . . in 1983 was the non-story of action on New Federalism issues." *Id.* Nevertheless, despite the failure of legislative action, "the Reagan Administration continued its deregulatory drive through other means. Chief among these other approaches were a firm federal "hands off" when administering block grants . . ., delegation to the states of certain watchdog functions . . . and, decentralizing responsibilities through executive orders and administrative circulars." *Id.* at 27.

6. *See generally* Beam, *From Law to Rule: Exploring the Maze of Intergovernmental Regulation*, INTERGOVERNMENTAL PERSP., Spring 1983, at 7 (discussing the problems resulting from the implementation of over 35 regulatory statutes aimed at or implemented by the states).

many members of the judiciary for big business is so overwhelming as to override any conflicting reverence for federalism's ideals. In part II, we develop our thesis that, whatever the motives of the actors in the regulation play, the federalism concept, even the "new federalism," will simply not support the baggage which it is all too often assigned.

The question of the best level of government for making a given policy is an important component, but only one piece, of the overall policy problem. Federalism is a process for implementing policy, and evolves with the competing values that continually redefine the allocation of government's powers. Because the Congress is a representative body, politically accountable to the people, federalism is best served when agencies and courts do their best to respect the intent of Congress.[7] Failure to do so makes federalism, the American way of allocating decisionmaking power, the province of the judiciary and the agencies, beyond the reach of the electorate.

I. THE CONGRESS AS WHIPPING BOY: WHO IS TO BLAME?

Congress has increasingly been cast as the instigator of villainous "big" government, due to its zeal in creating national regulatory programs that are both costly and intrusive. Much of this criticism misses the mark. Congress has on many important occasions legislated in a manner sensitive to state and local concerns. As the following case studies illustrate, however, implementing agencies and courts have frequently ignored congressional intent and thus diminished the importance of unique state and local interests.

A. The Case Studies

1. The Hazardous Materials Transportation Act.—The transportation of hazardous material has long been regulated by federal, state, and local governments.[8] In the 1960s, as the types and quantities of hazardous materials being shipped increased and concern for the environment grew, the regulations governing hazardous material

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7. *See generally* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546-52 (1954) (arguing that congressional sensitivity to local concerns reflects the states' role in selecting Congress); *see also* Banks, *Conservation, Federalism and the Courts: Limiting the Judicial Role*, 34 SYRACUSE L. REV. 685, 739-41 (1983) (arguing that the Supreme Court's flawed analysis of federalism principles has obstructed reasoned decisionmaking and suggesting a more limited judicial role).

8. *See generally* Trosten & Ancarrow, *Federal-State-Local Relationships in Transporting Radioactive Materials: Rules of the Nuclear Road*, 68 KY. L.J. 251 (1979).

transportation became complex and confused.[9] Until the passage of the Hazardous Material Transportation Act (HMTA)[10] in 1975, hazardous materials were regulated according to the mode of transport: thus the federal agencies regulating the airways, sealanes, railroads, and highways each promulgated and enforced regulations governing the transport of hazardous materials.[11] The potentially competing federal regulations, along with a growing number of local laws regulating the same materials, prompted Congress to act by consolidating the regulatory authority of the various federal agencies over hazardous materials in the Department of Transportation (DOT).[12]

Despite this shift to a uniform national policy, Congress recognized that localities may be in a better position to evaluate unique local circumstances and regulate for safety accordingly.[13] Thus, the HMTA allows any locality to request an exemption from the Act's provision that preempts conflicting local laws.[14] The Secretary may grant such an exemption if the local law does not unduly burden commerce and if it provides for a level of safety equal to or greater than the federal regulation with which it is inconsistent.[15]

In 1976 the DOT promulgated regulations to implement the preemption and exemption provisions of the Act.[16] The regulations adopt the Supreme Court's current formula for determining this

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9. *See id.* at 263-65 (outlining the development of federal regulation of hazardous material transportation).

10. Hazardous Materials Transportation Act of 1974, Pub. L. No. 93-633, 88 Stat. 2156 (codified as amended at 49 U.S.C. §§ 1801-1812 (1982)).

11. *See* Trosten & Ancarrow, *supra* note 8, at 264.

12. *See* 49 U.S.C. §§ 1801-1812 (1982). The HMTA does not prescribe safety standards; rather, it gives the Secretary of DOT the authority to promulgate substantive regulations. *See id.* § 1804. The Secretary has promulgated extensive regulations governing packaging, labeling, and handling of hazardous materials. *See* 49 C.F.R. §§ 100-177 (1984).

13. *See* S. REP. No. 1192, 93d Cong., 2d Sess. 37-38 (1974).

14. See 49 U.S.C. § 1811(a) (1982), which states, in pertinent part, that "any requirement, of the State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted."

15. See *id.* § 1811(b), which states in pertinent part:

> Any requirement, of a State or political subdivision thereof, which is not consistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, or of regulations issued under this chapter is not preempted if, upon the application of an appropriate State Agency, the Secretary determines . . . that such requirement (1) affords an equal or greater level of protection to the public than is afforded by the requirements of this chapter or of regulations issued under this chapter and (2) does not unreasonably burden commerce.

16. *See* 49 C.F.R. §§ 107.201-.255 (1984).

"conflict" type of preemption.[17] Conflict is determined by a two-step test: there is a direct conflict if compliance with the local law will require violation of the national law;[18] if there is no direct conflict, the law is then examined to determine whether it is "an obstacle" to achieving the safety goals of the HMTA.[19] If a local law does not directly conflict with a federal law or regulation and does not present an obstacle to achieving the goals of the legislation, then it is not preempted by the HMTA.[20]

The DOT determines whether a local law has been preempted through inconsistency rulings.[21] To apply for an exemption, a locality must either obtain such a determination or concede preemption.[22] The DOT's administrative finding of inconsistency is not binding on the locality, although at least one court has given it some weight.[23]

In spite of the statute's recognition of the important role that localities may have in furthering the national goal of transportation safety, the DOT has actively sought to preempt local laws, particularly those regulating the transportation of radioactive materials. The DOT first considered the issue in 1976 after New York City passed an ordinance banning the trucking of large quantities of radioactive material through the city.[24] A shipper based on Long Island requested an inconsistency ruling from the DOT.[25] In that ruling, the first under the HMTA regulations, the DOT determined that New York's law was *not* inconsistent with the HMTA, and thus not preempted, because there was no regulation issued under the HMTA with which the local law conflicted.[26] Applying the second part of the preemption test, the DOT determined that the law did

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17. *See id.* § 107.209. The regulations adopt the test stated by the Supreme Court in Hines v. Davidowitz, 312 U.S. 52 (1941). *See, e.g.*, Inconsistency Ruling Appeal, 47 Fed. Reg. 18,457, 18,458-59 (1982) (discussing the application of the standard to the city of Boston's laws governing hazardous material transport).

18. *See* 49 C.F.R. § 107.209(c)(1) (1984).

19. *See id.* § 107.209(c)(2).

20. *See id.* § 107.209.

21. The purpose of the inconsistency rulings, according to the DOT, is to provide an efficient means by which shippers and localities may determine whether a local rule is preempted. *See* Inconsistency Ruling (IR-2), 44 Fed. Reg. 75,566, 75,567 (1979).

22. *See* 49 C.F.R. § 107.215 (1984).

23. *See* National Tank Truck Carriers, Inc. v. Burke, 698 F.2d 559, 560 (1st Cir. 1983).

24. *See generally* Inconsistency Ruling (IR-1), 43 Fed. Reg. 16,954 (1978) (discussing the events that led to the enactment of the ban by New York City).

25. *See id.*

26. *Id.* at 16,956.

not present an obstacle to achieving the purposes of the HMTA.[27] The DOT found that the local law was essentially an extreme routing requirement justified by New York City's high population.[28]

In the ruling, however, the DOT expressed its misgivings about laws such as New York's and announced that it would begin proceedings for the promulgation of a national rule governing the routing of radioactive materials.[29] Subsequent notices concerning the proposed rule, HM-164, made it clear that the purpose of the national rule was to preempt laws such as New York's.[30] Although the final rule does not expressly preempt local regulations,[31] the DOT makes clear its disapproval of such laws in Appendix A.

This appendix purports to advise state and local governments how they may regulate radioactive materials in a manner that is consistent with the HMTA.[32] The appendix states that any local or state law that has the effect of banning highway shipments between any two points is preempted by HM-164 and the HMTA.[33] These provisions, for example, would preempt New York City's law because it had the effect of banning highway transportation of radioactive material from Long Island to the mainland.[34]

The onerous nature of Appendix A becomes clear when it is

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27. *Id.* at 16,956-57.

28. *See id.* at 16,957.

29. *See id.* at 16,957-58.

30. *See generally* Advance Notice of Proposed Rulemaking, 43 Fed. Reg. 36,492 (1978) (discussing need for and possible methods of establishing routing requirements); Notice of Proposed Rulemaking, 45 Fed. Reg. 7140 (1980) (proposing to establish routing requirements).

31. *See* Final Rule, 46 Fed. Reg. 5298 (1981) (codified at 49 C.F.R. pt. 177 (1984)). HM-164 states that large quantities of radioactive material must be shipped by "preferred routes." The rule provides that states may designate which routes within a state will be preferred. If a state does not make a designation, the rule designates interstate highways as preferred routes. *Id. But cf.* Notice of Proposed Rulemaking, 45 Fed. Reg. at 7153 (provisions of the proposed rule would expressly preempt any local rule).

32. Final Rule, 46 Fed. Reg. at 5317 (codified at 49 C.F.R. pt. 177, App. A (1984)).

33. *See id.*

34. *See* City of New York v. United States Dep't of Transp., 539 F. Supp. 1237 (S.D.N.Y. 1982), *rev'd*, 715 F.2d 732 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1403 (1984). In deciding New York City's challenge to HM-164, the district court recognized that the city's law would be preempted under the guidelines of the appendix. 539 F. Supp. at 1248. The district court held that HM-164 was invalid *only* as applied to New York City, a unique outcome for a challenge to a national rule. *Id.* at 1294. A divided panel of the Second Circuit, however, reversed the district court by upholding the rule in its entirety, 715 F.2d at 752, and the Supreme Court refused to hear the city's appeal, 104 S. Ct. at 1403. For a more detailed history of the legal challenge to HM-164 and further discussion of local regulation of radioactive material transportation, see Note, *Radioactive Material Transportation: Federal Regulators Pass Roadblocks to Local and State Initiatives*, 35 SYRACUSE L. REV. 1235, 1251-55 (1984).

considered in light of traditional preemption criteria. First, many local laws, including New York City's, would pass the first part of the two-pronged preemption inquiry, in that compliance with the local law would not require violation of a federal requirement.[35] Similarly, any local routing rule would not directly conflict with the present regulations issued under the HMTA because compliance with local routing laws and the HMTA is possible.[36] If a local law is preempted, then, it must be because the law is determined to present an "obstacle" to achieving the goals of the HMTA.[37] But a local law may provide for increased safety, clearly consistent with the HMTA's goals, and yet violate the terms of the appendix.[38]

The appendix has thus established a barrier to local regulations that may or may not have anything to do with the actual safety provided by the local laws. Preempting local laws by this device is heavy-handed and contrary to the HMTA and its provision for a local role in regulating hazardous material transportation.[39] Indeed, if the appendix is given effect by reviewing courts, the result will be the possibility of preemption and federal control far beyond that envisioned by Congress in enacting the HMTA.[40]

The DOT has also demonstrated hostility to local regulations in its inconsistency rulings by applying the preemption test in such a

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35. There is a direct conflict only if compliance with the local law requires violation of a federal standard. *See* 49 C.F.R. § 107.209 (1984). Compliance with a local routing requirement, or even a ban on transport through a jurisdiction, does not violate any of the routing requirements of HM-164 because shippers can comply with HM-164 while they comply with the local rule. For example, a shipper complying with a ban on transport through one jurisdiction can follow the HM-164 standards in avoiding that jurisdiction and thus comply with both the local and federal rules.

36. *See infra* note 39.

37. *See* 49 C.F.R. § 107.209(c)(2) (1984).

38. *See generally* Note, *supra* note 34, at 1273-81 (discussing the inconsistency between the statutory goals of the HMTA and the implementation by the DOT). For example, a local law that prevents hazardous shipments from passing through a dangerous area would be furthering transportation safety, and yet might violate the terms of Appendix A.

39. *See* 49 U.S.C. § 1811 (1982). In assessing the preemptive effect of the HMTA, the district court in *City of New York* stated: "Judged by any of the traditional judicial tests for determining federal preemption of a field of regulation, HMTA must be read to recognize a significant role for nonfederal authorities . . . ." 539 F. Supp. at 1257-58.

40. Although the appendix has not been directly challenged in a judicial proceeding, one district court has suggested that it may be valid. *See City of New York*, 539 F. Supp. at 1258. The problem with the appendix is that it applies in situations in which there is preemption only if the local law presents an "obstacle" to achieving the goals of the HMTA. Thus, the appendix threatens to replace a fact-sensitive evaluation of the effect of the local law on safety (the goal of the HMTA) with a mechanical application of the provisons of the appendix.

fashion that it almost inevitably determines that the local law is preempted. First, the DOT has elevated uniformity from a means for achieving the safety goal to an end in and of itself.[41] If uniformity is the controlling consideration, all local laws will be "obstacle[s]" to achieving HMTA's goals. The legislative history of the Act indicates, however, that uniformity is important only as it contributes to safety.[42] Thus, local laws should be evaluated not on their consistency with a nationally uniform plan, but on their contribution to transportation safety.[43]

Even more troublesome is how the DOT has allocated the burden of proof in its inconsistency rulings. The DOT requires a locality to show that its law does not endanger other communities and that the safety benefits of its law outweigh the cost of the local regulation.[44] This burden, not surprisingly, has never been met. As a result, the majority of local routing laws have been found "inconsistent" with, and thus preempted by, the HMTA.[45]

The courts' approach to preemption in the HMTA and in similar regulatory programs underscores the misguided efforts of the DOT. Traditionally, preemption analyses begin with the presumption that local laws are valid.[46] Two circuit courts considering the preemptive effect of the HMTA have implicitly adopted such an approach, and the Supreme Court has explicitly relied on the presumption of validity of local law as a basis for upholding local laws in the context of pervasive federal regulation of nuclear

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41. The DOT has relied on the need for uniformity as the rationale for invalidating a number of local regulations. *See, e.g.*, Inconsistency Ruling (IR-4), 47 Fed. Reg. 1231 (1982) (invalidating State of Washington regulation requiring color coding of shipping papers because of lack of uniformity with DOT regulations). Although there is a need for uniformity that contributes to increased safety, the DOT's analyses have occasionally strained to connect the uniformity with safety. Regarding the Washington regulation, for example, the DOT reasoned that the nonuniform color coding might cause a misplaced reliance on the color coding rather than the information required by the DOT, "which could lead to substantially greater risks to the emergency response personnel and the public." *Id.* at 1232-33.

42. *See* S. REP. No. 1192, 93d Cong., 2d Sess. 37-38 (1974).

43. *See, e.g.*, National Tank Truck Carriers, Inc. v. City of New York, 677 F.2d 270, 275 (2d Cir. 1982) (uniformity is significant only insofar as it contributes to safety and is not an end in and of itself).

44. See Inconsistency Ruling Appeal, 47 Fed. Reg. 18,457, 18,459 (1982), in which the DOT rejected Boston's argument that the DOT should begin its evaluation of local laws with a presumption of validity. Instead, the DOT required the city to demonstrate empirically that its law would provide for greater safety. Furthermore, the DOT required the locality to act through a process that considered the costs and benefits of its law and that evaluated the effect of the local law on surrounding localities.

45. *See infra* note 48 (listing outcomes of the DOT's inconsistency rulings).

46. *See* Banks, *supra* note 7, at 695-701.

technology.[47]

It is thus ironic that the executive, one of the leading advocates of the new federalism, has taken policymaking control away from states and localities that Congress intended them to have. But the explanation is easily made. All of the inconsistency rulings have been initiated by cost-conscious private shippers of hazardous materials who have sought to avoid compliance with local rules regulating transportation.[48] Private interests have aligned themselves with the federal government and persuaded the DOT that, notwithstanding the statutory language and the common law tradition respecting local control, national safety requires uniformity of regulation.[49] Not coincidentally, national uniformity also is the least-cost regulatory option for the shipping industry.[50] It has been

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47. *See* National Tank Truck Carriers, Inc. v. Burke, 698 F.2d 559 (1st Cir. 1983) (although finding state law regulating hazardous material invalid, analysis began with the historic assumption of validity of local law); National Tank Truck Carriers, Inc. v. City of New York, 677 F.2d 270 (2d Cir. 1980) (upholding New York City laws governing hazardous material transportation); Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 103 S. Ct. 1713 (1983) (California laws stopping construction of nuclear power plants until a federally approved method for disposing of waste is implemented are valid insofar as they are based on state's police power to regulate the economic concerns of power generation); Silkwood v. Kerr-McGee Corp., 104 S. Ct. 615 (1984) (holding that state law allowing for an award of punitive damages against a nuclear processing facility is not preempted by the Atomic Energy Act).

48. *See* IR-1, 43 Fed. Reg. 16,954 (1978) (New York City's laws banning radioactive material transport not inconsistent); IR-2, 44 Fed. Reg. 75,566 (1979) (four of eight Rhode Island laws, challenged by carrier's trade organization, are inconsistent with the HMTA); IR-3, 46 Fed. Reg. 18,918 (1981) (Boston's laws, challenged by carrier's trade organization, are inconsistent with the HMTA (on administrative appeal, 47 Fed. Reg. 18,457 (1982), the DOT conceded a valid rationale for the local law, but nevertheless stated that it could not determine whether the laws were consistent with the HMTA)); IR-4, 47 Fed. Reg. 1231 (1982) (the State of Washington's laws requiring color coding of shipping papers for hazardous materials, challenged by private carriers, are inconsistent with the HMTA); IR-5, 47 Fed. Reg. 51,991 (1982) (New York rules defining natural and liquid propane gas, challenged by private carriers, are inconsistent with the HMTA); IR-6, 48 Fed. Reg. 760 (1983) (Covington, Kentucky regulations governing the routing of hazardous materials, challenged by private carrier's association, are inconsistent with HMTA); IR-7 to IR-15, 49 Fed. Reg. 46,632 (1984) (almost all of a series of local and state laws regulating radioactive material transportation in Michigan, Vermont, and New York, challenged by Nuclear Assurances Corporation, a transporter of spent nuclear fuel, declared inconsistent with the HMTA).

Particularly in the area of radioactive material transportation, in which there is a powerful coalition of private interests, the DOT has exercised its preemptive power in a heavy-handed manner. *See supra* notes 31-41 and accompanying text; IR-7 to IR-15, 49 Fed. Reg. 46,632 (1984). Indeed, the district court in the *City of New York* case acknowledged the possibility that the DOT's routing rule was designed not to facilitate safety but to serve the interests of the nuclear industry. *See* 539 F. Supp. at 1292-93.

49. *See* Inconsistency Rulings, *supra* note 48.

50. *See* IR-1, 43 Fed. Reg. at 16,958 (noting that local bans might cause shippers not

economics, rather than a struggle over the proper locus of decision-making power, that is at the bottom of hazardous material transport regulation.

2. The Staggers Rail Act.—The railroads have long been regulated by both the federal and state governments.[51] Earlier in the twentieth century regulation of the railroads was essential to protect shippers and consumers from abuses resulting from monopoly power.[52] Competition from other modes of transport weakened the railroads' monopoly power, however, and, as the interstate highway network developed, the railroads lost much of their competitive edge.[53] By the late 1970s Congress had determined that overregulation and regulation based upon inapplicable and outdated economic theory had inhibited the growth of railroads and placed many in economically precarious situations.[54] Finally in 1980 the Staggers Rail Act[55] enlisted the aid of the Interstate Commerce Commission (ICC) in restructuring regulation of the rail industry.[56]

One aspect of the Staggers Act involved deregulation in order to give the railroads greater freedom to set rates.[57] The Act instructs the ICC to exempt any railroad from rate regulation when regulation is "not necessary to carry out the transportation policy of the Act"[58] and when the rail service is either of limited scope, or regulation is not needed to protect shippers from the abuse of market power.[59]

Congress limited the states' regulatory power as well. Before

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to comply with regulations, possibly resulting in a disrupted national transportation network).

51. *See, e.g.*, Houston, E. & W. Tex. Ry. v. United States (Shreveport Rate Case), 234 U.S. 342, 350-53 (1914).

52. *See* Staggers Rail Act of 1980, Pub. L. No. 96-448, § 2, 94 Stat. 1895, 1896 (Congressional findings).

53. *See* H. R. REP. No. 1035, 96th Cong., 2d Sess. 34-45, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3978, 3979-90 (discussing the effect of increased competition from highway and waterway transport and the low return on equity investment in the railroad industry).

54. *See id.*

55. Pub. L. No. 96-448, 94 Stat. 1895 (codified at 49 U.S.C. §§ 10101-11917 (1982)).

56. *See id*; *see also* H. R. REP. No. 1035, 96th Cong., 2d Sess. 34, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3978, 3979.

57. *See* 49 U.S.C. § 10101(a) (1982). This section, entitled "Rail Transportation Policy," states that "[i]t is the policy of the United States Government . . . to minimize the need for Federal regulatory control over the rail transportation system . . ." *Id.* § 10101a (2); *see also id.* § 10505 (granting the ICC authority to exempt persons, classes of persons, or services from regulation).

58. *Id.* § 10505(a)(1).

59. *Id.* § 10505(a)(2).

the passage of the Staggers Rail Act, the ICC had limited authority to preempt state regulation of intrastate rail rates.[60] After the passage of the Act, however, states that desire to continue regulating intrastate rail service must apply to the ICC for "certification." This will be granted only if the state authority certifies that its regulation will comply with the "standards and procedures" employed by the ICC.[61] For example, a state certified to regulate may make a rate determination for an intrastate line but must use the federal formulas for calculating marginal cost in setting those rates.[62] Even after certification, any state decision regulating an intrastate carrier may be appealed to the ICC on the grounds that the state authority failed to comply with the federal standards and procedures.[63]

In 1980 the State of Illinois, along with thirty-nine other states, applied to the ICC for certification to regulate intrastate rail traffic.[64] In its application Illinois proposed regulations that the ICC determined complied with its "standards and procedures."[65] Illinois' interpretation, however, was that an ICC-determined exemption from rate regulation for a class of interstate rail traffic would not automatically apply to intrastate routes in Illinois.[66] Instead, Illinois proposed to apply the federal statutory criteria and make an independent determination of whether the carrier was entitled to an exemption from regulation for their intrastate traffic.[67] Because the state agreed to apply the federal criteria to these exemption determinations, the ICC initially stated its intent to certify Illinois unless public comment persuaded it to take other measures.[68]

Several railroads filed comments challenging the proposed Illinois procedures.[69] The railroads argued that once the ICC made a national determination that a certain class of rail service was exempt from regulation, that determination was a federal "standard and

60. See *id.* § 11501 (Supp. III 1979) (amended 1980, 1982), which allowed preemption only if the state rates imposed a harsh burden on, or discriminated against, interstate commerce or if the state regulator was dilatory in acting on a rate request.

61. *See id.* § 11501(b)(3)(A) (1982).

62. *See, e.g.*, Public Service Co. v. ICC, 749 F.2d 753 (D.C. Cir. 1984). The Indiana Public Service Co. had jurisdiction to regulate intrastate traffic so long as federal standards for determining rates were applied. *Id.* at 757-61.

63. *See* 49 U.S.C. § 11501(c) (1982).

64. Illinois Commerce Comm'n v. ICC, 749 F.2d 875, 878 (D.C. Cir. 1984).

65. *See* State Intrastate Rail Rate Authority - P.L. 96-448, 365 I.C.C. 855, 857 (1982).

66. *Id.* at 856.

67. *Id.*

68. *See id.* at 857-58.

69. *Illinois Commerce Comm'n*, 749 F.2d at 879.

procedure" binding upon the states.[70] According to the railroads, *any* policy decision of the ICC was a "standard" or "procedure" that states must automatically apply to intrastate rate decisions.[71]

Shortly thereafter, a sharply divided ICC adopted the railroads' position.[72] The ICC recognized the possibility that the conditions for a local class of service might justify regulation even though that class would be exempt from interstate regulation.[73] Nevertheless, according to the ICC's revised opinion, that did not justify allowing states to make an independent determination to regulate the rates for that class of service.[74] Because deregulation was at the heart of the Staggers Act, the ICC concluded that Congress could not have intended that states continue to have regulatory authority over classes of rail service exempted from regulation by the ICC.[75] Thus, the ICC certified Illinois to regulate intrastate rail service only if the state automatically adopted the exemptions from regulation granted by the ICC.[76]

Illinois petitioned the court of appeals for review of the commission's order, challenging the modification of the exemption provision.[77] In sustaining the ICC decision, the court invoked the traditional incantations of deference to the administrative agency's interpretation of its statutory mandate and limited its inquiry to whether the ICC's interpretation was "reasonable."[78] Stating that "[d]eregulation and modernization of the regulations that were retained are the ethos of the Act,"[79] the court deferred to the judgment of the ICC that the exemptions from regulation were binding on the states.[80] Indeed, the outcome of the decision was foreshadowed by the court's characterization of the scope of preemption under the new Act: "Having totally preempted State authority,

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70. *Id.* at 879, 883.

71. *Id.* at 883.

72. State Intrastate Rail Rate Authority - P.L. 96-448, 367 I.C.C. 149, 152-54 (1983).

73. *Id.* at 154; *see also id.* at 155 (Simmons, J., dissenting). The Act allows the ICC to exempt parties from regulation when regulation is not necessary to protect consumers from abuses of market power. 49 U.S.C. § 10505(a) (1982). Clearly, such a situation could exist within one state even if it were not prevalent nationwide.

74. *See* 367 I.C.C. at 154. The ICC reasoned that unique state conditions could be accounted for in the context of a national exemption order. *See id.*

75. *Id.* at 153.

76. *Id.* at 156.

77. *Illinois Commerce Comm'n*, 749 F.2d at 876.

78. *See id.* at 883-87.

79. *Id.* at 883.

80. *See id.* at 883-85.

Congress then restored some of it as a matter of legislative grace."[81]

The legislative record belies this blithe characterization. The original House version of the Act would have flatly preempted all state jurisdiction over intrastate rail service.[82] In response to the concern of several states, an amendment was introduced that sought to "achieve a better balance between Federal regulation and State regulation."[83] The amendment, which eventually became law, achieved this balance by permitting states to regulate so long as the states applied the rate regulation procedures established by the federal statute.[84] The language of the Staggers Act makes it plain that Congress intended to preserve a role, albeit limited, for local regulators of railway rates. The statute allows state authorities to regulate "intrastate rail rates, classifications, rules and practices"[85] so long as the state applies "standards and procedures . . . in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission under this title."[86]

The essence of the majority opinion is that the ICC's decision—that the most efficient deregulation would result from the automatic application of the national exemptions to the states—is reasonable.[87] The agency would be correct if efficient deregulation were the only goal of the statute. But, as is often the case, Congress diluted its primary objective by compromising on a politically indispensable second goal, which was retaining a regulatory role for local decisionmakers.[88] In Illinois' challenge, the court should have started with the traditional assumption that the police powers of the state are not to be superseded unless there is an express intent on the part of Congress to do so.[89] Had the court done so, the record

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81. *Id.* at 878. The dissent noted that the majority "facilitated" its task by this characterization of the Act's preemption provisions. *Id.* at 887 (Scalia, J., dissenting). The dissent went on to say that "[t]his notion of total preemption and cede-back has no basis in reality." *Id.* Rather, the statute established a partial preemption of state power. *Id.* Thus, the issue before the court should have been the extent of the partial preemption. *Id.* at 887-88.

82. For a discussion of H.R. 7235, 96th Cong., 2d Sess., see 126 CONG. REC. 17,793 (1980).

83. 126 CONG. REC. 18,298 (1980).

84. *See* H.R. CONF. REP. No. 1430, 96th Cong., 2d Sess. 105-06, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4110, 4137-38.

85. 49 U.S.C. § 11501(b)(4)(A) (1982).

86. *Id.* § 11501(b)(3)(A).

87. *See Illinois Commerce Comm'n*, 749 F.2d at 885, 887.

88. *See supra* notes 82-84 and accompanying text.

89.

Where, as here, the field which Congress is said to have preempted has been traditionally occupied by the States . . . "we start with the assumption that the historic police

of debate and compromise in Congress and the resultant, admittedly vague, statutory language would have saved the narrow state role that Illinois and others desired to exercise.[90]

The reason for the executive and judicial blunder here is clear. Only after the ICC announced its intent to certify the original Illinois regulatory scheme did the agency receive the pressure from the railroad industry that caused it to cave in.[91] The railroad industry, by persuading the ICC to adopt its version of regulation, furthered its interest in being as free from regulation as possible. The ICC then teamed with the court to protect the railroads' interests, in disregard of both the legal presumption in favor of local control and the best efforts of Congress to articulate the role that was to remain for the states.[92]

3. The Consolidated Farm and Rural Development Act.—The federal government has a long history of close involvement with farmers. Beginning in 1863 with the Homestead Act, Congress has sought to encourage Americans to enter and remain in farming.[93] One means that Congress has employed to achieve this goal is the extension of

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powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (citations omitted) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

90. *See* supra notes 86-88 and accompanying text; *see also* State Intrastate Rail Rate Authority - P.L. 96-448, 367 I.C.C. 149, 155 (1983) (discussing the legitimate state interest in regulating intrastate rail traffic).

91. *See Illinois Commerce Comm'n*, 749 F.2d at 879. The court described the ICC's actions as follows:

> In view of [the proposed state regulation's] commitment to the federal criteria and the ability of the ICC to review a State exemption decision that differed from the ICC's decision, the ICC stated its intent to certify Illinois unless public comment persuaded it otherwise. . . .
>
> On September 7, 1982, several railroads operating in Illinois (the "railroads") filed joint comments challenging Illinois' proposed regulations. . . . On January 27, 1983 the ICC adopted the railroads' position and modified the Illinois regulations to require automatic compliance with federal exemptions.

Id. at 879 (citation omitted).

92. The drive for deregulation has resulted in rate hikes and service changes that have been protested, generally unsuccessfully, by the states. *See, e.g.*, Public Service Co. v. ICC, 749 F.2d 753 (D.C. Cir. 1984) (court upheld ICC action, which reversed state rate determination and reinstated a higher rate on an intrastate rail line); Pennsylvania Public Utility Comm'n v. United States, 749 F.2d 841 (D.C. Cir. 1984) (court upheld the ICC's determination that 11 bus routes could be discontinued; on the 12th route, however, the court termed the ICC's reasoning a "charade" and did not sustain the ICC's findings).

93. *See* Curry v. Block, 541 F. Supp. 506, 509-11 (S.D. Ga. 1982) (detailing the history of federal involvement with farmers), *aff'd*, 738 F.2d 1556 (11th Cir. 1984).

credit to farmers.[94] In 1935 the Resettlement Administration was created with authority to extend credit to farmers in order to encourage families to settle in rural areas.[95] Successive statutory revisions modified and extended the scope of the loan programs operated by the Department of Agriculture (DOA), but the thrust of Congress' efforts has been to recognize that farmers have unique credit needs. The heavy investment in land and equipment, as well as the vagaries of yearly crop production, limit many farmers' ability to obtain needed credit from traditional sources.[96]

To aid the DOA in meeting these unique needs, Congress has authorized the Secretary of the DOA to defer repayment of loans. Prior to 1978, the Secretary was authorized to "compromise, adjust, or reduce claims"[97] and to adjust and modify the terms of leases or mortgages entered into under the auspices of a DOA program "as circumstances may require."[98] In 1978, however, the need for relief from occasional "disasters" and congressional dissatisfaction with the DOA's existing loan deferral policies[99] prompted Congress to give the Secretary expanded authority to defer foreclosures and payments of interest or principal if the borrowers showed that making payments would impair their standard of living.[100]

In spite of Congress' clear directive, the Secretary took no steps to implement the amended deferral program.[101] Instead, the agency continued its practice of making demands for payment and threatening foreclosure on operating, ownership, and emergency

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94. *See id.*

95. *Id.* at 510. The Resettlement Administration was created by executive order.

96. *See* S. REP. No. 566, 87th Cong., 1st Sess. 64-65, *reprinted in* 1961 U.S. CODE CONG. & AD. NEWS 2243, 2305-06. Title III of the Agricultural Act of 1961, Pub. L. No. 87-128, 75 Stat. 294, 307, known as the Consolidated Farmers Home Administration Act, consolidated and modernized the authority of the Secretary of Agriculture to make loans for real estate acquisition, operating expenses, and emergencies. S. REP. No. 566, 87th Cong., 1st Sess. 64-66, *reprinted in* 1961 U.S. CODE CONG. & AD. NEWS 2243, 2304-06. In 1972 the authority of the Secretary was further expanded to enable the DOA to administer loans to improve substandard housing. *See* Rural Development Act of 1972, Pub. L. No. 92-419, 86 Stat. 657. The 1972 Act changed the title of the loan program to the Consolidated Farm and Rural Development Act. *See id.* § 101, 86 Stat. at 657. The program is currently codified at 7 U.S.C. §§ 1921-1996 (1982).

97. 7 U.S.C. § 1981(d) (1982).

98. *Id.*

99. *See Curry*, 541 F. Supp. at 518-20 (quoting 124 CONG. REC. 12,133-34 (1978) (remarks of Sen. Eagleton and Sen. Allen)).

100. Agriculture Credit Act of 1978, Pub. L. No. 95-334, § 122, 92 Stat. 420, 427-28 (codified at 7 U.S.C. § 1981a (1982)).

101. *See* Matzke v. Block, 732 F.2d 799, 800 (10th Cir. 1984) (discussing the failure of the Secretary to take any steps to implement the loan deferral program and holding that such failure to act is final agency action subject to judicial review).

loans.[102] Frustrated by the DOA's inaction, farmers initiated a series of law suits requesting that the Secretary be ordered to promulgate regulations to implement the new program and that notice of the deferral program's availability be given to borrowers.[103]

The Government based its refusal to issue regulations on two grounds. First, the Secretary argued that the statute merely clarified the DOA's preexisting authority to grant deferrals and did not require that any new program be implemented.[104] Second, the Secretary contended that the discretionary language in the statute left the decision whether to implement any loan deferral program entirely up to the agency.[105] In addition, the DOA argued that its existing deferral programs satisfied its obligations under the new statute.[106] The majority of courts reviewing these arguments have found them to be meritless.[107]

The DOA's first argument is belied by the plain language of the statute, which states that the Secretary may grant deferrals under his new authority "in addition to any authority" under existing statutes.[108] In contrast to the broad discretion granted the Secretary in the old law, the new provision adds structure by establishing eligibility criteria that must be satisfied before a loan recipient is eligible for deferral.[109]

The Government's second argument is not supported by either the statute or its history. Upon review of the statutory language and legislative history, two district courts concluded that Congress did not intend to leave the implementation of the new program entirely

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102. *See Curry*, 541 F. Supp. at 508-09.

103. *See, e.g.*, Matzke v. Block, 564 F. Supp 1157 (D. Kan. 1983), *aff'd in part, rev'd in part*, 732 F.2d 799 (10th Cir. 1984); Allison v. Block, 556 F. Supp. 400 (W.D. Mo. 1982), *aff'd*, 723 F.2d 631 (8th Cir. 1983); Curry v. Block, 541 F. Supp. 506 (S.D. Ga. 1982).

104. *Curry*, 541 F. Supp. at 515.

105. *Id.*

106. *Id.*

107. *See, e.g.*, Allison v. Block, 723 F.2d 631 (8th Cir. 1983) (Secretary must implement a loan deferral program); *accord* Curry v. Block, 738 F.2d 1556 (11th Cir. 1984); Ramey v. Block, 738 F.2d 756 (6th Cir. 1984); Matzke v. Block, 732 F.2d 799 (10th Cir. 1984); *cf.* United States v. Markgraf, 736 F.2d 1179 (7th Cir. 1984) (Secretary must implement the statute but need not do so by regulation).

108. 7 U.S.C. § 1981a (1982).

109. *See id.* Specifically, the section authorizes the Secretary to defer payments on principal or interest, or both, or to forego foreclosure, "upon a showing by the borrower that due to circumstances beyond the borrower's control, the borrower is temporarily unable to continue making payments . . . without unduly impairing the standard of living of the borrower." *Id.*

to the Secretary's discretion.[110] As one court noted, only after implementing the program "[would] the Secretary . . . appear to have discretion . . . whether to *either* grant a deferral *or* foreclosure once the eligibility criteria established by the statute have been met . . . ."[111] The legislative history also undermined the Government's argument. The remarks of one senator indicate that congressional dissatisfaction with the implementation of the existing deferral mechanisms was one reason for adopting the new section.[112]

Thus, those courts that concluded that the DOA must establish procedures for determining whether to grant deferrals and must give notice of the availability of the program were correct.[113] Although the decision of an agency not to act is usually within that agency's discretion, an agency cannot "completely ignore the purpose of the controlling statute[]."[114] Particularly when, as here, the agency action will affect important individual interests created by Congress, the agency has an obligation to "remain consistent with the governing legislation [and] . . . to employ procedures that conform to the law."[115] Accepting the argument of the DOA would have placed the executive agency beyond judicial review and effectively limited the control of Congress over the agency.

Congress declared that the DOA should defer from foreclosing or requiring repayment when payment would "impair the standard of living of the borrower."[116] The deferral principle was not directed at states; nevertheless, the ideals of federalism were being furthered since the deferral program was created to accommodate not only individuals, but towns, regions, and states with depressed farm economies. The deferral of foreclosure for a few farmers may serve to hold together, at least temporarily, a larger segment of society that benefits from the continuation of working farms and solvent

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110. *See Curry*, 541 F. Supp. at 516-21; *Matzke*, 542 F. Supp. at 1166-67.

111. *Curry*, 541 F. Supp. at 516. The court also found it persuasive that the new section was drafted in language similar to § 1475 of the Housing Act. Procedures implementing § 1475 at the time the new section was being considered required the provision of notice to loan recipients that deferral was available. 541 F. Supp. at 516-21.

112. *See* 124 CONG. REC. 556, 648 (daily ed. May 2, 1978) (statement of Sen. Eagleton).

113. *See generally* Curry v. Block, 738 F.2d 1556 (11th Cir. 1984); Matzke v. Block, 732 F.2d 799 (10th Cir. 1984); Allison v. Block, 723 F.2d 631 (8th Cir. 1983).

114. *See* Matze v. Block, 564 F. Supp. 1157, 1168 (D. Kan. 1983)(quoting Operating Engineers Local 627 v. Arthurs, 355 F. Supp. 7, 9 (W.D. Okla.), *aff'd*, 480 F.2d 603 (10th Cir. 1973)).

115. Morton v. Ruiz, 415 U.S. 199, 232 (1974) (citations omitted).

116. 29 U.S.C. § 1981(a) (1982).

farmers.[117]

Again, the irony is that the executive has tried to thwart Congress' attempt to enact a program that would help the "truly needy" by providing a "safety net" that shuns nationally uniform regulation in favor of sensitivity to local needs—in short, a prototype of the President's kind of government. Concededly, the farm loan program does not return policymaking control to the states, as new federalism proponents have advocated. The unique economics of farming, however, are such that without federal credit farmers might have no credit at all. Private lenders have not been interested in adapting to farmers' needs, and local and state governments have not acted.[118] Thus the federal role remains essential.

The DOA's failure to implement the statutory provisions is more understandable, however, when considered in light of the private interests involved. In the 1970s, when money for farm loans was readily available, the government encouraged farmers to expand and to use the credit to invest in land and equipment.[119] Now, farmers are being pressured on all sides.[120] Although encouraged to expand their farms and plant "acre to acre," farmers have found sagging markets for their crops.[121] At the same time, the government is trying to weaken the price supports offered to farmers,

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117. Both the plight of individual farmers and farming regions have garnered considerable media attention in 1985. *See, e.g.*, Sechler & Cook, *Cut Costly Myths: The Family Farm is Doomed*, Washington Post, Jan. 20, 1985, at C1, col.1; *Real Trouble on the Farm*, TIME, Feb. 18, 1985, at 24; Pear, *Farm Bank's Troubles are Worsening*, N.Y. Times, Mar. 6, 1985, at B11, col. 1; Trillin, *American Chronicles: "I've Got Problems,"* NEW YORKER, Mar. 18, 1985, at 109. Two commentators suggest that the current farm crisis, the result of rising interest rates, stagnant markets for crops, and antiquated federal policies, poses the greatest threat to the 570,000 farmers who are neither part-time, small operations nor huge "superfarms." Sechler & Cook, *supra*, at C4, cols. 2-3. These farmers produce approximately 40% of our nation's food, and they "are an endangered class within a rapidly changing economy. . . . They make up the bulk of the farmers who are now in serious financial difficulty as a result of sagging prices, high interest rates and big debts." *Id.* at C4, col 3.

118. *See* Trillin, *supra* note 117.

119. *See* Sechler & Cook, *supra* note 117, at C4, col. 4.

120. *See, e.g.*, Trillin, *supra* note 117 (discussing the plight of one farmer and the growing number of "fringe" organizations appealing to troubled farmers).

121.

> Farmers themselves are to blame, of course, for getting so far into hock. But so are the policies and predictions emanating from Washington in the 1970's. Beginning with Secretary of Agriculture Earl Butz in the early 70's, farmers were encouraged to plant fence row to fence row. Government controls on acreage planted were lifted. . . . The bust began in 1981 when high interest rates, stagnating export markets . . . and bumper U.S. crops caused prices to drop.

Sechler & Cook, *supra* note 117, at C4, col. 4.

which makes the farm income situation even more perilous.[122]

The combination of uncertain income and difficulty in obtaining deferrals on loan payments is forcing many small farmers out of agriculture.[123] This is a boon to the large agribusinesses, which are finding land available at lower costs and increasing their market shares.[124] Thus, the truly powerful private interests in agriculture are benefitting from the DOA's failure to implement the deferrals.

4. The Coastal Zone Management Act.—In 1972, Congress expressed its recognition of the serious problems of overuse and misuse of the coastal zone in the enactment of the Coastal Zone Management Act (CZMA).[125] The Act made it national policy to protect the coastal zone, to encourage federal-state cooperation in management programs, and to encourage broad participation in formulating state coastal zone management programs.[126]

The CZMA encourages states to develop coastal zone management plans by offering the states grants and incentives.[127] Participating states submit coastal zone management plans to the Secretary of Commerce for approval.[128] In order to be approved, a state plan must consider the "national interest" and the "views of the Federal agencies principally affected by such program."[129] Once a state plan is approved, the Act requires that any federal agency "conducting or supporting activities directly affecting" the coastal zone make its activities consistent with the state plan "to the maximum extent practicable."[130] The regulations that implement

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122. *See id.*

123. *See* Dickenson, *The Farm Crisis: Twaddle and Truth*, Washington Post, Apr. 7, 1985, at C2, col. 2.

124. *See id.*

125. Pub. L. No. 92-583, 86 Stat. 1280 (codified as amended at 16 U.S.C. §§ 1451-1464 (1982)).

126. *See* 16 U.S.C. § 1451 (1982). The congressional findings state, in part: "There is a national interest in the effective management, beneficial use, protection and development of the coastal zone." *Id.* § 1451(a). "The key to more effective protection and use of the land and water resources of the coastal zone is to encourage states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance." *Id.* § 1451(i).

127. *See id.* §§ 1454-1456c (providing for grants and assistance programs to states).

128. *See id.* § 1455(c) (program requirements for approval of state plans).

129. *Id.* §§ 1455(c)(8), 1456(b).

130. *Id.* § 1456(c)(1).

the Act require the affected federal agencies to submit a "consistency document" that will identify the direct affects of the federal activity and indicate how the activity has been tailored to be as consistent as possible with the state coastal zone management plan.[131]

California received approval for its Coastal Zone Management Plan in 1977.[132] Soon thereafter, Department of Interior officials responsible for overseeing oil leasing activities on the Outer Continental Shelf[133] prepared a sale of tracts for possible oil exploration off the coast of California.[134] In 1980 the California Coastal Commission informed Interior that the proposed lease sale was, in its view, an activity "directly affecting" the coastal zone and requested the required "consistency document."[135]

Interior refused the request, stating that the lease sale would not "directly affect" the coastal zone.[136] Interior did, however, remove more than half of the tracts from the proposed lease offering, leaving 115 tracts proposed for lease sale in the Santa Maria Basin.[137] After Interior issued a proposed notice of sale, California again requested a consistency determination.[138] In its request the State noted that its policy had been to maintain "buffer zones"

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131. *See* 15 C.F.R. pt. 930 (1984) (federal consistency with approved coastal management programs); *id.* § 930.39 (detailing the content of a consistency determination).

132. *See* Notice of Approval, 42 Fed. Reg. 60,585 (1977).

133. The Outer Continental Shelf Lands Act of 1953, Pub. L. No. 212, 67 Stat. 462 (codified as amended at 43 U.S.C. §§ 1331-1356 (1982)), authorized the federal government to lease the land of the Outer Continental Shelf for oil and gas exploration. The Outer Continental Shelf is the submerged land subject to United States' jurisdiction that lies beyond the states' "territorial sea." *See* 43 U.S.C. § 1331 (1982). The territorial sea of each state includes "all lands permanently or periodically covered by tidal waters . . . seaward to a line three geographical miles distant from the coast line of each such state . . . ." *Id.* § 1301(a)(2). The land beneath the territorial sea belongs to the states, *see id.* § 1311, while the federal government owns the land of the Outer Continental Shelf. *Id.* § 1302. The "coastal zone," as defined by the CZMA, is comprised of state land near the shoreline of coastal states and coastal waters extending "seaward to the outer limit of the . . . territorial sea." 16 U.S.C. § 1453(1) (1982).

The Outer Continental Shelf Lands Act grants the Secretary of the Interior the authority to lease the Outer Continental Shelf for oil and gas exploration and drilling. There are at least four distinct stages to developing an oil or gas well on the Outer Continental Shelf: 1) formulation of the 5-year leasing plan by the Department of Interior, *see* 43 U.S.C. § 1344 (1982); 2) sale of leases, *see id.* § 1337(a); 3) exploration, *see id.* § 1340; and 4) development and production, *see id.* § 1351. *See generally* Secretary of the Interior v. California, 464 U.S. 312, 337-41 (1984) (discussing the offshore leasing program).

134. 464 U.S. at 317.

135. *Id.* at 317-18.

136. *Id.* at 318.

137. *Id.*

138. *Id.*

around sensitive areas, a precautionary policy that was being threatened because twenty-nine of the proposed lease tracts were within twelve miles of the Sea Otter Range in the Santa Maria Basin.[139] Again, Interior denied the state's request.[140] After the final notice of sale was published, California sued to enjoin the sale of the tracts that were within twelve miles of the Sea Otter Range.[141]

Both the district court and the Court of Appeals for the Ninth Circuit agreed with the state that a consistency determination must be made before any lease sale.[142] In *Secretary of the Interior v. California (Watt)*,[143] the Supreme Court reversed, holding that Congress did not intend to require a consistency determination at the lease sale stage in the process of acquiring offshore drilling rights.[144]

At issue was a simple question of fact—whether the sale of leases was a federal activity "directly affecting" the coastal zone. California contended that "directly affecting" meant "initiating a series of events of coastal management consequence,"[145] while Interior argued that it meant "having a direct, identifiable impact on the coastal zone."[146] The Court stated that, while each construction was "superficially plausible," neither found support in the language of the Act.[147] Thus, the Court turned to the legislative history to determine whether Congress intended lease sales to fall into the category of activities "directly affecting" the coastal zone.[148]

The majority conceded the value of the collaboration between private, state, and federal interests that the CZMA clearly contemplates.[149] Furthermore, the majority recognized that any good planner would want to insure in advance that drilling operations would

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139. *Id.*

140. *Id.*

141. *Id.* at 319.

142. *See* California v. Watt, 520 F. Supp. 1359, 1368-82 (C.D. Cal. 1981), *aff'd*, 683 F.2d 1253 (9th Cir. 1982), *rev'd sub nom.* Secretary of the Interior v. California, 464 U.S. 312 (1984).

143. 464 U.S. 312 (1984).

144. *Id.* at 343.

145. *Id.* at 321 (quoting Brief for Respondent State of California at 10).

146. *Id.* (quoting Brief for Federal Petitioners at 20).

147. *Id.*

148. *Id.* at 321-43.

149. *See id.* at 343. The Court noted that "[c]ollaboration among state and federal agencies is certainly preferable to confrontation in or out of the courts." *Id.* The congressional findings of the CZMA state that "[t]he key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority . . . *in cooperation with Federal and local governments and other vitally affected interests* . . . ." 16 U.S.C. § 1451(i) (1982) (emphasis added).

harmonize with state programs and state wishes, since any investment loss would only increase in subsequent stages of the drilling operations.[150]

Nevertheless, Justice O'Connor concluded that the sale of leases was not an activity "directly affecting the coastal zone."[151] She found support for this conclusion by first noting that Congress rejected four different provisions that would have given the CZMA broader scope.[152] Second, other provisions of the CZMA and other statutory provisions governing offshore drilling make specific references to activities that must be consistent with a state coastal management plan.[153] Consistency reviews are required only at the last two stages of permit review, not at the lease sale stage, the second step in the four-step process.[154]

The Court's construction of the CZMA is a classic example of putting form before substance. Justice Stevens noted in his dissent that "[t]he plain meaning . . . indicates that the words 'directly affecting' were intended to enlarge the coverage of [the statute] to activities conducted outside as well as inside the zone."[155] Similarly, the legislative history of the Act, particularly in light of its overriding purpose of protection of the coastal zone, strongly suggests that Congress did not intend the narrower reading put forth by the majority.[156]

In form the statute resembles a grant of authority to a federal agency that is given a mandate to further a national interest. The difference is that Congress chose to take advantage of state expertise and resources rather than develop a new national agency.[157] The analogy to a federal agency highlights the incongruous nature

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150. *See* 464 U.S. at 337-43 (discussing the four stages of development of an offshore well, noting the expenditures of private planners in purchasing leases —i.e., the second stage—but arguing that consistency review is required only at the third and fourth stages of development).

151. *Id.* at 315.

152. *Id.* at 324-30.

153. *Id.* at 331-43.

154. *Id.* at 337-41.

155. *Id.* at 346 (Stevens, J., dissenting).

156. *See id.* at 347-59 (Stevens, J., dissenting).

157. *See* S. REP. No. 753, 92d Cong., 2d Sess. 2-6, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4776-4781 (discussing the need for the CZMA and the unique problems presented in protecting the coastal zone). The Senate Report notes: "The Committe has adopted the States as the focal point for developing comprehensive plans and implementing management programs for the coastal zone. It is believed that the States do have the resources, administrative machinery[,] enforcement powers, and constitutional authority on which to build a sound coastal zone management program." *Id.* at 5-6, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS at 4780.

of the *Watt* Court's decision. Traditionally courts treat an administrative agency's statutory interpretation and fact finding with deference.[158] In *Watt*, the Court's decision is based solely on its own de novo interpretation of the statute; it ignores the factual findings made by the agency and affirmed by the lower courts that the sale of leases will "directly affect" the coastal zone.[159] Had the same factual determination been made by a federal agency, the Court would have been expected to defer to its judgment.[160] There is no principled basis for treating the California agency differently.

The CZMA is particularly noteworthy because its purpose is to *increase* state control over the coastal zone: as its legislative history notes, there is no intent to preempt any existing state authority.[161] Rather, Congress both increased the power of the states and encouraged the states to utilize that power to further the national goal of protection of the coastal zone.[162] This grant of power to the states is precisely the type of legislation advocated by the new federalism proponents.

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158. *See, e.g.*, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413-17 (1971) (discussing the scope and standard of judicial review of agency action). The *Overton Park* Court noted that, in considering whether an administrative action is arbitrary and capricious, "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* at 416. Nevertheless, "[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id.* (construing the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (Supp. V 1964)).

159. Justice Stevens noted:

> One would think that this question [of whether the lease sale directly affects the coastal zone] could be easily answered simply by reference to a question of fact—does this sale of leases directly affect the coastal zone? The District Court made a finding that it did, which the Court of Appeals affirmed, and which is not disturbed by the Court. Based on a straightforward reading of the statute, one would think that that would be the end of the case.

464 U.S. at 344 (Stevens, J., dissenting).

160. *Cf.* Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87 (1983) where, in the context of determining whether the long-range environmental effects of disposing of spent nuclear fuel must be considered in licensing procedures, the Court deferred to the Nuclear Regulatory Commission's judgment in passing a "generic" statement of environmental effects that assumed nuclear fuel would not escape into the environment. In *Watt*, the California agency, not the Department of Interior, was responsible for implementing the CZMA.

161. *See* S. REP. No. 753, 92d Cong., 2d Sess. 1, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4776, 4776. Under the heading "Purpose" the report states: "There is no attempt to diminish state authority through federal preemption. The intent of this legislation is to enhance state authority by encouraging and assisting the states to assume planning and regulatory powers over their coastal zones." *Id.*

162. *See id.*; *see also supra* notes 127-131 and accompanying text.

The Court's holding usurps the power of state agencies by implicitly requiring that the threshold determination of "affecting the coastal zone" be made in court.[163] Both deference to congressional action and principles of federalism suggest that the state should be upheld unless it is arbitrary in its request for a consistency determination—in *Watt*, however, the Court passed right over that analysis.[164]

Here again, the outcome is better explained by examining the private interests at stake. As in the case of the ICC, private concerns latched onto a federal agency in order to further their own interests. The goals of the oil industry were identical to those of the Department of Interior, which was aggressively pursuing the leasing of the offshore areas for oil development.[165] The political climate also affected the proceedings; as the Reagan administration took office, the conflict became a contest between the "in-party," the new Reagan administration, and the "out-party," Governor Brown of California.[166] Thus, what appeared to be a federalism battle was actually a conflict between oil interests, aligned with the Department of Interior, and conservationists, aligned with the state.

5. The Clean Water Act.—The vagaries of federalism have seldom been as extended and misapplied as in the more than twelve-year saga concerning the interstate water pollution controversy between the city of Milwaukee and the State of Illinois. The *Illinois v. Milwaukee*[167] lawsuit began in 1972 as the latest in a long line of nuisance cases involving interstate parties.[168] The State of Illinois

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163. By refusing to give weight to either the statutory interpretation or the factual findings of the state agency, the Supreme Court is encouraging parties to challenge in court any decision that an activity is "affecting" the coastal zone. *See supra* notes 159-160 and accompanying text.

164. *See* 464 U.S. at 320-21.

165. *See* Comment, *Supreme Court Beaches Coastal Zone Management Act*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10,161, 10,162 (1984).

166. *See* Fairfax, Andrews, & Buschsbaum, *Federalism and the Wild and Scenic Rivers Act: Now You See It, Now You Don't*, 59 WASH. L. REV. 417, 417-418 (1984).

167. Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (*Milwaukee I*).

168. The basic principle supporting federal resolution of interstate disputes was stated in Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907):

> [I]t is plain that some such demands [for relief from injuries analogous to torts] must be recognized . . . . When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in [the Supreme Court].

Id. at 237 (citation omitted).

The Court has applied federal common law in cases involving air pollution between

requested that the Supreme Court exercise its original jurisdiction and order the city of Milwaukee to stop discharging pollution that threatened Illinois' use of Lake Michigan.[169] The Supreme Court declined to hear the case.[170] The Court determined that federal common law governed interstate water pollution; thus, Illinois could seek to have that federal common law applied in district court.[171]

Illinois then filed the nuisance action in federal district court and alleged three independent claims: one based on federal common law, one based on Illinois statutory law, and one based on Illinois common law.[172] The court held that the elements of all three claims were identical; therefore, the result would be the same no matter which served as the basis for decision.[173] The district court then ordered certain remedies, including the elimination of storm overflows,[174] which were stricter than those required by the newly enacted Federal Water Pollution Control Act Amendments of 1972,

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two states, *see, e.g, id.*, and water pollution between two states, *see, e.g.*, New York v. New Jersey, 256 U.S. 296 (1921), and has characterized the suits as involving "public nuisance." *See Milwaukee I*, 406 U.S. at 106.

169. *See Milwaukee I*, 406 U.S. at 93.

170. *See id.* at 108.

171. *See id.* at 101-08. The Court stated: " 'It is not uncommon for federal courts to fashion federal law where federal rights are concerned.' " *Id.* at 103 (quoting Textile Workers v. Lincoln Mills, 353 U.S. 448, 457 (1957)). The Court went on to state that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law. . . ." 406 U.S. at 103 (footnote omitted).

172. *See* Illinois v. City of Milwaukee, 599 F.2d at 177 n. 53.

173. *See* Illinois v. City of Milwaukee, 731 F.2d 403, 404 (7th Cir. 1984) (quoting the transcript of the district court's opinion), *cert. denied.*, 105 S. Ct. 575 (1985) (*Milwaukee III*).

174. *See* Illinois v. City of Milwaukee, 599 F.2d 151, 169-70 (7th Cir. 1977) (discussing the relief ordered by the district court). The factual findings of the district court were upheld in their entirety by the court of appeals. *Id.* at 167. Milwaukee had both sanitary sewers, which contained raw sewage only, and combined sewers, which carried rain water and sewage to a treatment plant. Both the sanitary and combined systems had bypasses, or overflows, that were activated by the level of sewage. *See id.* at 168. The overflows and bypasses, when activated, caused raw sewage to flow untreated into Lake Michigan. Because the overflows were triggered by the level of sewage, they were likely to be in use during wet weather. *See id.* The district court found that there were approximately 239 overflow points. *Id.* at 167. The amount of untreated sewage flowing into the lake was substantial: "In a single month in 1976 the untreated sewage discharged from just 11 of the 239 overflow points totalled 646.46 million gallons." *Id.* at 168.

The district court also found that treatment of sewage was inadequate, with discharges from the sewage treatment plant exceeding Environmental Protection Agency (EPA) standards. *Id.* The district court ordered the elimination of all overflows from the sanitary sewage treatment system by 1986 and ordered the construction of a collection and conveyance system for discharges from the combined sewer system. *Id.* at 169.

commonly called the Clean Water Act (CWA). [175]

Milwaukee appealed the district court's decision. The Seventh Circuit modified the judgment, but retained pollution control requirements stricter than those required under the CWA.[176] The Seventh Circuit also disagreed with the lower court's characterization of the causes of action, stating that it was "federal common law and not state statutory or common law that controls in this case."[177] The court of appeals found that federal common law had not been preempted by the CWA, reasoning that the federal common law endorsed by the Supreme Court in 1972 remained to fill gaps in the statutory scheme.[178] The court relied in part on the savings provision in the CWA (section 1365), which allows citizens to sue to enforce the provisions of the CWA and provides that "nothing in this section shall restrict any right which any person . . . may have

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175. Clean Water Act, Pub.L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376 (1982)). This Act made federal water pollution control requirements much more comprehensive than under prior law. The Senate report accompanying the 1972 Act notes that "[t]he legislation recommended by the committee proposes a major change in the enforcement mechanism of the Federal water pollution control program from water quality standards to effluent limits." S. REP. No. 414, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668, 3675. The Act establishes a ban on the discharge of any pollutant into navigable water except as allowed by the law. *See* 33 U.S.C. § 1311(a) (1982). The Act requires sources of pollution to reduce their discharges by the amount achievable using the "best practicable technology" in order to receive a permit for continued discharges. *See generally* Zener, *The Federal Law of Water Pollution Control*, in FEDERAL ENVIRONMENTAL LAW 682 (Dolgin & Guilbert eds. 1974) (discussing the operation of the Clean Water Act).

176. *See* 599 F.2d at 177. The court of appeals affirmed the district court "to the extent that it requires the elimination of all sewage overflows and imposes a 1 mg/l phosphorous effluent limitation." *Id.* The district court's orders imposing more stringent effluent limitations than required under the CWA were reversed. *See id.*

177. 599 F.2d at 177 n. 53.

178. Indeed, the court might not have considered the issue but for the amici curiae briefs of the State of Wisconsin and the EPA:

> Defendants concede that neither the 1972 nor the 1977 [Clean Water Act] amendments preempt the federal common law of nuisance. Wisconsin's brief *amicus curiae*, however, argues that the comprehensive statutory scheme preempts the common law. The brief of the United States as *amicus curiae* argues to the contrary. Since the issue concerns our jurisdiction, we are obliged to consider it.

Id. at 157. After considering the issues, the court concluded that

> if the evidence in this case shows that requirements more stringent than those imposed in the . . . permits are necessary to protect Illinois residents from harm caused or threatened by the defendant's sewage discharges, plaintiffs are entitled to have the more stringent standards imposed. We can think of no other reason for Congress' preserving previously existing rights and remedies than to protect the interests of those . . . able to show that the [federal] requirements . . . are inadequate to protect their interests.

Id. at 165.

under any statute or common law to seek enforcement of any effluent standard . . . or to seek any other relief . . . ."[179]

A divided Supreme Court reversed.[180] Justice Rehnquist, writing for the majority, reasoned that the comprehensive nature of the CWA obviated any need for a judicially fashioned federal common law to fill the "interstices" left unregulated.[181] In what the dissent termed a "strained" statutory interpretation,[182] the majority opinion rejected the argument that the savings clause preserved the federal common law.[183] The Court focused on the phrase "nothing in this section" and interpreted it to mean only that the specific section that provided for citizen suits does not revoke other remedies: "[The subsection] most assuredly cannot be read to mean that the Act as a whole does not supplant formerly available federal common law actions but only that the particular section authorizing citizen suits does not do so."[184]

The State of Illinois refused to give up. On remand the state requested that the court of appeals affirm the earlier decision based upon the state law claims.[185] In *Illinois v. City of Milwaukee (Milwaukee III)*,[186] the Seventh Circuit considered Illinois' *state law* claims against the city of Milwaukee along with two other suits based on state law which alleged similar water pollution harm against the city of Hammond, Indiana.[187]

The court first discussed the reasons why it was preferable to have a uniform body of federal law controlling interstate water pollution disputes. It noted the character of the parties and the fact

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179. 33 U.S.C. § 1365(e) (1982); *see also* 599 F.2d at 162-63 (discussing the savings provision).

180. *See* City of Milwaukee v. Illinois, 451 U.S. 304, 332 (1981) (*Milwaukee II*). Justice Rehnquist wrote the majority opinion. Justice Blackmun, joined by Justices Marshall and Stevens, dissented.

181. *See id.* at 312-23.

182. *Id.* at 342 (Blackmun, J., dissenting).

183. *See id.* at 327-32.

184. *Id.* at 329.

185. The original Seventh Circuit decision was vacated and remanded "for proceedings consistent with this opinion." *Id.* at 332. On remand, the Seventh Circuit court noted that

> [o]ur jurisdiction to consider the state law claims is at least unclear. It is clear that the Supreme Court refused to review our declining to consider state law as support for the district court judgment and at least doubtful that the direction to us on remand includes our reconsideration of that issue.

731 F.2d at 405. Nevertheless, the court considered the issue because of the virtually identical questions raised in the accompanying suit, Scott v. City of Hammond, 519 F. Supp. 292 (N.D. Ill. 1981). *See* 731 F.2d at 405.

186. 731 F.2d 403 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 575 (1985).

187. *See* 731 F.2d at 405, 406.

that "these are attempts by a state to regulate municipalities of another state in the discharge of their public responsibilities."[188] A stronger reason for applying federal law, however, was "the basic interests of federalism and the federal interest in a uniform rule of decision in interstate pollution disputes."[189] At issue, according to the court, was the "equitable reconciliation of competing uses of an interstate body of water, Lake Michigan."[190] Such "equitable reconciliation" required federal laws in order "both to guard states against encroachment by out-of-state polluters and equitably to apportion the use of interstate waters by competing states."[191] Thus, the court concluded that federal law must apply except to the extent that the CWA authorizes resort to state law.[192]

This time, the Seventh Circuit's reading of the CWA has an even greater Alice-In-Wonderland quality than the Supreme Court's interpretation in *Milwaukee II*. After again confronting the language of the savings clause,[193] the court of appeals held that state law of one state could not be employed against sources of water pollution located in another state.[194] The court conceded that section 1365 "may well preserve a right under statutes or the common law of the state within which a discharge occurs . . . to obtain enforcement of prescribed standards or limitations . . . ."[195] However, the court was somehow able to find in the savings clause a basis for distinguishing the applicability of state law on the basis of the *source* of the pollution.[196] The law of state 1 could not regulate a source of pollution in state 2.[197] To allow such regulation, according to the court, "would lead to chaotic confrontation between sovereign states."[198] Thus all three actions, which sought to control Indiana and Milwaukee polluters based on Illinois law, were dismissed.[199] In 1985 the Supreme Court declined to hear the appeal, thereby allowing the Seventh Circuit's decision to stand.[200]

The discussion by the *Milwaukee III* court of the preference for

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188. *Id.* at 407.
189. *Id.*
190. *Id.* at 410.
191. *Id.* at 410-11.
192. *See id.* at 411.
193. *See id.* at 411-14 (discussing 33 U.S.C. §§ 1370, 1365 (1982)).
194. *See id.* at 411-15.
195. *Id.* at 414.
196. *See id.*
197. *Id.*
198. *Id.*
199. *See id.*
200. Illinois v. City of Milwaukee, 105 S. Ct. 575 (1985).

uniform federal law is superfluous at best. The parties do not dispute the desirability of uniform federal law to resolve interstate water pollution disputes. Indeed, the plaintiffs would undoubtedly concede that a federal common law scheme would preempt state law and that such an approach would be preferable to state nuisance law. The uniformity gained and threat of bias lost would give federal common law a decided advantage.[201] In spite of the virtues of a body of federal common law governing interstate water use, however, the Supreme Court laid that issue to rest in *Milwaukee II*.[202]

Beyond that, the Seventh Circuit mistakes the nature of the problem. Although the court is correct in stating that the issue is the allocation of competing uses of an interstate body of water, it fails to consider all aspects of the problem. First, although use of the lake is an allocation problem, it is also a tort since Milwaukee's use is causing harm to Illinois.[203] More important, however, is recognition of the fact that, in enacting the CWA, Congress clearly contemplated enforcement measures beyond the permit program.[204]

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201. *See* 731 F.2d at 406-11 (discussing the desirability of federal law). Presumably the court engages in its extensive discussion of the desirability of federal law to support its conclusion that "we think federal law must govern in this situation except to the extent that the 1972 FWPCA (the governing federal law created by Congress) authorizes resort to state law." *Id.* at 411. This merely restates the holding of *Milwaukee II*, however, *see* 451 U.S. at 332, and adds nothing to the analysis of the problem before the court.

202. *See* 451 U.S. at 332.

203. *See* 599 F.2d at 177 n. 53 (discussing amount of raw sewage flowing into Lake Michigan); *see also id.* at 168-69 (discussing the danger presented by pathogens and viruses entering the lake).

204. The court noted that the savings clause "may well preserve a right under statutes or the common law of the state within which a discharge occurs (State I) to obtain enforcement of prescribed standards or limitations," 731 F.2d at 414, thus recognizing that stricter enforcement or more stringent regulation of pollution is contemplated, and even encouraged, by the CWA. Nevertheless, the court read a distinction into the statute between pollution from within the state and pollution from without:

> [I]t seems inplausible that Congress meant to preserve or confer any right of the state claiming injury (State II) or its citizens to seek enforcement of limitations on discharges in State I by applying the statutes or common law of State II. Such a complex scheme of interstate regulation would undermine the uniformity and state cooperation envisioned by the Act. For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states. Dischargers would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards . . . . It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water. Any permit issued under the Act would be rendered meaningless.

Id.

This analysis defies logic and is laced with hyperbole. The court recognizes that

In the *Milwaukee* litigation the courts used federalism rhetoric to shroud their distaste for what they viewed as expensive and unnecessary remedies for water pollution. As a result, Illinois cannot force Milwaukee or Hammond to stop fouling Lake Michigan.[205] Unless the EPA gets tougher or the cities voluntarily stop polluting, the citizens of Illinois must continue to live with a deteriorating lake, fouled beaches, and potential health hazards. The irony is that the structure of the statute, the seriousness of the pollution problem, and the uncertain mechanisms and effects of water pollution make it abundantly clear that sound policy should welcome a lawsuit like this one as a gap-filler, an opportunity for the exceptional circumstance to come up for air and be fairly litigated.[206] As decided, however, the case exposes the folly of a "for all cases" national policy on water pollution.

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courts within the state of discharge may impose stricter standards than those imposed by federal law, thus potentially subjecting a discharger to all of the "evils" envisioned by the court; yet it fails to state *why* Congress would allow an in-state court to regulate but not an out-of-state court. Furthermore, the court overstates the problem; for a nuisance action to succeed, the plaintiff would bear the burden of establishing both proximate cause and damages. Thus, it is hardly likely that an out-of-state court could render the permit program "meaningless."

At least one state court has refused to follow the Seventh Circuit's reasoning. *See* Tennessee v. Champion Int'l Corp., 22 Env't Rep. Cas. (BNA) 1338 (Tenn. Ct. App. 1985). Faced with pollution originating in North Carolina, the Tennessee Court of Appeals refused to dismiss an action by the State of Tennessee that sought injunctive relief and monetary damages against an out-of-state source of pollution. *Id.* at 1342. The Tennessee court characterized the Seventh Circuit's statutory interpretation as "strained" and noted that states are encouraged by the CWA to adopt water pollution standards more stringent than those required by the federal government. *Id.*

205. It is unclear from the *Milwaukee III* decision whether the State of Illinois could now bring suit in Wisconsin courts to try to stop the city of Milwaukee from polluting Lake Michigan. The essence of the opinion seems to be that state law is inappropriate for addressing interstate pollution problems, notwithstanding the savings provisions of the CWA. The court does state, however, that:

> [the savings provision, 33 U.S.C. § 1365 (1982)] may well preserve a right under statutes or the common law of the state within which a discharge occurs . . . to obtain enforcement of prescribed standards or limitations, *and we see no reason why such a right could not be asserted by an out-of-state plaintiff injured as a result of the violation.*

731 F.2d at 414 (1984) (emphasis added). If Illinois can sue Milwaukee in Wisconsin's courts, the logic of *Milwaukee III* is strained beyond the breaking point. If Illinois can sue only in Wisconsin, then the case stands for the proposition that the only court that can "fairly" adjudicate the rights of a Wisconsin defendant is a Wisconsin court. *See supra* note 208. This proposition is contrary to the constitutional command of full faith and credit, as well as to the principles of comity and respect for the judicial system.

206. Indeed, the whole issue of whether a federal common law remained for interstate pollution problems was raised by the amicus brief of Wisconsin and was challenged by the amicus brief of the United States. 599 F.2d at 157. The United States argued that a federal common law did remain to enable the states to resort to stricter standards than

The Clean Water Act consolidated the patchwork of common law and statutory remedies for water pollution into an ambitious national program.[207] Nevertheless, Congress realized that such a program could not cover all aspects of pollution control: hence, it included the savings provision. The Seventh Circuit relied on "basic interests of federalism"[208] to reject the State of Illinois' suit, without articulating what those interests were or relating those interests to either the Clean Water Act or the Constitution.[209] Thus, it was the court's reluctance to open the way for private remedies that may be costly to the cities and polluting industries, rather than any federalism interest, that prevailed in *Milwaukee III*.

6. State Controls and the Commerce Clause.—Despite the increased role of the federal government, state and local government regulations predominate in many areas. The allocation and control of water resources is and always has been one such area.[210] In recent years concern over pollution and dwindling resources has directed increased attention to water resource management.[211] Thus far, federal regulations concern pollution, and primarily pollution of surface waters, and leave groundwater, the source of much of the Nation's water supply, subject only to local and state regulations.[212] Although strong arguments favor a national policy governing

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those available under the permit program. *Id.* The legislative history underscores the fact that the savings clause is intended to preserve rights to parties harmed by pollution:

> It should be noted . . . that [section 505 of the Act, 33 U.S.C. § 1365 (1982)] would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.

S. REP. No. 414, 92d Cong., 2d Sess. 81, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668, 3746.

207. *See* Zener, *supra* note 175, at 683-93 (discussing the evolution of the provisions of the CWA).

208. 731 F.2d at 407 (reciting defendants' position, which is adopted by the court, *id.* at 410, 411).

209. *See generally* Goldsmith & Banks, *Environmental Values: Institutional Responsibility and the Supreme Court*, 7 HARV. ENVTL. L. REV. 1 (1983) (noting the failure of the Supreme Court to protect the environmental values contained in several pieces of environmental legislation; in spite of congressional willingness to impose present costs in order to reap future environmental benefits, the Court has shown increased hostility to agency actions imposing present costs).

210. Although groundwater resources have attracted national attention recently, the control and allocation of water rights is a traditional area of state law. *See* Banks, *supra* note 7, at 717-20.

211. *See, e.g.*, 11 U.S. COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL QUALITY 81-100 (1980) (discussing emerging problems of groundwater contamination and scarcity).

212. Several federal laws have implications for groundwater use, but have not been

ground water, Congress has not acted. Notwithstanding this inaction, in *Sporhase v. Nebraska*[213] the Supreme Court reversed a Nebraska effort at conserving groundwater, based on an unarticulated national interest that was violated by the Nebraska law.[214]

Nebraska sits atop the Ogallala aquifer, the largest underground lake in the Nation. The supply of water in the aquifer has been decreasing at an alarming rate, receding at the rate of three feet per year in some areas.[215] In order to accommodate the competing interests of water conservation and water-dependent development that is in the state's interest, Nebraska's legislature developed a permit program to allow for uses of groundwater that would otherwise be prohibited by statute.[216] Specifically, the law

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used to regulate groundwater to any extent. The Clean Water Act directs the Administrator of the EPA to "prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters. . . ." 33 U.S.C. § 1252(a) (1982). Nevertheless, "[t]he EPA has not exercised its authority or pressed for programs to protect ground water quality under the [Clean Water Act]." 11 U.S. COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL QUALITY 98 (1980).

The Safe Drinking Water Act of 1974, Pub.L. No. 93-523, 88 Stat. 1660 (codified as amended at 42 U.S.C. §§ 300f-300j-10 (1982)), also has provisions directed at protecting groundwater. Subtitle C of the Act, codified at 42 U.S.C. § 300h-1 (1982), is designed to protect groundwater from contamination by waste injected into the ground. The Council on Environmental Quality noted, however, that the recently promulgated underground injection regulations "allow for classification of aquifers into those which are or are not underground drinking water sources. They offer limited protection to those which are classified as drinking water sources and none to those which are not." 11 U.S. COUNCIL ON ENVTL. QUALITY, *supra* at 98. The Act also allows the EPA to designate an aquifer as the sole source of drinking water for an area: after such a designation, no commitment of federal financial assistance will be made to any project that "the Administrator determines may contaminate such aquifers through a recharge zone so as to create a significant hazard to public health." 42 U.S.C. § 300h-3e (1982). As of December 1982, eight aquifers had been designated as "sole sources," and 20 petitions are under consideration. *See* 13 U.S. COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL QUALITY 92, 95 (1982).

In addition to the above named acts, other federal laws that affect ground water protection are the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1982), the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1982), and the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 (1982). For a discussion of the relevant portions of these laws, see 11 U.S. COUNCIL ON ENVTL. QUALITY, *supra* at 98-99.

213. 458 U.S. 941 (1982).

214. *See id.* at 953-54: "Groundwater overdraft is a national problem and Congress has the power to deal with it on that scale." *Id.* at 954. *See generally* Banks, *supra* note 7, at 723 (discussing the analysis in *Sporhase*).

215. Banks, *supra* note 7, at 717.

216. Nebraska groundwater law is a combination of statutory common law and state constitutional requirements. The law rests on the basic principal that there is no right to water itself, but only to its use, and that water may be used only on the overlying owned land. *See* Aken, *Nebraska Groundwater Law and Administration*, 59 NEB. L. REV. 917, 975-86 (1980). As such, the system would not allow transfers of groundwater from overlying

requires any person who would withdraw water from a Nebraska well for use in another state to obtain a permit.[217] To be eligible for a permit, the withdrawal must be "reasonable, . . . not contrary to the conservation and use of groundwater, and . . . not otherwise detrimental to the public welfare."[218] If those requirements are satisfied, a permit will be issued only "if the state in which the water is to be used grants reciprocal rights . . . to the state of Nebraska."[219] The reciprocity provision was added to the law in part in response to a similar Kansas provision that was affecting water use at the Kansas/Nebraska border.[220] The provision also was intended to encourage interstate cooperation in managing groundwater resources.[221]

In *Sporhase v. Nebraska*, the Supreme Court rejected the Nebraska legislature's attempt to regulate groundwater use. Ranchers with land spanning the Colorado/Nebraska border needed water to irrigate their land.[222] Colorado authorities determined that the aquifer was overused and thus denied the ranchers a permit for a new well.[223] The farmers then began using water from their existing well in Nebraska to irrigate the land in Colorado.[224] Nebraska sought to enjoin the operation of the well because the farmers had not obtained the permit required to use the water in another state.[225] The farmers argued that the Nebraska law violated the dormant free trade commands of the commerce clause and therefore was unconstitutional.[226] The Nebraska Supreme Court rejected the farmer's argument, relying on an unnecessary legal fiction to hold that water was not an "item of commerce," and therefore not subject to the commerce clause.[227]

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owned land. To provide for flexibility the legislature enacted a permit program which allows transfers to be made pursuant to certain conditions. *See* Banks, *supra* note 7, at 719-21.

217. NEB. REV. STAT. § 46-613.01 (1978).

218. *Id.*

219. *Id.*

220. *See* Banks, *supra* note 7, at 737.

221. *See id.*

222. 458 U.S. at 944.

223. *See Commerce Clause Limits State's Ability to Stop Groundwater Exports: Supreme Court Overturns Nebraska Reciprocity Rule*, 12 ENVTL L. REP. (ENVTL. L. INST.) 10,083, 10,083-84 (1982).

224. *See id.*

225. *See* 458 U.S. at 944.

226. *See* State *ex rel* Douglas v. Sporhase, 208 Neb. 703, 706, 305 N.W.2d 614, 618 (1981).

227. *See id.* at 709, 305 N.W.2d at 618 ("Nebraska ground water is not an article of commerce and thus not subject to the strictures of the commerce clause.").

The Supreme Court reversed. While the Court found that the general permit conditions were reasonable attempts to meet an important conservation goal, the reciprocity provision of the Nebraska law was facially discriminatory and erected a barrier against interstate commerce. Thus, the provision was subject to "strictest scrutiny."[228] Not surprisingly, the reciprocity provision did not have the required "close fit" to the state's conservation interest and was held unconstitutional.[229]

The Court's analysis in *Sporhase* is inconsistent with both federalism and dormant commerce clause principles. The Court considered the reciprocity provision separately from the other requirements so that it could simultaneously voice great deference to state power over a vital resource, while striking down an integral part of the state program.[230] Even more troubling is the Court's disregard of the record. The record before the Court showed no evidence of any discrimination because the farmers had never applied for a permit to irrigate their Colorado land.[231] Had the farmers applied, their application might have been denied on any of the four statutory grounds.[232]

The Court also confused the commerce clause analysis. The Court never weighed the purposes of the law or the operation of the law as a whole against the economic fragmentation and balkanization values embodied in the commerce clause.[233] Although permits were difficult to obtain, they were restricted for both local and out-of-state water uses. Imposing stringent standards on water use was the essence of Nebraska's attempt to balance the competing interests in groundwater management.[234]

In *Sporhase*, the Court aggressively assumed the existence of a national interest in groundwater control that has never been articulated by Congress.[235] Although Congress has demonstrated its

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228. *See* 458 U.S. at 954-58.

229. *See id.* at 958.

230. *See id.* at 954-58; Banks, *supra* note 7, at 735.

231. The Court acknowledged that the appellants had not applied for a permit, but stated that "[b]ecause of the reciprocity requirement . . . appellants would not have been granted a permit had they applied for one." 458 U.S. at 944 n.2. The dissent notes, however, that there is "nothing in the Court's opinion that would preclude the Department of Water Resources from denying appellants a permit because of failure to satisfy the remaining conditions in the statute." *Id.* at 965 n.3 (Rehnquist, J., dissenting).

232. *See supra* text accompanying notes 218-219.

233. *See* Banks, *supra* note 7, at 735-38.

234. *See id.*

235. *See* 458 U.S. 941, 954 (1982).

awareness of the problems of groundwater resource management,[236] it has thus far declined to act, choosing instead to leave regulation to the states. Yet the *Sporhase* Court engaged in a lengthy discussion of the national interest and established that groundwater transfers are subject to the commerce clause.[237] This made it easier to then rule that Nebraska's important resource conservation measure must bow to the unarticulated free trade values of the commerce clause.[238]

The Court's analysis of the dormant commerce clause argument demonstrates its lack of allegiance to the interests of federalism. Instead of looking at the actual operation of the law, the Court did violence to the bedrock principle of federalism: Regulation should emanate from the bottom up, from localities and states, unless there is preemption by Congress or a real threat to commerce clause values.[239] In *Sporhase*, there was neither, and the Court would have better served federalism by upholding Nebraska's law.

The winners in *Sporhase* are the western developers who want to encourage sunbelt growth regardless of the long term and potentially disasterous implications of depleted groundwater supplies.[240] The Supreme Court's willingness to further those interests is an inexcusable blight on their federalism record, made even worse by the clear message sent by the *Sporhase* opinion to the states that it is dangerous and risky to cooperate with other states in regulating a fast-disappearing and vital natural resource.

B. Placing the Blame

These case studies demonstrate that agencies and courts disregard congressional directives for involvement of state and local government in decisionmaking, in favor of national uniformity. Given the contemporary popular refrains of the President, his subordinates, and the Supreme Court yearning for a return to a greater local role in public decisionmaking,[241] the failure of the courts and the executive to implement these federalism-sensitive programs suggests that these flagwaving invocations of the good old days and

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236. *See supra* note 212.

237. 458 U.S. at 945-54.

238. *See* Banks, *supra* note 7, at 729-33.

239. *See id.* at 734-36.

240. *See generally* Clyde, *Legal and Institutional Barriers to Transfers and Reallocation of Water Resources*, 29 S.D.L. REV. 232 (1984) (discussing the increasing demand for water use for development).

241. *See supra* notes 4-6 and accompanying text; Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

government from the bottom up take a back seat when the federalism values conflict with costly obligations imposed on private business by state and local regulators. These cases indicate that it is often not *who* is regulating, but *how much* is regulated, that is at issue. Indeed, these brief studies support the idea that it is the impact of regulation on the affected private interests, which, for expediency's sake, align themselves with the branch of government that appears to favor their view, rather than the question of the proper locus of decisionmaking power, that will determine the outcome of such regulatory challenges.[242]

II. CONCLUSION: SORTING OUT THE CONTRADICTIONS

Federalism does not best explain these cases. Indeed, viewing questions of regulation and deregulation as federalism questions does more to confuse the issues than to clarify them. This brief review indicates that even the staunchest proponents of the "new federalism" will take decidedly nationalist positions when doing so serves what are viewed as more important objectives. The present regulatory landscape is one in which private interests will align themselves with the level or institution of government most likely to serve their interests. Thus, policy changes that restructure intergovernmental relations may occur, but such changes will not, in and of themselves, either eliminate conflict between various levels of government or insure the successful implementation of a program.[243]

At a more basic level, the contradictions described in this paper

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242. The inquiry into the "locus of decisionmaking power" looks at the problem to be solved in terms of the level of government best equipped to solve the problem. That determination depends on a variety of factors, including history and legislative action or inaction. "Federalism is, history shows, entirely consistent with fluid allocations of authority dependent on an evaluation of a cluster of competing values." Banks, *supra* note 7, at 688 (quoting FEDERALISM: MATURE AND EMERGENT (A. MacMahon ed. 1955)).

243. A recent example is the Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (codified at 42 U.S.C. §§ 10101-10226 (1982)), which represents Congress' latest attempt to solve the problem of what to do with highly radioactive spent nuclear fuel. Anticipating the unavoidable, not-in-my-backyard reaction of residents of those areas selected as disposal sites, Congress devised a multistage process, involving studies, site recommendation, State and Indian Tribe vetoes, and congressional overrides. *See* 42 U.S.C §§ 10191-10203, 10121, 10132, 10135, 10136-10138; H. REP. NO. 491, 97th Cong., 2d Sess. 29-33, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 3792, 3795-99. The Act has engendered conflict from the start, however, because of the powerful competing private interests that will inevitably clash over the siting of a repository for spent nuclear fuel. *See generally* Hames, *The Nuclear Waste Policy Act: An Invitation for Litigation?*, TRIAL, Feb. 1985, at 52 (describing potential for litigation despite congressional attempts to limit).

exist because of misapprehensions about federalism. Formal federalism—the recognition of a technical or legal rule requiring national respect for local autonomy—is a doctrine without life.[244] The Supreme Court's recent overruling[245] of *National League of Cities v. Usery*[246] recognizes that the structure of our government provides adequate political safeguards for our federal system. Even if some formal federalism restraint on Congress is revived, the Court should recognize that the *National League* formula for judicial protection of federalism proved to be both unworkable and unnecessary.[247]

Notwithstanding the demise of formal federalism, there remains a role for federalism in creating, implementing, and enforcing policy. Ours is a living federalism, a result of our political and legal cultures. Assumptions about the role of federalism continue to affect all actors in our legal system. Because policymakers assume that federalism exists, and take it into account in shaping policy, those actions should be respected and given legal recognition. It is possible to give credit to these assumptions that federalism has content, however, without resorting to the unwieldy formula of *National League*.

Congress is the national policymaking body and should normally not be second-guessed by the courts on issues of federalism. As a representative and politically accountable body, Congress routinely considers the impact of its legislation on state and local governments.[248] Because the only formal limits on Congress' policymaking power are those contained in the Constitution, reviewing courts should examine congressional action only to determine whether it is properly within the enumerated powers.[249]

Both the courts and the agencies should recognize and fully respect congressional efforts to accommodate local interests, even if those accommodations are ambiguous or roughly articulated. Because preemption doctrine has traditionally presumed the validity of local regulation when Congress has not unambiguously preempted, the federal implementers and enforcers have ample guidance on how to do their jobs in relation to local actors.[250]

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244. *See* Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC'Y REV. 663, 683 (1980).

245. Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985).

246. 426 U.S. 833 (1976).

247. *Garcia*, 105 S. Ct. at 1023.

248. *See generally* Wechsler, *supra* note 7.

249. U.S. CONST. art I.

250. *See generally* Note, *supra* note 241 (suggesting new approach to preemption in order to promote cooperation between federal and state governments).

Similarly, the courts should respect the efforts of the agencies that are, pursuant to a delegation from Congress, seeking to accommodate local interests.[251] Delegation principles require that courts defer to agency decisions that are fairly made and within the confines of the grant of authority from Congress.[252] Thus, in *Watt*, the efforts of the state agency to protect the California coastal waters should have been upheld.

Conversely, the courts must be ready to enforce Congress' intent when the agency fails or has been captured by private interests. For example, in *Illinois Commerce Commission v. ICC*,[253] the court failed to require the agency to accommodate the limited state role which Congress had preserved, notwithstanding the presumption favoring local regulation and evidence that the agency had bowed to pressure from the railroads.[254]

In the same vein, the courts should not resort to wooden arguments about the commands of theoretical federalism to deprive congressional actions of their full effect or to take power from the states in the face of congressional silence. In the *Milwaukee* cases, for example, the courts deprived the Clean Water Act of an important gap-filler that Congress affirmatively included in the Act.[255] In *Sporhase*, the Court assumed the existence of a national policy where none exists, leaving a regulatory void.[256] In both these instances the courts acted improperly, whether due to the influence of private interests or a more abstract judicial distaste for the cost of regulation.

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251. For example, in *Milwaukee II* the Supreme Court paid little heed to the fact that the EPA, intervening in the lower court proceedings, had argued that the Clean Water Act did not obviate the need for federal common law. *See supra* note 178 and accompanying text.

252. *See generally* Aranson, Gelhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982) (describing delegation doctrine). For a discussion of the possible revitalization of the non-delegation doctrine, see Goldsmith, *INS v. Chadha and the Nondelegation Doctrine: A Speculation*, 35 SYRACUSE L. REV. 749 (1984).

253. 749 F.2d 875 (D.C. Cir. 1984).

254. *See supra* notes 64-76 and accompanying text.

255. *See supra* notes 194-204 and accompanying text.

256. *See supra* notes 228-234 and accompanying text.