

THE ROLE OF STATE LAW IN AN ERA OF FEDERAL PREEMPTION: LESSONS FROM ENVIRONMENTAL REGULATION

JOHN P. DWYER*

I

INTRODUCTION

There is little judicially enforceable federalism in environmental law. For the most part, states are not genuinely autonomous regulators; they exercise regulatory authority only by congressional grace.

Although Congress has broad power to preempt state environmental policies, it rarely does so explicitly. The need to tailor environmental policy to local conditions and the even more important need to use state technical and personnel resources compel Congress to share some of its authority. Congress's usual approach is to enlist the states in the implementation and enforcement of federal regulatory programs by offering technical and financial assistance to state agencies, and by threatening to cut off federal public works funding or to increase regulatory burdens on industries in uncooperative states. The federal government does not always get its way—at times the states can be powerful political actors in the federal bureaucracy and Congress—but normally it is able to induce states to cooperate in implementing and enforcing federal environmental policies.

In recent years, scholars and politicians have challenged this arrangement as favoring too heavily federal policies at the expense of state policy preferences. The resulting debate over the significance of interstate externalities, the nature and extent of interstate competition to attract or retain business by relaxing environmental standards, and the public choice problems that arise in state and federal decisionmaking may signal a reconceptualization of the federal-state partnership in environmental law.

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* John H. Boalt Professor of Law, Boalt Hall School of Law, University of California, Berkeley.

II

THE GROWTH OF FEDERAL REGULATORY POWER AND THE STATES'
SHRINKING "RESIDUARY AND INVIOLEABLE SOVEREIGNTY"¹

State autonomy has been under steady assault from federal hegemony since the nation's founding. Despite constitutional provisions designed to ensure a federalist form of government, state legal and political autonomy has gradually, and in some cases dramatically, given way to federal assertions of superior authority.² Political, constitutional, technological, and economic changes have severely eroded the states' claims as autonomous political actors and have facilitated the trend toward greater centralization of political authority in the national government. State autonomy has not been eliminated—Congress has elected to preserve a role for it, and recent Supreme Court decisions suggest a renewed interest in carving a constitutionally protected niche for state sovereignty—but the states' role is decidedly secondary in many areas, including environmental policy.

A. The Evolution of Federal Hegemony

The Civil War, of course, eradicated the states' most extreme claim of sovereignty—the right to secede from the nation. But the Union's victory also led to constitutional amendments subjecting state governments and officials to federally defined civil rights, and eventually to statutes substantially expanding federal court jurisdiction. "Dual federalism"—the idea of separate spheres of political authority—was coming to an end as the nation entered a period of increasing centralization of political power.³

The states remained important actors in many areas of public and private law. State law, not federal law, primarily defined the law of contracts, property, personal injury, business law, and crimes. But this picture steadily changed as advances in communications and transportation led to increasingly integrated national markets. Congress's establishment of the Interstate Commerce Commission in 1887 and its adoption of the Sherman Antitrust Act in 1890 and Clayton Act in 1914 (along with the Federal Trade Commission) exemplified the federal government's growing presence in economic regulation.⁴ The Great Depression in the 1930s greatly accelerated this trend. The President and Congress (and eventually the Supreme Court) recognized the need for national leadership in economic policy; in many sectors—agriculture, heavy industry, banking—the relevant markets had become or were becoming integrated na-

1. THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961) (The Constitution "leaves to the several States a residuary and inviolable sovereignty.").

2. See generally Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619 (1978); Harry N. Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 L. & SOC'Y REV. 663 (1980).

3. See Scheiber, *American Federalism and the Diffusion of Power*, *supra* note 2, at 640.

4. See generally SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY* (1959) (describing the growth of federal conservation agencies and programs during the Progressive Era).

tional markets. State boundaries were less relevant to business, and state governments had neither the resources, the expertise, nor the political power to tackle, much less solve, the national economic crisis.⁵ “Cooperative federalism”—the concept of shared political and legal authority with the federal government as the dominant partner—became the model for inter-governmental relations.⁶

Federal political power expanded in new directions after World War II, encompassing civil rights, worker health and safety, and environmental and natural resource protection. Beginning in 1970, Congress adopted lengthy environmental statutes giving federal agencies detailed instructions about the types of regulatory programs to be adopted, the criteria for environmental standards, the procedures for rulemaking and enforcement, and the procedures and criteria for state participation in the federal programs. These statutes were a stark departure from previous environmental statutes, which had established a much more modest federal role, generally limited to supporting research on the causes and effects of pollution and to encouraging state regulation.

Federal regulatory agencies grew correspondingly. At the beginning of 1970, the Environmental Protection Agency (“EPA”) did not exist; today it has a \$7 billion budget with regional offices throughout the country. Although the state environmental agencies also have grown substantially since 1970 (and in aggregate are larger than EPA), their role is increasingly restricted to those areas not yet subject to extensive federal regulation (for example, solid waste disposal) and to the implementation and enforcement of permits issued pursuant to federal standards and procedures.⁷

B. Judicial Abdication

In this century, the Supreme Court has largely supported congressional expansion of federal power at the expense of state power, imposing limits only at the margins. Civil rights against discriminatory state governments, of course, pose the least problematic questions because the Civil War Amendments were adopted in part to restrict state autonomy. “[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments ‘by appropriate legislation.’”⁸ But the Court’s Commerce Clause⁹ and Spending Clause¹⁰ juris-

5. See Scheiber, *American Federalism and the Diffusion of Power*, *supra* note 2, at 644.

6. See *id.* at 640-48.

7. See, e.g., 42 U.S.C. § 7410(a)(2) (Clean Air Act provision setting forth the criteria for federally approved state implementation plans).

8. *City of Rome v. United States*, 446 U.S. 156, 179 (1980) (upholding a provision of the Voting Rights Act of 1965 adopted under the Fourteenth Amendment); see also *Ex parte Virginia*, 100 U.S. 339, 346 (1879) (upholding a statute making criminal the exclusion of persons from jury service on the basis of race: “Nor does it make any difference that such legislation is restrictive of what the State might have done before the constitutional amendment was adopted. The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power”); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (upholding a provision of the Voting Rights Act of 1965 enacted under the Fifteenth Amendment: “As against the reserved powers of the States,

prudence has proven to be almost equally accommodating of federal interests at the expense of state policy interests.

1. *The Commerce Clause.* Although the Court continues to insist that the federal government may regulate only those intrastate activities that have a “substantial relation” to interstate commerce,¹¹ in practice the Court has upheld federal regulatory statutes having only the most slender relation to interstate commerce. Federal statutes may regulate intrastate land use,¹² local criminal activities,¹³ racial discrimination by local businesses,¹⁴ and even the production of wheat on a family farm intended solely for the farmer’s home consumption.¹⁵ The Court’s 1995 decision in *Lopez*—a rare decision striking down a federal statute for exceeding the scope of Congress’s power under the Commerce Clause—reinforces the conclusion that Congress’s Commerce Clause authority is exceedingly broad. In that case, the Court declared unconstitutional a provision in the Gun-Free School Zones Act of 1990, which made possession of a gun in a designated school zone a federal crime.¹⁶ In its analysis, the Court observed that the criminal activity—possession of a gun in a school zone—was not commercial activity and that the federal law trenched upon education, an area traditionally left to state regulation. But the Court also observed that Congress had made no findings that the activity affected interstate commerce, and that the statute did not require the jury to find an impact on interstate commerce.¹⁷ Although the Court did not commit itself to a different outcome had Congress made appropriate findings or inserted a jurisdictional provision, the decision suggests that Congress can virtually assure the validity of a statute

Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting”). *See generally* Henry Paul Monaghan, *The Sovereign Immunity “Exception”*, 110 HARV. L. REV. 102 (1996).

9. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

10. U.S. CONST. art I, § 8, cl. 1 (authorizing Congress to spend to “provide for the . . . general Welfare of the United States”).

11. *United States v. Lopez*, 514 U.S. 549, 559 (1995); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

12. *See Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 281-83 (1981) (upholding federal regulation of intrastate mining operations because the mined coal was sold in interstate commerce and because Congress had a rational basis to conclude it was necessary to eliminate “destructive interstate competition” that would lead to a weakening of state environmental standards).

13. *See Perez v. United States*, 402 U.S. 146, 154-55 (1971) (upholding a federal conviction for loan-sharking activities under the Consumer Credit Protection Act on the ground that such activities in aggregate could affect interstate commerce).

14. *See Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding application of the Civil Rights Act to a local restaurant on the ground that it bought some of its food from out-of-state).

15. *See Wickard v. Filburn*, 317 U.S. 111, 118-29 (1942) (upholding a federal order under the Agricultural Adjustment Act of 1938 restricting the production of wheat for consumption on the farm, on the ground that such production might affect interstate commerce by reducing the market demand for bread); *see also United States v. Lopez*, 514 U.S. 549, 560 (1995) (observing that *Wickard v. Filburn* was “the most far reaching example of Commerce Clause authority over intrastate activity,” but not overruling the decision).

16. *See Lopez*, 514 U.S. at 549 (holding unconstitutional 18 U.S.C. § 922(q)(1)(A)).

17. *Id.* at 561-63.

against a Commerce Clause challenge.¹⁸ The Court's Commerce Clause doctrine thus permits federal regulation of activities that may be termed "interstate commerce" only by a semantic sleight of hand.

Even when Congress has not legislated, the Court unhesitatingly has invoked the Dormant Commerce Clause—a transparent fiction demonstrating the Court's deep commitment to federal hegemony over the national economy—to strike down state and local laws that discriminate against out-of-state economic actors, unless the state can show that the state law advances a legitimate state or local interest that cannot be met by a reasonable nondiscriminatory alternative.¹⁹ Thus, the Court repeatedly has struck down state and local waste disposal laws favoring local businesses, despite claims that such laws were necessary to preserve dwindling landfill space and to minimize the burden on natural resources.²⁰ Claims that discriminatory laws are necessary to protect other natural resources generally fare no better; under the Court's doctrine, state and local interests in resource protection normally must give way to the national economic interest in eliminating state barriers to commercial activity.²¹

18. See Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 727 (1995) ("Without further action from the Supreme Court, it is unlikely that *Lopez* will cut a noticeable swath through federal law.").

19. See *Oregon Waste Sys., Inc. v. Department of Env'tl Quality*, 511 U.S. 93, 101 (1994). If the state law is not facially discriminatory, but has only an incidental impact on interstate commerce, the Court employs a balancing test and shifts the burden of proof to the party challenging the law: A court will uphold the statute unless "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

20. See *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (striking down a local "flow control" ordinance requiring all solid waste generated in the town to be disposed in a local solid waste transfer station); *Oregon Waste Sys., Inc.*, 511 U.S. at 93 (striking down a differential tipping fee on solid waste); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan*, 504 U.S. 353 (1992) (striking down a state law prohibiting private landfills from accepting solid waste from outside the county in which the landfill was located); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992) (striking down a state statute imposing an additional tipping fee on out-of-state hazardous waste); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (holding that state and local governments may not discriminate against out-of-state waste producers).

21. See, e.g., *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (striking down a state law that prohibited the shipping of natural minnows outside the state). In *Sporhase v. Nebraska*, 458 U.S. 941 (1982), the Court struck down a state requirement that prohibited interstate transfers of groundwater unless the receiving state also allowed the export of water. Despite the holding, the Court expressed sympathy with state-imposed restrictions on groundwater withdrawals "for the purpose of protecting the health of its citizens," *id.* at 956, and further suggested that public ownership of the water "may support a limited preference for its own citizens in the utilization of the resource," *id.* When states later invoked this language in the solid waste cases, the Court limited *Sporhase* to its facts. "That holding was premised on several different factors tied to the simple fact of life that 'water, unlike other natural resources, is essential for human survival.'" *Oregon Waste Sys., Inc.*, 511 U.S. at 107 (quoting *Sporhase*, 458 U.S. at 952). State laws protecting other natural resources also seem unlikely to receive much protection under *Sporhase*.

Maine v. Taylor, 477 U.S. 131 (1986), does not change this conclusion. In that case, the Court upheld a state law that prohibited the importation of "golden shiners," a live bait fish. The state had argued that the prohibition was necessary to protect its natural resources; the imported fish might bring parasites that would harm indigenous golden shiners, and the shipments might contain non-native species that would disrupt ecosystems in Maine. Maine also argued that there were no other reasonable means to detect parasites or non-native species in shipments. After reviewing the evidence, the Court held that the district court's findings, which were based on the state's arguments, were not clearly wrong. Thus, the Court held that Maine had met its burden under *Hughes v. Oklahoma*, 441 U.S. 322,

Because nearly all environmental statutes are enacted under the Commerce Clause,²² the federal government's authority to regulate private activity affecting the environment is exceptionally broad.

2. *The Spending Clause.* While the Court's interpretation of the Commerce Clause allows the broad expansion of federal regulatory power, its Spending Clause doctrine allows the federal government to compel states to agree to implement and enforce federal programs by threatening to withhold federal funds. Because federal grants have become critical for states to carry out state programs,²³ Congress's power is more akin to coercion, despite the theoretical exit option for the states. According to the Supreme Court, so long as a state has a choice to decline to execute the federal program—no matter that the choice would be quite costly to that state and the political careers of state politicians—the federal government has not unconstitutionally trenched upon state autonomy. Under the Spending Clause, the Court has upheld federal statutes severely limiting the political activities of state officials working for federally funded state agencies,²⁴ and federal statutes requiring state legislatures to raise the minimum drinking age to twenty-one as a condition for receiving federal highway funding.²⁵ Federal environmental statutes commonly authorize EPA to withhold federal highway or other public works funds when states do not meet federal programmatic requirements and deadlines,²⁶ although EPA has only occasionally and (for political, not constitutional, reasons) cautiously invoked that authority.²⁷ Even though the Supreme Court's decisions assert that the conditions must be related to the funded state activity, dissenting Justices and scholars alike have observed that the Court's current Spending Clause doctrine imposes no meaningful limits on Congress's power to coerce state government cooperation.²⁸

3. *The Tenth Amendment.* Conceivably, the Tenth Amendment²⁹ could protect state autonomy from a sprawling and intrusive federal bureaucracy by establishing workable standards to delineate the federal-state fault line. The Amendment, which reserves to the states powers not delegated to the federal government, is a plausible source for judicially enforceable federalism. Experience, however, has proven otherwise. Perhaps because the Tenth

336-37 (1979). See *Taylor*, 477 U.S. at 144-51. *Maine v. Taylor* thus arose in the special circumstance where interstate commerce posed a type of threat not manifested in intrastate commerce. Most claims about resource exploitation—such as the solid waste cases or the resource export cases—do not involve these concerns.

22. A few statutes regulating federal land, such as parks or federally owned wilderness areas, arise under the Property Clause. That clause gives Congress plenary authority over federal land. See U.S. CONST. art. IV, § 3, cl. 2 ("Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."). See also *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) ("[T]he power over the public land thus entrusted to Congress is without limitations.") (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940)). Nonetheless, state laws are not *per se* preempted. Rather, "state law is pre-empted only when it conflicts with the operation or objectives of federal law, or when Congress 'evidences an intent to occupy a given field.'" *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 593 (1987) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)).

Amendment provides no textual guidance to determine the proper boundaries of state sovereignty and federal power, the Court's doctrine has vacillated between radically different visions of federalism. Even when the Court's decisions purport to establish a sphere of judicially protected state autonomy, the clarity of the constitutional standard is illusory, and federal power remains largely unchecked.

One now-rejected line of cases sought to identify a judicially protected area for state sovereignty; the current doctrine largely abandons the states to the national political process on the theory that the states can take care of themselves.³⁰ Under the first approach, articulated in *National League of Cities v. Usery*,³¹ the Tenth Amendment bars federal legislation that interferes with states' "traditional governmental functions."³² The standard is notoriously vague,³³ and subsequent decisions were unable to give it sharper definition. More importantly, the standard seemed to offer little protection for state autonomy; subsequent decisions repeatedly upheld federal statutes. In *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, the Supreme Court

23. See Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 871-83 (1979); Scheiber, *Federalism and Legal Process*, *supra* note 2, at 669-75.

24. See *Oklahoma v. United States Civil Service Comm'n*, 330 U.S. 127, 142-44 (1947) (upholding a provision in the Hatch Act restricting political activity by employees of state agencies partly supported by federal funds).

25. See *South Dakota v. Dole*, 483 U.S. 203, 206-12 (1987) (upholding a provision in the Surface Transportation Act requiring the Secretary of Transportation to withhold 10% of federal highway funds from states that did not adopt a minimum drinking age of 21); *North Carolina v. Califano*, 435 U.S. 962 (1978) (affirming a judgment that Congress may withhold hospital program funds from states that do not enact legislation requiring state health planning agencies to oversee major capital projects for hospitals).

26. For example, the Clean Air Act includes provisions such as 42 U.S.C. §§ 7509(b)(1)(A) (funding for transportation projects), 7509(a) (funding for state air pollution planning and control programs), 7616(b) (funding for sewage treatment projects).

27. See, e.g., 45 Fed. Reg. 81,746, 81,747 (1980) (cutting off federal highway funds to California when the state failed to adopt federally approved inspection and maintenance programs for used cars). See generally John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1209-11 (1995).

28. See, e.g., *South Dakota v. Dole*, 483 U.S. at 215 (O'Connor, J. dissenting) ("Congress could effectively regulate almost any area of a [s]tate's social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced."); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 117-25 (asserting that *South Dakota v. Dole* imposes no significant legal restraints on federal power); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987) (arguing that there are few constitutional limits on conditions imposed by federal grants to states).

29. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the [s]tates, are reserved to the [s]tates respectively, or to the people.")

30. See generally John Choon Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997). Professor Merritt labels these the "territorial" and "process" models of federalism. Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1564-71 (1994). She also identifies a third approach—the "autonomy" model—but that model closely tracks the territorial model. *Id.*

31. 426 U.S. 833 (1976) (striking down the application of the Fair Labor Standards Act to state and local employees).

32. *Id.* at 851.

33. See Martha A. Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 89-95 (1985).

declared in dicta that Congress may not “commandeer[] the [state] legislative processes by directly compelling them to enact and enforce a federal regulatory program,”³⁴ but the Court upheld the Surface Mining Control and Reclamation Act³⁵ despite claims that it interfered with state and local land use controls.³⁶ In *FERC v. Mississippi*,³⁷ the Court upheld a federal statute requiring a state legislature to “consider” federal standards for public utility regulation. Because the federal statute was not “a federal command to promulgate and enforce laws and regulations”—even though it surely would command the legislature’s resources and could well affect the dynamics of the state legislative process—the Court held it did not violate the Tenth Amendment.³⁸ Under the *National League of Cities* doctrine, the Court found it difficult to identify real examples of traditional state functions that deserved judicial protection from federal interference.

Less than a decade after *National League of Cities*, the Court abruptly changed direction (Justice Blackmun switched sides, and the dissenters became the majority). In *Garcia v. San Antonio Metropolitan Transit Authority*,³⁹ the Court declared that it would not review Tenth Amendment claims, but rather would leave their resolution to the national political process. Under *Garcia*’s political process model, the Tenth Amendment provides little or no judicially enforced federalism.⁴⁰ The Court’s holding was based in part on scholarship concluding that the structure of the federal political process requires the federal government to take adequate account of states’ interests.⁴¹

More recent scholarship has challenged *Garcia*’s rationale as empirically unfounded.⁴² Professor John Yoo argues:

34. 452 U.S. 264, 288 (1981).

35. 30 U.S.C. §§ 1201-1328 (1994).

36. *Hodel*, 452 U.S. at 283-93.

37. 456 U.S. 742 (1982).

38. *Id.* at 762.

39. 469 U.S. 528 (1985) (overruling *National League of Cities*).

40. *Garcia* recognized that judicial intervention might be necessary if the political process broke down. See 469 U.S. at 554 (“Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of [the national political process], and it must be tailored to compensate for possible failings in the national political process rather than to dictate a ‘sacred province of state autonomy.’”) (quoting *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983)). See generally Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 SUP. CT. REV. 341.

41. See Herbert 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 (1954) (arguing that the structure of the national political process protected states’ interests); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 175-95 (1980) (agreeing with Wechsler’s analysis, but adding that the judiciary’s primary role is to protect individual rights and that it should not waste its limited political capital on the states). The Court also accepted the argument that the *National League of Cities* standard was unworkably vague. See *Garcia*, 469 U.S. at 539.

42. See Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1503-14 (1994); William Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1724 n.64 (1985).

Some scholars see a more complicated picture in which states wield some political power in Congress. See Dwyer, *supra* note 27 at 1199-1216 (describing instances in which states successfully lobbied to reverse congressional and EPA requirements in the Clean Air Act); Carol F. Lee, *The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local*

Changes in culture, technology, and the economy have diluted regional and local identities in favor of politics that are national in scope and focus. If there ever was a political culture that emphasized reliance upon the states for the solution to social and economic problems, the sweeping federal environmental, economic, welfare, and entitlement laws of the 1960s and 1970s replaced it with a mindset that seeks federal answers first. The Supreme Court in the same period federalized control over the composition of the electorate, and presidential elections evolved into a plebiscitary primary system. The political safeguards model also failed to take into account the vast power that the federal government could wield against the state by using federal money and grant programs.⁴³

Subsequent decisions, however, hint that the Court's commitment to the political process may be wavering. Yoo even argues that the Court has silently overruled *Garcia* and returned to the view that there exists a judicially protected area of state sovereignty.⁴⁴ Although the Court has not re-adopted the unsuccessful "traditional governmental functions" test in *National League of Cities*, it has made tentative steps to define the boundaries of state sovereignty. For example, in *Gregory v. Ashcroft*,⁴⁵ the Court adopted a "clear statement" rule for federal statutes and on that basis declined to apply the Age Discrimination in Employment Act to state judges: The Court will not read federal regulatory statutes as applying to state officials unless Congress clearly intended that result. The holding certainly is not a complete break with *Garcia*—it still allows the national political process to define the extent of the states' autonomy—but it undermines *Garcia* because a clear statement rule is necessary only if there is an area of state sovereignty requiring judicial solicitude.⁴⁶

The Court further distanced itself from *Garcia* in *New York v. United States*.⁴⁷ Echoing *Hodel's* statement that the federal government may not commandeer state legislatures, the Court lectured that "States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart."⁴⁸ According to the Court, the Tenth

Liability, 20 URB. LAW. 301 (1988) (describing four case studies of instances when Congress has and has not been responsive to state and local concerns threatened by Supreme Court decisions, and concluding that states must actively lobby to protect their interests, that federal legislators often have connections to local politics that make them sensitive to local concerns, and that state and local governments are not treated as another interest group because as providers of essential services they can more credibly claim to represent the public interest).

Although Kramer rejects the Wechsler-Choper argument, he speculates that other aspects of the political process—in particular, the manner in which political parties link the interests of federal and state office holders—may cause federal policy makers to be sensitive to state concerns. Kramer, *supra*, at 1522-42.

43. Yoo, *supra* note 30, at 1321.

44. *Id.* at 1335.

45. 501 U.S. 452 (1991).

46. Yoo, *supra* note 30, at 1338-40.

47. 505 U.S. 144 (1992).

48. *Id.* at 188. This language makes clear that the Tenth Amendment bars the federal government from ordering state governments to implement federal programs. The Court stated that the decision did not undermine Congress's authority to require state governments to comply with "generally applicable laws." *Id.* at 160. Thus, *New York v. United States* is formally consistent with *Garcia*.

Amendment helps to ensure that federal and state governments remain accountable to the people. Federal “commandeering” of the state legislature purportedly would cause voters to think mistakenly that state legislators are responsible for federal policies, and thus would allow federal legislators to escape electoral responsibility.⁴⁹ This and other cases demonstrate that the Court is again seeking a substantive, judicially protected definition of state sovereignty.⁵⁰

It is doubtful, however, that these cases establish substantial judicially enforceable protections for state sovereignty, particularly in the area of environmental policy.⁵¹ For example, in *New York v. United States*, the Court struck down a unique statute requiring states to “take title” to low-level radioactive waste if they failed to meet a federal deadline to enter an interstate waste disposal compact.⁵² Because no other environmental statute forces a state to shoulder such a financial and legal liability as punishment for failing to comply with federal requirements, it is unlikely the decision will have much if any impact on federal environmental regulation.⁵³ The same decision, moreover, upheld a provision assessing and redistributing a surcharge on waste disposal de-

49. See *id.* at 169 (“But where the [f]ederal [g]overnment directs the [s]tates to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.”). But see Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1061-74 (1995) (arguing that federal mandates will shift some but not much political liability to state governments and that in many cases there is little basis to believe citizens will misallocate blame for unpopular policies).

50. See *United States v. Lopez*, 514 U.S. 549 (1995) (holding that a federal statute criminalizing possession of a gun in a school zone exceeded Congress’s Commerce Clause power, in part because education is an area of traditional state control); *Printz v. United States*, 117 S. Ct. 2365 (1997) (extending the Court’s Tenth Amendment doctrine to protect the autonomy of executive as well as legislative state officials). Some federal environmental statutes may fall under *Printz*. See *Asbestos Hazards Abatement Program*, 20 U.S.C. § 4013 (1994) (requiring governors to keep records on asbestos in schools and to submit the records to EPA); *Emergency Planning and Community Right to Know Act*, 42 U.S.C. § 11001 (1994) (requiring states and local governments to form commissions to prepare emergency response plans for accidental releases of hazardous materials); *Regulation of Underground Storage Tanks*, 42 U.S.C. § 6991a (1994) (requiring states to inventory underground storage tanks containing hazardous substances and submit the information to EPA). These provisions, however, represent a tiny portion of federal environmental laws and programs. Although it is simpler directly to order state agencies to collect information, the federal government also can delegate such obligations to states, which for the most part will voluntarily shoulder the burdens. In other cases, Congress could subsidize the states or condition receipt of federal funds on compliance with the data collection and reporting requirements. See also Saikrishna B. Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993) (arguing that the authors of the Constitution intended to permit Congress to require state executive officials to implement federal statutes and regulatory programs).

51. See John P. Dwyer, *The Commerce Clause and the Limits of Congressional Authority to Regulate the Environment*, 25 ENVTL L. RPTER. 10421 (1995) (arguing that *Lopez* would not lead to the invalidation of federal environmental laws).

52. See *New York v. United States*, 505 U.S. 144, 174-77 (1992).

53. See *id.* at 177 (“The take title provision appears to be unique. No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress.”).

pending on whether the state had a disposal site,⁵⁴ and it upheld another provision allowing states with disposal sites to impose differential tipping fees and eventually to close their sites to waste generated in other states.⁵⁵ The case thus does not significantly affect the current *practice* of federalism, for Congress almost never attempts to instruct state officials directly. Given the breadth of Spending Clause power, it has no need to do so.

4. *The Eleventh Amendment.* The other constitutional provision protecting federalism—the Eleventh Amendment⁵⁶—also does little to protect state autonomy to regulate the environment. Although it immunizes states from suit in federal court,⁵⁷ the Amendment is subject to substantial exceptions: Congress may abrogate state sovereign immunity if the federal statute forming the basis for the suit was enacted under the Fourteenth Amendment;⁵⁸ under *Ex parte Young*,⁵⁹ a federal court may enjoin state officials from violating federal law⁶⁰; and the Amendment imposes no restrictions on suits brought by the federal government against a state. Although immunity from federal suits for environmental damage might seem to be a significant restriction on federal authority,⁶¹ very few federal environmental statutes seek to hold states liable

54. See *id.* at 173 (upholding the provision under both Commerce and Spending Clauses).

55. See *id.* at 173-74 (upholding this authority under the Commerce Clause).

56. U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

57. See *Hans v. Louisiana*, 134 U.S. 1, 13 (1890). Numerous scholars have challenged the Court’s interpretation of the Eleventh Amendment. See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988).

58. Compare *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (holding that Congress may abrogate state sovereign immunity for suits based on statutes arising under the Fourteenth Amendment), with *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that Congress may not abrogate state sovereign immunity for suits based on statutes enacted under the Commerce Clauses).

59. 209 U.S. 123 (1908).

60. See *Idaho v. Coeur d’Alene Tribe*, 117 S.Ct. 2028, 2040-43 (1997) (holding that the *Ex parte Young* exception was unavailable when a suit by a Tribe to enjoin state officials from asserting jurisdiction over submerged lands was the “functional equivalent” of a suit to quiet title against the state). Although *Coeur d’Alene Tribe* may be read as signaling the Court’s readiness to erode *Ex parte Young*, a better interpretation is that in the unique circumstances of that case—where the suit sought to divest state officials from exercising any jurisdiction over the land, thereby implicating more than in most suits the state’s sovereignty interests—the Court’s refusal to apply *Ex parte Young* is not a serious restriction on the doctrine. “The suit seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State. The requested injunctive relief would bar the State’s principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State’s control over a vast reach of lands and waters long deemed by the States to be an integral part of its territory.” *Id.* at 2040. See generally Eric B. Wolff, *Coeur d’Alene and Existential Categories for Sovereign Immunity*, 86 CAL. L. REV. (forthcoming 1998) (on file with author).

61. See *Seminole Tribe*, 517 U.S. at 55-73 (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), in which a plurality had concluded that Congress had authority under the Interstate Commerce Clause to abrogate state sovereign immunity from federal suits for environmental response costs).

for such costs. Rather, in almost every statute Congress has sought to enlist the states' political, financial, and technological assistance in implementing and enforcing federal environmental programs against private polluters. The Eleventh Amendment might be important in other contexts, but it plays almost no role in protecting state autonomy in the formation, implementation, or enforcement of environmental policy.

In sum, the Constitution imposes no meaningful limits on the growth of federal environmental policy at the expense of the states. The Supreme Court has blandly noted that the "Constitution enables the [f]ederal [g]overnment to pre-empt state regulation contrary to federal interests, and it permits the [f]ederal [g]overnment to hold out incentives to the [s]tates as a means of encouraging them to adopt suggested regulatory schemes."⁶² This statement acknowledges that except at the margins—when Congress directly commands state legislative or executive officials—the federal government has plenary power to regulate matters only marginally affecting interstate commerce, to preempt conflicting state law, and to use powerful economic threats to coerce state cooperation with the federal programs. The federal courts have largely abdicated any role in establishing meaningful boundaries for federalism perhaps because, as Professor Kramer notes, "judges lack the resources, know-how, and flexibility to make dependable decisions about the level at which to govern in today's complex and rapidly evolving world."⁶³ The residuum of state environmental authority is to be found not in the doctrinal limits of the Commerce Clause or the protections of the Tenth Amendment, but primarily in electoral and bureaucratic politics.

III

THE STATES' ROLE IN ENVIRONMENTAL POLICY: MARGINALIZATION AND SUBORDINATION TO FEDERAL POLICY

The state role in environmental regulation and enforcement varies significantly across the spectrum of environmental issues and programs. In some environmental programs, particularly those involving regulation of nationally marketed commodities, Congress has left the states no regulatory role: Federal statutes wholly preempt state regulation and enforcement, leaving policymaking, standard setting, and enforcement entirely in federal hands. More commonly, the states are junior partners in joint federal-state regulatory enterprises, where the federal government defines national environmental policy and sets standards (although it may allow the states to adopt stricter standards), and federally approved state agencies issue and enforce permits subject to federal oversight. Finally, in a few environmental programs, the federal government has permitted and even encouraged the states to adopt parallel regulatory programs.

62. *New York v. United States*, 505 U.S. at 188.

63. Kramer, *supra* note 42, at 1503.

A. Federal Preemption

A few federal environmental programs—particularly those directly regulating nuclear waste and nationally marketed products—leave little or no room for state environmental policies and preferences. For example, under the Clean Air Act, the national government defines, monitors, and enforces the air pollution standards for new cars⁶⁴; states have no regulatory role until the car is sold to a consumer. The reason is plain: It would be hugely inefficient to allow fifty states to set their own emission standards.⁶⁵ Even here, however, Congress offers states a modest policy making role; states may adopt the “California standards,” which are stricter than the national standards.⁶⁶ A few Northeastern states (as well as California) have done so.

Similarly, the federal statute governing the labeling of pesticides⁶⁷ preempts most state tort claims based on a breach of the duty to warn.⁶⁸ Congress deemed label uniformity an overriding concern (it would have been inefficient for each state to set its own labeling requirements for these nationally marketed commodities), and courts have diligently barred state tort claims that would effectively impose more stringent requirements.⁶⁹ The statute, however, does not limit state or local regulation of pesticide use,⁷⁰ and the Supreme Court declined an invitation to read such a limitation into the statute.⁷¹ Thus, although Congress certainly had the authority to preempt all state pesticide regulation, it tailored its preemption powers to address its felt need for uniformity in product labeling.

These examples have a common theme in the environmental area: Congress sparingly uses its power to preempt all state authority. When it does preempt state regulation, Congress tends to tailor federal preemption to meet an important need, such as the need for national uniformity.⁷²

64. See 42 U.S.C. §§ 7521-7554 (1994).

65. In the legislative history for the Motor Vehicle Air Pollution Control Act of 1965, Congress expressly noted that multiple car standards would be inefficient. See S. REP. 89-192, at 6 (1965) (“It would be more desirable to have national standards rather than for each State to have a variation in standards and requirements which could result in chaos insofar as manufacturers, dealers, and users are concerned.”). This sentiment carried through to the 1970 Clean Air Act, in which Congress rejected an amendment that would have allowed each state to adopt its own new car standards. See 116 CONG. REC. 19,231-37 (1970).

66. See 42 U.S.C. § 7543(b) (1994).

67. See Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (1994).

68. See 7 U.S.C. § 136v(a) (1994).

69. See, e.g., *Taylor AG Industries v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995) (holding that the Act preempts state tort claims for failure to warn, for negligent testing based on inadequate labeling, and for breach of express and implied warranties).

70. See 7 U.S.C. § 136v(a) (1994).

71. See *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991) (upholding local regulation requiring a pesticide applicator to obtain a permit for use).

72. The Supreme Court’s preemption doctrine also favors a regulatory role for states even in the face of federal regulatory statutes. “When considering preemption, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Wisconsin Public Intervenor*, 501 U.S. at 605 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). State law is preempted only when Congress expressly intended to preempt state law, when the federal regulatory scheme is so pervasive that

B. States as Junior Partners

In many environmental programs (particularly pollution control programs), the federal and state governments share regulatory power, although the states' preferences are generally subsidiary to the federal government's policy choices and standards. In these programs, the federal agency's role is threefold: to set substantive standards for environmental quality or pollution emissions; to review and approve state regulatory programs designed to implement and enforce those standards; and to oversee state implementation and enforcement (and to re-assume implementation and enforcement if state efforts fall below a minimum threshold).

For example, under the Clean Air Act, EPA defines nationally uniform "air quality" standards for common pollutants (for example, ozone, particulates) that each state is expected to attain within statutory deadlines.⁷³ In addition, EPA must review state air pollution programs to determine whether the states are qualified to implement and enforce the federal standards, that is, whether the state agency has sufficient personnel with adequate training, resources, and enforcement authority.⁷⁴ After EPA approves a state regulatory program, the state agency issues all air pollution permits, monitors compliance, and enforces permit and other regulatory violations. EPA normally recedes into the background; its primary role is to assure itself that the state permit requirements meet minimum federal standards and that the state enforcement agency takes appropriate enforcement action and seeks sufficiently strict sanctions.

States of course are not required to participate in the federal regulatory program; the lesson of the Tenth Amendment cases is that Congress cannot direct the state legislature or the state agency to create a federally approved program.⁷⁵ And the lesson of the Commerce Clause and preemption cases is that EPA may regulate private activity directly in those few states that refuse to help implement the federal program. But the more important lesson of the Spending Clause cases is that Congress and EPA can cut off federal funds to states that do not cooperate. Perhaps partly as a consequence, most states elect

it demonstrates Congress's intent to occupy the field, or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* Thus, the existence of co-extensive federal regulatory statutes alone is not a basis for preemption. *See California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (holding that federal laws do not necessarily preempt state regulation of mining activities on federal land).

73. *See* 42 U.S.C. § 7409 (1994). EPA defines the pollution standards for all of the other air pollution programs as well. *See, e.g., id.* §§ 7411 (new source performance standards), 7412 (hazardous air pollutants), 7470-7479 (standards for prevention of significant deterioration in attainment areas).

74. *See* 42 U.S.C. § 7410(a)(2) (a qualified state implementation plan must have: quantified emission limitations and timetables for compliance; monitoring and enforcement programs; adequate funding, personnel, and legal authority to implement the plan; contingency plans; and procedures for periodic evaluation and revision). In addition, in the 1990 amendments to the Clean Air Act, Congress established detailed timetables for states to achieve compliance with federal air quality standards, *id.* §§ 7501-7515, and required states to adopt comprehensive permit programs for air pollution sources, *id.* §§ 7661-7661f.

75. *See, e.g., New York v. United States*, 505 U.S. 144, 188 (1992) ("The Federal Government may not compel the states to enact or administer a federal regulatory program.").

to implement and enforce federal programs and use the political process to attempt to change the federal requirements they do not like⁷⁶; they rarely surrender the authority to implement and enforce federal programs.

The key point, however, is that Congress has left implementation and enforcement to the states (subject to EPA approval). This delegation is critical, for it allows state agencies to allocate emissions among polluters, determine the schedule for compliance, set enforcement priorities, and determine appropriate sanctions—in short, to exercise considerable political authority at the retail level. Given that one hundred percent compliance with the environmental laws is impossible—indeed, complete compliance would be imprudent—the state agency can decide what problems to address first. This enforcement flexibility, exercised through delay, relaxed sanctions, or simply non-enforcement, allows the state agency to evaluate the significance of particular problems in light of local conditions and political preferences.

EPA could (and occasionally does) intervene—to disapprove a permit, to file its own enforcement action, or in rare cases to de-certify a state enforcement program—but EPA has neither the resources nor the political capital to intervene widely or frequently. As Professor Robert Percival has pointed out, EPA cannot easily ensure minimum quality for state environmental programs; in principle, EPA could withdraw its delegation of implementation and enforcement authority, but that sanction is too blunt in most cases to be effective. Moreover, EPA has little incentive to take over state programs and increase its own administrative responsibilities.⁷⁷ As a result, the quality of state environmental programs is highly variable, which is another way of saying that state agencies exercise considerable implementation and enforcement discretion.

C. Parallel State Programs

In some cases, the federal and state governments have parallel regulatory programs. For example, the National Environmental Policy Act⁷⁸ requires a federal agency to prepare an environmental impact statement whenever it makes a decision (for example, issues a permit or funds a development project) that may significantly affect the environment. About fifteen states have similar requirements for state agencies.⁷⁹ In large development projects requiring both federal and state permits (or funding), both levels of government will be involved in the environmental analysis of the project. Similarly, states are free to adopt their own programs to preserve wetlands and endangered species.

In the pollution statutes, Congress usually permits states to adopt standards that supplement or even supersede federal standards. Under the Clean Water

76. See Dwyer, *supra*, note 27, at 1208-16 (describing states' efforts to change EPA's burdensome vehicle inspection and maintenance programs).

77. See Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1175 (1995).

78. 42 U.S.C. §§ 4321-4370d (1994).

79. See DANIEL MANDELKER, NEPA LAW AND LITIGATION § 12.01 (1992).

Act, the states adopt water quality standards (determined separately for each body of water) that are enforced along with the federal industry-wide effluent standards. The Act resolves potential conflicts by requiring the polluter to meet the stricter of the two standards.⁸⁰ Similarly, the Clean Air Act permits states to adopt stricter pollution standards (except for new cars).⁸¹ In addition, virtually all of the federal pollution statutes permit state suits based on nuisance and other state causes of action.⁸² Thus, Congress often gives states some freedom to adopt substantive environmental policies, so long as those policies are at least as strict as the federal policies.

D. Practical Imperatives for a Significant State Role in Environmental Regulation

As the previous paragraphs should have made clear, Congress has not preempted all state environmental law or all state involvement in permitting or enforcement, despite the constitutional power to do so. The curious question is why the federal government would want to delegate *any* regulatory power to the states. At least at first glance, federal officials should want to keep all regulatory authority both to garner political support from interest groups and to ensure that federal policies are properly implemented. It is far easier for Congress to monitor and discipline federal agencies than to control fifty state legislatures and innumerable state and local agencies that have no direct relationship with Congress. Some interest groups also might prefer federal regulation: It is easier to enact and monitor implementation of a single federal law than fifty equivalent state laws; enactment of state laws requires not only the effort to enact them, but also the effort to fight off preempting federal legislation; federal laws are higher quality than many state statutes; the political deal may be more durable in Congress than in state legislatures; and regulated entities cannot as easily avoid federal law (it is one thing to move to another state; for many firms, it is quite another to leave the country).

Nonetheless, Congress delegates significant aspects of environmental law to states. Professor Jonathan Macey offers a general public choice model of delegation that provides a partial explanation.⁸³ Public choice theory rests on the assumption that politicians want to maximize their political support—votes, endorsements, campaign contributions—and minimize political opposition. Under this model, Macey argues that Congress is more likely to delegate political power to states when (1) states have established a system of regulation that federal law would disrupt, (2) wide variations in conditions makes a one-size-fits-all statute less than optimal, and (3) Congress wants to avoid responsibility

80. See 33 U.S.C. §§ 1311-1313 (1994).

81. See 42 U.S.C. § 7416, 7543(b) (1994).

82. See, e.g., *International Paper Co. v. Ouellette*, 479 U.S. 481, 497-500 (1987) (holding that the Clean Water Act does not preempt nuisance suits arising under the laws of the state in which the discharge occurs).

83. See generally Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public Choice Explanation of Federalism*, 76 VA. L. REV. 265 (1990).

for regulatory policies. Macey's model may be untestable; it may be much too difficult to ferret out the precise relationship between the vague notion of political support and a particular allocation of power in a regulatory statute. Nevertheless, at a minimum Macey offers a useful way to structure our thinking about the allocation of regulatory authority between federal and state governments.

The first factor—the prior existence of a system of state regulation—would be important when states have invested heavily in regulation. Expertise, reputational value, and human capital together may make the state regulatory system an asset that both local officials and locally based interest groups will fight to keep. This factor echoes the “traditional state functions” that the Supreme Court once trumpeted in *National League of Cities*. In the environmental area, such regulatory systems would certainly include, for example, land use regulation, and in California it would include new car standards. However, in most areas of environmental regulation, this factor has not been important. Before 1970, most states had not established effective schemes of environmental regulation despite constant federal prodding.⁸⁴ Thus, federal environmental regulation generally has not displaced state regulation; rather, federal funding, technical support, and threats have led to the formation of state environmental agencies and regulatory schemes. Moreover, because most states perceive that it is in their interests to have a role in environmental regulation—environmental regulation directly affects land use policy, protection of public health and safety, and conservation of natural resources—state officials often welcome federal policy leadership and federal technical and financial support to develop state environmental agencies.⁸⁵

Macey's third factor—Congress's desire to avoid blame—also may not explain much federal delegation of environmental regulation. This factor grows out of Professor Morris Fiorina's work showing that Congress often delegates power to agencies to claim the political benefits of having adopted new laws but also to avoid the political blame for the costs of such laws.⁸⁶ There is less reason, however, to believe that Congress can avoid much accountability by delegating implementation and enforcement to the states. Both local politicians and adversely affected private actors have substantial incentive to reveal the true source of burdensome environmental policies.⁸⁷

However, Macey's second factor—the need to tailor environmental laws to local conditions—may be more powerful. Because of huge variations in climate

84. See Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 600-02 (1996).

85. See, e.g., 42 U.S.C. § 7405 (authorizing grants to support air pollution planning and control programs).

86. See Morris Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33 (1982); see also Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 33 (1982) (arguing that a legislative strategy of ambiguity to avoid blame may take the form of delegation to administrative agencies).

87. See Caminker, *supra* note 49, at 1067.

and weather (for example, temperature, rainfall, wind), geography (for example, mountains, deserts, plains, wetlands, and coastal regions), environmental risks (for example, the size and density of affected human populations, the presence of particularly important or scarce natural resources or wildlife), the relative importance of types and sources of pollution (for example, vehicle miles traveled, the presence of large industrial sources), economic conditions, and preferences for environmental protection, it is highly unlikely that a single, national approach to implementation and enforcement would succeed. To be effective, regulatory officials must be knowledgeable about local conditions and concerns to set appropriate regulatory priorities and to plan for future developments.

Macey's model, however, does not fully explain Congress's penchant to delegate implementation and enforcement of federal environmental law. The federal government desperately needs the technical and personnel resources of state and local governments. There are not—and probably never will be—enough federal employees to implement the federal environmental laws; local regulators are needed to carry the biggest fraction of the regulatory burden.

Realistically speaking, Congress can neither abandon these [regulatory] programs nor “fire” the states and have federal bureaucrats assume full responsibility for them. The federal government needs the states as much as the reverse, and this mutual dependency guarantees state officials a voice in the process. Not necessarily an equal voice: because federal law is supreme and Congress holds the purse strings, the federal government is bound to prevail if push comes to shove. But federal dependency on state administrators gives federal officials an incentive to see that push doesn't come to shove, or at least that this happens as seldom as possible, and that means taking state interests into account.⁸⁸

Federal regulators also need the political support of local officials. Environmental regulation—especially in its site-specific application—remains politically controversial. The impacts of regulation often are concentrated locally, where resources may be specially affected or where regulatory and opportunity costs are felt most acutely. Federal regulatory programs that disregard state and local concerns and priorities are more likely to encounter delay and even failure.

While frequent use of Congress's Spending Clause power to bludgeon states into submission would produce state cooperation in the short run, that cooperation would come grudgingly and at the cost of local political support for controversial federal requirements. Genuine cooperation arises when the national government communicates its trust in state and local officials by sharing regulatory power. It may be too much to expect the national government to surrender its role in standard setting—the most visible expression of national environmental policy—but normally it is not too much for Congress to delegate primary control over implementation and enforcement to states that have demonstrated a willingness and ability to seek compliance with federal law. Delegation helps to build and reinforce the state environmental bureaucracy,

88. Kramer, *supra* note 42, at 1544.

which in turn becomes a political force broadly supporting federal environmental policies. No doubt, delegation of implementation and enforcement sacrifices some uniformity—both in terms of agency priorities and in the relative degrees of enthusiasm and technical sophistication—but the gains for the overall, long-term viability of the federal program outweigh concerns about the lack of uniformity.

IV

ALLOCATING ENVIRONMENTAL POLICY MAKING AUTHORITY IN A FEDERAL SYSTEM

The strong centralization characteristic of most environmental policy has come under attack from some scholars and politicians in recent years. At core, the issue is how to reconcile the values of federalism with the substantive goals of environmental policy.

Scholars and courts have offered three principal justifications for independent spheres of state authority: (1) because they are “close to the people,” state governments are more likely to promote participatory democracy and protect individual liberties; (2) decentralization promotes policy innovation⁸⁹; and (3) states are more likely to offer a range of political and cultural choices (for example, tax levels, environmental protection) that would not be available in a highly centralized political system. These justifications resonate with important characteristics of environmental regulation, although the characteristics do not always point unambiguously toward state autonomy.

Two widely accepted norms in environmental law, expressed in federal and state statutes, are specifically designed to promote participatory democracy: The relatively easy and broad access to government information, and the availability of numerous avenues for public participation in the formation, implementation, and enforcement of environmental policy. But one should be cautious in concluding that the acceptance of these norms support state autonomy. Many of the legal rights to information and public participation are guaranteed by federal law. The Clean Air Act, for example, requires state implementation plans to include provisions for public participation and access to information.⁹⁰ It is doubtful that all states would include such provisions in the absence of federal law. Some states may conclude that participatory democracy is too inefficient, and captured state legislatures and agencies may wish to minimize participatory democracy.

89. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); Kramer, *supra* note 42, at 1498-99 (a state government can “adapt[] law to local conditions and tastes,” is “more democratic and constitutive of popular self-government,” and “encourages regulatory innovation”); Merritt, *supra* note 30, at 1573-75; Scheiber, *Federalism and Legal Process*, *supra* note 2, at 689-92. Scheiber points out that for much of the nation’s history state autonomy failed to protect individual rights. *Id.* at 706-07.

90. See 42 U.S.C. § 7410(a)(2) (requiring notice and public hearings before a state can adopt a state implementation plan); *id.* § 7410 (a)(2)(F)(iii) (requiring state reports on emissions and emissions-related data be made available to the public).

The second justification for greater state autonomy—policy innovation—does not seem especially compelling in environmental law. Having numerous state agencies actively working on environmental problems is likely to produce innovative policies, but the federal government, with its superior resources and often better trained personnel, also generates innovative policies. Fluctuating state and federal environmental budgets further cloud the picture. At best, this justification supports a division of authority that spurs policy innovation from both state and federal agencies.

The third justification—offering a greater range of political and cultural choices—may weigh more heavily in favor of state autonomy.⁹¹ Although this justification may be viewed only as an argument against uniformity and not necessarily in favor of greater state autonomy,⁹² as a practical matter, it generally supports greater state-level control of environmental regulation. The sheer size of the nation and the dizzying variety of social and environmental conditions and political preferences leave little hope that the central government could efficiently or accurately custom tailor environmental laws for different regions. Indeed, it is partly for this reason that the federal government delegates most implementation and enforcement responsibility to the states. But there is something deeper in this justification than just administrative convenience: A greater number of choices promises to satisfy a greater number of individual preferences, either because local decisionmaking reflects local preferences, or because people can move to the jurisdictions that best accommodate their preferences. Centralized policy may not only fail to take adequate account of the local regulatory costs and benefits, it may also weigh too heavily the preferences of outsiders, who are unconcerned about local regulatory costs and benefits or who may use national environmental regulation to undermine the jurisdiction's economic competitiveness.

Of course, state autonomy does not always lead to greater satisfaction of local policy preferences. As with the justification based on participatory democracy, state (or regional or local) political processes could be systematically biased and thus not accurately reflect state (or regional or local) preferences. Moreover, when a significant portion of the costs and benefits of environmental regulation are external to the state's political jurisdiction, greater state autonomy virtually ensures that not all relevant preferences will be included in environmental policies.

The justifications for centralized environmental policy include (1) economies of scale, (2) interstate externalities, and (3) sub-optimally weak state environmental regulation.⁹³ The first justification—economies of scale—supports a

91. See Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 536 (1997) (arguing that this factor may be particularly important in environmental regulation, where preferences for and the costs and benefits of environmental regulation may vary significantly among regions).

92. See Esty, *supra* note 84, at 617.

93. See Joshua D. Sarnoff, *The Continuing Imperative (But Only from a National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL L. & POL'Y F. 225, 251-91 (1997) (arguing that cen-

federal role in research and data collection, but this is a relatively modest role. It would also support a role in standard setting, but only if environmental standards should be nationally uniform. For example, in the absence of significant state pollution regulation (as was the case before 1970), a federal program with uniform standards may be the quickest and most effective means to jump-start a program of environmental regulation. But today, most states have substantial environmental programs. Given the regional diversity of environmental conditions, economic conditions, and preferences for environmental quality, the economies of scale argument is much less powerful; it would be inefficient for the national government to tailor pollution standards to meet the conditions and preferences of each state or region.

The second justification—interstate externalities—plainly supports a national role in environmental policy making. For example, absent federal regulation, upwind and upstream states will under-value and thus under-regulate pollution; because their citizens do not suffer the social costs of pollution, they have little political incentive to take these costs into account in setting environmental policy. Indeed, they even have incentives to site pollution-generating facilities near the border with the downwind and downstream states. Moreover, downwind and downstream have little leverage over pollution from upwind states. Nuisance law is available, but litigation is slow, expensive, and after-the-fact. Causation is often difficult or impossible to prove, and nuisance law may not adequately recognize a variety of environmental insults. Interstate pollution is not the only type of interstate externality. States with especially important natural resources worthy of preservation (for example, endangered species or important habitats or ecosystems) may not properly weigh the interests of outsiders in preservation.⁹⁴ The need for centralized regulation—or even better, redundant federal and state systems of regulation—is particularly acute when the interstate externalities are irreversible. Properly conceived, federal regulation can help to ensure that environmental policies balance the conflicting concerns of insiders and outsiders, of upwind state and downwind states. Of course, centralized environmental regulation is hardly a panacea; it may overstate the interests of outsiders, who have little incentive to take account of regulatory costs, at the expense of insiders who must bear those costs.

In any event, interstate externalities do not justify national control of all areas of environmental policy. Although there are important interstate pollution problems (for example, ozone transport, acid precipitation, and in some cases water pollution), the effects of much environmental pollution (for example, solid and hazardous waste disposal, ground water pollution, surface water pollution, air pollution, and wetlands preservation) remain intrastate. Thus, the

tralized regulation is necessary to implement national environmental values); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1211-19 (1977).

94. See Esty, *supra* note 84, at 594-97; Revesz, *supra* note 91, at 543.

justification based on interstate externalities supports a division of regulatory authority, with federal regulation focused on interstate problems.⁹⁵

The third justification for centralized environmental policy making—the deep suspicion that states would set sub-optimal environmental standards—grows out of the historical experience with state regulation: Although they had two decades to address the growing seriousness of environmental problems, states did virtually nothing. Various failed efforts to get states to set and enforce air and water pollution standards convinced federal policy makers in the early 1970s that the only viable solution was federal regulation. The theoretical argument about the causes of inadequate state environmental standards has two independent strands: (1) States will compete with each other for business and consequently set sub-optimal standards—the “race-to-the-bottom”; and (2) state political processes are defective and will result in sub-optimal standards (for example, the state legislature has been “captured” or even corrupted by industrial interests).

Professor Richard Revesz has challenged the race-to-the-bottom justification as having an inadequate theoretical justification.⁹⁶ As Revesz describes it, the race-to-the-bottom theory is a form of the prisoner’s dilemma problem. It assumes that firms will make investment choices that minimize operating costs, all other things being equal. Since environmental regulatory costs can be significant, firms will build new polluting facilities in states with the most relaxed standards. States, in turn, want to attract businesses because they provide jobs and taxes; to maximize the economic benefits to their citizens, states will (absent preemptive federal standards) relax environmental standards to attract (or retain) businesses. Competing states will respond by relaxing their standards. In the end, states will neither gain nor lose businesses, but all will have lower environmental standards. Whether purposefully or inadvertently through the logic of the prisoner’s dilemma, businesses play the states against each other. Through competition, states relax their environmental standards without any offsetting gains from economic development.⁹⁷

95. Federal regulation of interstate pollution must be properly structured to succeed. See Kay M. Crider, *Interstate Air Pollution: Over a Decade of Ineffective Regulation*, 64 CHI-KENT L. REV. 619, 624-38 (1988); Comment, *Interstate Air Pollution Abatement and the Clean Air Act Amendments of 1990: Balancing Interests*, 62 U. COLO. L. REV. 957, 960-71 (1991). For discussions of how federal environmental regulation fails to address effectively the problem of interstate externalities, and why more authority should be reallocated to state officials, see Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341 (1996); Richard L. Revesz, *The Control of Interstate Environmental Externalities in a Federal System*, 38 ARIZ. L. REV. 883 (1996); Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL’Y REV. 23 (1996).

96. See Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992). Decades earlier, Justice Brandeis called this phenomenon a “race . . . of laxity.” *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 559 (1933) (Brandeis, J., dissenting).

97. The Supreme Court accepted this justification in upholding Congress’s power to regulate coal mining. See *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 282 (1981) (“The prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause.”).

States could counter this competitive pressure by agreeing among themselves to maintain higher standards or by seeking federal legislation for national (although not necessarily uniform) environmental standards. Because of coordination costs and the risk of defection, interstate agreements seem unlikely, or at least completion of such agreements would take many years. Federal law, which does not suffer from this collective action problem, thus is really a benefit for the states (assuming—and this is a large assumption—that federal standards are set at the level the states would have preferred in the absence of interstate competition), rather than an unwarranted intrusion into state autonomy.⁹⁸

Revesz does not argue that race-to-the-bottom is necessarily wrong, but only that it has inadequate theoretical support. His argument is based on a series of increasingly complex economic models of interstate competition, which predict that state environmental standards will not be sub-optimal. His basic point is that competition between states reveals their actual preferences for the mix of environmental protection and economic development, and that mix, far from being sub-optimal, will maximize social value. His models make several admittedly strong assumptions, including that capital is mobile, that states have perfect information about the tradeoffs, and that state political processes do not suffer from serious public choice defects.

Several scholars have mounted a counter-attack.⁹⁹ Professor Kirsten Engel, for example, maintains that a better model—one that more accurately reflects the circumstances in which states find themselves—is one of imperfect information and strategic behavior, best described by game theory models. Under such models, players often reach sub-optimal results because they cannot be certain what other players will do. Turning to a range of empirical sources, Engel finds four things: (1) annually there are few new industrial facilities; (2) states compete intensely for these new facilities; (3) environmental costs are a fairly small part of a firm's decision to locate in a particular state (the structure of the labor market, the quality of infrastructure, taxes, schools, and access to markets weigh more heavily); and (4) a significant number of state officials mistakenly believe that concerns about the cost of complying with environmental standards make a significant difference in a firm's decision.¹⁰⁰ As a result, states

98. See Revesz, *supra* note 96, at 1213-19.

99. See Esty, *supra* note 84; Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "to the Bottom"?*, 48 HASTINGS L.J. 271 (1997); Sarnoff, *supra* note 93; Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL'Y REV. 67 (1996).

100. See Engel, *supra* note 99, at 315-51. *But see* RANDY BECKER & VERNON HENDERSON, EFFECTS ON AIR QUALITY REGULATION ON DECISIONS OF FIRMS IN POLLUTING INDUSTRIES 29-39 (National Bureau of Econ. Research Working Paper No. 6160, 1997) (an empirical study of air pollution regulation of certain industries concluding that the designation of an area as being in attainment or nonattainment with federal standards has a significant impact on the location of new industrial facilities). This report does not undermine either Engel's or Revesz's thesis; it does strongly imply that greater state autonomy would produce a greater variety of environmental standards. If environmental regulatory costs are a significant factor in decisions to locate new industrial facilities, the argument for more state autonomy depends not only on whether states accurately assess the importance of compli-

probably relax their environmental standards more than they would otherwise want to, that is, to a sub-optimal level.

Professors Peter Swire and Daniel Esty also take issue with Revesz's decision to exclude considerations of imperfect competition, interstate externalities, and public choice issues.¹⁰¹ That is, they do not especially disagree with his explication of the model and corresponding analysis, but with his underlying assumptions. They maintain, in effect, that the problem cannot usefully be disaggregated into separate problems of inter-jurisdictional competition and local political failure.¹⁰²

To some extent, this debate is inconclusive. Necessarily resting on simple economic models of inter-jurisdictional competition, such analyses cannot determine the optimal allocation of federal and state regulatory authority in particular cases. Both Swire and Revesz acknowledge, for example, that the potential existence of severe public choice problems does not determine whether those problems will be more severe at the federal or at the state level.¹⁰³

This debate, however, reflects a deeper ferment that environmental policy is due for a fundamental reconsideration and perhaps reconceptualization. For a generation, policymakers have assumed that states were technically and politically unable to make environmental policy; policy was for the federal government, while implementation and enforcement were for the states. But recent scholarship has made the telling point that it may be possible to improve the match between the particular environmental problem and the primary jurisdictional authority.¹⁰⁴ Over the last generation, state agencies have surpassed federal agencies in resources and often in technical expertise, and many of the most innovative programs now originate in the states. While defects in the state political processes (not to mention interstate externalities) may support a strong federal role in many areas, similar defects in the federal regulatory process and the absence of a strong justification for a dominant federal role support a greater state role in others. Given the limits of theoretical arguments, it may be time to experiment more broadly with state autonomy in environmental policymaking.

ance costs to industry (which is Engel's point), but also on whether states may be trusted to weigh competing considerations of environmental quality and economic development.

101. See Swire, *supra* note 99, at 94-105; Esty, *supra* note 84, at 613-52. As Professor Edward Rubin has pointed out, there is little basis to apply rational actor theory to collective entities, particularly political organizations such as states. See Edward Rubin, *Rational States?*, 83 VA. L. REV. 1433, 1439-43 (1997).

102. In a subsequent article, Revesz takes issue with this perspective, arguing that analytic clarity is lost upon addressing the multiple considerations simultaneously. See Revesz, *supra* note 91, at 545-46.

103. See Revesz, *supra* note 91, at 558-61; Swire, *supra* note 99, at 108-09 (concluding that as a result of this uncertainty dual regulation might be optimal, especially when the issue involves irreversible environmental impacts).

104. The optimal locus of jurisdictional authority may vary with the particular environmental problem—and perhaps with the political commitment of the competing jurisdictions to address the problem. In many cases, the proper authority will be shared, both to ensure some measure of checks and balances and to maximize the comparative advantages of state and federal regulation.

Designing and implementing the new environmental federalism, giving appropriate weight to interstate externalities and the dangers of sub-optimal state standards, will prove to be difficult. First, it is not possible to assign pollution programs wholesale to state governments on the ground that the underlying environmental problem is wholly intrastate. Local and regional variations in climate, hydrogeology, geography, and demographics, as well as the location of pollution sources and the size of the state, determine whether the pollution will be interstate or intrastate. For each major medium (air, water, and land) some states produce only intrastate pollution, other states produce interstate pollution, and many states produce both. Thus, each of the major programs and subprograms governing air pollution, water pollution, and hazardous waste disposal and cleanup would require interminable and probably unproductive debate to decide whether in a particular state—or in a particular portion of the state—the interstate aspect of the problem was significant enough to require national rather than state regulation (a preliminary debate also would be required to decide whether the default position was national or state regulation).

Second, even where there are no physical interstate externalities, the environmental concerns of outsiders should be considered in establishing environmental policy. Many outsiders genuinely value environmental protection even though they do not live in the relevant political jurisdiction. Outsiders' claims for environmental protection are especially strong for unique resources that may be irreversibly lost with economic development (for example, endangered species), although their claims to protect more prosaic resources are also relevant. Of course, outsiders do not necessarily pay the price for the environmental protection, and thus they may overvalue it, just as exclusive state control would undervalue outsider's interests. This suggests that some sort of national subsidy program for local conservation, rather than wholesale delegation of environmental policy, may help strike the right balance.

Third, although it would be imprudent to give local governments much exclusive regulatory authority, it will be difficult to decide, as a general proposition, whether state governments normally would establish sub-optimal environmental standards and programs. Local governments that rely heavily on property taxes to finance local schools and government services often have pressing financial needs that can be met only by new sources of property taxes, that is, new economic development (the other municipal tactic to relieve fiscal pressures is to adopt zoning laws that exclude people who require more in services than they pay in taxes, namely poor people). Moreover, the benefits of environmental protection are diffuse and long-term, and the benefits of development and the costs of regulation are concentrated on developers. In other words, developers are highly motivated to seek relaxed environmental standards, while environmental groups (if they exist in a particular locality) often must depend on unreliable public education campaigns to motivate public support for appropriate environmental controls. For all these reasons, municipalities will tend to favor immediate economic development at the expense of long-term policies to protect the environment. Of course, not every development

project will prevail over arguments for environmental protection. But over the long term, the temporal and distributional asymmetry of local costs and benefits of environmental regulation systematically distort municipal decisionmaking in favor of relaxed standards.

The fiscal pressures that state governments face probably are not as severe. States often have other sources of revenues (for example, income taxes), and each individual development is not as critical for government finances. Nonetheless, experience shows that at different times many state legislatures are unduly influenced by powerful economic interests. The question, then, is not whether as a general proposition state legislatures (and regulatory agencies) would adopt sub-optimal environmental standards and programs. It seems likely that some would and some would not, and that the states' commitment to environmental protection likely would vary over time. Instead, the difficult question is how to decide whether a particular state can be trusted to have exclusive environmental regulatory authority over intrastate issues. My judgment is that it would not be politically feasible to choose among states; either all states would have exclusive authority for a given environmental issue, or none would. Exclusive state control of environmental programs thus promises at least some sub-optimal environmental standards and programs. This outcome is especially problematic for decisions that irreversibly change the environment.

Finally, neither local, state, nor national governments are particularly able to protect the interests of future generations. Not only do future generations have no voice, it is difficult for most people to envision the interests of the future beyond their children or grandchildren.

V

CONCLUSION

All of these reasons suggest that the present hybrid system of national standards and state implementation and enforcement may be a reasonable accommodation of national and state interests. As noted earlier, states often have some flexibility to impose their own policies and priorities in the context of implementing federal environmental programs. In many pollution programs they are free to set stricter standards, and in many natural resource programs (for example, endangered species protection) they are able to establish additional state controls. Thus, in most cases, the danger of excessively weak federal standards can be ameliorated by stronger concurrent state standards.

There is some danger that federal standards for intrastate environmental problems are too strict (that is, stricter than a state would prefer). But even here states are able to reassert their own preferences and priorities to some extent. By controlling permitting and enforcement, states can decide what development projects merit priority, set enforcement priorities, and within limits decide how vigorously to enforce the permits and standards. And, as noted earlier, states can be effective political actors in Congress and the federal agencies.

The current arrangement imposes some checks on state authority—in many pollution programs, the federal government can reject state-approved permits, file its own enforcement actions, and in extreme cases decertify a state regulatory program, and citizen groups can file their own civil enforcement actions. But some system of checks and balances is necessary if one concedes that state governments sometimes will adopt sub-optimal environmental policies. The checks may be too much at times—resulting, for example, in too much enforcement for the benefits obtained—but that argues in favor of adjusting the checks and balances, not delegating environmental policy wholesale to the states.